



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms. Laila Meachin

**Respondent:** Henley-on-Thames Town Council

**Heard at:** Reading by CVP                      **On:** 20,21,22 and 23 November 2023

**Before:** Judge S. Matthews  
Mr. A. Chinn-Shaw  
Mr. G. Page

## Representation

**Claimant:** In person

**Respondent:** Miss A. Stroud (Counsel)

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

The claimant's complaints of direct disability discrimination, discrimination arising from disability, indirect disability discrimination, associative indirect disability discrimination, indirect age discrimination, indirect sex discrimination, harassment related to disability and/or sex and/or age and failure to make reasonable adjustments are each dismissed. The complaints are not well founded.

# REASONS

## Introduction

1. The claimant was employed by the respondent, a Town Council, as a Cemetery Warden from 26 July 2021 to 8 October 2021. Her employment was terminated by the respondent.
2. She has brought claims for direct disability discrimination, discrimination arising from disability, indirect disability discrimination, associative indirect disability discrimination, indirect age discrimination, indirect sex discrimination,

harassment related to disability and/or sex and/or age and failure to make reasonable adjustments.

3. She also brought a claim for discrimination on the grounds of marriage. This was dismissed on 3 October 2022 on withdrawal by the claimant. Early conciliation started on 1 October 2021 and ended on 19 October 2021. The claim form was presented on 20 October 2021.
4. The respondent denies liability for each of the claims. The respondent's defence is that the claimant was dismissed during her contractual probationary period as she was not suitable for the role. The respondent denies discrimination and failure to make reasonable adjustments.
5. The hearing was listed for four days. It was agreed that the Tribunal would hear evidence on liability first and then if the claimant was successful on liability a further hearing would be listed to decide remedy.
6. A Restricted Reporting Order was put in place to the date of Judgment in order to protect the privacy of the person the claimant relies on for her associative indirect disability discrimination claim. There has subsequently been an application for an Order for anonymity (Rule 50). The application has not been granted as it is possible to maintain the privacy of the person by not naming the person or including any identifying information. The Judgment will instead refer to the claimant's 'caring responsibilities'.

## **Issues**

7. The issues the Tribunal will decide were discussed at a case management hearing on 5 October 2022 (68-81).
8. At the outset of the final hearing the claimant submitted that the List of Issues did not reflect her case. She said that she was not complaining that the respondent required her to work 6 hours in a day. She accepted that the respondent had not required that. Her case was that she was unable to work more than 3 hours in a day. She said she had agreed that she would work 3 hours a day over 5 days but the respondent required her to work more than 3 hours in a day. She wished to change the reference in the List of Issues from 6 hours to 3 hours.
9. Counsel for the respondent objected to the amendment being made to the List of Issues. She argued that the claimant had previously confirmed she agreed the List of Issues and the respondent would be prejudiced by the change. Evidence had been prepared on the basis that the allegation was that the respondent required the claimant to work 6 hours in a day.
10. The Tribunal decided to allow the change to the List of Issues. The Tribunal's core duty is to hear the case in accordance with the law and evidence and departure from an agreed List of Issues is sometimes necessary to enable the Tribunal to comply with that duty. The respondent was not prejudiced as the witnesses who could give evidence on the issue were at the Tribunal. This could be dealt with by a short adjournment and by amendment to the respondent's witness statements or by the respondent being given leave to give evidence in chief on the factual allegations. The claimant could be cross examined on the allegations.

11. The final Amended List of Issues required the Tribunal to make findings in respect of the following facts:

### 1. Disability

1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1.1.1 Did she have a mental impairment: depression and anxiety?

1.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

1.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

1.1.5.2 if not, were they likely to recur?

### 2. Direct disability discrimination (Equality Act 2010 section 13)

2.1 Did the respondent do the following things:

2.1.1 Bully the claimant and criticise her tone and behaviour?

2.1.2 Dismiss her.

2.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who she says was treated better than she was.

2.3 If so, was it because of disability?

### 3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the respondent treat the claimant unfavourably by:

3.1.1 Requiring her to work more than 3 hours in one day

3.1.2 Criticising her tone and conduct.

3.1.3 Dismissing her.

3.2 Did the following things arise in consequence of the claimant's disability:

3.2.1 The inability to undertake the role more than 3 hours in one day

3.2.2 Her tone and conduct

3.3 Was the unfavourable treatment because of any of this inability to work more than 3 hours in a day and/or her tone and conduct?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.4.1 To ensure the cemetery was maintained to an appropriate standard

3.4.2 To ensure duties carried out to a high standard

3.4.3 To ensure the health, safety and welfare of employees and members of the public

3.4.4 To ensure the correct placement of graves.

3.5 The Tribunal will decide in particular:

3.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 could something less discriminatory have been done instead;

3.5.3 how should the needs of the claimant and the respondent be balanced?

3.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

#### 4. Indirect disability discrimination (Equality Act 2010 section 19)

4.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

4.1.1 A requirement to work more than 3 hours in a day?

4.2 Did the respondent apply the PCP to the claimant?

4.3 Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, e.g. non-disabled employees or would it have done so?

4.4 Did the PCP put disabled employees at a particular disadvantage when compared with non-disabled employees, as disabled employees will be less able to undertake the role for more than 3 hours in a day?

4.5 Did the PCP put the claimant at that disadvantage?

4.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

4.6.1 To ensure the cemetery was maintained to a high standard;

4.6.2 To ensure duties were carried out to a high standard;

4.6.3 To ensure the health, safety and welfare of employees and members of the public;

4.6.4 To ensure the correct placement of graves.

4.7 The Tribunal will decide in particular:

4.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

4.7.2 could something less discriminatory have been done instead;

## 5. Associative indirect disability discrimination

5.1 The claimant argues that she had a caring responsibilities for a person with a disability, which meant she was less able to work more than 3 hours in a day than employees who were not carers.

5.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

5.2.1 A requirement to work more than 3 hours in a day?

5.3 Did the respondent apply the PCP to the claimant?

5.4 Did the respondent apply the PCP to persons who are not associated with and carers for a person with a disability?

5.5 Did the PCP put disabled employees at a particular disadvantage when compared with employees who are not carers for persons with a disability, as such employees will be less able to undertake the role for more than 3 hours in a day?

