

EMPLOYMENT TRIBUNALS

Claimant: Mr Trevor Mendez

Respondent: Advisory Conciliation and Arbitration Service

Heard at: London South Employment Tribunal, Croydon

On: 1-3 November 2023

Before: Employment Judge Abbott, Mrs N Beeston & Mrs A Williams

Representation

Claimant: in person

Respondent: Miss Jo Moore, barrister, instructed by the Government Legal Department

JUDGMENT having been sent to the parties on 23 November 2023 (reasons having been delivered orally on 3 November 2023) and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant, Mr Trevor Mendez, was employed by the respondent, Advisory Conciliation and Arbitration Service (“**ACAS**”), from 1997 until he resigned, his last day of employment being 30 June 2022. He brought complaints of constructive unfair dismissal, unlawful deductions from wages, direct and indirect disability discrimination and failure to make reasonable adjustments. The complaints were resisted by ACAS.
3. The claim came before the Tribunal for Final Hearing on 1-3 November 2023. The hearing was held in person at the Tribunal venue in Croydon.
4. Oral reasons for dismissing all of the complaints were provided on 3 November 2023. The Claimant requested written reasons immediately after the oral reasons had been provided.
5. Mr Mendez represented himself. He provided a witness statement and gave oral evidence. He also relied upon a witness statement from the Union representative who acted for him during the course of the events that the claim was concerned with, Ms Zita Holbourne, who also gave oral evidence. ACAS was represented by Miss Jo Moore, barrister, instructed by the Government Legal Department. It called evidence from Ms Julie Osuchukwu

and Mrs Fionuala Stephens, who each provided witness statements and gave oral evidence. I thank all of them for their assistance in this matter. The Tribunal was also provided with a 1557-page Bundle of Documents prepared by ACAS. Mr Mendez also produced his own hard-copy set of documents (albeit that there were insufficient copies for all of the Tribunal members and the witness box). However, Mr Mendez confirmed at the start of the hearing that he believed all of the documents in that file were also in ACAS's bundle, and we therefore worked from ACAS's bundle. No material difficulties were encountered during the hearing in terms of identifying documents that either party wished to take witnesses and/or the Tribunal to.

The issues

6. A list of issues that was prepared by Employment Judge Sudra at a preliminary hearing in June 2023 and, as is recorded in the Judge's Order, both parties consented to and agreed that list. It is reproduced below, with additions underlined to reflect the different time limits rules that are applicable to claims under the Employment Rights Act 1996 and the Equality Act 2010.

1. TIME LIMITS

1.1 Did the Claimant bring the claim within three months (taking into account any extension during the ACAS early conciliation period) of:

1.1.1 Effective date of termination, for the purposes of the constructive dismissal claim;

1.1.2 The unlawful deduction of any wages;

1.1.3 The alleged discriminatory act or omission.

1.2 If the Claimant did not bring the claim within three months of the alleged acts or omissions (taking into account any extension during the ACAS early conciliation period):

1.2.1 Did any discriminatory acts or omissions form part of a continuing act with allegations that are in time? If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

1.2.1A Was there a series of deductions and was the claim made to the Tribunal within three months (plus ACAS early conciliation extension) of the last one?

1.2.2 In respect of any unlawful deductions or unfair dismissal claim not brought in time, is the Employment Tribunal satisfied that it was not reasonably practicable for the complaint to be presented before the end of the relevant period of three months?

1.2.3 If so, what further period does the tribunal consider reasonable?

2. CONSTRUCTIVE DISMISSAL

2.1 Did the Respondent commit a serious breach of contract, going to the root of the contract or showing that the Respondent was no longer prepared to be bound by one or more of the express or implied terms of the contract?

2.2 If so, what was that breach of contract and when did it occur?

2.3 C says that R's breached contract by:

2.3.1 R wrote to C, on more than one occasion, in the period February 2022 to early May 2022 stating that C's pay would be stopped;

2.3.2 R's unwilling to exhaust all options in relation to car parks put forward for C to park his car;

2.4 If so, did the Claimant terminate the contract of employment in response to that breach of contract?

2.5 If so, has the Claimant waived the breach of contract by undue delay, or by apparently full acceptance of the changes brought about to his contract by the Respondent's breach?

3. UNLAWFUL DEDUCTION OF WAGES

3.1 Did the Respondent make a deduction from the Claimant's wages?

3.2 If so, when was that deduction made and what amount was deducted?

3.3 C relies on:

3.3.1 Only being paid one months' notice pay rather than three months therefore, resulting in an underpayment of around £5,000.

3.4 If so:

3.4.1 was that deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant's contract;
or

3.4.2 did the Claimant previously signify in writing his agreement or consent to the making of the deduction?

4. DISABILITY

4.1 Does the Claimant have a disability within the meaning of Section 6 of the Equality Act 2010?

4.2 C relies on the impairments of

(i) Osteoarthritis; and

(ii) rheumatoid arthritis.

4.3 If so, what was the effect of that disability on normal day-to-day activities?

4.4 If the Claimant is a disabled person, did the Respondent know the Claimant was disabled at the relevant time(s)? If so, from what date did the Respondent have such knowledge?

4.5 If not, could the Respondent be reasonably expected to have known of the Claimant's disability at the relevant time(s)? If so, from what date did the Respondent have such knowledge?

