



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Jill Collins

**Respondent:** Chief Constable of Avon & Somerset Police

**Heard at:** Bristol **On:** 13<sup>th</sup>-16<sup>th</sup> June 2022

**Before:** Employment Judge David Hughes  
Ms Y Ramsaran  
Ms E Smillie

## Representation

Claimant: In person

Respondent: Mr M Ley-Morgan, counsel

# JUDGMENT

1. The Claimants' claims in unfair dismissal, disability discrimination and age discrimination are dismissed.

# REASONS

1. The Claimant was employed by the Respondent as a Clerical Officer from 27.11.2012 to 17.07.2020.
2. By letter dated 22.04.2020, the Claimant was given three months' notice of termination of employment. The circumstances of this we explain below.
3. The Claimant claims for unfair dismissal, and discrimination on the grounds of age and disability.
4. At a telephone hearing on 17.08.2021, before employment Judge Cadney, Case Management Orders were made, and a draft list of issues was prepared. The draft list of issues reads as follows:

### **UNFAIR DISMISSAL**

1. *What was the reason for the Claimant's dismissal?*
2. *Was the Claimant's dismissal fair?*

### **DISABILITY DISCRIMINATION**

**Disability**

3. Was the Claimant disabled within the meaning of S.6 EqA 2010 at the material time?

4. The Respondent accepts that the Claimant was a person with a deemed disability (cancer) and was at all material times a disabled person within the meaning of s6 Equality Act 2010

**Discrimination arising from disability (s15 Equality Act 2010)**

5. What is the “something” arising from the Claimant’s disability?

i) The Claimant asserts that her inability to perform the new work rota was something arising from disability.

6. Was the Claimant dismissed because of something arising from her disability?

7. If the Claimant was dismissed because of something arising from her disability, was the dismissal a proportionate means of achieving the legitimate aim of;

(a) Enabling the Respondent to provide the required service to partner agencies and the criminal justice system as a whole (see paragraph 7 of the Response)?

(b) Maintaining workplace morale?

**Reasonable adjustments (S20 Equality Act 2010)**

8. What is the PCP that the Claimant relies upon?

i) The Claimant asserts the requirement for all clerical officers to perform the new shift rota was a PCP the Respondent applied to her.

9. Did the PCP relied upon put the Claimant at a substantial disadvantage in comparison with a person who is not disabled?

10. Did the Respondent fail to make reasonable adjustments?

**AGE DISCRIMINATION**

*Indirect Discrimination (s19 Equality Act 2010)*

11. The Claimant alleges that:

i) The requirement to perform the new shift rota is a PCP applied by the Respondent to her;

ii) Those aged 60 and above are less able to meet the requirement to perform the new shift rota (group disadvantage)

iii) The Claimant shared the group disadvantage (individual disadvantage)

12. If the matters set out above are proven was the application of the PCP a proportionate means of achieving a legitimate aim (see paragraph 7 above)

5. The parties agreed at the outset that the draft list fairly reflected the dispute between them.

**Law**

6. The Employment Rights Act 1996, s98, provides as follows:

**98.— General.**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) 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

(b) shall be determined in accordance with equity and the substantial merits of the case.

(6) [Subsection (4)] is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

## Equality Act 2010

7. The Equality Act 2010 deals with age and disability at ss5 & 6, which provide as follows:

### **5 Age**

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

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

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

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

### **6 Disability**

(1) A person (P) has a disability if—

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

- (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
- (2) *A reference to a disabled person is a reference to a person who has a disability.*
- (3) *In relation to the protected characteristic of disability—*
- (a) *a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
- (b) *a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
- (4) *This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*
- (a) *a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*
- (b) *a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*
- (5) *A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*
- (6) *Schedule 1 (disability: supplementary provision) has effect.*
8. Paragraph 6(1) of Schedule 1 to the Equality Act 2010 provides that cancer is a disability.
9. S13 of the Act defines direct discrimination. It reads as follows:

**13 Direct discrimination**

- (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
- (2) *If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
- (3) *If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*
- (4) *If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*
- (5) *If the protected characteristic is race, less favourable treatment includes segregating B from others.*
- (6) *If the protected characteristic is sex—*
- (a) *less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*
- (b) *in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*
- (7) *Subsection (6)(a) does not apply for the purposes of Part 5 (work).*
- (8) *This section is subject to sections 17(6) and 18(7).*
10. S15 deals with discrimination arising from disability. It reads:

**15 Discrimination arising from disability**

- (1) *A person (A) discriminates against a disabled person (B) if—*

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

11. S19 deals with indirect discrimination, providing as follows:

**19 Indirect discrimination**

- (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
  - (a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*
  - (b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
  - (c) *it puts, or would put, B at that disadvantage, and*
  - (d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*
- (3) *The relevant protected characteristics are—*
  - *age;*
  - *disability;*
  - *gender reassignment;*
  - *marriage and civil partnership;*
  - *race;*
  - *religion or belief;*
  - *sex;*
  - *sexual orientation.*

12. S20 deals with the duty of make reasonable adjustments:

**20 Duty to make adjustments**

- (1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) *The duty comprises the following three requirements.*
- (3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
- (4) *The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

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

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

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

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

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

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

(b) *altering it, or*

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

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

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

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

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

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

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

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

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

<b>Part of this Act</b>	<b>Applicable Schedule</b>
<i>Part 3 (services and public functions)</i>	<i>Schedule 2</i>
<i>Part 4 (premises)</i>	<i>Schedule 4</i>
<i>Part 5 (work)</i>	<i>Schedule 8</i>
<i>Part 6 (education)</i>	<i>Schedule 13</i>
<i>Part 7 (associations)</i>	<i>Schedule 15</i>
<i>Each of the Parts mentioned above</i>	<i>Schedule 21</i>

13. S39 of the Act deals with discrimination in the workplace. It reads as follows:

**39 Employees and applicants**

(1) *An employer (A) must not discriminate against a person (B)—*

- (a) in the arrangements A makes for deciding to whom to offer employment;*
- (b) as to the terms on which A offers B employment;*
- (c) by not offering B employment.*
- (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.*
- (3) An employer (A) must not victimise a person (B)—*
  - (a) in the arrangements A makes for deciding to whom to offer employment;*
  - (b) as to the terms on which A offers B employment;*
  - (c) by not offering B employment.*
- (4) An employer (A) must not victimise 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 any other benefit, facility or service;*
  - (c) by dismissing B;*
  - (d) by subjecting B to any other detriment.*
- (5) A duty to make reasonable adjustments applies to an employer.*
- (6) Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—*
  - (a) unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or*
  - (b) if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.*
- (7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—*
  - (a) by the expiry of a period (including a period expiring by reference to an event or circumstance);*
  - (b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.*
- (8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.*

### **What happened**

14. The Claimant's job with the Respondent – or at least part of it – involved the preparation of prosecution team process files for the Crown Prosecution Service (CPS) and magistrates' courts. Magistrates' courts often sit on Saturdays and Bank Holidays. Historically, the Respondent had sought to address the need for Clerical Officers to work to prepare these files by seeking volunteers. We were told, and we accept, that this proved unsatisfactory as there was difficulty in sourcing volunteers.