5.6 Did the PCP put the claimant at that disadvantage?

5.7 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

5.7.1 To ensure the cemetery was maintained to a high standard;

5.7.2 To ensure duties were carried out to a high standard;

5.7.3 To ensure the health, safety and welfare of employees and members of the public;

5.7.4 To ensure the correct placement of graves.

5.8 The Tribunal will decide in particular:

5.8.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

5.8.2 could something less discriminatory have been done instead;

5.8.3 how should the needs of the claimant and the respondent be balanced?

## 6. Indirect age discrimination (Equality Act 2010 section 19)

6.1 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP:

6.1.1 A requirement to work for more than 3 hours in a day?

6.2 Did the respondent apply the PCP to the claimant?

6.3 Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, e.g. younger employees or would it have done so?

6.4 Did the PCP put employees of or around the claimant’s age at a particular disadvantage when compared with younger employees, as employees of or around the claimant’s age will be less able to undertake the role for more than 3 hours in a day?

6.5 Did the PCP put the claimant at that disadvantage?

6.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

6.7.1 To ensure the cemetery was maintained to a high standard;

6.7.2 To ensure duties were carried out to a high standard;

6.7.3 To ensure the health, safety and welfare of employees and members of the public;

6.7.4 To ensure the correct placement of graves.

6.7 The Tribunal will decide in particular:

6.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

6.7.2 could something less discriminatory have been done instead;

6.7.3 how should the needs of the claimant and the respondent be balanced?

## 7. Indirect sex discrimination (Equality Act 2010 section 19)

7.1 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP:

7.1.1 A requirement to work more than 3 hours in a day?

7.2 Did the respondent apply the PCP to the claimant?

7.3 Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, e.g. men, or would it have done so?

7.4 Did the PCP put female employees at a particular disadvantage when compared with male employees, as female employees are more likely to have caring responsibilities than male employees?

7.5 Did the PCP put the claimant at that disadvantage?

7.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

7.7.1 To ensure the cemetery was maintained to a high standard;

7.7.2 To ensure duties were carried out to a high standard;

7.7.3 To ensure the health, safety and welfare of employees and members of the public;

7.7.4 To ensure the correct placement of graves.

7.7 The Tribunal will decide in particular

7.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

7.7.2 could something less discriminatory have been done instead;

7.7.3 how should the needs of the claimant and the respondent be balanced?

## 8. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

8.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

8.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

8.2.1 The requirement to work more than 3 hours in a day?

8.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was unable to undertake the role for more than 3 hours in a day?

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

8.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

8.5.1 Allowing her to work her working week of 12 hours over 2-3 hours a day.

8.6 Was it reasonable for the respondent to have to take those steps?

8.7 Did the respondent fail to take those steps?

9. Harassment related to disability and/or sex and/or age (Equality Act 2010 section 26)

9.1 The claimant says that the way she was talked to when she raised concerns about her hours and the reasons why she could not work more than 3 hours in a day referring to her age and health, was rude and disrespectful and amounted to harassment.

9.2 Did the respondent do the following things:

9.2.1 Treat the claimant rudely and disrespectfully when she mentioned difficulties she had working more than 3 hours in a day?

9.2.2 Refuse to provide her with a change of workwear (t-shirt etc) when hers became sweaty and dirty?

9.3 If so, was that unwanted conduct?

9.4 Did it relate to age, and/or sex, and/or disability?

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

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

**Evidence**

12. The Tribunal heard sworn evidence from the claimant and 3 witnesses on behalf of the respondent:
  - Sheridan Jacklin-Edward (Town Clerk)
  - Karl Bishop (Park Services Manager)
  - Kyle Dowling (Assistant Parks Services Manager)
13. The witnesses from whom we heard oral evidence each confirmed the truth of a written statement before being questioned.
14. In reaching its decision the Tribunal has taken into account only the documents to which it was taken in evidence. The Tribunal was initially provided with a bundle of 378 pages.
15. The following documents were disclosed and admitted at the beginning of the hearing; Case Management Agenda and ET1 version 2 (379-398), copy GP records (399-411) and a GP letter dated 25 May 2023 (Supplementary Bundle). After hearing from both parties we decided to admit the GP records because they were clearly relevant to the claimant's claim that she has a disability as defined by section 6 of the Equality Act 2010. The claimant said that the reason for late submission was that she had not realised she could request them until she was required to obtain them in relation to another matter. The respondent was not prejudiced as the claimant could be cross-examined on the content.
16. The documents included a video and transcript recording a conversation between the claimant and Kyle Dowling on 21 September 2021. This was covertly obtained by Kyle



Dowling; the claimant did not realise that she was being recorded during the conversation. It was agreed by the parties that the transcript of the video was not accurate. The claimant confirmed that she was agreeable to the Tribunal watching the video. The Tribunal watched the video and the claimant was taken to it in cross examination. The Tribunal decided to place no weight on it and to disregard it, as it was obtained covertly and it was not determinative of the factual findings they were required to make. See paragraph 62 below.

17. References to pages in the Bundle are in brackets (X) and references to paragraphs in the witness statements consist of the witness's initials and number of the paragraph (AB/YZ).

### **Facts**

18. This section of our Reasons sets out the broad chronology of events to the extent that it is relevant to the factual findings we need to make. There were points where we had to resolve disputed issues of primary fact in order to decide the case and we give our reasons for the findings we made.

### Disability

19. The claimant relies on the mental impairment of depression and anxiety which she claims amounts to a disability under s.6 Equality Act 2010. The Tribunal heard oral evidence from the claimant about the history and treatment of her condition and the bundle contained medical notes which gave details of diagnoses and medication. There were also letters from her GP which post-dated her employment with the respondent.
20. The medical notes were not complete. They were obtained by a Subject Access request relating to another matter. They contain a summary of the claimant's medical history from 2003 and medication prescribed since 1994. They record that the claimant was diagnosed with chronic anxiety in 2009 (399). She was prescribed anti-depressants (Citalopram) in May 2009 (408) and the prescription continued to be renewed, almost continuously, until she moved to an alternative anti-depressant (Sertraline), in September 2019 (404).
21. In January 2021 the records state 'stress at work' and shortly before that, in December 2020, her dosage for anti-depressants increased (400). The earliest sick note in the bundle is dated 18 December 2020 (331-342) for work related stress, some 7 months before she started working for the respondent.
22. In terms of therapy there is a reference to an appointment with Talking Space on 22 December 2020 (353).
23. In her witness statement the claimant says that the stress started in February 2021. In evidence the claimant was clear that the problems that caused the stress built up from June 2020 and were exacerbated in February 2021.
24. The claimant referred in evidence to very debilitating symptoms in 1992 (326) and it is confirmed in a GP's letter dated 18 March 2022, presumably with access to her notes, that she suffered from debilitating anxiety in her 20's. The GP goes on to say, 'although she has suffered from anxiety subsequently, she has been able to control it with

medication and by managing her lifestyle' (329). In evidence the claimant confirmed she managed her symptoms with medication and lifestyle (351).