5. DIRECT DISABILITY DISCRIMINATION

5.1 Did the Respondent treat the Claimant less favourably than it treated or would treat others because of the Claimant's disability? The Claimant alleges the following were acts of direct discrimination:

5.1.1 The Respondent failing to act promptly enough in researching or securing a car park which would need the Claimant's needs namely, to have a car park space or a car park with available disabled bays.

5.2 Who is the correct comparator (whose circumstances, including abilities, are not materially different to those of the Claimant)? Should a hypothetical comparator be used?

5.2.1 The Claimant relies on a hypothetical comparator.

6. INDIRECT DISABILITY DISCRIMINATION

6.1 Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant, which it would also apply to employees who do not share the Claimant's disability? The PCP relied upon by the Claimant is:

6.1.1 Moving to premises without a car park for employees to be able to park their cars.

6.2 If so, does that PCP put employees who have the disability on which the Claimant relies at a disadvantage compared to employees who do not have that particular disability (such group including disabled and non-disabled employees)?

6.3 If so, does this PCP put or would it put the Claimant at that disadvantage?

6.4 The substantial disadvantage relied upon by the Claimant is:

6.4.1 Not being able to park his car at his place of work.

6.5 If so, can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim?

7. FAILURE TO MAKE REASONABLE ADJUSTMENTS

7.1 Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant, which it would also apply to employees who do not share the Claimant's disability? The PCP relied upon by the Claimant is:

7.1.1 Moving to premises without a car park for employees to be able to park their cars; and

7.1.2 Requiring employees to work from home.

7.2 If so, did that PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

7.3 The substantial disadvantage relied upon by the Claimant is:

7.3.1 Not being able to park his car at his place of work; and

7.3.2 Not being able to have access to his workplace equipment at home.

7.4 Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage? The Claimant alleges that the following adjustments should have been made:

7.4.1 Finding a car park or another building with a place to park his car if possible.

7.4.2 To relocate him to another office.

8. REMEDY

8.1 If the Claimant is successful in his claim, to what remedy is he entitled?

8.2 Is an award for injury to feelings appropriate?

8.3 What compensation would be just and equitable?

8.4 Has the Claimant mitigated their loss and should there be a deduction of sums earned for such mitigation, or to reflect a failure by the Claimant to take reasonable steps in mitigation?

8.5 Should there be an increase or reduction in any award on the basis of any failure to comply with the ACAS Code of Practice on Discipline and Grievance Procedures?

The facts

7. The witnesses were identified in paragraph 5 above. The role of the Tribunal is to consider all of the evidence, and the documentary materials we have been referred to, and form a view as to what is most likely to be the true position. It is important to say that, simply because we may disbelieve the evidence of a witness on a particular point, does not mean that we consider they are deliberately seeking to mislead – nor does it mean we must automatically disbelieve them on other points. Ultimately we have to weigh up all the evidence on all different points and assess it on its merits.
8. The relevant facts are, we find, as follows. Where it has been necessary for us to resolve any conflict of evidence, we indicate how we have done so at the relevant point. We have only made findings of fact relevant to the issues in the list of issues. We have not referred to every document we have read and/or were taken to during the hearing, but we have considered all such documents. We have not considered documents that were not referred to in the written or oral evidence or in submissions – it would have been impractical

to do so in circumstances where the bundle comprises in excess of 1500 pages.

9. Mr Mendez started working for ACAS on 9 June 1997 and was provided Written Particulars on 14 July 1997. The relevant parts of those Particulars for present purposes were the following:

[...]

Mobility

Mobility means liability to transfer to anywhere in the United Kingdom or abroad. All Civil Service appointments at Executive Officer level and above, and in certain other grades where the nature of the work requires staff to be moved from one location to another are classed as mobile grades.

As a full-time EO this obligation is a condition of your appointment.

[...]

Sick Absence

Any salary you receive whilst you are absent due to sickness or injury is known as Departmental Sick Pay. This can be paid at your full salary rate for up to 6 months in any 12 month period, then at half pay, up to a maximum of 12 months sick pay in any period of 4 years or less. After this time you may qualify for a payment at pension rate, otherwise your absence will be unpaid.

[...]

Notice

Normally, unless you are dismissed on disciplinary grounds and provided you have completed one months continuous service or more, the following minimum periods of notice will apply:

- staff with less than 4 years continuous service – 5 weeks
- staff with [more] than 4 years continuous service – not less than one week for each year of continuous service, to a maximum of 13 weeks.

[...]

If you decide to leave the Department you are required to give:

- staff below Grade 7 – not less than one months service
- Grade 7 and above – not less than 3 months notice (or any longer periods specified in the terms and conditions of a particular post, up to a maximum of 6 months).

[...]

10. Mr Mendez's role was office-based, originally at Brandon House, and then he was relocated to Euston Tower in 2004.
11. So far as relevant to this claim, by 2020, Mr Mendez had various adjustments in place that ACAS had provided to assist Mr Mendez in view of his physical conditions – namely, osteoarthritis and rheumatoid arthritis.

These adjustments included a special chair, desk, leg rest, arm rest, monitor stand, mouse and ice machine. He also had a dedicated disabled parking space within Euston Tower's onsite car park. Mr Mendez was not contractually entitled to these adjustments (we were shown no evidence to suggest they were), but were made by ACAS to accommodate his physical conditions.