15. The Respondent introduced a rota system that would require clerical officers to work one Saturday every 11 weeks, and Bank Holidays at a rate of approximately one every two years. The Claimant sought to be exempt from this requirement. As we explain below, initially she was exempt. Later on, she was required to work to this new rota system, but refused to do so. This led to her dismissal.
16. When she started working for the Respondent, the Claimant worked Monday to Friday. Her working day started at 8 AM, although there was some flexibility on this to allow for bus travel, and finished at 4 PM. In 2015, it was agreed with the Claimant that she could reduce her hours, and finish work at 3:30 PM. The Respondent sought to vary the Claimant's working pattern as we go on to describe.
17. On 17 February 2017, a consultation meeting was held to discuss changing in the working hours. The documents before us included what looks like an agenda or script sheet. It has been meeting apparently being led by Michaela Poole, and be attended by Paul Mason, who is described as "*HR manager*", by Unison reps and by a "*PVR team rep*".
18. The Claimant requested not to be included in the new roster. She did so because she was providing care to her elderly mother at weekends. Her brother cared for her mother during the week, but she would go to her mother's home on Friday night and stay there through the weekend until Sunday night. This request was initially turned down, but the Claimant raised a grievance on 3 May 2017 about that decision. Her grievance letter emphasises her caring responsibilities, but does refer to potential transport difficulties in getting to work on a Saturday, and also says that working the new roster would be "*absolutely exhausting*" for her. It refers to age – then "*almost 60*" and to the fact that she had been treated for cancer three times.
19. A grievance meeting was held with. Mr Ellis was a serving officer with Avon and Somerset police at the time. He retired in September 2019. The following month, he rejoined as a civilian employee. At the time of this meeting, he was Superintendent Ellis, but we will refer to him as Mr Ellis as he was so referred to in the hearing. A transcript of the grievance meeting was before us. At the meeting, the Claimant was assisted by Sue Ganfield, of Unison. In the meeting, the Claimant accepted that there was a "*business need*" for the preparation of files for court on Saturday mornings.
20. Mr Ellis agreed that the Claimant's caring responsibilities constituted exceptional circumstances and therefore that she should be exempt from the new roster. He stated clearly, however, that they would need to be a review because, "*... A six monthly review, just of your circumstances because if they change for any reason, maybe that we'd have to have the discussion about reconsidering it*". The Claimant responded to this with "*yes*".
21. We were told, and we accept, that the new roster was not popular with other Clerical Officers. This is consistent with the Respondent



experiencing difficulty meeting the need for staff through volunteers, and also with a complaint made about the Claimant's exemption from the new roster that was made by some of her colleagues. The merits or otherwise of that complaint do not concern the tribunal, were not investigated, and the Respondent has properly not sought to rely on the complaint. The only relevance of the complaint is in helping to show that the exemption of the Claimant from the roster was at least a potential source of friction in the Clerical Officer team.

22. The Claimant's mother sadly died in March 2018. Thereafter, the Claimant went on a period of bereavement and sick leave. The Claimant commenced a phased return to work in August 2018, and the phased return to work plan contemplated her returning to normal duties in the week commencing 15<sup>th</sup> October, nine weeks after the phased return to work started.
23. The Claimant had been exempt from the roster arrangement because of her caring responsibilities for her mother. That circumstance had now changed, and a decision was taken that the Claimant should therefore be included in the roster. Ms Kalpana Morar, temporary team leader, discussed this with the Claimant in a 1-to-1 meeting on 19.02.2019. On 22.02.2019, the Claimant emailed Mr Ellis. Her email read as follows:

*During a one-to-one meeting with Kalpana Morar on 19<sup>th</sup> February, I advised that I would not be working the Saturday/bank holiday rota starting on 2 March 2019.*

*I am writing to confirm that I do not agree to any changes in my contract verbally or written for the Saturday/bank holiday rota. I will not agree to work the shift.*

*I am 62 years old, my middle age had been blighted with breast cancer three times, aged 40, 46 and 56. It will not be good for my health to start working Saturdays with such an early start this late in my working life. This shift would be too much for me, I need my weekends in block.*

24. Mr Ellis responded to the Claimant later that same day. He reminded the Claimant that he had agreed to exempt her from the roster in 2017. He reminded her that the situation would be subject to a review, and that she had agreed to this. He said that "My sense is that you should now be included on the Saturday and BHL roster. If you are well enough to work Monday through to Friday then I fail to see why you couldn't work on a Saturday or BHL providing you get that time back in lieu. Logically it just doesn't make sense." He added that she would now be added to the roster, subject to being given the appropriate notice.
25. The documents before us included rosters showing that the Claimant was scheduled to work to work the following Saturdays: 02.03.2019, 25.05.2019, 17.08.2019 and 02.11.2019. We were also told that she was scheduled to work the August Bank Holiday in 2020, but no Bank Holidays in 2019.