25. The claimant's Disability Impact statement (326) gives no information about the effect of the condition on her day to day life or how it manifests itself. The claimant was given clear guidance in writing after the case management hearing on 5 October 2022 but she has failed to provide any meaningful information about the effect on her ability to carry out day to day activities. This may be because she manages her symptoms with anti-depressants and lifestyle adaptations as indicated above.
26. The only information provided specifically in relation to the period when she was working for the respondent, July to October 2021, is that the effect on her day to day life was difficulty sleeping, difficulty focusing, heightened sensitivity, emotions and fear, feeling mentally exhausted and needing to rest in the afternoons (351) (LM/para 35). This is not supported by any contemporaneous medical evidence. In addition the claimant asserted that 'a stressed or anxious person who is subject to this kind of behaviour is more likely to respond in a defensive way' (LM/para 31).
27. Under cross examination, when challenged about how she knew that the medication was alleviating her symptoms, the claimant said that she came off the medication at times and had to build back up again. The medical records show that the prescriptions have been regular since 2003, with a gap during 2013 to early 2014. The claimant subsequently clarified that she had not had much time off medication since 2009 but that there would have been a period off medication when transitioning from one type of anti-depressant to another.
28. The latest GP's letter dated 25 May 2023 states that if she works for more than 3 to 4 hours a day it 'proves too challenging' and she 'will continue to battle stress and anxiety, I suspect, her whole life' (supplementary bundle). The letter post-dates the start of the claimant's employment with the respondent by nearly 2 years.
29. In the Health Questionnaire the claimant completed at the start of her employment on 26 July 2021 (119) the claimant inserted 'recent stress, anxiety due to divorce' and caring responsibilities. In reply to the request to identify any medical condition or illness that had prevented her from attending work for more than one week in the last year she wrote 'stress/anxiety, see above'.

#### Caring Responsibilities

30. The respondent accepts that the person the claimant was caring for was a person with a disability as defined by s.6 Equality Act 2010. The respondent accepts that it was aware of the disability from April 2021 (86).

#### Recruitment and Induction

31. The claimant enquired about the Cemetery Warden role with the respondent before it was formally advertised. It was a new role for the respondent. In an email to Sheridan Jacklin-Edward (SJE) (Town Clerk) dated 21 April 2021 (376) the claimant said that she was giving up her teaching role because of her caring responsibilities and would be interested in the job. SJE acknowledged her email and told her to look out for an advertisement on the website and said he would try and remember to alert her (377).

32. In May 2021 the respondent advertised for the position of Cemetery Warden. There was a Recruitment pack and Job description (106-109), which subsequently formed the basis of the employment contract and is referred to below under 'Terms, Conditions and Policies'.
33. The claimant applied for the position sending a detailed letter and CV (308-310). She was interviewed online on 17 June 2021. SJE and Karl Bishop (KB) (Park Services Manager) were present. She told them that she wanted a more manual job as this would ease the stress and anxiety caused by her marital breakdown (SJE/8). There was a discussion about the hours she would be required to work which is referred to under 'Hours' below.
34. The claimant was offered the position and signed the contract of employment on 6 July 2021 (110-117). On 7 and 8 July 2021 there were emails between the claimant and Kyle Dowling (KD) (Assistant Parks Services Manager) about uniform (238) which are referred to under 'Uniform' below.
35. On 26 July 2021 the claimant commenced employment with the respondent. She completed the new starter Health Questionnaire with the information set out at paragraph 29 above. This was seen by SJE. He said he had no concerns about the information on there; he saw it as reaction to life events (SJE/10) and understood that the claimant had taken this job to alleviate stress. In oral evidence he said that if had concerns he would have referred the matter to Occupational Health and alerted the claimant's line manager. As he had no concerns he simply placed it on her personnel file. Her line manager KB had access to that file but did not look at it. He said in evidence that he prefers not to go through employees' personal details unless he needs to.
36. KB was on holiday for a fortnight on the day the claimant started. The claimant's induction was undertaken by KD.

#### Uniform

37. At the claimant's induction on her first day of work she was provided with uniform and protective equipment by KD. KD initially said he was going to order the uniform in advance of her start date (238), but he then reasonably decided it was easier to wait until she could try it on when she started work. He had a supply of new uniform in various sizes at the depot (KD/10). The claimant says that the uniform was not suitable; it did not fit and there were not enough short sleeved shirts. The claimant admits she 'did not make a fuss at the time' and she filled in the form (313) to confirm she had received it.
38. The respondent provided her with 2 short sleeve and 2 long sleeve shirts, which was the same as provided to other staff, one to wear and one to wash (KB/26).
39. On 22 September 2021 Claimant sent a text message to KB requesting 5 medium short sleeved t-shirts (321). This was not actioned as the uniform order had already been processed and there was a budget which needed to be spread across the team (KD/11). Her employment was terminated shortly afterwards.

#### Terms, Conditions and Policies

40. The contract of employment signed by the claimant refers to a summary of employment terms (110-117). The duties are set out in the job description (106-109). See paragraphs 44 and 45 below for further discussion.
41. There was a probationary period of 6 months, during which the respondent will 'review and assess your work performance' (112) and can end the contract by giving one week's notice (110). The contract can be terminated by pay in lieu of notice (115).
42. Disciplinary, Grievance and Capability procedures are set out in the Staff Handbook (125-230). The disciplinary policy provides that no action will be taken against an employee until a reasonable investigation of the allegations has been undertaken (143). A formal, staged procedure is set out (143-144). The capability procedure (145-147) comprises a series of review meetings.