12. Although requests had been made on several occasions from 2013 onward, Mr Mendez had never agreed to an Occupational Health ("OH") assessment. Nevertheless, the adjustments mentioned above remained in place.
13. In 2019, Mr Mendez asked to be considered for a settlement agreement on the grounds of stress and alleged disability discrimination. That request was refused, though he was offered mediation, flexible home-working and the option of requesting a managed move. None of these options were taken up.
14. As part of a grievance process unrelated to the issues raised in this claim, Mr Mendez had proposed an "exit package" in a meeting held on 11 February 2020. He also mentioned during that meeting that he had been offered, but refused, such a package in 2017. No such exit package was offered in response to Mr Mendez's proposal.
15. On 23 March 2020, all ACAS staff were advised they needed to work from home until further notice due to the COVID pandemic. Mr Mendez was offered the opportunity to have his special equipment moved to his home, but he advised ACAS that he did not have the space.
16. During the early months of the pandemic, Mr Mendez continued to work from home. He was having regular meetings with his manager at the time, Ms Osuchukwu, and various options were discussed as summarised in the notes of a meeting held on 30 June 2020:

Options considered: -

1. As the present chair will not be suitable due to the availability of space in Trevor's home, we agreed that we will wait until he visits Back 2 for assessment for the suitable chair that will meet his requirement and will also fit it into the space in his home.
2. To worker shorter number of hours over 5 days
3. To work 15 hours over Mon, Weds & Fri. If he worked a Tues or Thursday (eg Team meetings, TU, H&S meetings) he would take the time off Mon or Fri
4. To move his present equipment to another Government office that is Covid compliant in a location where Trevor can go to with his parking space provided for him.
5. For Trevor to fit the work as it suits (any number of hours possible, taking as much breaks as he sees necessary) him in a day even if it means working shorter hour as long as it suits Trevor's situation.
6. Confirmed that TU and H&S meetings are regarded as work meetings and these are included in working time

7. To take paid special leave until the chair arrives (guesstimate given booking for assessment and delivery time, mid-August)

17. We accept that, during these early months, Mr Mendez's physical condition worsened, which is why ACAS was exploring these options to seek to support him. He was permitted to work as many hours as he was able to in a given day, taking as many breaks as he saw necessary (i.e. option 5 above). Later, he was provided with a wireless headset to enable him to move around whilst on calls. It is important to record that Mr Mendez expressed resistance to being signed off work sick despite his pain worsening. The possibility of a new chair was also explored, but due to supplier unavailability, it was ultimately agreed that Mr Mendez's existing chair would be delivered to his home. This happened on 24 August 2020.
18. Mr Mendez did not consider that the adjustments made in respect of his homeworking were helping, and therefore steps were taken between July and September 2020 by ACAS to seek to identify an alternative office building (since Euston Tower was closed) in which Mr Mendez would be able to work with his full range of equipment.
19. As was known to the Claimant and other ACAS staff, ACAS was required to leave Euston Tower by the end of 2020 as the lease was due to expire. On 28 August 2020, it was announced that a new building had been identified, Windsor House, to accommodate ACAS's more than 200 staff. It was notified to staff that this building did not have onsite parking.
20. At 10:29 on 16 September 2020, Ms Osuchukwu emailed Mr Mendez noting that due to the office move a new disabled parking option would be required for him, and suggested there was a need for an OH referral. She explained that this was to give ACAS management an indication as to the distance that Mr Mendez can walk in order to identify an appropriate car park that met his needs.
21. At 13:29 on 16 September 2020, Mr Mendez raised a grievance regarding the office move. He argued that the removal of onsite parking amounted to direct discrimination and breach of contract, as well as raising issues around lack of consultation. The outcome he sought in his grievance was to "Leave ACAS".
22. At 14:38 on the same day, Mr Mendez responded to Ms Osuchukwu saying he did not consider an OH assessment to be necessary and declining to submit to one. He stated that "no walking or public transport would be acceptable".
23. On 22 September 2020, Kirsty Burrows (ACAS Area Director) wrote to Ms Osuchukwu identifying a potential alternative office for Mr Mendez, being the Department for Business, Energy & Industrial Strategy office on Buckingham Palace Road. Mr Mendez was then asked to complete a risk assessment, which he did on 28 September 2020 with his Union representative, Ms Holbourne. The upshot of that assessment was that Mr Mendez's level of risk was scored as "high risk" and therefore it was agreed by all parties that an alternative office would not be a suitable option.
24. On 9 October 2020, Ms Holbourne, in her capacity as a Union representative, reported to Mr Mendez and Barbara Hawkes (ACAS Acting

Area Director) regarding discussions with the office move project team around options for those who previously parked onsite. She noted that two options had been discussed – a taxi service or local car parking – and that it would be down to the individual concerned which they found most suitable depending, for instance, on the distance of walking that could be managed.

