EMPLOYMENT TRIBUNALS

Claimant: Mrs T Munday

Respondent: Southampton City Council

Heard at: Southampton **On: 1, 2, 3, 4 June 2026**

Before: Employment Judge Dawson, Ms Metcalf, Mr Wakeman

Appearances
For the claimant: Representing herself
For the respondent: Mr Potterton, counsel

FULL REASONS

JUDGMENT and summary oral reasons having been sent to the parties and written reasons having been requested in accordance with Rule 60 of the Employment Tribunal Procedure Rules 2024 , the following **full reasons** are provided pursuant to rule 60(4E):

Introduction and overview

1. By a claim form presented on 13 September 2024 the claimant brought the following complaints;

    a. unfair dismissal,

    b. discrimination on the grounds of disability and sex.

The issues

2. The issues were agreed by the parties in a hearing which took place on 25 June 2025 and recorded in an order sent following that hearing. The identified issues (leaving out the issues in relation to time and remedy) were as follows:

2. Disability

2.1 It is admitted that the Claimant was, at all material times, disabled by reason of depression/anxiety.

2.2 Did the Claimant's chronic kidney disease amount to a disability within the meaning of section 6 of the Equality Act at the time of the events the claim is about? The tribunal will decide:

2.2.1 Whether this amounted to a physical impairment.

2.2.2 Whether the Claimant's chronic kidney disease had a substantial adverse effect on her ability to carry out day-to-day activities.

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

2.2.4 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?

2.2.5 Were the effects of the impairment long-term? The tribunal will decide:

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

2.2.5.2 if not, were they likely to recur?

3. Unfair dismissal

3.1 Was the Claimant dismissed? The Respondent admits that the Claimant was dismissed.

3.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to redundancy or alternatively 'some other substantial reason', being a reorganisation of the business undertaken on the grounds of efficiency. These are potentially fair reasons for dismissal under sections 98(1) and (2) of the Employment Rights Act 1996.

3.3 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? In relation to redundancy the tribunal will usually decide, in particular, whether:

3.3.1 the Respondent adopted a reasonable selection decision, including its approach to a selection pool;

3.3.2 the Respondent adequately warned and consulted the Claimant;

3.3.3 the Respondent took reasonable steps to find the Claimant suitable alternative employment (the Claimant says it did not);

3.3.4 the Respondent used a fair procedure.

3.4 If the Respondent did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

4. Indirect sex discrimination (Equality Act 2010 section 19)

4.1 A 'PCP' is a provision, criterion or practice. Did the Respondent have or apply the following PCP:

4.1.1 a requirement that the Claimant work consecutive days.

4.2 Did the Respondent apply the PCP to the Claimant? This is admitted.

4.3 Did the Respondent apply the PCP to persons with whom the Claimant did not share the same protected characteristic, or would it have done so? This is admitted.

4.4 Did the PCP put persons with whom the Claimant shared the characteristic (namely sex) at a particular disadvantage when compared with persons with whom she did not share the characteristic?

4.5 Did the PCP put the Claimant at that disadvantage in that she was unable to look after her grandchildren on Tuesdays and Thursdays?

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

4.6.1 the need to ensure resilience and effective service delivery;

4.6.2 the need to avoid a working pattern that would have had a detrimental impact on performance and the ability to meet customer need.

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?

4.7.3 How should the needs of the Claimant and the Respondent be balanced?

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

5.1 Did the Respondent treat the Claimant unfavourably by:

5.1.1 offering the Claimant an alternative role within the new structure which required the Claimant to work in the office over three consecutive days, as opposed to working on Monday, Wednesday and Friday;

5.1.2 dismissing the Claimant?

5.2 Did the following things arise in consequence of the Claimant's disability?

5.2.1 the Claimant's need for reasonable adjustments to work alternate days as opposed to consecutive days;

5.2.2 the Claimant's need for reasonable adjustments to work from home as opposed to the office?

5.3 Was the unfavourable treatment because of any of those things?

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

5.4.1 the need to ensure service resilience and effective service delivery;

5.4.2 the need to avoid a working pattern that would have had a detrimental impact on performance and the ability to meet customer need.

5.5 The tribunal will decide in particular:

5.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

5.5.2 Could something less discriminatory have been done instead?

5.5.3 How should the needs of the Claimant and the Respondent be balanced?

5.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date? The Respondent denies knowledge at the material times of the Claimant's depression/anxiety. The Claimant says that the Respondent was aware of her depression/anxiety because she had discussed it with her managers and it was referred to in an occupational health report.

6. Reasonable adjustments (Equality Act 2010 sections 20 & 21)

6.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disabilities? From what date?

6.2 A 'PCP' is a provision, criterion or practice. Did the Respondent have the following PCPs:

6.2.1 a requirement that the Claimant work consecutive days;

6.2.2 a requirement that the Claimant work from the office?

6.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that working consecutive days and/or working in the office: (i) did not allow her to manage the fatigue that was a symptom of her kidney disease; and (ii) caused and/or exacerbated her depression/anxiety?

6.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

6.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

6.5.1 allowing the Claimant to work from home;

6.5.2 allowing the Claimant to work alternate days.

6.6 Was it reasonable for the Respondent to have to take those steps and when?

6.7 Did the Respondent fail to take those steps?

3. At the outset of the hearing, we went through the issues with the parties in detail. Subject to what is said below, all the parties agreed that the list of issues was accurate and set out the claims that we must determine.

4. The following clarifications were made in respect of the list of issues;

    a. in respect of the question of whether the claimant's chronic kidney disease was a disability, the respondent only took issue with the question of whether the disease had an adverse impact on day-to-day activities which was substantial (an impact being accepted),

b. at the end of the hearing, the respondent confirmed that it was no longer relying upon redundancy as being a reason for dismissal but simply relying upon “some other substantial reason”,

c. the PCP in paragraph 4.1.1 was clarified and both parties agreed that PCP actually imposed by the respondent was a requirement that the claimant work two consecutive days in the week,

d. in respect of issue 4.5, the claimant clarified that her case was that she was unable to work on Tuesdays and Thursdays because of childcare responsibilities,

e. in respect of issues 6.2.1 and 6. 2.2 the respondent admitted that there was a requirement that the claimant work two consecutive days and that from October 2023 there was a requirement that the claimant worked in the office.

Conduct of the Hearing

Reasonable Adjustments

5. At the outset of the hearing, the claimant was asked whether she required any adjustments in respect of the hearing and she confirmed that she did not. Nevertheless, we invited her to let us know whenever she needed a break.

6. In the course of being cross examined the claimant indicated that because of her anxiety, it would help her to have pre-prepared notes in front of her (in addition to the clean copies of the bundle and witness statements). We considered that could amount to a reasonable adjustment and endeavoured to explore with the claimant what it was about her anxiety that led to her needing those notes. The claimant indicated that she had read that she would be allowed to look at her statement and have notes. We explained that the claimant could, in any event, look at her witness statement whilst giving evidence and could have her pre-prepared notes with her when cross-examining the respondent’s witnesses or making her submissions. The tribunal sought to clarify how notes would assist her in answering the respondent’s questions in cross examination. At that point the claimant indicated that she no longer wished to have her notes with her whilst giving evidence. We clarified that she was no longer requesting to have those notes with her and, given that the claimant confirmed that was her position, we made no determination on the question of whether it would be a reasonable adjustment to allow the claimant have notes with her while giving evidence.

7. The respondent confirmed that its witnesses did not require any adjustments.

The Evidence

8. We were provided with witness statements for those witnesses from whom we heard (including two witness statements from the claimant, one on the question of whether her chronic kidney disease amounted to a disability and one dealing with liability generally). We were also provided with a bundle

running to 238 pages (on the PDF version). Except where otherwise stated, references to page numbers in this judgment are to the internal pages of the hearing bundle.