### Hours of work

43. At paragraph 5 of the employment contract it is stated that the normal hours of work are in the summary (112) which says at paragraph 9:

'Normal Hours of Work: flexibly, to be mutually agreed with your line manager' (110)

44. The duties are those in the Job description (112) which states:

'The work is 10-12 hours per week including occasional weekend and bank holiday work, with seasonal variation (i.e. shorter hours in the winter, and longer in the summer to cope with the demands of grass cutting). Working hours will be dependent on the timing of burials, and so flexibility with availability is essential.' (109)

45. The Job description lists duties relating to day to day management of the cemetery including gardening tasks such as grass cutting and maintenance of hedgerows and trees. It provides that the Cemetery Warden 'will also liaise with funeral directors, the grave digger, and the Estate team to coordinate funerals and troubleshoot any practical issues to ensure burials and ceremonies can be carried out smoothly and respectfully.' (107).
46. The claimant disputed that liaison with funeral directors and the grave digger was part of her role on the grounds that she did not carry out such tasks while she was working there. We accept the respondent's explanation that it was intended to be part of the role, but because the claimant was settling into the role she had not been required to do it by the time she left. SJE gave cogent evidence that it was intended that the Warden would be on site to assist grave diggers and funeral directors to make sure graves were correctly placed. The current Warden does this. It was an important part of the role and it was likely to mean that sometimes the claimant would be required to work afternoons, as funerals are often in the afternoon. The claimant said that she would have been able to change her hours occasionally if requested to accommodate this, but it can be seen below that in practice she was not prepared to do so.
47. At the time of her application the claimant described herself as happy to work flexibly, physically capable and used to working long hours (308-309). She said in oral evidence that her situation changed over time and she needed to work 9am to

midday, as her caring responsibilities meant that she needed to be away by lunchtime.

48. In the interview the claimant did not say she was limited to 3 hours in a day or 9am to midday. She did ask if her hours could be spread throughout the week and she said her understanding was that 3 hours a day would be acceptable. SJE can recall working hours being discussed but 'nothing was set in stone' and he said that he would need some flexibility, if for example there were 2 funerals in one day. He also told her that her hours were subject to seasonal variation, 15 hours in summer and 12 hours in the winter (SJE/9).
49. The claimant said in evidence that 'I was happy to do extra time on occasions, but I had a hectic life with caring responsibilities, if the respondent does not give notice I can't necessarily respond to a request'.
50. When she started the role the claimant told KD that her hours, 9am to midday, had been agreed at interview. We find that her hours were not agreed at interview; the claimant herself said that she merely referred to them being spread through the week. KD was surprised as he had expected more flexibility (KD/5). KB said in evidence that he was not necessarily opposed to her working 3 hours a day; as it was a new role he described there needing to be an element of 'suck it and see'.
51. On 9 August 2021, the day KB returned from holiday, the claimant discussed her hours with him. KB cannot remember the meeting, but the claimant remembers saying that she would try out working 4 hours a day instead of 3 on a trial basis.
52. We find that the claimant was either not willing or was not able to offer the flexibility that SJE and KB envisaged when the job description was prepared. She regularly needed to leave work by lunchtime because of her caring responsibilities. She appeared reluctant to work afternoons. She wanted to work 9am to midday most days. We accept that it may have been genuinely difficult for her; as she said in evidence 'my time was not my own'. As discussed below we also find that the respondent did not demand or even try to persuade her to work hours that were not of her own choosing; they tried to be as accommodating as they could.
53. The claimant said in evidence that another reason that she could not work more than 3 hours was that it was heavy manual work and that this would be difficult for her due to her age (she was 48 at the time). We accept the respondent's evidence that the work was mainly light manual labour, with some limited heavier work, such as using the strimmer or chain saws. This accords with the job description which mainly refers to gardening type tasks. If the claimant had worked longer hours it would not be necessary for her to spend all the time doing heavy manual work (KB/16).

### Incidents

54. On 12 August 2021 KD arranged training for the claimant at midday on shoring equipment which did not take place as the claimant was not present (314). There was confusion about the time. The claimant says she was asked to be there at 2pm; KD said he told her it was midday.
55. On 24 August 2021 KB arrived on site just after 12.30 pm to find that the claimant was not there. He sent a text message to the claimant to find out where she was. She

responded by stating that she had left at 12.30 and was 'doing a reccy of the other graveyards to check out what we're up against' (315).

56. In his reply KB stated that in future he needed to know if she was leaving the site for insurance purposes (316). The claimant replied to him saying that 'surely' she is not expected to be on site every minute she is working, and that she does not want to be 'clock watched'; 'I have not work (sic) like this since I was a teenager and don't intend to start now'. She then stated that she would have to go back to working only 3 hours in a day because of her caring responsibilities (320).
57. On the following day KB had a meeting with the claimant where they discussed her hours and the claimant said she was 'not prepared to be pushed around by anyone' (KB/22). KB allowed her to go back to 3 hours without question. In evidence he said it 'got to the point where I didn't dare ask'. In cross examination the claimant was asked what she would have done if they objected and she said, 'they couldn't do anything, I would have had to have left the job'.
58. On 15 September 2021 KD arranged training for the claimant on the stump grinder. Unfortunately Joe, who was carrying out the training, was late and the claimant had to leave at the end of her 3 hour shift. The next day KD referred to her not staying behind in front of KB. The claimant said she found this humiliating. KD said he mentioned it in a light hearted way as he wanted to understand why she had not been able to stay. He thought she was interested in learning how to use equipment and could not understand why she could not stay another half hour as the stump grinder was not hired very often (KD/13).
59. On 21 September 2021 KD phoned the claimant at home at 8.30am to see if she was coming in early so she could let the grave digger in. The grave digger had called him at 8pm the evening before and he thought it was not fair to phone the claimant about it in the evening. We accept his evidence that he did not tell the claimant that she had to come in, he merely asked her if she could be there. The claimant seemed friendly and amicable at the time he made the request (KD/16). The claimant said in evidence that KD was 'expecting' her to go in, but she did not go in and we find that, although the request may have annoyed her, the reality was she did not feel any pressure to comply.
60. On the same date, when the claimant was at work and on site, KD spoke to her, initially on the telephone about storing petrol and machinery at the columbarium (KD/17). The claimant says she was told by KB she could store it there but KD was concerned as it was flammable. Both KB and KD conceded that there had been a misunderstanding about where to store equipment and that was not the claimant's fault.
61. KD says he raised it with the claimant 'politely' on the telephone and asked if it could be removed (KD/17). The claimant reacted with hostility on the telephone. In order to protect himself from false allegations he suggested they continue the conversation face to face and he recorded the conversation on video without her being aware (KD/18).
62. It is clear and undisputed that the claimant took offence about being told that she should not have stored equipment there. The Tribunal did not need to see the video to conclude that was the case. The claimant said in evidence, 'I swore (on the phone, before the video) and said I had had enough. If it had been a polite request there was no way I would have responded in that way, he made out I was jeopardizing council business when he was showing loved ones round'.