25. On 22 October 2020, Mr Mendez responded to Ms Hawkes, alleging that onsite parking was part of his terms and conditions of employment, and that neither of the options being presented was suitable. In particular, he considered taxis to be unsuitable because of his high risk status and family commitments that he said required him to have his car nearby at all times.
26. Mr Mendez was signed off work sick for 3 weeks during November 2020.
27. Mr Mendez's grievance regarding the removal of onsite parking was heard at a meeting on 7 December 2020. In the meeting he stated his preferred outcome was to have onsite parking, though it was clear by this stage that this was not possible given the move to Windsor House was already committed to. He went to insist that whatever option "cannot involve walking". As regards the taxi option, he stated "why should I give up my car". He then raised a third option, being a settlement agreement.
28. On 14 December 2020, Lisa Claxton (an ACAS Conciliator who was line managing Mr Mendez at this time) wrote to Mr Mendez with a list of 6 nearby car parks for him to consider. The list set out the approximate distances of the car parks from Windsor House. Ms Holbourne responded the following day raising queries regarding the first of these car parks. There is no evidence of Mr Mendez himself engaging with this list immediately.
29. On 17 December 2020, a grievance appeal meeting was held in relation to an unrelated grievance raised by Mr Mendez. During this meeting, Mr Mendez again raised the possibility of a settlement agreement as a preferred outcome.
30. On 17 December 2020, Mr Nigel Paul (who was the Change Ambassador for the office move) sent to Ms Holbourne the draft Equality Impact Assessment for the move. This document addressed the impact of there being no onsite parking on those with disabilities, and presented the options that have already been mentioned, *i.e.* a taxi service or offsite parking.
31. On 4 January 2021, Mr Mendez raised a further grievance, alleging bullying, victimisation and disability discrimination against Ms Osuchukwu, Ms Hawkes and Ms Claxton, all relating to adjustments for working at home and the ongoing issues around the office move. The outcome sought by Mr Mendez was an "exit package".
32. A meeting to discuss the grievance took place on 20 January 2021. Again, during this meeting, Mr Mendez raised the possibility of an exit from ACAS, either by way of redundancy or sickness retirement. Ultimately the grievance was not upheld, as set out in a letter dated 22 July 2021.
33. On 2 February 2021, Mr Mendez wrote to Ms Burrows with (for the first time) his comments on the car park options. The comments provided were based on desk research, *i.e.* looking at the websites of the car parks. Although Mr

Mendez gave oral evidence that he had visited the car parks by this time, we reject that evidence as inconsistent with both this email and his subsequent email in May 2021, the latter of which expressly stated that he had not visited any of the sites even by that time.

34. On 13 August 2021, Mr Mendez's new line manager, Mrs Stephens, wrote him again with the list of six car parks, noting that some had been ruled out the previous year but suggesting that, given the passage of time, they should be explored again. She also raised the taxi option. This was done in the context that the Windsor House office was now anticipated to be opening in September 2021.
35. Mr Mendez responded later that day, resending information he had previously provided, complaining that some of the options seemed to have been withdrawn, again rejecting the idea of using a taxi, and again raising the possibility of a settlement agreement. He ended the email with a reiteration of his belief that he was being discriminated against.
36. There were various communications between Mrs Stephens and Mr Mendez during August and September 2021, both on email and in KIT meetings, discussing the options around return to work. This culminated in a letter being sent by Mrs Stephens on 9 September 2021 summarising the position to date, and then a meeting on 21 September 2021. The letter also explained that, because the office was reopening, the COVID sickness policy (which disapplied the contractual sick pay scheme and instead allowed full pay during the time Mr Mendez was at home and unable to work without this counting towards trigger points) would not apply beyond 6 September 2021, with the usual sick pay arrangements applying thereafter. Mrs Stephens also advised Mr Mendez that he had the right to be considered for ill-health retirement – though it does not appear that Mr Mendez wished to explore this option.
37. During the 21 September 2021 meeting, Mr Mendez identified two car parks, one of which he had visited, that he considered may be suitable. By this stage Mr Mendez was suggesting that some degree of walking was manageable at least on a good day, but that he was unable to say what would be a good day or a bad day. Also during the meeting, Ms Holbourne mentioned the possibility of ACAS opening an account for Mr Mendez with Addison Lee to lower the risk associated with any taxi use.
38. Due to family reasons and COVID, Mrs Stephens was off from work in the period immediately after this meeting.
39. On 15 December 2021, Mr Mendez wrote to Mrs Stephens regarding the ongoing issues. Among other things, the email asked whether an ACAS Health & Safety officer or someone from the Equality Impact Assessment team would accompany Mr Mendez on any visit to car parks, though it is not clear from the email if Mr Mendez was requesting Mrs Stephens to arrange that. When, on the following day, Mr Mendez wrote to Mrs Stephens to inform her of the time of the appointment he had made to visit at least one of the car parks, he did not repeat the question from the previous day, and we find it was reasonable for Mrs Stephens to interpret his email regarding the date of

the visit as for her information only rather than asking or requiring her to take any action.