26. On 19.03.2019, the Claimant received an email asking about which day she would like as her rest day in lieu of Saturday working. She replied as follows:

*I would just like to make it clear that Saturday/bank holiday working is not part of my contract and I have not agreed to any change in my contract verbally or written.*

*I will not work the Saturday/bank holiday rota....*

27. The response to this letter reminded the Claimant of Mr Ellis's decision that she should be included in the roster. It went on to say as follows:

*you will be receiving notice of your change of contract shortly. HR wanted to include your preferred Rest Day in that letter but as you have not indicated a preference will be allocated the Monday following the Saturday that you have worked.*

*Once you have received your notice you will have a formal opportunity to present your case if you wish to do so.*

28. On 5 April 2019, a letter in the following terms was sent to the Claimant:

*Following conversations with your line manager regarding the requirement for weekend working, I am writing to confirm that with effect from 28/06/19 your shift pattern will alter. With effect from 05/04/19, I am issuing you with written 12 weeks contractual notice of this variation as outlined in the Contractual Variations Policy.*

*Within this change there is a requirement to work 1 Saturday in 11, starting at 7am. The Monday following the Saturday working will be a rest day. As you will now be working weekends, you will receive a weekend enhancement of 17.53 hours per annum.*

*This letter notifies a change to your Conditions of Service and you are advised to retain a copy as it may constitute part of your contract of employment. All other terms and conditions of your employment remain unchanged.*

*Would you please sign and return the enclosed copy letter indicating your understanding of the above.*

29. It is not in dispute that the Claimant refused to work on Saturdays as required by the rota, and that she has consistently taken the position that the rota constitutes a change in her contract of employment to which she does not agree.

30. The internal communications show that the Respondent's organisation was concerned about this. On 12.04.2019, Sophie Dingley the Respondents criminal justice business manager, had emailed one Becca Gregory, a HR partner from whom we did not hear, to ask what options were open. Ms Dingley said "*we strongly believe that she should be included in the rota, but would appreciate HR and legal advice.*" On

15.04.2019, there was an email exchange between Ms Gregory intended to speak with somebody in “legal” to seek a view on the position.

31. On 17.04.2019, Ms Dingley emailed the Claimant, her message including the following:

*We are currently seeking legal and HR advice as to our next steps. In the meantime if there is any new or further information that you would like to submit to explain your position in more detail, please forward to me, or I would be happy to meet with you to discuss in person.*

32. On 25.04.2019, Ms Dingley emailed Mr Ellis, saying that she had just spoken to Ms Gregory. A substantial part of this email is redacted, we understand because it contains privileged legal advice. What can be seen is the following:

*...Not the exact news we were hoping for. **Redacted**. Becca has spoken to Dorothy, and her suggestion is to ensure that we are completely covered in anticipation of the tribunal that I meet with Jill with HR, for her to explain her reasons and for us then to set out the potential next steps. Dorothy thinks that if following this she still does not accept it, she is resigning – **redacted**.*

...

33. On 08.05.2019, Ms Dingley wrote an email to Mr Ellis, again a substantial part of which is redacted. What can be seen includes the following:

*.... I have just spoken to Becca who has finished a meeting with **Redacted**. Dorothy suggests we try to get her to resign, without saying as much – not sure we can do that. So I am arranging a meeting for next week with Jill and Becca where we will give Jill the opportunity to explain the reason she can't work it, we will then set out why we don't agree with those and that she has not raised in the past and then explained that she could expect to work on site and if she doesn't turn up we will start misconduct proceedings. Becca is going to see whether we can go straight to a gross misconduct hearing.*

34. The suggestion made by Dorothy - meaning Dorothy Russell, at the time the Respondent's head of HR operation – that the Respondent “*try to get her to resign*”, is concerning. However, the tribunal considers that Ms Dingley's response to that is a tactful recognition that that would not be appropriate. Her response does reflect a degree of frustration in the organisation that the Claimant was not working the rota, and the wish to do something about that. We do not, however, think that there was a real intention in the Respondent organisation to force the Claimant to resign. The Respondent's treatment of her, both before and after, has, the tribunal considers, been relatively sympathetic.

35. A meeting was requested with the Claimant, and one took place on 16.05.2019. Ms Dingley attended the meeting, as did Ms Gregory.

Although the Claimant was advised that she could have a Unison rep or work colleague, she did not choose to be accompanied by either.

