Neutral Citation Number: [2025] EAT 99

Case No: EA-2023-001382-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 July 2025

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Ladbrokes Betting & Gaming Limited

Appellant

- and –

Ms Wahida Omi

Respondent

- -
- -

Hari Menon (instructed by Ward Hadaway LLP) for the **Appellant**
Patrick Halliday (instructed through Advocate) for the **Respondent**

Hearing date: 24 June 2025

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JUDGMENT

SUMMARY

Disability Discrimination, Constructive Dismissal

The Employment Tribunal did not err in law in finding that the claimant was subject to direct disability discrimination and was constructively dismissed. Comparators in discrimination complaints and affirmation in constructive dismissal discussed.

HIS HONOUR JUDGE JAMES TAYLER

Overview

1. This appeal raised the question of whether an Employment Tribunal erred in law in holding that the respondent subjected the claimant to direct disability discrimination by not increasing her hours from 17 to 30 per week and, as a result, constructively dismissed her.

2. The appeal is against the judgment of Employment Judge Emery sitting at London Central with members after a hearing on 12, 13, 14 & 15 September 2023. The judgment was sent to the parties on 20 October 2023.

The facts

3. I take the facts from the decision of the Employment Tribunal.

4. The claimant was employed by the respondent as a Customer Service Manager from 13 December 2016. She started working in the Cornhill shop on a 30 hour per week contract. The claimant then moved to the Watling Street shop on 29 November 2021.

5. The claimant has Conns Syndrome. The respondent conceded that she is a disabled person.

6. On 23 December 2021, the claimant went off sick. Her GP provided a fit note that recommended that when the claimant was fit to return to work adjustments should include working afternoon or evening shifts.

7. On 26 December 2021, the claimant sent an email to Amran Ul-Haque, Area Manager, complaining that there was to be a reduction in her hours of work to 17 per week.

8. The claimant returned to work on 2 January 2022.

9. On 10 February 2022, the claimant sent an email with the heading "Discrimination at workplace & poor treatment" to Colin Hughes, Regional Manager. She asserted that regular overtime was available for almost all other employees.

10. In an occupational health report dated 23 March 2022, Brian Grant, an Occupational Health Advisor, recommended:

> With regard to working shifts, I would recommend that consideration is given to flexible working i.e., an earlier or later start time depending on when energy/alertness

> levels are best. At this point in time Wahida reports that her energy levels are best later in the day therefore I would recommend avoiding an early shift pattern if operationally possible.

11. The claimant relied on a comparator called Tejas who started working at Chancery Lane and Watling Street in March 2022 under a 20 hour a week contract. On 16 June 2022, Tejas' contracted hours were increased to 30 hours a week based at Watling Street. At the time the claimant was seeking an increase in her contractual hours to 30 a week.

12. The Employment Tribunal rejected an assertion by the respondent that the claimant had indicated in a text message dated 7 June 2022 that she only wanted to work Monday to Wednesday:

> 39. The respondent's case is that in June 2022 the claimant said she only wanted to work Monday to Wednesday as she was working in another role, this restricted her hours. The claimant accepted she needed to look for another job because her hours had been reduced and she needed the money. At this time, she was not working elsewhere but she was studying. In a text on 7 June, in response to a request from the respondent, she provided times/days she could work "as examples" of the shifts she could work based on her contracted hours in the next few weeks.
>
> 40. We did not accept the respondent's case that the claimant was expressly limiting her hours in this text. She was asked for shifts she could work; she was contracted to work 17 hours and she gave an "example" of a shift pattern. We do not accept at this time the respondent believed the claimant had restricted herself to 17 core hours.

13. The claimant discovered that Tejas was based at Watling Street on a 30-hour contract at the end of July 2022.

14. The claimant went off sick on 1 August 2022 with depression. She sent medical certificates and kept in contact with the respondent about her absence by text. The claimant resigned on 28 November 2022.

15. The respondent does not challenge the Employment Tribunal's self-direction as to the law.

The conclusion of the Employment Tribunal

16. The Employment Tribunal concluded in respect of the complaint of direct disability discrimination:

> 57. It was Mr. Virdi's involvement which prompted the business case to increase the contract hours, including hours required at Watling Street and his business case was accepted in June 2022. **While we saw no direct evidence on it, we accept that the aim of the business case was to have a regular increase in contract hours at**

Chancery Lane and Watling Street. While work was available at other locations Mr. Virdi managed, the business case did not relate to this overtime, which was available at these other shops in any event. The business case was for an increase in contract hours at Watling Street and Chancery Lane.