63. She said she was not angry but upset. She did not swear at him but said she was 'pissed off'. She said that 'if it happens again I am going to treat it as bullying' (KD/18). The claimant conceded in evidence that 'he quite possibly was intimidated'. We find that KD did raise the matter politely and appropriately and that it was not reasonable for the claimant to react in the way she did.
64. The following day KD spoke to KB (KD/19) and showed him the video. On 27 September 2021 KB spoke to SJE as described below.

Decision to terminate employment.

65. On 27 September 2021 KB approached SJE expressing various concerns about the claimant since she started employment. SJE asks him to put the concerns in an email (258).
66. The email dated 27 September 2021 says:

As discussed we have created bullet points of what we can think of, happy to use/not use anything listed below.

In the last 9 weeks we have had 2 separate situations that have escalated into confrontational conversations with Laila and management over issues with flexibility/work hours, emotional blackmail to her home life situation to excuse her erratic behaviour, and how she is managed day to day. This has rung alarm bells for myself and Kyle.

- Confrontational to management - Text over Hours & the video which highlights swearing and accusations of bullying, attitude is erratic and unpredictable.
- Erratic behaviour - Swearing and space invading, generally when she doesn't get her way e.g. hours, tools, uniform etc
- Flexibility – Hours have had to be changed to suit Laila, not suit position or even attempt to work for the role.
- Holiday – Not following protocol for example emailing other members of staff even after going through management team.
- Staff/colleagues – management feels like we need to tread on eggshells around Laila because of her self-explained sensitive and emotional state, unpredictability/threats of bullying. This has come to the point that neither myself or Kyle feel comfortable to manage one on one with Laila.
- Double standards – Would not stay and extra 10/20mins to have an induction on machinery (requested by management), but would stay an hour after her time to meet with Judith and stone mason (unrequested by management). I am not criticizing the fact that she has taken the initiative but she cannot have it both ways.
- Awol - Turned up to the cemetery on 24th Aug to have a catch up with Laila but she was not on site - after asking where she was, Laila's text turned confrontational (as read by yourself) also questioning and borderline demanding.

When on site Laila does work hard and completes jobs to a good standard but has an attitude of her way or no way which is detrimental to the team dynamic. We believe her home situation seriously has an impact on her work life too which makes things difficult to manage. To have so many issues in a short space of time is worrying and we feel going forward these will only get worse.

I hope this reads ok and like I say we can use or not use anything.

67. The email criticises her 'erratic' and 'confrontational' behaviour. KB said 'erratic' was his choice of word and he meant that she was liable to sudden unpredictable change.
68. On 28 September 2021 KB sent an email to the Claimant asking her to attend a meeting with him and SJE at 11am the next morning 'to go through a performance review please' (262). SJE said the invitation to the meeting deliberately played down the seriousness of the review as KB was very worried about the claimant's behaviour

and how she would react to the request. He accepts that it gave the claimant no chance to prepare for the meeting.

69. The invitation refers to a performance review, rather than a probationary review. SJE said that this was because he viewed probationary reviews as taking place at the end of the probationary period. He admitted that he did not follow the procedures for disciplinary or capability in the staff handbook (paragraph 42 above). Having taken advice from the respondent's HR providers, he considered he was not required to do so during a probationary period as the claimant had no relevant statutory rights, such as the right to be accompanied.
70. In evidence he said that they had not made the decision to dismiss the claimant when they convened the meeting but that the claimant had a 'very high hurdle to get over' and 'you would have to convince us to show you were suitable'.
71. On 29 September 2021 the claimant attended the meeting with SJE and KB. Minutes were not taken but SJE hand wrote a summary which he typed up after the meeting (265-266). The claimant disputes the accuracy of the summary. She says she responded to specific questions, but she was not given an opportunity to raise issues. The summary refers to the respondent's concerns about the claimant's confrontational behaviour, her working hours and lack of flexibility and timeliness. It records the claimant's concerns about her uniform and equipment. It records that she alleges bullying by KD regarding the incident when contacted at 8.30am, the stump grinder and the columbarium. She raised concerns about doing more than 3 hours manual labour due to her age (48). SJE said that difficulty because of her age had been not raised previously and he was surprised (SJE/21).
72. The same evening the claimant sent an email to SJE saying that she was concerned about the meeting and asking whether it was a performance review or disciplinary meeting (261). She said she had 'absolutely no idea was in any way a disciplinary or grievance meeting or indeed would lead directly to my dismissal' (LM/para 8). The Tribunal find her confusion understandable. The respondent deliberately played down the seriousness of the meeting. This is despite SJE admitting in evidence that there was a high hurdle for the claimant to get over to avoid dismissal. We agree with the claimant that dismissal was the most likely outcome and she was not warned that was the case.
73. Immediately following the meeting SJE and KB discussed options. They decided that there was nothing they could do which would make a difference. In evidence SJE said that his primary concern was the claimant's behaviour, both around other members of staff and the public at the cemetery. He described it as a very sensitive role and he felt concerned that behaviour may show itself in front of members of the public. He felt that the other concerns regarding work hours and flexibility were not so important but he did expect there to be mutual agreement about the working hours and he felt that the claimant was not prepared to work with the respondent. He did not understand why she was imposing a limit of 3 hours in a day.
74. It took around half an hour after the meeting for SJE and KB to make the decision to terminate the contract. SJE felt no further investigation was necessary. KB said the decision was made because we were 'not feeling we were making much headroom' and the claimant was 'just a very strong willed person and it felt like pushing water uphill'.



75. On 30 September 2021 the claimant worked a full shift as normal but later that day a letter dismissing her with pay in lieu of notice (267) was delivered to her house by KB.
76. The letter signed by SJE stated:  
'I gave careful consideration to your responses in the meeting but reached the conclusion that you have failed to demonstrate your suitability for your role during your probationary period.'
77. The claimant emailed asking about her right to appeal and was told that she had no right to appeal (260).
78. On 1 October 2021 the claimant sent an email to SJE stating;  
'You have said that I have failed to meet the standards you require, but you have not explained why. Since you have given me no option to appeal, please be aware that I am starting a conciliation process for unfair dismissal based on disability discrimination, which could ultimately end in an employment tribunal.'
79. On 6 October 2021 the claimant was accidentally sent an email to 'HTC Users' regarding an Employee Assistance Programme (273). The claimant responded on the same day by email stating 'Thank you for this and I await contact.'(274). The Tribunal finds that by then her employment had terminated and the email did not apply to her.