36. In the meeting, the Claimant was asked about any health issues or concerns. She said that she had had cancer three times in her life, when she was 40, 46 and 56. On each occasion, she had had breast cancer. She said that she found it too tiring to do six days in a row, and that she needed her weekends in a block. To the suggestion that, if she worked a Saturday she could have the following Monday off, she replied that having four days off the following week would not stop her being too tired from having worked six days in a row. She said that was unacceptable. Ms Dingley suggested that the Respondent could look at flexible working, but the Claimant said that she did not want to reduce her hours as she could not afford to do that, because it would reduce her pension. Ms Dingley explained that flexible working request could look at patterns, so that the Claimant could split her hours over two weeks so that she didn't have to work a six-day week. To that, the Claimant simply responded that she would be too tired.
37. Ms Dingley asked if there were any issues other than tiredness. The Claimant responded that she had had cancer. Ms Dingley stated that she was sympathetic but asked if there were any lasting effects of the cancer. She mentioned that there were others in the department who had had cancer and were working the roster, and were Clerical Officers older than the Claimant. The Claimant responded that tiredness runs down your health, and that she needed to look after herself. She was asked if she had spoken with Health Assured, to which she responded that she had spoken with in employment law solicitor and taken his advice. She had not spoken with Occupational Health or her doctor. Ms Dingley said that the force could look at not working the full seven hours on Saturday, the Claimant replied that she would still need to work back the hours in the week and will be too tired. Ms Dingley explained that the Respondent was not asking her to work any extra hours, but the Claimant responded that five days in a row was enough.
38. Ms Dingley explained that she had to make sure that the roster was fair across the whole team, that she was only asking the Claimant to work one Saturday and 11, or approximately four weekends every year, but the Claimant responded "*I don't know. I'm sticking to what I say. I'm 62 years old I cannot work six days on. It's too much.*"
39. Ms Dingley asked if there was anything else that the Respondent to do could do to assist the Claimant to work on a Saturday. She asked there were any adjustments that could be put in place. Ms Gregory if the Claimant had discussed her tiredness with her doctor or with Occupational Health, but the Claimant replied that they were busy and was she was not sure what he could do for her. Ms Dingley offered to refer the Claimant to Occupational Health, but the Claimant responded "*I don't know. I will think about it. My decisions have not been taken lightly.*"
40. At the conclusion of the meeting, Ms Dingley said that she did not think that the Claimant had provided any good reason not to be included in the

roster, and therefore her “*change of contract*” started on 28.06.2019, with her being rostered to work on 17.08.2019. She said that, by continuing to work after 28.06.2019, the Claimant would be impliedly accepting the change, and if she did not turn up to work on 17.08.2019, there would be a disciplinary process, the outcome of which could be dismissal. The Claimant indicated that she agreed that. She said that she would think about the doctor and occupational health, but nothing else.

41. The tribunal’s impression of this meeting is that the Respondent, through Ms Dingley, was making every effort to try to address any concern that the Claimant might have. The Respondent was met with a simple refusal to work the new roster.

42. On 21.05.2019, notes of the meeting with Ms Dingley were sent to the Claimant. She was advised that she had been rostered to work on 17.08.2019, and reminded of the possible consequences of failing to do so.

43. The Claimant responded in a letter on 03.06.2019. Her letter read as follows:

*As you are aware I have consistently made it clear that I do not agree to the proposed change of my contract. My contract cannot change without my agreement. For the avoidance of doubt my continuing to work after 28<sup>th</sup> June will not change this and is in no way to be taken as any implication that I agree the proposed change that I will go on Saturdays.*

*I remain bound by my current contract as does the Constabulary.*

44. On 26.07.2019, the Claimant emailed Ms Gregory, asking that payment for Saturday working be deducted from her following month’s salary as she would not be taking part in Saturday/weekend working.

45. A disciplinary process was commenced. The conclusion reached was that this was a contractual dispute, rather than a disciplinary matter. That decision was reached in January 2020.

46. On 22.01.2020, Shaun Screen, a professional standard investigation officer, emailed the Claimant to advise that that conclusion had been reached, and that the decision had been sent to Ms Russell.

47. Mr Ellis emailed Ms Dingley and Ms Gregory, along with another, on the same day. He said that the matter needed urgent attention, that he was aware of the frustrations it was causing and described team morale and frustration as being at “boiling point”. He said “*if it appears that nothing is being done for too much longer than I am sure we will end up with a tranche of others not turning up for sat/BHL working on the basis they have seen a colleague get away with exactly that for a long time*”.