58. **The respondent's forceful submission was that Tejas is not an appropriate comparator as he became an employee after many of the events in question. They say the correct comparator would be an employee who was on a 17 hour a week contract who was not flexible in the hours they could work and who could not work in many of the stores. Tejas is not the correct comparator as he was flexible and could meet the business requirements**.

59. **That was because there was no need for flexibility in these additional hours at these stores. It was clear on the evidence that after his hours were increased, Tejas worked regular afternoon and evening shifts at Watling Street, in particular Tuesdays and Fridays. The claimant was seeking the same location and similar hours. We accept that there were hours at other stores the respondent also needed filling at short notice, and the claimant was limited in the hours she could work. But this was not the requirement at Watling Street.**

60. **Considering the circumstances relevant to the issue in the case, we concluded that the appropriate comparator is an employee who was working in the same two-store market as the claimant, on a part-time contract, who was seeking an increase in their contract hours in a situation where increased contract hours were available**. This applied to the claimant and to **Tejas, who we concluded was an appropriate comparator**.

61. **The claimant was not offered additional contract hours. The Tribunal concluded that the requirements of flexibility for the business case to increase hours at Watling St and Chancery Lane was not defined by the respondents at Watling Street, which she had been pressing for. Tejas was given these hours. This was a difference in treatment and was less favourable treatment**.

62. The respondent's explanation is that Mr. Virdi wanted Tejas in the role as he was flexible. But this does not explain Mr. Ul-Haque's failure to intervene during the discussions on the business case and suggest the claimant could work at least some of these hours, that recently she had actively sought an increase in hours and complained when they were not given. Tejas started working on a consistent pattern of either Tuesday or Friday working at Watling Street on the evening shift – this did not require flexibility.

63. **The respondent's explanation also does not explain why the general practice of offering increased contract hours to all staff was not followed. No witness could explain this, apart from saying Mr. Virdi was seeking flexibility**.

64. **Mr. Ul-Haque knew the claimant was disabled and restricted in her hours and place of work. We did not accept that the claimant's apparent inflexibility was a factor which should have stopped her from being asked. The respondent operates shifts, and its evidence was that many staff have preferred rota patterns. We reiterate that many of the 11 shifts worked by Tejas at Watling St in June-July were hours suitable for the claimant, that Watling Street did not require a**

significant degree of flexibility in the additional contract hours.

65. The recent Occupational Health report had referred to the claimant's ongoing health issues. We concluded that this fed the perception of the Mr. Ul-Haque that the claimant was lacking in flexibility, and for this reason was not suitable for any of the additional contract hours on offer. **We concluded that a significant reason for not considering the claimant for additional contract hours was because she is disabled. The respondent's use of flexibility was, we found, a proxy for the view that the claimant was inflexible because she is disabled.** This was the reason why she was not considered for any of the additional contract hours, in particular the increased contract hours available at Watling Street.

66. **To put it another way, we concluded that had the claimant been an employee who was not disabled but who was actively seeking additional hours at Watling Street only, it is highly likely she would have been informed of the prospect of hours being available at Watling Street. The need for flexibility at other shops was not relevant to the fact there was an agreed increase in regular contract hours at Watling Street which the claimant was willing and able to work**.

67. **We did not consider a non-disabled employee's lack of flexibility would have stopped them being offered increased hours at Watling Street. Tejas wish for increased hours could have been accommodated by increased hours at Chancery Lane plus additional hours he could work flexibly elsewhere.** We concluded that **alternatives were not considered because the respondent had a closed mind, the claimant was disabled and was lacking in flexibility and therefore she was not going to be considered for increased hours. In this we followed *Essop* that the claimant's lack of flexibility was effectively a proxy for the claimant's disability, as she was unable to work flexibly because she is disabled.**

68. The Tribunal had significant concerns about the respondent's transparency when considering when and how to offer increased hours and overtime to employees. It struck us that managerial discretion appeared to play a significant part in the process. A lack of clear guidelines can give rise to unintended outcomes, including issues of discrimination. We concluded that this is what occurred here. No one intended to discriminate against the claimant – but we concluded that the outcome of the respondent's decision making, and the thought process around it, was discriminatory, in that its mindset was not to consider informing the claimant about the increased contract hours at Watling Street because of a perception she was inflexible as she was disabled; when in fact the respondent knew it did not require flexibility in the allocation of increased contract hours at Watling Street.