9. We explained to the parties that we would not, generally, take into account documents which were in the bundle but which we had not been referred to (whether in witness statements or in the course of the hearing). That was partly for reasons of time (the tribunal only having been provided with limited time for reading) and partly because, if we took account of documents on which we had not been addressed, we may be relying upon documents which one party would dispute, either in terms of genuineness or context. Therefore, we told the parties that they would need to take us to the relevant documents. However, we also informed the parties that if we did, for any reason look at documents which we thought were important, we would ensure that the parties had the opportunity to address us on them.

10. We heard evidence from the claimant and for the respondent we heard from

    a. Mrs Hooper, Service Manager within the Transport and Planning Division,

    b. Mr Boustred, Director for Transport and Planning,

    c. Mr Taylor, Arboriculture Manager.

11. An issue arose in respect of paragraph 4 of the claimant's substantive witness statement, the respondent objecting to its inclusion because it was the product of a covert recording and was irrelevant to the issues. Whilst we noted that the fact that a recording was covert does not mean that it is inadmissible, we took the view that the evidence in paragraph 4 of the witness statement was irrelevant to the issues which we must consider. It made allegations against a witness who would not have the opportunity to answer them and we ruled that the evidence was inadmissible and should be removed from the witness statement.

12. It may be helpful to observe that the tribunal's function is not to conduct a general review into a person's employment or determine whether, generally speaking, an employer is a good or bad employer (or, indeed, an employee is a good or bad employee). Our function is limited to deciding the issues which have been put before us. A tribunal may only decide those issues (in the absence of any application to amend) because that is the case which the parties have come to the tribunal to deal with. To go beyond those issues is likely to be unfair to either or both parties, since they will not have brought the relevant evidence to the tribunal and will not have been prepared to deal with those points.

13. We must also only decide the case on the evidence which has been presented to us and must do so without taking into account considerations of sympathy or other emotions.

Timetable

14. The timetable which had been set down at the case management hearing on 25 June 2025 was discussed at the outset of the hearing and we explained to the parties the importance of sticking to it.

15. We drew the parties' attention to the principles laid down in the Presidential Guidance for General Case Management about asking important questions first and avoiding irrelevant questions and both parties were able to complete their cross examinations well within the time allowed.

16. The order made on 25 June 2025 timetabled the case so that the question of whether the claimant was disabled by reason of chronic kidney disease was to be treated as a preliminary issue with evidence, deliberations and judgment being dealt with on the first day of the hearing. It was for that reason that the claimant had provided two separate statements, one dealing with whether she was disabled and the other dealing with liability related matters.

17. The tribunal raised with the parties whether it would be preferable to hear all of the evidence so that the question of disability could be considered in the light of all of the evidence. The respondent indicated that its view was that the matter should be dealt with in accordance with the direction of Employment Judge Leverton and that it did not think we would hear any (or any significant) evidence in the liability part of the hearing which would impact on the question of whether or not the claimant was disabled. The claimant was largely neutral on the position but appeared to indicate a preference to stick to the agreed timetable.

18. In those circumstances we dealt with the question of disability as a preliminary issue on the first day and gave judgment accordingly on that day. We decided that the claimant was not disabled by reason of chronic kidney disease. We accepted the respondent's submission that the claimant had not proved that it had a substantial adverse impact on her day-to-day activities. We set out the reasons for the decision in the appendix to this set of reasons.

<u>The Law</u>

<u>Approach To Evidence</u>

19. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, Leggatt J gave the following helpful guidance

> Evidence Based on Recollection
>
> [16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related)

errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

[17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory)

…

[22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. ... Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

20. We have approached the evidence in that way, whilst bearing in mind that in an employment context it is likely there are less documents then there would be in a commercial case

Indirect Discrimination

21. As to the claim of indirect disability discrimination, under section 19(1) of the Equality Act 20210

(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.

22. In respect of a provision criterion or practice (PCP) in the case of *Ishola v Transport for London* [2020] ICR 1204 the Court of Appeal held "“In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one” (paragraph 38).

23. In *Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 601, Baroness Hale stated that the change brought about by the introduction of the Equality Act 2010 'was intended to do away with the need for statistical comparison where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question'.

24. In *MacCulloch v ICI* [2008] IRLR 846, EAT, set out the legal principles with regard to justification, (approved by the Court of Appeal in Lockwood v DWP [2013] EWCA Civ 1195) as follows:

> 10 The legal principles with regard to justification are not in dispute and can be summarised as follows:
>
> (1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].
>
> (2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must 'correspond to a real need ... are appropriate

with a view to achieving the objectives pursued and are necessary to that end' (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to 'necessary' means 'reasonably necessary': see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

25. It is also helpful to consider, the decision of the EAT in *Dr J Ali v Drs Torrosian, Lechi, Ebeid & Doshi t/a Bedford Hill Family Practice* Appeal No. UKEAT/0029/18/JOJ, HHJ Eady QC helpfully summarised the principles in relation to justification in the context of a claim of discrimination because of something arising from disability.

15. Section 15(1)(b) thus allows that the unfavourable treatment relevantly identified for the purposes of section 15(1)(a) - here, the Claimant's dismissal - might be justified if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question has to be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (see *Chief Constable of West Yorkshire Police & Another v Homer* [2012] ICR 704 SC , and *Allonby v Accrington & Rossendale College & Others* [2001] ICR 1189 CA).

16. Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (see *Ojutiku v Manpower Services Commission* [1982] ICR 661 CA per Stephenson LJ at page 674B-C, *Land Registry v Houghton & Others* UKEAT/0149/14 at paragraphs 8 and 9, and *Hensman v Ministry of Defence* UKEAT/0067/14 at paragraphs 41, 42 and 44).

17. It is, further, common ground that when determining whether or not a measure is proportionate it will be relevant for the ET to consider whether or not any lesser measure might nevertheless have served the employer's legitimate aim (see the EAT's judgment in *Naeem v Secretary of State for Justice* [2014] ICR 472).

18. More specifically, the case law acknowledges that it will be for the ET to undertake a fair and detailed assessment of the working practices and business considerations involved, and to have regard to the business needs of the employer (see *Hensman* at paragraph 44). In that context, the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence will, no doubt, be a significant element in the balance that will determine the point at which their dismissal becomes justified, albeit, the evidence that may be required in this respect will be primarily a matter for the ET (see per Underhill LJ at paragraph 45 of *O'Brien v Bolton St Catherine's Academy* [2017] ICR 737 CA).

19. In *O'Brien*, a particular concern was raised as to what was said to have been the conflation by the ET in that case of the test applicable under section 15 of the EqA and that in the unfair dismissal claim, brought under section 98 of the Employment Rights Act 1996 ("ERA"). As Underhill LJ acknowledged in *O'Brien*, in carrying out the assessment required for the purposes of section 15 EqA , the ET is applying a different legal test to that arising in the context of an unfair dismissal claim under section 98 ERA . That said, Underhill LJ went on to deprecate the introduction of additional complexity where the substantive assessment is likely to be the same. Specifically, as he identified, where an ET is concerned with both such claims in the context of a dismissal for long-term sickness absence, the factors that are relevant for its determination of one claim are likely to be substantially the same as those to be weighed in the other (see paragraphs 53 to 55 of *O'Brien*).

20. As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied (see *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2015] ICR 1197 EAT at paragraph 42). When the putative discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification (see *Ministry of Justice v O'Brien* [2013] UKSC 6 , see in particular the judgment of the Court at paragraph 48; although the test remains an objective one, see *O'Brien* at paragraph 47).

26. In *Dobson v North Cumbria Integrated Care NHS Foundation Trust v Working Families* [2021] I.C.R. 1699 it was held

22. The highlighted passages establish that the starting point for identifying the pool is to identify the PCP. Once that PCP is identified then the identification of the pool itself will not be a question of discretion or of fact-finding but of logic. In reaching their decision as to the appropriate pool in a particular case, there may, depending on the PCP, be a range of logical options open to the tribunal.