48. There was internal discussion about arranging a meeting with the Claimant. On the 11.02.2020, the Claimant was invited to a meeting, to take place on 27.02.2020. The letter described the meetings purposes as

being *“to understand if your position is still the same i.e. that you will not agree to work any Saturday, or if this has changed what alternatives you would like the panel to consider. We will also discuss what, if anything, the Constabulary can do to assist you in working the Saturdays.”* It identified the following possible outcomes:

1. *You may be permitted to retain your current working pattern;*
  2. *An alternative pattern may be agreed or adjustments will be put in place or redeployment into another role as agreed;*
  3. *You may be dismissed under some other substantial reason, namely a refusal to agree to a change of terms and conditions.*
49. The Claimant was advised that she was entitled to bring a trade union representative or work colleague to the meeting.
50. The Claimant was aggrieved that she felt the first of the possible outcomes wasn't seriously considered. Her sense of grievance was, we find, genuine, but based on a misunderstanding. It was plain that the Respondent did not want outcome 1. But the Respondent was prepared to consider it, if the Claimant could justify an exemption. The listing of it as a possible outcome reflected the Respondent's position.
51. A manuscript note of the meeting was before us. In the course of the meeting, although she did refer to her health, the Claimant also stated that she had taken legal advice. The tribunal's finding is that, in this meeting as in the earlier meeting to which we have referred, the Claimant's primary stance was that her working hours Monday to Friday were contractually agreed and could not be varied without her agreement.
52. On 16.03.2020, Ms Russell wrote to the Claimant. The letter was lengthy, extending over four pages. In it, Ms Russell said that over the previous 18 months, there have been many discussions to explore options with the Claimant, discussions about flexible working, reduction in hours, and referral to occupational health for consideration for any adjustments. The Claimant had refused all offers. She wanted to continue her current working pattern and was not prepared to consider any other options. Paragraphs in the Contractual Variation Policy were drawn to her attention.
53. We do not quote the letter in full. However, two paragraphs in particular seem to us to be worth setting out:

*... I asked if your position was still the same in respect of your refusal to work the hours required. You stated that you were not prepared to consider any alternative arrangements. He reiterated the previous comments relating to health issues, and that you “needed weekends off”.*

*We discussed your general health and you confirmed again that you were not suffering any effects from your previous cancer treatment, and that your general health was “okay”. You did not consider a referral to the Occupational Health Unit would be of benefit.*

54. The Claimant reiterated that she wanted to continue with her current working pattern and was not prepared to consider any other options.
55. The terms referred to were paragraphs 5.5 and 5.6 of the Respondent's Contractual Variation Policy. We will deal with the contract in detail below. Paragraph 5.5 deals with implied acceptance. 5.6 provides for the possibility of dismissal and re-engagement new terms being offered, where an employee rejects new terms and conditions of employment.
56. The coronavirus pandemic and consequent restrictions imposed meant that the meeting could not take place face-to-face. Attempts to arrange it via Skype were not successful, so it took place via telephone conference.
57. Following the meeting, a letter was sent to the Claimant on 22.04.2020. The letter recorded that the Claimant had confirmed she had considered all options, that her position remains unchanged and that she could not agree to the revised working pattern and would not be moving to working under the roster under any circumstances. It recorded that Ms Russell had explained to the Claimant that a number of options were open to the organisation, including dismissal. It reiterated the consultations that had taken place, and stated that, despite engagement with her and offers of support, ideas and suggestions the Claimant had refused everything offered. It said that, with regret, her employment was being terminated. She was to be placed onto the redeployment register for 12 weeks, and offered support and assistance relating to making applications for any alternative role for which she might apply.
58. The Claimant was not offered a right of appeal against the decision to dismiss her. In this hearing, and indeed before, this has been frankly conceded to have been a mistake. On 04.09.2020, Ms Russell wrote to the Claimant offering her a right of appeal and inviting her to exercise that right. By that time, the Claimant had served her notice period and was no longer employed by the Respondent. This offer of appeal was made after the Constabulary's legal services had been contacted via ACAS.
59. The Claimant should have been offered a right of appeal when she was dismissed. The Respondent has not sought to argue otherwise. The tribunal is satisfied that this was a genuine mistake on the Respondent's part. The tribunal is also satisfied that the offer of a right to appeal was made in a good faith attempt to put right that mistake. Any complaint that the Claimant may have about not having been offered a right of appeal is very significantly undermined by the fact that, once she was offered a right, and indeed invited to exercise that right of appeal, she chose not to do so.