69. **We have concluded that the claimant was discriminated against, and she resigned as a consequence. We conclude that the claimant's dismissal amounted to an act of discrimination**. [emphasis added]

17. The Employment Tribunal also concluded that the constructive dismissal was unfair:

76. **We concluded that the reason why the claimant was resigned was because of the failure of the respondent on several occasions to increase her contractual hours. This for the claimant came to a head when she discovered Tejas's contractual hours at Watling Street.** As she put it no one had listed to the issues she

was trying to resolve. We accept that the failure to allocate her more hours and her view that this was discrimination and there was no attempt to resolve this was the principal reason for her resignation.

77. As we have found, the failure to increase the claimant's hours amounted to an act of direct discrimination. Noting that not all discriminatory acts necessarily amount to a repudiatory breach of contract (per Amnesty International v Ahmed) we concluded that in this case it did. The respondent's only justification for not considering the claimant for more hours was that she was inflexible, when in fact the hours at Watling Street did not need flexibility. The reason for resignation was that she had tried to raise and resolve issues at work for some time, but "no-one listened". We accepted that the fact the claimant's concerns were ignored, her request for an investigation into discrimination was ignored, her request for more hours was rejected, when hours became available shortly after she was passed over for, all created a hostile working environment for her. We also accepted that the acts of failing to consider her for increased hours was the issue she refers to in her resignation email as that she was trying to solve: all of this were issues she had been unable to solve, and which led directly to her resignation.

78. We concluded that the reason why the claimant resigned is because she reasonably considered she had been treated unfairly, she had complained, no-one had addressed her complaint, she was then discriminated against in the allocation additional contract hours at Watling Steet, which she found out about in end July 2022, the last act which caused her resignation. The failure to address her complaint – listen to her – and the appointment of Tejas and failure to consider her were repudiatory breaches of contract, the respondent was acting without reasonable or proper cause, and the claimant resigned as a consequence. [emphasis added]

The Law

Direct Discrimination

18. The **EQA** provides:

13 Direct discrimination

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

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A **there must be no material difference between the circumstances** relating to each case.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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. [emphasis added]

19. In **Jones v The Secretary of State for Health and Social Care** [2025] EAT 76 it was stated:

> 35. A number of questions may arise in complaints of direct discrimination:
>
> 35.1. What is the relevant treatment
>
> 35.2. Was that treatment different to that of another person
>
> 35.3. Were there any material differences between the circumstances of the claimant and any such other person? (where there are no material differences in circumstances the other person is an **actual comparator** – where there are material differences, but the circumstances are sufficiently similar in a more general sense, the other person may be an **evidential comparator**, whose treatment may assist in deciding whether to draw an inference of discrimination)
>
> 35.4. Was the claimant treated differently to how another person would have been treated? (in such circumstances that theoretical person is often described as a **hypothetical comparator**)
>
> 35.5. Are their facts from which the Employment Tribunal could conclude, in the absence of any other explanation, that the respondent breached the EQA
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> 35.6. If so, has the respondent shown that it did not contravene the EQA
>
> 36. Sir Patrick Elias said in *Law Society v Bahl* [2004] EWCA Civ 1070, [2003] IRLR 640, that in considering any discrimination complaint:
>
> > It is trite but true that the starting point of all Tribunals is that they must remember that they are concerned with the rooting out of certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error.
>
> 37. **There will often be a number of ways in which a complaint of discrimination could be analysed**. The Employment Tribunal has to decide what is the relevant treatment and what are the material circumstances. **Where the claimant seeks to compare his treatment with that of another person the Employment Tribunal will have to consider the extent to which that other person can be relied on as an actual or evidential comparator. If the correct questions are asked, the analysis of the Employment Tribunal can generally only be challenged if it is irrational**. [emphasis added]

20. In **Martin v Board of Governors of St Francis Xavier 6th Form College** [2024] EAT 22, [2024] IRLR 472, Cavanagh J held:

> 63. **The question, in direct discrimination cases, as to whether the situations of the claimant, on the one hand, and the proposed comparator, whether actual or**