40. Mr Mendez did subsequently raise the question of whether an ACAS Health & Safety officer or Equality Impact Assessment team member had visited, or should visit, the car parks. Mrs Stephens responded on 21 January 2022, having discussed with the Health & Safety team, that no Health & Safety visit would be required for the car park.
41. There were further email exchanges in February 2022 in which Mr Mendez raised concerns around what he regarded as the insufficient size of standard car parking bays in the available car parks. These emails focused on the general point that disabled bays are typically 3-5ft wider than standard bays, but not on the specific dimensions of bays in the particular car parks, nor on why Mr Mendez reasonably required a larger bay that was available in the particular car parks.
42. A further KIT meeting took place on 9 February 2022. By this time, Mr Mendez had been notified that he would be going onto half pay imminently due to having exhausted 6 months of sickness absence. There was some dispute over Mr Mendez's status during this period as he had not been working nor submitting fit notes. There were further discussions regarding the car parks.
43. On 10 March 2022 Mr Mendez was sent a letter by ACAS confirming that he would be on nil pay from 18 April 2022 having exhausted his sick pay entitlement. We accept that this was in compliance with the policy in place at the time and Mr Mendez's contractual terms.
44. On 23 March 2022, Mr Mendez raised a grievance regarding a range of issues around adjustments, return to work, and sick pay. A meeting was held on 8 April 2021 and, ultimately, whilst the complaint was not upheld, it was recommended that Mr Mendez's occupational sick pay be extended by 2 months to account for the delay in ACAS identifying that fit notes had not been provided, and the time taken by Mr Mendez to look into adjustments. This was duly done.
45. The email exchanges and meetings continued between Mrs Stephens and Mr Mendez. By 15 April 2022, Mr Mendez had adopted a position that, because ACAS was unwilling to trial allowing him to park in a Central London car park and then take a taxi from that car park to the office, he would reluctantly use a taxi from home to work, despite this impacting his claimed caring responsibilities. The reason ACAS wouldn't agree to even trial Mr Mendez's proposed option was that it was not possible to book in advance a disabled bay in any car park, meaning there was no guaranteed car parking space on his plan. We find this was a reasonable position for ACAS to take.
46. Mrs Stephens responded to Mr Mendez on 22 April 2022, reiterating ACAS's position around the inability to guarantee a disabled parking space and noting that she would be happy to work with Mr Mendez to accommodate his caring responsibilities around his work and travel arrangements. Mrs Stephens followed up on 9 May 2022 asking Mr Mendez to confirm when he would like the taxi-from-home arrangement to commence and explaining the

other arrangements that would need to be put in place to facilitate Mr Mendez's return to work.

47. A further KIT meeting took place on 18 May 2022. During this meeting, Mr Mendez indicated his intention to resign. He confirmed this in writing by email on 31 May 2022, giving one month's notice (which was in accordance with the terms of his contract as he was a member of staff below Grade 7). He stated his reason for resigning was that:

"...there has been a fundamental breach of my contract of employment and the implied terms of mutual trust and confidence. Where Acas have forced me to resign, as a result of the lack of support from Acas, bullying and harassing me, to make my position untenable by making unlawful deductions and stopping my pay, causing me financial hardship and unnecessary stress.

Acas, have also breached the Equality Act 2010, by discriminating on the grounds of my disability, by not considering all the reasonable adjustments available under the above Act before reducing and stopping my pay and the failure in acting promptly when I had raised concerns or dealing with grievances in accordance with the ERA or Acas Grievance procedures."

48. It was ultimately agreed that, once outstanding leave was taken into account, Mr Mendez's last day of employment would be 30 June 2022.
49. Early Conciliation was commenced on 8 June 2022 and ended on 15 June 2022. The claim was presented on 12 July 2022. The law

Constructive dismissal

50. Section 94 of the Employment Rights Act 1996 ("**ERA**") provides that an employee has the right not to be unfairly dismissed. Section 95 defines what is meant by "dismissed" providing, insofar as is relevant, that:

(1) For the purposes of this Part an employee is dismissed by his employer if ...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

51. A claimant contending that they have been constructively dismissed must demonstrate: (1) that there was a fundamental breach of contract on the part of the employer; (2) that that breach caused the employee to resign; and (3) that they did not delay too long before resigning, such that they might be said to have affirmed the contract (per Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221).

52. The fundamental breach of contract may relate to an express term of the contract or to an implied term, such as the implied term of mutual trust and confidence (see *Malik v BCCI SA (in compulsory liquidation)* [1997] ICR 606, HL), which requires that an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

Unlawful deductions from wages

53. Section 13(1) of the ERA provides that:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

54. A deduction is a complete or partial failure to pay what was properly payable on a particular occasion (section 13(3) ERA).

Disability

55. Disability is a protected characteristic under the Equality Act 2010 ("**EqA**"): see section 4 EqA.

56. Section 6(1) EqA provides that:

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.

57. Supplementary provisions are found in Schedule 1 to the EqA. Paragraph 2(1) of Schedule 1 provides that:

(1) The effect of an impairment is long-term if – (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.

58. Paragraph 5(1) of Schedule 1 provides that:

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if - (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect.

59. It is the practice of the Employment Tribunal, consistent with paragraph 12 of Schedule 1, to also take account of ministerial guidance, specifically the "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions related to the definition of disability" (May 2011) (the Guidance). In addition to the Guidance, we also had regard to the guidance on the meaning of "disability" included in Appendix 1 to the "Equality and Human Rights Commission: Code of Practice on Employment" (2011).

60. The relevant point(s) in time for the assessment of whether the claimant is disabled is the time of the alleged discriminatory act(s): *Cruickshank v Vaw Motorcast Ltd* [2002] ICR 729.