…

49. In the present case, the claimant had expressly pleaded at para 17 of her claim that the PCP put her, "as a woman, at a particular disadvantage when compared to men on the basis that women are more likely to be child carers than men". The respondent pleaded in reply that the PCP did not put the claimant at a disadvantage but did not specifically address the more general case about women being disadvantaged. In our judgment, that pleaded case provides sufficient notice of the issue in respect of which judicial notice is invited: the tribunal was expressly being asked to find that women are more likely to be child carers than men and that this put women in general, and the claimant specifically, at a disadvantage in the context of being required to work flexibly. The tribunal erred in not taking account of it and in treating the claimant's case as unsupported by evidence. The child care disparity is so well known in the context of indirect discrimination claims and so often the subject of judicial notice in other cases that it was incumbent on the tribunal, in the circumstances, to take notice of it here.

50. However, taking judicial notice of the child care disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general position that is the result of the child care disparity and the particular PCP in question. The child care disparity means that women are more likely to find it difficult to work certain hours (e g nights) or changeable hours (where the changes are dictated by the employer) than men because of child care responsibilities. If the PCP requires working to such arrangements, then the group disadvantage would be highly likely to follow from taking judicial notice of the child care disparity. However, if the PCP as to flexible working requires working any period of eight hours within a fixed window or involves some other arrangement that might not necessarily be more difficult for those with child care responsibilities, then it would be open to the tribunal to conclude that the group disadvantage is not made out. Judicial notice enables a fact to be established without specific evidence. However, that fact might not be sufficient on its own to establish the cause of action being relied upon. As is so often the case, the specific circumstances will have to be considered and one needs to guard against moving from an "indisputable fact" (of which judicial notice may be taken) to a "disputable gloss" (which may not be apt for judicial notice): see R (Interim Executive Board of Al-Hijrah School) v HM Chief Inspector of Education, Children's Services and Skills (Secretary of State for Education intervening) [2018] 1 WLR 1471 at para 108 . Taking judicial notice of the child care disparity does not lead inexorably to the conclusion that any form of flexible working puts or would put women at a particular disadvantage.

…

56. In summary, when considering whether there is group disadvantage in a claim of indirect discrimination, tribunals should bear

in mind that particular disadvantage can be established in one of several ways, including the following.

(a) There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected in limine;

(b) Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;

(c) The disadvantage may be inherent in the PCP in question; and/or

(d) The disadvantage may be established having regard to matters, such as the child care disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken.

<u>Discrimination because of Something Arising from Disability</u>

27. In respect of a claim for discrimination arising from disability, under section 15(1) of the Equality Act 2010 a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

28. Under section 15(2), this 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.

29. The proper approach to section 15 claims was considered by Simler P in the case of *Pnaiser v NHS England* at paragraph 31. She held:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

30. In Private Medicine Intermediaries Ltd v Hodkinson, HHJ Eady QC held

[24] The protection afforded by s 15 applies where the employee is treated “unfavourably”. It does not necessitate the kind of comparison required by the use of the term “less favourable treatment” as in other forms of direct discrimination protection; neither is it to be understood as being the same as “detriment”. “Unfavourable treatment” suggests the placing of a hurdle in front of, or creating a particular difficulty or disadvantage for, a person because of something arising in consequence of their disability. It will be for an ET to assess, but treatment that is advantageous will not be unfavourable merely because it might have been more advantageous.

31. As we have set out above, in *Dr J Ali v Drs Torrosian, Lechi, Ebeid & Doshi t/a Bedford Hill Family Practice* Appeal No. UKEAT/0029/18/JOJ, HHJ Eady QC summarised the principles in relation to justification UKEAT/0029/18/JOJ, HHJ Eady QC helpfully summarised the principles in relation to justification

32. In *Buchanan v Commissioner of the Police of the Metropolis* [2016] IRLR 918, the Employment Appeal Tribunal made clear that the focus in a section 15 claim is on the treatment complained of rather than the policy which gave rise to the treatment. The EAT held:

33. In *Crime Reduction Initiatives (CRI) v Lawrence* UKEAT/0319/13/DA, UKEAT/0321/13/DA the EAT held that the question of justification is objective and purely procedural questions are irrelevant to dealing with justification. It quoted *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 that “what

matters in any case is the practical outcome, not the quality of the decision-making process that led to it" (para 13)

Reasonable adjustments

34. The following provisions of the Equality Act 2010 are relevant

> 20 Duty to make adjustments
>
> (1) …
>
> (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.
>
> …
>
> 21 Failure to comply with duty
>
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
>
> ...

35. In *Environment Agency v Rowan* [2008] IRLR 20, the EAT gave guidance on how an employment tribunal should act when considering a claim of failure to make reasonable adjustments. The tribunal must identify:

> "(a) the provision, criterion or practice applied by or on behalf of an employer, or;
>
> (b) the physical feature of premises occupied by the employer;
>
> (c) the identity of non-disabled comparators (where appropriate); and
>
> (d) the nature and extent of the substantial disadvantage suffered by the claimant'.'

36. The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1).

General Provisions

37. Some parts of the Equality Act 2010 apply to more than one type of discrimination. They include the following sections:

    39 Employees and applicants

    (2) An employer (A) must not discriminate against an employee of A's (B) -

    (a) as to B's terms of employment;

    (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

    (c) by dismissing B;

    (d) by subjecting B to any other detriment.

    109 Liability of employers and principals

    (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

    (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

    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.

Unfair Dismissal

38. Section 98 Employment Rights Act 1996 provides that it is for the Respondent to show the reason for dismissal and that it is a potentially fair reason.

39. Section 98(4) states that “The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee,

and shall be determined in accordance with equity and the substantial merits of the case".

40. In *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 the Court of Appeal held that the range of reasonable responses test (or to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision.

<u>Findings of Fact</u>

41. The claimant has worked for the respondent since 2003. She tells us, and we accept, that she started working in her role as Transport Coordination Officer in 2007. She arranged school transport for children with special educational needs. The claimant tells us, and it was not disputed, that she was good at her job which had been recognised in her annual appraisals and she had been praised by Mrs Hooper for a piece of work that she conducted in 2023 leading to substantial efficiencies. We see no reason to doubt that evidence, although this is not a case where the claimant's conduct or capability is in issue.

42. In January 2016, the claimant was assessed by the respondent's occupational health provider. It reported that the claimant had stage III chronic kidney disease and suffered from coccydynia and lower back pain. The report referred to the claimant having reduced concentration, not sleeping well and feeling anxious as well as experiencing palpitations. The report stated that those symptoms could be attributed to stress and the menopause. It advised, in respect of the claimant's symptoms of stress, that the claimant should maintain a good work life balance and recorded that the claimant had told the occupational health adviser that she had discussed a potential reduction in hours to 4 days a week, which the adviser would support (page 83). The claimant agreed that was the position and stated that she had gone down to 4 days a week because she could not afford to reduce her working hours further. In 2019, the respondent introduced a Smarter Ways of Working policy which allowed staff to work their hours flexibly across a day and staff were encouraged to work flexibly from home. A hot desking system was introduced. The claimant worked from home, at least on some occasions from then, and in 2020 the claimant made a flexible working request to reduce her hours by a further day. The claimant says, and we do not doubt, that she told the respondent she continued to struggle with her mental health and that spending more time with her family was beneficial. It was agreed that the claimant would work a pattern of Monday, Wednesday and Friday.

43. As is well known, in 2020 the coronavirus pandemic struck the United Kingdom and the claimant, along with many others, started to work from home. The claimant and her team continued to work from home after lockdown.

44. In the early part of 2023, the claimant's absence was such that she was required to attend an attendance management review meeting. The claimant

had been ill with a number of ailments mainly in relation to respiratory matters. The outcome letter of 6 April 2023 recorded that:

> We discussed your kidney disease that you were diagnosed with approximately 15 years ago. You do not require medication and are monitored by your GP, your kidneys function at 50% currently. You did not feel any adjustments were needed regarding this health condition. We discussed a referral to Occupational Health so I can support you with any reasonable adjustments that they may suggest. A referral has been made now, and your appointment is on the 11 April 2023 at 11:30.