> **evidential, on the other, are comparable is a question of fact and degree**: *Hewage v Grampian Health Board* [2012] UKSC 37; [2012] ICR 1034. The Supreme Court upheld the view of the Inner House of the Court of Session, restoring the decision of the Employment Tribunal, that **unless the Employment Tribunal's judgment could be said to be absurd or perverse it was not for the Appeal Tribunal to impose its own judgment on the point.** To like effect, in *Kalu v Brighton & Sussex University Hospitals NHS Trust* (UKEAT/0609/12), Langstaff P said, at para 24, that **the identification of a comparator is a question of fact**.
>
> 64. In order for a comparator to be an actual or statutory comparator, is not necessary that the circumstances are the same in every particular. In *Vento*, above, Lindsay J said, at para 12:
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> > '… **it is all too easy to become nit-picking and pedantic in the approach to comparators. It is not required that a minutely exact actual comparator has to be found**.'
>
> 65. In *Kalu*, at para 24, Langstaff P said, 'The purpose of making the comparison … needs to be understood before a comparator may properly be identified.' In our judgment, this is of central importance. **Whether a point of difference has any significance or not depends on the nature of the less favourable treatment about which complaint is made.** So, for example, if the complaint is about the claimant not being selected for a job, whilst the comparator was selected, the fact that the claimant and comparator have similar academic qualifications may well be relevant if the job required developed intellectual skills, but it is not relevant if the job requires solely manual labour or (to use one of Langstaff P's examples) is to model clothing. [emphasis added]

Affirmation

21. The respondent asserted that in determining the complaint of constructive dismissal the Employment Tribunal did not consider whether the claimant had affirmed the contract before resigning.

22. HHJ Auerbach considered the relevant authorities in **Leaney v Loughborough University** [2023] EAT 155:

> 18. There was no dispute as to the guiding principles that emerge from the authorities in this area. In particular, starting with an observation of Lord Denning MR, in *Western Excavations (ECC) Ltd v Sharp* [1977] EWCA Civ 165; [1978] ICR 221, but then building on that in subsequent authorities, notably *Bashir v Brillo Manufacturing Co* [1979] IRLR 295, W. E. *Certification Officer Toner (International) Ltd. v Crook* [1981] ICR 823, *Bournemouth University Higher Education Corporation v Buckland* [2010] EWCA Civ 121; [2010] ICR 908; and *Chindove v William Morrisons Supermarkets Plc*, UKEAT/0201/13. Some of these principles have also recently been reviewed by the EAT in *Brooks v Brooks Leisure Employment Services Ltd* [2023] EAT 137.

19. For our purposes the relevant general principles may be summarised as follows. The starting point is that, **where one party is in fundamental breach of contract, the injured party may elect to accept the breach as bringing the contract to an end, or to treat the contract as continuing, requiring the party in breach to continue to perform it – that is affirmation.** Where the injured party affirms, they will thereby have lost the right thereafter to treat the other party's conduct as having brought the contract to an end (unless or until there is thereafter further relevant conduct on the part of the offending party, a point discussed in *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978; [2019] ICR 1).

20. **The innocent party may indicate by some express communication that they have decided to affirm, but affirmation may also be implied (that is, inferred) from conduct. Mere delay in communicating a decision to accept the breach as bringing the contract to an end will not, in the absence of something amounting to express or implied affirmation, amount in itself to affirmation. But the ongoing and dynamic nature of the employment relationship means that a prolonged or significant delay may give rise to an implied affirmation, because of what occurred during that period**.

21. **In particular, acts of the innocent party which are consistent only with the contract continuing are liable to be treated as evidence of implied affirmation. Where the injured party is the employee, the proactive carrying out of duties falling on him and/or the acceptance of significant performance by the employer by way of payment of wages, will place him at potential risk of being treated as having affirmed.** However, **if the injured party communicates that he is considering and, in some sense, reserving, his position, or makes attempts to seek to allow the other party some opportunity to put right the breach, before deciding what to do, then if, in the meantime, he continues to give some performance or to draw pay, he may not necessarily be taken to have thereby affirmed the breach**.

22. In Buckland Jacob LJ recognised the difficult choice which the employee may often face in the following passage:

> "54. Next, a word about affirmation in the context of employment contracts. When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."