## **Law**

80. The claimant brings complaints of discrimination. The complaints fall to be considered under the Equality Act 2010. This section of our Reasons first sets out the relevant law under the Equality Act together with respective provisions on the burden of proof.

## **Disability**

81. Section 6 of the Equality Act 2010 states:
- (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.
82. The definition set out in section 6, as supplemented by provisions in Schedule 1 to the Act, poses four questions:
- i) Does the person have a physical or mental impairment?  
ii) Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?  
iii) Is that effect substantial?  
iv) Is that effect long-term?

83. The activities affected must be "normal". The Equality Act 2010 "Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011" states (D3):

'In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.'

84. Schedule 1 (paragraph 2) to the Act provides that an impairment will have a long-term effect only if:

It has lasted at least 12 months;  
The period for which it lasts is likely to be 12 months; or  
It is likely to last for the rest of the life of the person affected.

85. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day- to-day activities, it is to be treated as having that effect if that effect is likely to recur at the date of discrimination (paragraph 2(2), Schedule 1, Equality Act 2010). The test is whether the particular effect is likely to recur.

86. An impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if:

Measures are being taken to treat it or correct it; and  
But for the measures, the impairment would be likely to have that effect  
(Paragraph 5(1), Schedule 1.)

#### Knowledge of disability

87. The issue of knowledge of disability is relevant to both reasonable adjustment claims and section 15 discrimination arising from disability claims.

88. Knowledge is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known).

89. An employer cannot claim that it did not know about a person's disability if the employer's agent or employee (for example, an occupational health adviser, HR officer or line manager) knows in that capacity of the disability. The EHRC Employment Code indicates that such knowledge is imputed to the employer (see paragraph 6.21).

90. The EHRC Employment Code further states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (paragraph 5.15). What is reasonable will depend on the circumstances. This is an objective assessment. It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person' (paragraph 5.14).

91. The burden is on the respondent to make reasonable enquiries based on the information given to it. It does not require them to make every possible enquiry even where there is no basis for doing so.
92. In the context of a claim of discrimination because of something arising from disability, section 15(2) means that an employer will not be liable for section 15 discrimination if it did not know and could not reasonably have been expected to know of the employee's disability.
93. Paragraph 20(1) of Schedule 8 to the Equality Act 2010 indicates that the employer will only come under the duty to make reasonable adjustments if it knows, not just that the relevant person is disabled, but also that the relevant person's disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons.
94. The burden of proof is on the employer in establishing that they did not know, or ought not reasonably to have known, about the disability.

Direct disability discrimination (s.13 Equality Act 2010)

95. Direct discrimination is defined in section 13(1) as follows:

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.

96. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies. On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.
97. The effect of section 23 is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical comparator. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including Amnesty International v Ahmed [2009] IRLR 884, in most cases the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.
98. In Aitken v Commissioner of Police of the Metropolis [2012] ICR 78, the Court of Appeal held at para 41:

*On the comparator issue, the appeal tribunal repeated its conclusion that the employment tribunal had not erred in failing to regard the claimant's behaviour which gave rise to a fear of violence as his disability. The employment tribunal did not err in law in including bad behaviour as a relevant circumstances in making the comparison*

*between how the claimant was treated and how a comparator would have been treated.*

Discrimination arising from disability (s.15 Equality Act 2010)

99. Section 15 Equality Act 2010 provides:

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

100. Three elements must be made out in order for the claimant to succeed in a section 15 claim:

- i) There must be unfavourable treatment. No comparison is required.
- ii) There must be 'something' that arises 'in consequence of the claimant's disability.' The consequences of a disability vary depending on the circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether 'something' does in fact arise in consequence of a claimant's disability.
- iii) The unfavourable treatment must be because of (i.e. caused by) the 'something' that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.

101. The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability (City of York Council v Grosset [2018] ICR 1492).

102. When considering an employer's defence pursuant to section 15(1)(b) the question as to whether an aim is "legitimate" is a question of fact for the tribunal. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved.

Indirect disability, age and sex discrimination (s. 19 Equality Act 2010)

103. Section 19 of the Equality Act provides:

- (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.

104. The phrase “provision criterion or practice” should be construed widely and the EHRC Code indicates that it can include “one-off” decisions and actions. In *Ishola v Transport for London* [2020] EWCA Civ 112 Simler LJ stated, ‘In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. ...In context and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that “practice” here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP of “practice” to have been applied to anyone else in fact. Something may be a practice or done “in practice” if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one. ...in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to “practice” as having something of an element of repetition about it.’
105. Thus the PCP must apply to people who do not share the protected characteristic(s) or an indication that it will in future if a hypothetical case arises.
106. It has to put people who share the same protected characteristic(s) as the claimant at a particular disadvantage.
107. In regard to indirect sex discrimination Judicial notice can be taken of the ‘childcare disparity’, namely that certain PCPs will disadvantage women more than men: *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] IRLR 729.

#### Associative indirect disability discrimination

108. The language of s.19 (1) is arguably an obstacle to a claim for associative indirect disability discrimination (see paragraph 103 above). Under s.19 (1) the claimant must show he or she is part of the protected group; for ‘B’ to be discriminated against by ‘A’, ‘A’ must have applied a PCP which is discriminatory in relation to a relevant protected characteristic of B’s.

109. *Chez Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia C-83/14* [2015] IRLR 746 suggests that individuals who 'suffer' from a policy which disadvantages a group with a protected characteristic such as gender, race and so on, even where the individual is not a member of that group, may be able to bring such a claim.

Reasonable Adjustments (s.20 and 21 Equality Act 2010)

110. Section 20 (so far as relevant) states:

(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.

111. Section 21 states:

(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.

112. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The question is what objectively the employer could reasonably have known following reasonable enquiry. The burden of proof is on the employer.

113. The employer therefore needs to have knowledge of both the disability and the substantial disadvantage. That is an additional requirement to that required for discrimination arising from disability where the employer only needs to have knowledge of the disability.

Harassment related to disability and/or sex and/or age (s.26 Equality Act 2010)

114. The definition of harassment (so far as relevant) appears in section 26 as follows:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

- (b) the conduct has the purpose or effect of
  - (i) violating B’s dignity, or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account –

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

### Burden of Proof

115. The Equality Act 2010 provides for a shifting burden of proof. Section 136 provides as follows:

(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

116. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. Those facts include whether the claimant had a disability at the relevant time, that he or she was subject to unfavourable treatment, a link between the disability and the ‘something’ that is said to cause the unfavourable treatment, evidence from which the Tribunal can infer that the ‘something’ was an effective reason or the cause of the unfavourable treatment.

117. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

118. In Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337, Lord Nicholls in the House of Lords (NI) said that the Tribunal should focus on the primary question which was why the complainant was treated as he or she was? The issue essentially boiled down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others?

### **Submissions**

119. The Tribunal received detailed written submissions from Counsel for the respondent on the final morning of the hearing, followed by verbal submissions. The claimant made verbal submissions.

120. Submissions from Counsel for the respondent commenced by reminding the Tribunal that the respondent denies that the claimant had a disability at the relevant time. It was argued that the claimant’s condition was an adverse reaction to life events: Herry v Dudley Metropolitan Council [2017] ICR 610, Igweike v TSB Bank plc [2020] IRLR 267.

121. The claimant spoke about the unfairness of the respondent's process. She felt strongly that something was wrong with the way she was dismissed. When the respondent's employees used the word 'erratic' to describe her she says she realised that she was being treated that way because of her anxiety, which causes a 'fight' reaction when she feels under threat. In her submission the respondent should have investigated her condition further when they saw 'stress and anxiety' on the health questionnaire. They should have carried out a fuller investigation and a more appropriate process before deciding to dismiss her. They should have taken into account that she was performing the job well and there had been no complaints from members of the public. It was wrong for them to rely on the fact that, in their view, she had no statutory rights because she had not been working for the respondent for two years.

### Conclusions

122. The Tribunal worked through the List of Issues at paragraph 11 above. In respect of each complaint in the List of Issues we concluded as follows:

#### Did the claimant have a disability?

123. The Tribunal found that the claimant was on medication almost continuously from 2009 for anxiety and depression. She was diagnosed with chronic depression in 2009 and prescribed anti-depressants. She had regular repeat prescriptions, and her medication was adjusted as necessary at various times.

124. The Tribunal decided that, on a balance of probabilities, anti-depressants would not have been prescribed unless there was a condition of anxiety and depression since 2009. We do not accept that the claimant's situation was analogous to that in Herry v Dudley Metropolitan Council. In that case the findings related to stress and the effect on the claimant's day to day activities. In this case the claimant has a long standing condition of anxiety and depression that pre-dates her employment with the respondent by over a decade.

125. Taking account of the fact that the claimant was prescribed medication consistently from 2009, it is relevant to deduce the effect of that medication. What would the situation have been if she did not take medication/have treatment? The Tribunal decided that the treatment was either masking or improving symptoms. If that were not the case there would be no point in the doctor prescribing it. The claimant herself said that she managed her condition with medication and lifestyle.

126. The Tribunal decided that, notwithstanding the lack of information on the day to day effects of the condition, it is reasonable in this case to infer that anxiety and depression which was diagnosed as 'chronic' in 2009 and which has required medication over that period of time, is a condition which would have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, if it were not for the medication.

127. The condition is clearly long-term. It has been ongoing since at least 2009.

128. On that basis we accept that the claimant's stress and anxiety meets the definition of disability within the meaning of section 6 of the Equality Act 2010.



What were the effects of the disability?

129. It is important to decide the effect of the disability in respect of the claim for discrimination arising from disability and the claim for failure to make reasonable adjustments. As noted above there is extremely limited evidence because, as the claimant has said, the condition was managed by medication and lifestyle. The burden of proof is on the claimant. The Tribunal did not hear any convincing evidence that the condition caused the claimant's tone and conduct (described by KB as erratic behaviour). The Tribunal noted the claimant's assertion that the condition caused heightened sensitivity, emotions and fear and caused her to react in a confrontational manner. There was no medical evidence in support of this assertion.
130. The Tribunal also heard no evidence that indicated the condition prevented the claimant from working for than 3 hours a day. The claimant consistently referred to her caring responsibilities as the reason she had to leave by lunchtime. That was the reason she gave for not being able to continue the trial of 4 hours a day.

Did the respondent know about the disability?

131. It is important to decide when the respondent knew or should have known about the disability in relation to the claim for discrimination arising from disability and the claim for reasonable adjustments.
132. The Tribunal finds that the respondent had constructive knowledge of the disability when the claimant filled in the Health Questionnaire at the start of her employment. This should have triggered further questions and enquiries by the respondent up to (and including) an Occupational Health referral. If it had asked appropriate questions and explored the matter it may well have been furnished with more information about it. The case law and the Code indicate that the respondent cannot benefit by not asking the relevant questions and closing its eyes to the possibility of the disability. Whilst we do not necessarily accept that individuals in this case had actual knowledge of the disability, there was certainly constructive knowledge within the organisation which suffices for the purposes of this case.
133. In the event, as we have found that the disability did not cause the 'tone and conduct' or the alleged inability to work more than 3 hours in a day (paragraphs 129-130 above), the failure to make further enquiries was of no consequence.

Direct disability discrimination

134. Did the respondent bully the claimant and criticise her tone and behaviour? In dismissing her did the respondent treat her worse than someone else because of her disability?
135. The Tribunal find that the respondent did not bully the claimant. The incidents which amounted to an altercation or disagreement with the claimant are set out at paragraphs 54 to 63. The Tribunal found that, although the claimant reacted with hostility and became annoyed and/or upset about these incidents, the respondent's employees did not speak unkindly to the claimant or treat her in any way other than reasonably. The claimant admitted that KD would have felt intimidated by *her*

behaviour on 21 September 2021. KB said that it got to the stage where he did not dare ask her to change her hours.

136. The respondent did criticise the claimant's tone and behaviour at the review meeting on 29 September. It was the principal reason they dismissed her (see discussion below). This did not amount to her being treated less favourably than someone who did not have a disability. The appropriate comparator would be someone with the same tone and conduct as the claimant but without the disability. The respondent would treat such a person in the same way. In any event we have found that her tone and conduct was not related to her disability and so this allegation would not succeed in any event.

Discrimination arising from disability

137. Did the respondent treat the claimant unfavourably by requiring her to work more than 3 hours in a day, criticising her tone and conduct and dismissing her? If so was that because of 'something' arising from her disability, specifically her inability to work more than 3 hours a day and her tone and conduct?

138. We do not uphold this complaint for the following reasons:

We have found that the respondent did not require the claimant to work more than 3 hours in a day (paragraphs 52 and 57).

We have found that the claimant has not established that her alleged inability to work more than 3 hours a day was caused by her disability (paragraph 130).