Page 99

45. An Occupational Health report was provided on 12 April 2023 which included the following statements (page 101):

    a. Teri states that she attends regular gp (sic) reviews to monitor her long term health condition, chronic kidney disease (CKD). She states that this kidney condition has remained stable and was not the reason for her recent absences, which were all respiratory and covid related. She states she has returned to work and manages her workload and contracted hours well.

    b. Based on my assessment, it appears Teri has recovered well, within the expected timeframe. Her long-term health condition CKD has remained stable and she attends regular GP reviews to monitor this. A person with CKD is able to live a normal life, without being impacted by this condition. She remains under primary care review and uses good lifestyle methods to help support her CKD health, with a healthy diet and exercise.

    c. Teri is fit for work performing her full contracted hours and duties. No modifications are required. In my opinion, her CKD is stable and her current frequent short-term absences have been related to respiratory illnesses.

    d. No routine OH review is required.

46. Mrs Hooper told us, and we accept (the relevant parts not being challenged by the claimant) that in early 2023 the respondent commissioned a management consultancy, Edge Public Solutions (Edge) to review the Transport Coordination Unit within which the claimant worked. Mrs Hooper told us that the unit was spending excessively and delivering poor service practices and delivery. Although the claimant did not agree with Mrs Hooper's analysis of the reasons for the problems, she did accept that the service was not functioning as well as it might be. Amongst other things she accepted, in cross examination, that failures had been identified within the service for not having continuity because non-working days were not covered and customers had to wait until people returned to work (by reference to the document page 180).

47. We have not been taken to the Edge report but we find that, as a result of it, there was a decision to restructure the Transport Coordination Unit. That decision is most clearly evidenced in the Equality and Safety Impact Assessment at page 103. The assessment states:

> The vision for the Home to School Transport Service is to transform the service so that it is more robust and resilient for future growth, offers more sustainable travel options that can achieve cost efficiencies to mitigate the service cost pressures, and to be a service that puts the customer at the heart of service delivery.

It goes on in the paragraph numbered 7 to state;

> Re-design historical working patterns that are affecting the service's ability to: meet the changes in demand; ensure knowledge sharing; and, support service resilience and business continuity.

48. The impact assessment records that the existing unit had 10 posts reporting to one manager whereas, in the future, there would be an increase in staffing levels from 9.83 FTE to 12.81 FTE. Five posts would be deleted and seven new posts would be created. The assessment also records that within the Transport Coordination Unit was the Home to Transport Service and the SmartCities and Concessionary Fares Services. The latter two were out of scope for the restructure.

49. Again, Mrs Hooper tells us and we have no reason to doubt, that Edge had recommended that staff in the unit be employed on a full-time rather than part-time role due to the "heavily operational nature of the role" and that most local authority school transport services had full-time staff. Mrs Hooper refers us to an email from a Mr Cooper of Edge dated 8 May 2024. In his email he has pasted questions asked of him by Mrs Hooper and then set out his answers and to assist the reader of this judgment we have underlined the questions which he was asked. The email reads:

> <u>Can you confirm the approx. no. of LAs that have part-time (or job share) as opposed to full time staff in post and more rationale behind this:</u> In my experience there have been only a few Part time/job share roles. Only one LA comes to mind but they still had staff in every day but only part days (mornings or afternoons covering peak telephone periods) therefore they could still manage a caseload. This is/should be, a highly operational environment, and as we discussed when bringing staff back in to the office, there is huge benefit in the interaction, shared learning, consistent processes etc from doing so. This reflects on the challenge you now face with the job share position. It is possible but you lose considerable time with handovers, inconsistencies in practices and you don't have the software to accurately track activity.

<u>Also, Paul spoke during the final presentations about reviewing the working patterns of staff that are not conducive to efficient service delivery, i.e. non-consecutive working days (that he was surprised we had in place) but unfortunately this was not included in the final report. Are you able to elaborate on this point</u>? I certainly agree with Paul, and wouldn't have any non-consecutive days if that were possible. The position could be mitigated with the introduction of proper Transport management software where all activity is recorded, tasks can be allocated and handovers could be managed better. In terms of working patterns I would look to ensure coverage of peak call volume times, I would also look forward to operational peaks (summer etc) and manage coverage then. If you were to job share/part time I would recommend every day in the office, but for only half days.

Page 196

50. The respondent did not accept the advice that all staff should be employed on a full-time basis but did decide that for staff working part-time, they should work on consecutive days. The respondent did not have the transport management software referred to at page 196. The respondent took the view that working consecutive days would reduce the amount of time spent on handovers and encourage continuity.

51. The respondent also decided to move all roles to office-based roles. Mrs Hooper told us, and we accept, that doing so enabled the respondent to ensure that;

    a. staff were following policies,

    b. more experienced staff could support junior members of staff,

    c. knowledge sharing would be more efficient because spontaneous communications could happen during the day,

    d. information could be shared on a whiteboard,

    e. daily huddles could take place and

    f. physical handovers could take place.

    Staff were required to start working from the office from October 2023 and the claimant did so.

52. The claimant told us that she and her entire team were resistant to moving back to the office and we accept that evidence, it is the tribunal's industrial experience that many people who have started working from home are resistant to a requirement to return to the office. In addition, the claimant told us that, at least by the end of 2023, she had reached a long-term agreement with her daughter that she would look after her grandchildren on Tuesdays and Thursdays. That enabled the claimant's daughter to work the hours that she wanted to and also worked well with the claimant's daughter's husband's

work commitments. The claimant told us that looking after her grandchildren assisted her mental well-being. We accept all of that evidence.

53. We have not been provided with the documents which launched the formal consultation process in relation to the proposed changes to the Transport Coordination Unit, but there is no doubt that there was one. The consultation was intended to last 45 days. The claimant's evidence, which we accept, is that she was first told about the proposals on 22 November 2023.

54. On 8 December 2023 the claimant wrote to Rumbie Shandirwa, her contact within the respondent in respect of the consultation. She wrote as follows:

> I am writing with a proposal for my position in the new restructure. (Having already requested a flexible working plan on health grounds which was supported by Occupational Health and accepted in 2020, I am disappointed that I do not appear to be fully accommodated in the new structure. My current working days were chosen by my manager at the time and already required a change, and I have built my life around these days. I have discussed with my family and it simply isn't possible for me to change my working days. As you are aware I look after my grandchildren while my daughter works as a midwife and unfortunately my daughter's nursery does not accommodate her shift hours which start at 0700. Therefore changing my days would impact the lives of too many other people.)
>
> Proposal:
>
> I have discussed with my colleague Tracy Gerrard who has also been identified as a natural successor to the Senior Transport Officer role, and we would like to apply as a job share for one of these roles, but keeping to a similar working pattern as we have now. I do understand that consistency is key in the new restructure and believe that we offer full consistency with every day being covered. I recognise this is one of the major problems in the previous structure which left many schools without cover on certain days, however the new restructure has already addressed this issue. I feel our days can be accommodated with no negative impact on the team. This already requires both Tracy and I to reduce our hours but in order to lessen the impact I would agree to work 2 days (Monday and Wednesday) leaving Tracy with Tuesday Thursday and Friday. I feel with regular communications and Teams meetings, this would not negatively impact the Team or stakeholders as full cover is provided every day. I would however be prepared to work my 14.8 hours over 3 days to include Friday if this is deemed necessary in order to provide some crossover.
>
> I will be discussing my position with the union and eagerly await your reply.

55. Although the claimant referred to having requested a flexible working plan on health grounds, the reason she gave for wishing to work on non-consecutive days was the childcare responsibilities which she had taken on. The claimant did not suggest in that email that she required a rest day between working days.