23. Although Mr Flood properly acknowledged that this observation may as such have been obiter, it was taken up and expounded upon by the EAT in *Chindove* in the following passage:

> "26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to

> continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of B*uckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test." [emphasis added]

23. Judge Auerbach emphasised that the employee must have done something that constitutes express or implied affirmation:

> 36. First, we agree with the broad tenor of Mr Flood's submission that, while the tribunal in its conclusions made a number of points about things that did not happen in this case which, if they had, might have pointed away from affirmation, **what the tribunal needed to focus on was the question of what conduct there had been during the relevant period that might or might not have amounted to an express or implied communication of affirmation.** [emphasis added]

24. Judge Auerbach considered the potential relevance of an employee being off sick:

> 50. We turn then to the fact, as found, that the claimant was signed off sick for about the last three weeks of the period leading up to his resignation, a fact recorded by the tribunal but, again, not apparently considered in the context of affirmation. We do accept Mr Heard's submission that **a tribunal is not bound to assume in every case that there cannot be any affirmation during a period of sickness absence**; and we recognise that in this case consideration of this feature would not address the position in relation to the period prior to the start of the sickness absence. Nevertheless, it was something that, in our judgment, needed to be considered in the overall context of the issue of whether the claimant had, at some point in the relevant time window, affirmed. [emphasis added]

25. Finally, Judge Auerbach considered the relevance of negotiations and/or a person expressing dissatisfaction with their treatment:

> 51. We also consider that the tribunal gave insufficient attention to the potential significance of the fact that there were negotiations taking place during much of the

> period prior to the claimant going off sick, and its own finding that he did so following the end of those negotiations. While there is no challenge before us to the conclusion that the negotiations could not be relied upon as a last straw, the question of the significance of this aspect for the issue of affirmation was a distinct matter. The fact that the tribunal did not know specifically what the negotiations were about was properly treated as decisive of the former issue, but we do not think it was correct to treat the fact that there was a period of negotiations as, therefore, irrelevant to the distinct issue of affirmation.
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> 52. The tribunal properly noted that there was no evidence that the claimant had specifically indicated that he was reserving his position pending the outcome of the negotiations; and it made the point that involving solicitors in a dispute is not necessarily always to be equated with working under protest. Nevertheless, it was clear that his position was that the point of the negotiations was that they might provide some resolution to his concerns, whatever that might be; and that it was the negotiations coming to an end without any resolution which triggered his going off sick and then resigning.
>
> 53. In oral submissions Mr Flood said that the parties obviously were not talking about the weather. Those were his words, not ours, but in the view of the judge and industrial members of the present panel, they capture a feature of the facts found in this case that the Tribunal failed to grapple with sufficiently when considering the question of affirmation. As discussed in *Brooks* at [30], **where an employee postpones resigning in order to pursue a contractual grievance procedure which might lead to a resolution of their concern, that will generally not amount to an affirmation. Rather, the employee should be treated as continuing to work and draw pay for a limited time while giving the employer the opportunity to put matters right**. So, in the present case, some consideration needed to be given to whether, although he did not say in terms that he was working under protest, the claimant could be said to have been working on while he allowed the respondent some opportunity to try to address his concerns in some way through these negotiations, before deciding whether to resign.

The Role of the EAT

26. The decision of an Employment Tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. An Employment Tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. It is not legitimate for the EAT to assume that a failure by an Employment Tribunal to refer to evidence means that it was not taken into account: **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016. The Court of Appeal held at paragraph 58:

> 58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals

> sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.

The appeal

GROUND 1

The ET erred in law in finding that C was subject to s.13 direct disability discrimination contrary to s.13 and/or its decision as to s.13 was perverse in that:

1.1 it applied the incorrect timeframe for the purpose of drawing a comparison with the comparator chosen by C and adopted by the ET (i.e. by including the 16 weeks prior to the EDT when C was off sick) and/or

1.2 if the ET applied the correct timeframe for the comparator, it incorrectly calculated the shifts within that timeframe allocated to the comparator to C's disadvantage, and/or

1.3 it failed to appreciate, adequately or at all that the limited shifts C was allocated in comparison with the comparator was because C could not work early shifts for medical reasons and/or was because of C's express preference to work on certain days of the week for personal reasons, such failures by the ET, or any of them, being perverse.