Direct discrimination

61. Section 13 EqA prohibits direct discrimination. Section 13(1) EqA states:

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

62. The primary focus in a direct discrimination case is on identifying why the claimant was treated as he was, before coming back to whether it was less favourable treatment because of the protected characteristic (see e.g.

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11). It is well established law that a respondent's motive is irrelevant and, indeed, the possibility of unconscious discrimination is recognised (see e.g. *Nagarajan v London Regional Transport* [1999] IRLR 572, HL). Moreover, the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment.

63. The bare facts of (i) a difference in status and (ii) a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination (*Madrassy v Nomura International plc* [2007] EWCA Civ 32). Something more is needed.

Indirect discrimination

64. Section 19 EqA prohibits indirect discrimination, including in relation to disability (section 19(3)). Section 19(1) EqA states:

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.

65. Section 19(2) provides that:

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.

66. It is not necessary to identify why the provision, criterion or practice (“PCP”) puts people with the claimant's protected characteristic at a particular disadvantage (*Essop v Home Office* [2017] IRLR 558, SC).

Reasonable adjustments

67. Section 21(1) and 21(2) EqA provide that A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments. The duty to make reasonable adjustments is explained in

section 20 EqA. For the purposes of the present case, it is the first of the three requirements that make up the duty that is relevant (section 20(3) EqA):

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.

68. Miss Moore for the Respondent drew our attention to three cases concerning reasonable adjustments claims which we accept are of some relevance to this part of the case:
1. *Royal Bank of Scotland v Ashton* [2011] ICR 632, EAT, which confirms that the Tribunal has to focus on the objective practical result of measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment (see paragraph 24).
 2. *Newcastle Hospitals NHS Trust v Bagley* [2012] All ER (D) 240, EAT, which confirms that the substantial disadvantage relied upon has to be because of the disability, not some other reason (see paragraph 76).
 3. *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763, which confirms that the duty to make reasonable adjustments under the EqA only applies in respect of an employee, and not with a connected person (e.g. in that case, the employee's daughter) (see paragraphs 12 to 15).

Time limits: Equality Act claims

69. Section 123(1) EqA provides, insofar as relevant, that a complaint under the Act may not be brought after the end of — (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.
70. Under section 123(3), conduct extending over a period is treated as done at the end of the period, and a failure to do something is to be treated as occurring when the person in question decided on it.
71. In considering whether it is 'just and equitable' to extend time, the Tribunal has a wide discretion but must take account of all relevant factors, including considering the length and reason for the delay and whether the delay has prejudiced the respondent in respect of matters such as investigation and obtaining evidence (see e.g. *Secretary of State for Justice v Johnson* [2022] EAT 1). The burden of persuasion is on the claimant (*Robertson v Bexley Community Centre* [2003] IRLR 434).

The parties' submissions

72. We briefly summarise the parties' submissions.

The Respondent

73. Miss Moore accepted that no time limits issue arises in respect of the unfair dismissal or unlawful deductions claims. However, time points were raised in respect of some of the discrimination allegations:
1. Concerning the decision of ACAS to move to a building without a carpark (issues 6.1.1 and 7.1.1) – this decision was made in August 2020, Mr Mendez raised a grievance about it shortly thereafter and had the outcome by January 2021. The office move was clearly a standalone event, and complaints about it in this claim were therefore brought considerably out of time.
 2. Concerning the mandate to work from home (issue 7.1.2) – this was done in March 2020 so again any complaint about it was considerably out of time.
74. Miss Moore accepted that Mr Mendez has the conditions he has identified, and that they impact his life. However, for present purposes, the major issue was the impact on his ability to walk (and therefore his needs in terms of parking). Because of Mr Mendez's conduct, ACAS was never provided a clear picture in that regard. Instead the information provided varied over time, and never with medical or OH support. This was therefore relevant to the ACAS's knowledge of his conditions and the adjustments it could reasonably be expected to provide.
75. Regarding the substantive discrimination allegations:
1. Miss Moore regarded the decision of ACAS to move to a building without a car park primarily to be out of time but, in any event, clearly a proportionate means of achieving a legitimate aim, bearing in mind the lease on Euston Tower was expiring and a new premises had to be found.
 2. Miss Moore regarded the mandate to work from home primarily to be out of time but, in any event, justifiable given the guidance from Government at that time. Nevertheless, Miss Moore submitted that it took a host of reasonable steps and adjustments for the benefit of Mr Mendez. The only adjustment identified in the list of issues – relocation to a different office (issue 7.4.2) – was explored but it was common ground it was not achievable because of Mr Mendez's "high risk" status.
 3. Miss Moore did not accept that the office move amounted to a PCP, but in any event submitted ACAS took all reasonable steps to find a suitable option for Mr Mendez.
 4. Miss Moore submitted there was no credible evidence of anything being done to Mr Mendez because of his disability, so the direct disability discrimination claim (issue 5) was flawed.
76. In respect of the constructive dismissal claim, Miss Moore submitted that neither of the alleged breaches identified in issue 2.3 were in fact breaches at all. Mr Mendez's pay was going to be stopped because he had

exhausted his contractual right to sick pay. Regarding parking, all reasonable efforts had been made by ACAS. Moreover, there was consistent evidence of Mr Mendez's desire to leave ACAS from as early as 2019, well before any of the facts now relied upon.