56. The claimant also sent an email on 12 January 2024 to Mr Murray, her trade union representative. In that email she pasted an earlier email which referred to getting tired as a result of her chronic kidney disease and therefore only working her contracted hours and she went on to say that her initial decision to go part-time was made following an occupational health meeting which followed being signed off with stress at work. She referred to looking after her grandchildren on her non-working days which was good for her health (page 109 – 111).

57. The claimant kept notes of conversations which she had. They appear to have been made on a contemporaneous basis (her evidence on this point was not entirely clear, but that is our understanding). One of her notes states:

> 22 November 2023 - a meeting was arranged with Annamarie, Marianne and myself. ... She said that the jobs would be open to jobshare but would be MON Tues WED/ and Wed Thurs Friday. I explained that this would not be possible for me but she said that SCC could not continue to run its business around my children and that I had enough notice for my daughter to change nursery days etc I was gobsmacked at this as I had never asked SCC to work around my children. I did not go part time in order to look after my Grandchildren, I went part time because of Health reasons which were supported by Occupational Health. I have received comments before which left me uncomfortable such as I should be able to work full time when my grandchildren go to school. Again where has this assumption that I reduced my hours to support my children come from? It is true that I don't wish to change my days now that I have built my life around the days that were chosen by Marianne. My daughter's nursery does not operate when my daughter's shifts are so it would also involve her husband changing his WFH days which would also affect his Office Team. And my second daughter who arranged her working week around my days. I just do not see why it would be necessary. Tracy and I have agreed to job share which provides cover every day.

(Page 114, sic)

58. Again, it can be seen from that email that although the claimant is saying that she reduced her hours because of her health, the stated reason for not wishing to change her working pattern is because of childcare, not because the claimant requires a rest day between working days.

59. On 22 January 2024 Mrs Hooper wrote to the claimant asking her a number of questions. The first question was around whether she had explored alternative options in respect of childcare for her grandchildren and the fourth question was:

> I understand that your occupational health assessment, where you requested a flexible working plan on health grounds that was supported by Occupational Health, had the outcome to reduce your FTE by one working day and your contract was reduced to accommodate the recommendation. Can you please confirm that this adjustment is still relevant and if other adjustments on health grounds have since been requested/ implemented?

Page 120

60. The claimant replied and in the course of her reply stated:

> At my Occupational Health Meeting, the recommendation was to reduce to part time. It was my decision to opt for 1 day at this time and yes all reasons still apply. Things continued to get worse when I started to enter the Menopause. My Health living with CKD is only likely to get worse with time. If you google life expectancy of someone with CKD in their 40s it states 28 years which gives me another 8 years. Whilst I don't feel at the end stage I am noticing that I get more infections and take longer to get over them (sic).

61. In the context of requiring reasonable adjustments the claimant made no reference to working from home or requiring a rest day between working days.

62. On 2 February 2024 the respondent, through Marianne Alford, wrote to the claimant setting out that if a job share was to take place it would be necessary for the claimant and her colleague to work 2.5 consecutive days each. There must be an overlap of hours on the Wednesday to allow a physical handover to take place (page 122).

63. The claimant replied on the same day stating that she would not accept the proposed changes to her contract.

64. On 5 February 2024 the claimant raised a grievance (page 154). The grievance expressed that it was in two parts, firstly around the failure by the respondent to comply with its own flexible working policies and the second part relating to the fact that the respondent had failed to provide a safe system of work.

65. On 26 February 2024 a consultation meeting took place between the claimant, Mrs Hooper, the claimant's trade union representative and the HR business partner. The letter sent following that meeting (page 156) showed that the respondent was maintaining its position in relation to the restructure but a further meeting was to take place on 4 March 2024.

66. On 27 February 2024 Mrs Hooper responded to the grievance stating that the first part would be dealt with within the restructure outcome meetings and the second part would be dealt with separately but asked for more information in respect of that part (page 253).

67. A letter was sent following the meeting on 4 March 2024 which appears at page 167. It records that the claimant had stated that she did not wish to work in a full-time role and that her health limited her from doing so which is why she currently worked part-time hours. Mrs Hooper, in evidence to us, confirmed that the discussion in respect of health was around the claimant's anxiety as well as her chronic kidney disease. The respondent's position had shifted on the need for each person in a job share to work a minimum of 2.5 days with an overlap for a physical handover. The respondent was, then, willing to accept two consecutive working days and some overlap with the job share partner. The letter records that the claimant had stated that due to her commitment to her family she would not be able to work Tuesdays and Thursdays because of childcare.

68. On Monday, 11 March 2024 the claimant wrote to the respondent setting out why she did not regard the new role as being suitable alternative employment. In the course of that letter the claimant stated:

> I have since began caring for my grandchildren on every Tuesday and Thursday on an ongoing/permanent basis. Having discussed the matter with my family it is not possible for me to stop doing this.
>
> Working 3 consecutive days would also take a toll on my health, as my chronic kidney disease causes me to become fatigued more easily and my current working pattern allows me time to recover.
>
> Because of these two points I do not consider the offer of altern (sic) employment to be a suitable one, and consider it reasonable for me to refuse this offer.

Pages 167 – 168

69. On 25 March 2024 the respondent wrote to the claimant confirming that the formal 45 day consultation period had been completed and the claimant had been identified as a natural successor to the Senior School Travel Officer role. That role was, in essence, the same role that the claimant had been carrying out but with a requirement to work consecutive days and work from the office. It was not in dispute that on a working day, staff could still work flexibly in the sense of starting and finishing at flexible times and building up flexi-leave. Because the claimant had advised that she did not consider that the Senior School Travel Officer role was suitable alternative employment for her, the matter had been referred to the head of service, Dave Tyrie.

70. We find that the intention of the respondent had been to impose the intended changes on its staff. Those changes were in the form of new job roles, so that the claimant's role as Transport Coordination Officer ceased to exist and was to be replaced with the Senior School Travel Officer role. If staff refused to accept their newly designed roles they would be dismissed the grounds of redundancy. However, if the respondent considered that the new role amounted to suitable alternative employment, staff would lose their right to a redundancy payment. Although we do not find the correspondence makes the

position particularly clear, there appears to be no dispute that everyone understood what the position was.

71. The matter was therefore referred to Mr Tyrie and Mrs Hooper set out for him the justification for requiring staff to work consecutive days. That appears at page 176 as follows:

    Reasons working non -consecutive days does not work for a job share:-

    - Need to ensure that both employees are working 50% of the time.
    - Non-consecutive days means the employee is out of the loop and feels constantly absent
    - Constantly having to sharing information
    - Hard meeting deadlines within the role
    - Need to work closely with the other person and work as one.
    - Both parties must commit to completing the whole job as a duo not I am just completing what they can in the day they happen to be working.
    - Attend training and meetings on a crossover day.
    - Follow up on issues or replies.
    - Creating handover notes as working non-consecutive days and catching up on handover notes means potentially losing 1-2 hours per week.
    - There needs to be a face-face handover on one day especially to discuss any major issues and tasks

72. Having received those reasons, Mr Tyrie raised a series of questions as can be seen from pages 180 – 182. The respondent's HR Department then answered those questions at pages 180-181. The HR Department answered the questions by reference to existing failures within the service and the Edge recommendations.

73. Mr Tyrie concluded that the role did require employees in those posts to work consecutive days in order to stabilise business continuity and to ensure efficient and effective service delivery and there was a reasonable business case to justify the working hours in the new structure. However, from the claimant's point of view because the new structure had an impact on her income, lifestyle, work life balance and personal commitments he did not consider that the new role was suitable alternative employment. Thus, he concluded that the claimant would be entitled to a redundancy payment, although he stressed that he was not making the claimant redundant (pages 187 – 188.)