27. This ground is founded on a false premise. It was not necessary to consider a timeframe for the comparison. Adopting the approach suggested in **Jones**: the relevant treatment was held by the Employment Tribunal to be the failure to increase the claimant's hours to 30 from 17 when Tejas's hours were increased to 30. That occurred on 16 June 2022. It was for the Employment Tribunal to consider the material circumstances for the comparison. The Employment Tribunal concluded that the material circumstances were that both the claimant and Tejas wished to increase their contractual hours and shifts were available to allow them to do so. Tejas' hours were increased while the claimant's were not. It was not a necessary element of the analysis that the claimant was required to be able to work the same additional shifts as Tejas. The Employment Tribunal appreciated that the claimant did not want to work early shifts but it rejected the respondent's suggestion that the claimant had limited the days on which she wished to work to Monday to Wednesday. That was a factual determination that was open to the Employment Tribunal. The respondent does not come close to

establishing that the decision was perverse.

GROUND 2

> The ET erred in law by choosing a comparator, for the purpose of C's s.13 claims, who did not comply with s.23 and was therefore, an incorrect comparator.

28. This is essentially another version of ground 1. The Employment Tribunal was entitled to conclude that Tejas was an actual comparator because the differences between his and the claimant's circumstances were not material. The Employment Tribunal was also entitled to hold that the material facts were that they both wished to increase their hours to 30 per week and that shifts that would allow them to do so were available. The fact that the claimant did not want to work early shifts was not material because the Employment Tribunal concluded that shifts were available at Watling Street that would allow her to increase her hours to 30 per week without having to work early shifts. The Employment Tribunal permissibly held that the claimant had not limited the days on which she would work to between Monday and Wednesday. I do not consider there was any error of law in the Employment Tribunal accepting that Tejas was an actual comparator.

29. Even if there was any arguable error of law in his selection as an actual comparator, he obviously was an evidential comparator whose treatment could assist in analysing a hypothetical comparator; i.e. how the claimant would have been treated if she had not been disabled. That is what the Employment Tribunal did at paragraph 66 to 67 of the judgment. That finding is not challenged in the appeal. In any event, there is no arguable error of law in the analysis.

GROUND 3

> The ET erred in law in that it was materially influenced by irrelevant factors i.e. relating to shifts worked by other employees of R, who were not comparators and whose shifts were outside the relevant timeframe for a comparator.

30. The Employment Tribunal was entitled to take account of the approach that the respondent took to allocating shifts to other employees when considering whether to infer discrimination. These other employees were evidential comparators. There was no error of law in the approach adopted by the Employment Tribunal.

GROUND 4 UNFAIR DISMISSAL

> The ET erred in law in finding that C was unfairly dismissed and/or such finding was perverse and/or the ET failed to consider an issue material to the question of constructive dismissal.

31. The respondent pleaded that the claimant had affirmed her contract of employment before resigning. The respondent did not plead what the claimant had done to communicate affirmation. Mr Menon did not state what the claimant was said to have done that demonstrated the affirmation in his skeleton argument for the Employment Tribunal. In oral argument in this appeal, he asserted that the claimant had affirmed her contract of employment by accepting sick pay. The claimant did not recall this having been argued in the Employment Tribunal. As a result Mr Menon reviewed his notes of the Employment Tribunal hearing and of the Employment Tribunal's oral judgment, which unlike the written judgment referred to affirmation, but only because of delay, and rejected that argument. Having done so he properly accepted that he cannot rely on the argument that the claimant affirmed her contract by accepting receipt of sick pay. The parties agreed that insofar as necessary I should determine the affirmation issue.

32. The claimant discovered that Tejas had been given a 30 hour a week contract in late July 2022. The claimant went off sick on 1 August 2022. She was suffering significant depression. The claimant had previously complained internally about her treatment. The claimant commenced ACAS Conciliation on 9 August 2022 and brought an Employment Tribunal claim on 20 October 2022, prior to resigning on 28 November 2022. While the Employment Tribunal failed to deal with this issue in its written judgment, it is clear that, were the Employment Tribunal to be asked, it would confirm that it rejected the assertion of affirmation by effluxion of time. I agree and hold that the only possible decision was that the claimant had not affirmed her contract before she resigned. Even if there was more than one possible answer, I would have gone on to determine the issue, as agreed by the parties, and would have unhesitatingly held that the claimant did not affirm her contract of employment because of delay before resigning.

33. The appeal is dismissed.