77. In respect of the unlawful deductions claim, Miss Moore submitted that Mr Mendez's contractual notice entitlement on resignation was 1 month, and that was what he was paid for. There is no basis for him to claim to be entitled to 3 months' notice pay.

The Claimant

78. Mr Mendez submitted, in essence, that ACAS had treated him differently because of his disability, and had not been as considerate as they could have

been in terms of finding a resolution with him. He denied that he "wanted out" all along, and pointed to the fact he had returned from periods of sick leave following various operations in the past.

79. Mr Mendez pointed to the lack of an Equality Impact Assessment before the move to Windsor House was announced. He justified his refusal to submit to OH assessment on the basis it was presented to him as a "digging exercise". He relied upon ACAS's awareness of his caring responsibilities which would have prevented the use of a taxi to and from work.
80. Ultimately, Mr Mendez's position was that he was left with no choice but to resign once it was confirmed he would be moving onto nil pay because he wasn't able to return to work.

Discussion

81. We now come to apply the law to the facts of this case. We will take the issues in the order that Miss Moore did in submissions (as summarised above), save that we will deal with time limits under each individual head of claim.

Disability (issue 4)

82. The first issue to address is disability (issue 4), which is the gateway to the Equality Act claims. There is no factual dispute as to Mr Mendez's conditions (osteoarthritis and rheumatoid arthritis) and it has been recognised that the conditions did have a substantial and long-term adverse effect on him in terms of normal day-to-day activities, which is why he had the adjustments that he did. We also note that, when Mr Mendez was working at home in the early part of the pandemic, he was adversely affected by not having his adjustments in that his conditions worsened. To be clear, we find that was not the fault of ACAS, since it had offered to ship all of his equipment to him, but Mr Mendez had not been able to accommodate that yet nevertheless wanted to continue working and not be signed off sick.
83. The upshot is that Mr Mendez does meet the definition of a disabled person for the purposes of section 6 EqA. We will deal with the question of ACAS's knowledge of the disability and, more specifically, its effect on particular

day-to-day activities like walking, in the context of the specific claims that are being made.

Indirect disability discrimination (issue 6)

84. The first claim to consider is the indirect discrimination claim (issue 6). Mr Mendez relies on a PCP of ACAS moving to a premises without a car park for employees to be able to park their cars, and claims this put him at a substantial disadvantage in that he could no longer park at his place of work. ACAS denies that this was a PCP at all, but in any event argues that (1) the claim is way out of time and (2) the office move was plainly a proportionate means of achieving a legitimate aim.
85. Taking the second point first, there was a legitimate aim here: that being the need to accommodate more than 200 ACAS staff in a suitable office, bearing in mind that the lease on Euston Tower was expiring at the end of 2020. The selection of Windsor House was a proportionate means of doing that. It cannot realistically be said that ACAS was not permitted to consider office spaces that did not have onsite parking because that may adversely affect certain staff with disabilities. Mr Mendez had no contractual right to have onsite parking. He had been provided onsite parking whilst at Euston Tower as part of a package of adjustments that had been made to support him, but this was not a contractual entitlement. Moreover, Mr Mendez's contract does include a mobility clause which obliges him to transfer to alternative workplaces as required. As a matter of fact, ACAS did consider the impact of the move on disabled staff many months prior to the move actually taking place, and put forward options that would address any disadvantage posed to Mr Mendez (and other disabled employees) by onsite parking not being available. There is therefore nothing in the point that the Equality Impact Assessment was not completed before the move was announced. There was therefore no indirect discrimination here, irrespective of whether an office move can properly be classed as a PCP, which is a matter we need not decide.
86. As mentioned, ACAS also raised a time point in respect of this claim, arguing that Mr Mendez had all that he needed in order to bring a claim in respect of the office move by the time he raised his grievance in this regard in September 2020. The claim is therefore substantially outside the primary time limit of 3 months. ACAS argued it is a standalone matter, separate from the other issues raised. We accept that is correct. ACAS pointed to the fact that Mr Mendez had advice from his Union rep, and given the nature of his own employment, must have been aware of time limits and Employment Tribunal processes. No explanation has been given why the claim was not brought earlier. Had it been necessary for us to consider whether a 'just and equitable' extension was necessary to allow this claim to proceed, we would not have granted such an extension. No real effort was made to persuade us that an extension was appropriate and, in all the circumstances, we see no basis for doing so, recognising that extensions are meant to be the exception and not the rule. As it is, however, the claim shall be dismissed on its merits rather than on jurisdictional grounds.

Failure to make reasonable adjustments (issue 7)