74. A meeting then took place on 29th April 2024 as a result of which the claimant was dismissed on the grounds of redundancy and provided with a redundancy payment. Mr Boustred was the dismissing officer. He accepts in his witness statement, that part of the proposed changes was to increase the headcount in the Transport Coordination Unit rather than reduce it. He reviewed matters and noted the respondent's rationale for the restructure and the two individual consultation meetings with the claimant. He noted that the claimant had

rejected the respondent’s suggestion of working two consecutive working days with some overlap with the job share partner and discussed with the claimant the possibility of redeployment. The claimant said she did wish to be considered for redeployment. Mr Boustred concluded it was appropriate for the claimant be given notice of dismissal but placed on the redeployment register for the period of her 12 weeks’ notice. If the claimant found alternative employment within that period then, presumably, she would be redeployed accordingly. We accept all of Mr Boustred’s evidence, it was not challenged by the claimant and it is supported by the letter of dismissal which he sent on 1 May 2024 (page 193). The claimant was given the right of appeal but she did not exercise it because she believed that matters would be dealt with within her grievance. The claimant’s understanding in that respect was mistaken. As had been explained to the claimant, the respondent was not dealing with her concerns in relation to the restructure within the grievance but within the restructuring process.

75. The respondent had met with the claimant on 16 April 2024 to discuss the remainder of her grievance and the claimant was sent an outcome in that respect on 20 June 2024. The issues raised within that grievance are not relevant to the issues which we must decide.

76. The claimant did not find alternative employment and her employment came to an end on 24 July 2024.

Conclusions

77. We now set out our conclusions by reference to the agreed list of issues. As set out earlier, the decision in relation to disability was dealt with as a preliminary issue and the decision in that respect appears as an annex to these reasons.

78. We deal, firstly, with the indirect sex discrimination and disability discrimination claims because our decision on the question of whether the claimant was unfairly dismissed must take account of any findings of discrimination which we make.

Indirect Sex Discrimination

79. In respect of issue 4.1.1 there is no doubt that the respondent did have a requirement that the claimant work consecutive days, however by the time the claimant was dismissed, the requirement was that the claimant work two consecutive days.

80. The respondent admits that requirement was applied to the claimant and to men and women generally.

81. Under issue 4.4 we must consider whether the requirement put women at a particular disadvantage when compared with men.

82. We take judicial notice of the fact that women bear the greater burden of childcare responsibilities than men and doing so can limit their ability to work

certain hours. That is the childcare disparity. However, we also note (following *Dobson*) that such disparity does not necessarily mean that group disadvantage is made out in every case. Whether or not it is made out will depend on the interrelationship between that disparity and the PCP in question.

83. In considering whether group disadvantage has been made out, we find that the appropriate pool for comparison is not only those people in the Transport Coordination Unit that were facing the restructure (and thereby being required to work consecutive days) but also those people who might reasonably apply for roles in the Transport Coordination Unit. Given that new roles were being created, applicants for such roles would be affected by the requirement to work consecutive days as well as those who were already doing the job. In particular, we bear in mind that people on the respondent's redeployment register might be interested in applying for such a role

84. We must ask ourselves whether, in that context, the requirement to work consecutive days places women at a particular disadvantage when compared with men. Having considered the principles in *Dobson*, we do not think that we can simply move from the childcare disparity to a finding that a PCP that employees work on consecutive days places women at a disadvantage compared to men. In reaching that conclusion we have taken into account that the PCP did not specify which consecutive days its staff must work, it amended its PCP to allow for working on only two consecutive days and it allowed flexible working (in terms of the hours worked) within those two days. Once the dates which the claimant would work had been agreed, it was not anticipated that the working days would change and thus this was not a requirement for flexible working

85. We note the claimant's argument, made in the course of the hearing, that some sort of deal had been done with her job share partner which meant that the claimant would not have a free choice of days on which she was to work. In particular her partner could not work on Wednesdays. The claimant's evidence was not very clear on this point but, in any event, the precise way in which the PCP was to be applied in the claimant's case is not relevant to the issue of group disadvantage, which is what we must address at this stage.

86. In this case the claimant has produced no evidence as to the makeup of the Transport Coordination Unit, either in terms of sex or in terms of the hours or days worked by staff within the transport unit. We have been provided with no evidence that indicates that women generally, or within the pool, find it difficult to obtain childcare on consecutive days or are otherwise at a disadvantage because of the requirement to work consecutive days.

87. We also do not consider that we can extrapolate from the difficulties that the claimant had to find a group disadvantage. The claimant's difficulties were specific to her situation. They were based on the hours which her daughter and son-in-law worked and the fact that over a substantial period of time childcare arrangements had been constructed around the availability of all three (the claimant, her daughter and her son-in-law). We can make no extrapolation in respect of the rest of the group from that unique situation.

88. Thus, we do not consider that there is evidence on which we can conclude that women are placed at a particular disadvantage when compared to men by a requirement to work on consecutive days.

89. Although that is enough to dispose of this issue, in case we are wrong we go on to consider the respondent's argument that the PCP was a proportionate means of achieving a legitimate aim. We accept that the PCP did place the claimant at a disadvantage because her childcare responsibilities meant that she was unable to work on Tuesdays and Thursdays.

90. In respect of issue 4.6 we find that the respondent's aims were legitimate. The claimant herself accepted that the service was not performing well and, in a taxpayer funded service, particularly one providing services to children with special educational needs, it is legitimate to require the service to be resilient and effective. The aim in issue 4.6.2 adds little to 4.6.1. The need to avoid a working pattern which would have a detrimental impact on performance is not, in itself, an aim. The aim is to have a service which performs properly and meets customer needs. Nevertheless, we accept that there were legitimate aims of the respondent to have a service which was resilient and effective, performed appropriately and met customer need.

91. We must then consider whether a requirement for staff to work consecutive days was a proportionate means of achieving that aim. We must undertake a fair and detailed assessment of the working practices and business considerations involved, and to have regard to the business needs of the employer and balance that against the discriminatory impact of the PCP. In some senses that exercise is artificial at this stage, because we have not found that the PCP did have a discriminatory impact. However, doing the best we can, we find that the respondent was right to decide that consecutive days would improve consistency. It was supported in that view by its professional advisers, Edge. A requirement to work consecutive days would entail fewer handovers and provide fewer opportunities for things to be missed or misunderstood. The benefit of reduced handovers is not only in the fact that fewer notes need to be written (or conversations had), it is also in the fact that the information exchanged in a handover can never be as complete as the knowledge of the person making the handover. If A starts a task on day one which needs to be finished on day two, on day two A will usually be in a better position to finish the task than B would be, if B had to do so having been given a handover. We also find some force in the argument that an employee who works on non-consecutive days is somewhat out of the loop.

92. All of those reasons support the respondent's argument that requiring consecutive working days is a proportionate means of achieving its aim. We note that the respondent has stepped back from the more discriminatory recommendations made by Edge. It has not adopted the recommendation that all staff should be required to work on a full-time basis. It has reduced the PCP from being a requirement to work 2.5 consecutive days to working two consecutive days. As Mr Potterton said in his closing submissions, if an employee is working more than one day a week, it is not possible to have a less discriminatory way of applying a requirement to work consecutive days. We also take account of the fact that these measures were introduced

because the respondent's previous way of working, was not, in fact, working. The system was failing; it was not providing the service which children with special educational needs (and their carers) were entitled to. There was good reason for the respondent making changes to the unit

93. Weighing all of those matters, we find that even if the PCP did place women at a particular disadvantage compared to men, the PCP was a proportionate means of achieving a legitimate aim.

Discrimination arising from disability (Equality Act 2010 section 15)

94. In respect of issue 5.1.1, in fact the respondent required the claimant to work in the office over two consecutive days, as opposed to working on Monday, Wednesday and Friday. However, we accept that was to the claimant's disadvantage and is properly to be classed as unfavourable treatment.