The respondent did criticise her tone and conduct at the final meeting on 29 September 2021, but we have found that her tone and conduct was not related to her disability (paragraph 129).

139. The respondent dismissed the claimant because of her tone and conduct. SJE was concerned about the effect of her behaviour on other staff and if witnessed by members of the public (paragraph 73 above). This was in his mind at the time of the dismissal.
140. We therefore find that the respondent did not treat the claimant unfavourably because of something arising from her disability. The treatment was unconnected to the disability.
141. Even if that were not the case we decided that the treatment would be a proportionate means of achieving a legitimate aim. The claimant's lack of flexibility and her tone and conduct made her unsuitable for the role. In order to maintain the cemetery to a high standard the Cemetery Warden needed to be available to attend when grave diggers were on site to check that graves were correctly sited and to be on site for funerals. That was envisaged when the job description was drawn up and was an essential part of the role. They also needed to work with the other members of the team and display appropriate behaviour in front of members of the public. This was important because this was a sensitive role where members of the public were likely to be upset and grieving. There is no suggestion that the claimant had upset any members of the public and her work overall was of a high standard. The concern was about her tone and conduct to other staff and what might happen in the future.

142. We comment at this point that it may have helped the claimant understand the respondent's reasons and she may have felt that it was a fairer process if the respondent had followed the disciplinary or capability procedures in the staff handbook, notwithstanding that she was in her probationary period. She was not warned about why the respondent thought she was unsuitable for the role and was not given an opportunity to improve.

Indirect disability, associative, sex, age

143. Did the respondent have the following PCP:  
A requirement to work more than 3 hours in a day?
144. We find that the respondent did not have a PCP to work more than 3 hours in a day. The claimant was able to insist on working no more than 3 hours and this was accepted by KB without argument. The respondent would have liked more flexibility from the claimant. She insisted on working fixed hours, 9am to midday, a working pattern that did not suit the role. There was no suggestion that the respondent would not have allowed her to start work later and finish later in order to fit in with what was needed.
145. Having found that the respondent did not have a PCP we do not need to decide whether such a PCP would put the claimant at a disadvantage because of her disability, caring responsibilities, age or sex. However, if we did have to make a finding, we decided that such a PCP would not have placed such persons at a particular disadvantage. The Tribunal has considered whether the requirement to work more than three hours a day could adversely affect: (i) females, (ii) persons with the claimant's disability, (iii) older persons or (iv) persons with a disabled dependant. We heard no evidence that was the case.
146. As the respondent did not have a PCP we have not gone on to consider whether if they did it would be a proportionate means of achieving a legitimate aim. Our findings at paragraph 141 would apply; the respondent required flexibility, not a set minimum number of hours a day, and we find that would be proportionate and legitimate for this role.

Associative Indirect discrimination

147. It was accepted by the respondent that the claimant had caring responsibilities for a person with a disability and that the respondent was aware from April 2021.
148. As noted above (paragraph 108 to 109) the right to bring a claim for indirect associative discrimination is unclear in law.
149. Even if that were not the case we would not uphold the claimant's claim for associative indirect discrimination. This is because we did not find there was a PCP to work more than 3 hours in a day. We did not hear evidence that such a requirement would disadvantage carers. The claimant needed to leave at lunchtime, but the flexible nature of the job meant that if she was required to work more than 3 hours she could have considered starting earlier or returning in the afternoon.

Reasonable adjustments

150. The claimant's case is that reasonable adjustments should have been made to enable her to work 2 to 3 hours a day. We have found that there was not a PCP requiring the claimant to work more than 3 hours in a day and this complaint fails for that reason.
151. We have nevertheless gone on to consider what the position would be if the respondent did have such a PCP. As this is a claim for reasonable adjustments we need to consider the extent of the respondent's knowledge about how the claimant would be put a substantial disadvantage by the PCP (paragraph 113 above).
152. We decided that the respondent did not have knowledge of the substantial disadvantage. The claimant said at interview that the work would ease her stress and anxiety (paragraph 33 above) and there was no suggestion that it would be detrimental to her health to work more than 3 hours in day.

Harassment related to disability and/or sex and/or age,

153. The claimant alleges that the way she was talked to when she raised concerns about her hours and the reasons why she could not work more than 3 hours in a day referring to her age and health, was rude and disrespectful.
154. The claimant did not provide any clear or cogent evidence about what she alleged the respondent's employees said that amounted to rude and disrespectful comments.
155. We heard no evidence that the claimant raised concerns about working more than 3 hours in a day, until the final meeting on 29 September 2021 when she referred to it in relation to her age. She did make it clear on several occasions that she would work no later than midday. She was not challenged on this and was allowed to leave when she wished.
156. KD made a light hearted comment when she failed to stay behind for the stump grinder training (paragraph 58 above). The claimant says she found this humiliating, but we find that it was not intended to be, KD was trying to approach the issue in a non confrontational manner. He was interested in why she had not been able to stay and she had not explained it to him. We also find that it was not reasonable for the comment to have that effect; the claimant did not explain why she found it humiliating and it was light hearted. In any event the claimant has not provided any evidence that it related to her disability, sex or age.
157. The other incidents the claimant presumably relies on are i) being asked if she was coming in early one morning (paragraph 59) and ii) being asked to tell KB in future when she went off site (paragraph 55-56). As indicated above we found that KD and KB did not challenge her when she reacted in a hostile manner to these requests. She has not shown how the comments related to her disability, age or sex.
158. The claimant first mentioned her age in connection with her hours in the final meeting on 29 September 2021. SJE did not understand why she was raising this and the claimant did not suggest that he reacted by making adverse comments.
159. The claimant further alleges harassment on the grounds that the respondent refused to provide her with a change of workwear (t-shirt etc) when hers became sweaty and dirty?

160. We find that this was not the case. The claimant was provided with uniform in accordance with the respondent's policy and budget and had one t-shirt to wash and one to wear. She requested more uniform but we do not accept that the failure to provide it created an intimidating, hostile, degrading, humiliating or offensive environment. We do not accept that was the claimant's perception as there is no evidence of her complaining at the time, but even if the claimant did feel it created that environment we do not accept that it was reasonable for it to have that effect. We do not accept that the failure to provide more uniform was related to her age, sex or disability. The same policy applied to all staff.

### **Summary**

161. Accordingly the claimant's complaints are not well founded and they are dismissed.

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Employment Judge **S. Matthews**

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Date 27 December 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

5 January 2024

FOR EMPLOYMENT TRIBUNALS

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