87. We can then move on to the reasonable adjustments claim (issue 7). There are two PCPs relied upon here, one relating to the requirement to work from home and one relating to car parking provision.
88. Dealing with the working from home issues first. This was necessary because of a Government mandate as part of the COVID pandemic response rather than an independent decision of ACAS. Moreover, Mr Mendez was offered the chance to have his workplace equipment moved to his home, but decided that was not possible due to a lack of space. Therefore the substantial disadvantage relied upon in fact resulted from a position taken by Mr Mendez himself rather than by ACAS. We therefore find that ACAS did not apply a PCP that put Mr Mendez at a substantial disadvantage and this part of the claim must fail on that basis.
89. In any event, Mr Mendez argued that the reasonable adjustment that should have been made was to relocate to another office; however, that option was explored, but following a risk assessment that Mr Mendez and his Union representative actively participated in, and agreed with the conclusions of, a relocation was deemed not to be possible. In other words, what was argued to be the appropriate adjustment was not (as agreed by all parties at the time) a reasonable one. There were, as we have found on the facts, numerous meetings between Mr Mendez and his manager to discuss adjustments during this period and it is clear to the Tribunal that reasonable efforts (and more) were made to identify and implement adjustments to support Mr Mendez. Accordingly, this aspect of the reasonable adjustments claim must fail.
90. Again, ACAS raised a time point in respect of this aspect of the claim, bearing in mind that the period of home working essentially ended by September 2021 when Windsor House opened. Had it been necessary for us to consider whether a 'just and equitable' extension was necessary to allow this claim to proceed, we would not have granted such an extension. No real effort was made to persuade us that an extension was appropriate and, in all the circumstances, we see no basis for doing so, recognising that extensions are meant to be the exception and not the rule. As it is, however, the claim shall be dismissed on its merits rather than on jurisdictional grounds.
91. As regards the car parking issues, we have found on the facts that ACAS did take a large number of steps to seek to identify an alternative car park. A list of 6 car parks was provided as early as December 2020, which was more than 9 months before the Windsor House move was to take place. There was a degree of inaction on the part of Mr Mendez – although he said in evidence to us that he had visited car parks in early 2021, we have found that was not the case. Importantly, Mr Mendez never made clear to ACAS precisely what difficulties he had in terms of walking distances which would have enabled ACAS to reach an informed view as to his limitations and what options may be available. Despite being asked to do so, he never submitted to an OH assessment, and he was never himself clear as to how far he could walk. Because of this, ACAS lacked the necessary knowledge to make informed

decisions as to what was reasonable in terms of walking distances and was left trying to deal with an unclear (and moving) target.

92. Even later in the process when Mr Mendez was engaging with specific carpark options, he raised issues around the size of the bays without ever making it clear why he reasonably required a bay wider than the standard bays that were available in the car parks being explored. Regrettably he appeared to be unwilling to accept anything less than what he had provided for him in Euston Tower – because he felt, wrongly, that this was a contractual entitlement. However, ACAS's obligation was to provide a reasonable adjustment, not to provide the exact same solution as before.
93. It also follows from our factual findings that ACAS explored other options to facilitate Mr Mendez's travel to work aside from car parks, including offering a taxi service from door-to-door, though Mr Mendez was resistant to that. This was seemingly for reasons unrelated to his disability, namely his caring responsibilities and/or the risk status of his partner (issues that, as illustrated by the cases cited to us and summarised under "The law" above, we cannot take account of). Accordingly, this aspect of the reasonable adjustments claim must also fail. Given this car parking issues were continuing up to the point Mr Mendez resigned, we do not consider that a time point arises here.

Direct disability discrimination (issue 5)

94. We can then move on to the direct discrimination claim (issue 5). We have already rejected in our earlier discussion the argument that there was any failure on the part of ACAS to act promptly in exploring other parking options. Our factual findings show the contrary. Parking options were explored at length, as were alternatives such as the use of taxi. There was no less favourable treatment. We also accept ACAS's submission that there is no evidence to support that anything conceivably adverse that ACAS did to Mr Mendez was done to him "because of" his disability. In fact, ACAS was taking reasonable steps (and more) to seek to accommodate Mr Mendez's needs and facilitate his return to work. This claim must also fail.
95. That deals with all of the Equality Act claims. It leaves two other claims to address, where it is agreed that no time points arise.

Constructive dismissal (issue 2)

96. We must first ask what was the reason for resignation. Mr Mendez essentially conceded in his closing submissions that his resignation was because he was going to move onto nil pay in the course of June 2022 as a consequence of exhausting his sick pay entitlement. We find this was the reason. The fact that Mr Mendez had exhausted his sick pay entitlement was consistent with his contractual terms and there was no breach by ACAS in this regard. He was given adequate notice this was going to happen and moreover, following a grievance, he was (in our view generously) given a 2 month extension of his sick pay entitlement.
97. We have already found that ACAS had exhausted all reasonable efforts in seeking to accommodate Mr Mendez's car parking / travel needs, so it

cannot be said that there was any contractual breach by ACAS in this regard either, which is the only other alleged breach identified in the List of Issues.

98. Therefore, in circumstances where the resignation was not in response to any fundamental breach of contract on the part of ACAS, there is no dismissal within the terms of section 95 ERA, and this claim must fail.

Unlawful deductions from wages (issue 3)

99. The final claim to address is that of unlawful deduction of wages (issue 3). The claim is that Mr Mendez should have been paid 3 months' notice pay but was only paid for 1 month. However, Mr Mendez's employment contract required Mr Mendez to give 1 months' notice of termination, which he did. There is no contractual or other right for Mr Mendez to be paid for more than 1 month in respect of notice in circumstances where he resigned, and therefore no basis whatsoever for this claim. The claim fails. Conclusion

100. In conclusion, the unanimous judgment of the Tribunal is that none of Mr Mendez's complaints are well-founded and all are dismissed.

Employment Judge Abbott

Date: 30 November 2023

REASONS SENT TO THE PARTIES ON

15 December 2023

FOR THE TRIBUNAL OFFICE

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