95. We accept that the claimant was dismissed as per issue 5.1.2 and that was unfavourable treatment.

96. In respect of issue 5.2.1, we must consider whether the claimant's disability of depression and anxiety meant that the requirement to work consecutive days put her at a substantial disadvantage in comparison with persons who did not have her disability. This is, of course, the test for a failure to make reasonable adjustments, however that is appropriate given the way issue 5.2 is framed. In that respect we have been presented with no medical evidence in support of the claimant's case and for the majority of the time when she was engaging with the respondent during the reorganisation process, her arguments around the need to work alternative rather than consecutive days were only around childcare. As far as we have been able to tell from the evidence, it was not until the email of 11 March 2024 that the claimant suggested that working (three) consecutive days would take a toll on her ill-health. Neither occupational health report suggested that the claimant could not work consecutive days and it is a matter of some surprise that the claimant did not mention that working three consecutive days would take a toll on her ill-health until 11 March 2024.

97. In the absence of any independent evidence to support the claimant's assertion as to the effects of her anxiety and depression on her ability to work consecutive days, we do not accept the assertion that she could not work on three consecutive days because of her health. We find that the real reason why the claimant wanted to work non-consecutive days was to enable her to continue looking after her grandchildren.

98. In any event, even if we were satisfied that the claimant could not work three consecutive days because of her health, it would not follow from that, that the claimant could not work two consecutive days, which was the respondent's position by 4 March 2024 (page 167).

99. Likewise, in respect of issue 5.2.2, there is no medical evidence that suggests that the claimant needed to work from home as opposed to at the office and the claimant had been working from the office since October 2023. She had

had no absence which was related to her depression and anxiety and she did not suggest in the consultation period that she needed to work from home because of her anxiety and depression. We do not find, on the evidence that we have been presented with, that a need to work from home arose from the claimant's anxiety and depression.

100. It follows, therefore, that this claim fails because the claimant does not establish the matters set out in issue 5.2. However, even if we were satisfied that those things arose in consequence of the claimant's disability, we are entirely satisfied that the requirement to work consecutive days and the requirement to work from the office were nothing to do with matters which arose from the claimant's disability. They were because of the restructure which the respondent was carrying out. Further, the reason that the claimant was dismissed was because she was unwilling to accept a role which required her to work consecutive days and work from the office. We find that she would not accept that role because she wanted to continue looking after her grandchildren on Tuesdays and Thursdays. The dismissal was not because of things which arose from the claimant's disability.

101. Finally, on this point, and for the purposes of completeness, even if we had found that the claimant was disabled by reason of chronic kidney disease, we have seen no evidence which would have persuaded us that the claimant could not work consecutive days or work from the office because of her kidney disease.

<u>Reasonable Adjustments</u>

102. We accept that the respondent could reasonably have been expected to know of the claimant's disability of depression and anxiety from the meeting on 4 March 2024. Mrs Hooper told us that the claimant told her in that meeting that her health issues included anxiety and, in those circumstances, we find that the respondent should have investigated the claimant's health concerns in more detail. Given that the respondent concedes that, as a matter of fact, the claimant was disabled by reason of depression and anxiety at that point, we are bound to conclude that had the respondent commissioned an occupational health report, that report would have informed the respondent that the claimant was so disabled. Thus we find that from 4 March 2024 the respondent ought to have known that the claimant was disabled.

103. In respect of issue 6.2.1 the PCP was a requirement that the claimant work two consecutive days and in respect of issue 6.2.2 the PCP was a requirement that the claimant work from the office.

104. For the reasons that we have given above, we do not find that the PCPs placed the claimant at a substantial disadvantage compared to somebody without her disability. Even if we had found that the claimant was disabled by reason of kidney disease, on the evidence, we are not able to accept the claimant's case that she needed to work from home or have a break between individual working days in order to manage any fatigue arising from that kidney disease. We will not repeat the reasons we have set out above in detail, suffice it to say that the claimant made no mention of such

fatigue as a reason why she could not work consecutive days until 11 March 2024 and, even then, she only said that she could not work three consecutive days, when the respondent had already agreed that it would only require her to work two consecutive days. The claimant had been working from the office since October 2023 and had not raised that as a concern, even when she was asked about reasonable adjustments in January 2024.

105. Likewise, we are not satisfied that the requirements to work two consecutive days and work from the office caused or exacerbated the claimant's depression and anxiety. The claimant took no time off work because of depression and anxiety and, again, raised no suggestion of a need for reasonable adjustments even when she was asked about that in January 2024. The claimant has not produced any supporting medical evidence and the occupational health reports do not support the claimant's case.

106. Even if we had been of the view there was sufficient evidence to persuade us that the PCPs exacerbated the claimant's depression or anxiety, we are not satisfied that the respondent knew or ought reasonably to have known that the claimant was placed at the disadvantage she asserts. Whilst we have concluded that if, in March 2024, the respondent had commissioned an occupational health report it is likely that the respondent would have been told that the claimant was disabled by reason of depression and anxiety, there is no evidence that an occupational health report would have said that the claimant was being disadvantaged by the PCPs in question. As we have already set out above, the claimant did not say that to the respondent, she made no reference to a need to work from home and only referred to difficulties in working three consecutive days.

107. It follows that because we are not satisfied that the claimant was placed at a substantial disadvantage compared to somebody without her disability by the PCPs and because we are not satisfied that the respondent knew or ought to have known that disadvantage, the claim of a failure to make reasonable adjustments must fail.

Unfair Dismissal

108. We turn, finally, to the question of whether the claimant was unfairly dismissed.

109. There is no doubt that the claimant was dismissed. The reason why Mr Boustred dismissed the claimant was because she would not accept the new role in the restructured department. In this case we think Mr Potterton's concession that this was not a redundancy situation, is correct. The requirements of the business for employees to carry out work of the kind being done by the claimant had not ceased or diminished. The respondent was simply restructuring the way in which that work was done. The restructuring of a department can, however, amount to some other substantial reason for a dismissal.

110. Whether the restructuring was fair or not depends upon all the circumstances of the case, including the size and administrative resources of the respondent. There is no doubt that the respondent is a large employer with significant administrative resources.

111. The restructuring was a reasonable decision for the respondent to make, it was based upon sound business reasons. There were good reasons for it. The respondent consulted at length with the employees who were affected by the restructure and held two individual consultation meetings with the claimant. It is clear that the respondent listened to the claimant's representations and adjusted the proposals, at least to the extent that the claimant was permitted to work two consecutive days rather than 2.5 consecutive days. To that extent, it took account of the needs of the claimant and did what it could to reasonably accommodate them.

112. Whilst we must consider the claimant's interests in determining whether there was a sound and good business reason for the dismissal, given that we are satisfied there was no discrimination in the respondent's proposals, we do not think it can be said that the claimant's need to look after her grandchildren on Tuesdays and Thursdays in order to accommodate her daughter and son-in-law's work patterns, should trump the business needs of the respondent.

113. The respondent sought alternative employment by placing the claimant on the redeployment register for a 12 week period.

114. In the course of argument the claimant referred to being told when she moved to 3 days a week in 2020, that her manager would treat a Friday and a Monday as being consecutive days. The claimant's argument appeared to be that if the respondent had taken the same approach on this occasion, she would have been able to accept the new role. That was a point made for the first time during the course of argument and did not appear in the claimant's witness statement or the list of issues. Understandably, it was not addressed in the respondent's evidence. The respondent's witnesses were not asked about it. In circumstances where the claimant did not raise this suggestion at any point during the consultation period, we do not think that the failure by the respondent to think of such an option renders the decision to dismiss outside the range of reasonable responses.

115. In some respects, the respondent's approach was akin to a fire and rehire situation even though it was not put on that basis. Neither party addressed us on the Code of Practice on Dismissal and Re-engagement issued by the Secretary of State (which only came into force on 18 July 2024) and we should be cautious about drawing conclusions in those circumstances. However, we note that on the face of matters there was substantial compliance with the principles in the code including involvement of the trade union and consultation with individually affected employees. The consultation was to take place over 45 days and, as far as we can tell from the evidence, the employer gave sufficient information to enable the consultation to be meaningful. The consultation period was extended as was necessary. The claimant clearly understood that if she did not accept the new role she faced dismissal.

116. Ultimately, applying the test in section 98(4) Employment Rights Act 1996, we find that the respondent behaved reasonably in its decision to dismiss the claimant having regard to its size and administrative resources and having regard to equity and the substantial merits of the case.

Overall Conclusions

117. The claim of indirect sex discrimination fails because we do not find that the requirement to work on at least two consecutive days placed women at a substantial disadvantage compared to men, even taking account of the childcare disparity principle. In any event, we find that the requirement was a proportionate means of achieving a legitimate aim.

118. The claim of discrimination because of something arising from disability fails because we are not satisfied that the claimant needed reasonable adjustments to work alternative days because of her disability or to work from home because of her disability. In any event the requirements to work consecutive days and to work from the office were not because of something arising from the claimant's disability but because of the respondent's need to restructure the Transport Coordination Unit.

119. The claim of failure to make reasonable adjustments fails, firstly, because we are not satisfied that the claimant was placed at a substantial disadvantage by the requirements to work on consecutive days and/ or work from the office compared somebody without her disability and, secondly, because in any event we do not find the respondent knew or ought reasonably to have known of that disadvantage (if it existed).

120. The claim of unfair dismissal fails because we find that the claimant's dismissal was for some other substantial reason and the respondent behaved reasonably in treating the restructure as a reason to dismiss the claimant taking account of the respondent's size and administrative resources and equity and the merits of the case.

Concluding Remarks

121. We record our appreciation to the claimant for the calm and careful way she presented the case over the hearing and although her claim has failed, we wish her and her family well for the future.

122. We also record our appreciation to Mr Potterton for the measured way he presented the claim on behalf of the respondent and pay tribute to his comprehensive written submissions on the law, for which we were grateful.

Employment Judge Dawson
Date: 1 July 2026

REASONS SENT TO THE PARTIES ON
16 July 2026

Jade Lobb
FOR THE TRIBUNAL OFFICE

APPENDIX- DECISION ON THE QUESTION OF DISABILITY

1. The question we must give judgment on at this stage is whether the claimant was disabled by reason of chronic kidney disease (CKD) at the material time.

2. The material time is the period before the claimant's dismissal in July 2024.

3. The question is a mixed one of fact and law, in the sense that we need to decide what the relevant facts were and we then have to ask ourselves whether, as a matter of law, those facts amount to a disability.

<u>The Law</u>

4. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd,* Leggatt J gave the following helpful guidance

> Evidence Based on Recollection
>
> [16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> [17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory)

…

> [22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. ... Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

> When we look at the question of fact, there is a case called Gerstmann against credit Suisse, where Mr Justice Leggett, as he then was he suitably became a judge of Supreme Court justice legacy then what gave her guidance on how court should approach evidence based on recollection, he said the while everyone knows Marisa Fadel. He doesn't believe that the legal system sufficiently absorb the lessons of centre psychological research into the nature of memory and worse important lessons about research is that in everyday life were not aware the extent to which our own and other people's memories are unreliable believe our members to be more faithful than they are. He goes on to explain that memory is rewritten whenever it's retrieved and therefore external information intrude into witnesses memories as can their thoughts or beliefs. He talks about the fact that witnesses recollections change. Therefore, every time has to do things such as write a witness statement. He says that in light of those considerations, the best approach is to place little reliance on witnesses recollections, but mostly on factual findings and inferences which can be drawn from documentary evidence unknown or probable facts that

5. Disability is defined in section 6 of the Equality Act 2010. A person has a disability if they have a physical or mental impairment and that impairment has a substantial and long term adverse effect on their ability to carry out day-to-day activities.

6. “Substantial” means more than minor or trivial (section 212 (1) Equality Act 2010)

7. It was held in *Mutombo-Mpania v Angard Staffing Solutions Ltd* UKEATS/0002/18, that the burden of proof is on the claimant to show that they fall within the definition of disability (see paragraph 14).

8. In *Aderemi v London and South Eastern Railway* [2013] ICR 591, Langstaff P stated

> “It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day

activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other'. (paragraph 14)

9. The Guidance on the Definition of Disability provides that “The requirement that an adverse effect be substantial reflects the general understanding of “disability” as a limitation going beyond the normal differences in ability which may exist among people. A “substantial” effect is more than would be produced by the sort of physical or mental conditions experienced by many people which have only minor effects. A “substantial” effect is one which is more than “minor” or “trivial”."

10. It also states:

    Day-to-day activities are things people do on a regular daily basis. Examples include shopping, reading, writing, having conversations using the telephone, watching television, getting washed and dressed, preparing and eating food going out household tasks, walking, travelling, taking part in social activities.

<u>Analysis</u>

11. The respondent does not challenge that the claimant had a physical impairment The respondent also does not challenge that the impairment had a long-term and adverse effect on the claimant.

12. The only issue is whether the impairment had a *substantial* adverse effect on the claimant’s ability to carry out day-to-day activities.

13. We find that looking after grandchildren would amount to a normal day-to-day activity.

14. In terms of the evidence in support of the claim, the claimant has not taken us to any GP records or any other medical records. We have not seen any evidence of an expert nature from the claimant, such as a letter from a GP in terms of her medical position. The only documentary evidence that we have been taken to is the two occupational health reports, one from 2016 and one from 2023 and the occupational health referral at page 97. Neither party asked us to look at any other documents.

15. In respect of the 2016 report the claimant agreed in cross examination that the report states "All of these symptoms can be attributed to stress and also the menopause and Ms Munday has discussed this with her doctor and taken his advice." She also agreed that she raised no difficulties with her CKD with the occupational health practitioner and if she had issues she would have raised them,

16. The claimant's evidence was that she had blood tests once a year and her urine was tested every two years in respect of her CKD. She is not on medication, but she has altered her diet to a plant-based diet.

17. In paragraph 3 of her witness statement, the claimant explains that she has muscle spasms, high blood pressure and fatigue. Fatigue is the most noticeable symptom. The claimant explains that is not the same as general tiredness and on many occasions on a daily basis she is left needing to shut her eyes and lie down. She also wakes in the night.

18. In answer to the Tribunal's questions, the claimant told us that she needs to lie down for 10 to 15 minutes every two hours. That evidence went further than the claimant's witness statement.

19. If the claimant's evidence, as contained within her witness statement and as expanded in evidence before us, is correct and reflects the position at the material time, then we would conclude that the CKD had an adverse effect on the claimant's day-to-day activities which was substantial. In particular we would find that it had that effect when she was looking after her grandchildren.

20. However, that evidence does not give the same picture as the one presented by the occupational health report of 12 April 2023. That occupational health report states that the claimant's kidney condition remained stable and CKD was not the reason for recent absences which were all respiratory and covid related.

21. The report recorded that the claimant had returned to work and managed her workload and contracted hours well following those absences. It went on to say (again) that the long-term health condition CKD had remained stable and the claimant attended GP reviews. It states "A person with CKD is able to live a normal life, without being impacted by this condition. She remains under primary care review and uses good lifestyle methods to help support her CKD health, with a healthy diet and exercise".

22. The occupational health report is, in effect, a contemporaneous document and the description of the claimant presented within it, is different to the evidence which was presented to us. We must take into account the fact that we have been shown no GP entries or other medical evidence from the claimant, the claimant has not been prescribed any medication and she manages her condition by changes to her diet. The claimant's statement was written in October 2024 after proceedings had commenced. There is, therefore, a significant risk of the claimant's recollection of how the disease affected her in the period up to her dismissal has changed over time as set out in *Gestmin SGPS SA v Credit Suisse (UK) Ltd.* In those circumstances we do not feel

able to rely on the claimant's evidence in her witness statement or as given to us at the hearing.

23. It is for the claimant to satisfy us on the balance of probabilities that she was disabled at the material time and if we focus on the later occupational health report, as being a contemporaneous document, we find that the claimant has not persuaded us that the effect of the CKD was more than minor or trivial at the material time and we do not find that the claimant was disabled by reason of it.

Notes

Public access to employment tribunal decisions