#### The contract of employment

60. An important question in the proceedings before us was whether the Respondent was entitled to require a change in the Claimant's working hours.

61. The documents before us included one headed “*Avon and Somerset police authority statement of particulars*”. It describes the Claimant’s post as “Clerical Officer”, states her grade and date of appointment, and the location of work. It says that she would work 37 hours per week, this was subsequently modified at the Claimant’s request to 35 hours per week.

62. Under the heading “**conditions of service**”, it reads as follows:

*Conditions of service for support staff within this. Based upon those conditions contained within the Police Support Staff Council Handbook (a copy of which is available from your HR department). These conditions have been developed and collective agreements negotiated and agreed with Unison. These agreements are available from your local administration office.*

*Any variations to these conditions of service will result from negotiations at national, regional or local level with Unison and will either be notified to you on an individual basis or will be included in the documents retained at the administration office....*

63. Under the heading “**notice**”, the document reads as follows:

*during your probationary period, your appointment is subject to a minimum of one week’s notice in writing by either side.*

*Once your appointment has been confirmed, your employment will be subject to a full week notice period in writing on either side (eight weeks for PO grades). However, where your period of continuous service entitles you to a longer period of notice, you will receive the appropriate length of notice be the termination of employment or variation to conditions of service as follows: –*

*Between 1 month and 2 years’ continuous service -1 week’s notice*

*Between 2 years and 12 years’ continuous service - 1 week for each year of continuous employment*

*12 years or more continuous service - 12 weeks’ notice*

*At the discretion of the organisation, it may be decided to pay salary in lieu of notice in appropriate circumstances.*

64. The document is signed by the Claimant at the end, dated the 27.11.2012. Although not expressly described as the Claimant’s contract of employment, the Respondent contends that this does represent the Claimant’s contract of employment. The Claimant did not dispute this, and the Tribunal finds that it is so.

65. The handbook referred to in the contract was also before us. Part two is entitled “pay and conditions of service”. Sections 1 and 2 read as follows:



## **Section 1 Working Time**

### **1. Working hours**

1.1 *The normal working hours of full-time employees shall be an average of 37 per week. The pattern of working hours of employees should be determined locally in consultation with recognised trade unions.*

1.2 *In determining working arrangements employers should take into account the needs of individual employees and groups of employees.*

*Working arrangements should avoid:*

1.2.1 *split shifts as part of a regular shift pattern;*

1.2.2 *short notice changes to planned or expected patterns of work;*

1.2.3 *excessive hours in any one week, and;*

1.2.4 *unnecessarily long periods over which the weekly hours are arranged.*

1.3 *Where short notice changes to working days are unavoidable, the provisions of Section 2 paragraphs 9 and 10 shall apply.*

1.4 *In determining working arrangements employers should have regard to the*

*Working Time Regulations 1998.*

### **2. Planning working patterns**

2.1 *Police staff shall know twelve months in advance when their rest days will be.*

2.2 *With at least three months' notice they are entitled to know what their start time and finish times are for their working days. Working patterns covering at least three months shall be drawn up and published by force management. At the same time it is good practice to plan annual leave up to a year in advance, in the interests of both staff and managers. These working patterns shall provide for an interval of not less than eleven hours (or such other period determined by local collective agreement) between the end of an employee's planned period of duty and the beginning of his or her next planned period of duty.*

2.3 *Rest days and start/finish times may change in line with clauses 2.4 to 2.8 below.*

2.4 *Changes to agreed working patterns shall be subject to full consultation with the Trade Union Side.*

2.5 *Where alterations are made to published working patterns, with three months' notice or less, these changes must arise from exigencies of duty, unless they are mutually agreed by the employer and employee, or by collective agreement. Such alterations shall be notified to the employee as soon in advance of the intended change as possible.*

2.6 *The term 'exigencies of duty' should be interpreted as relating only to situations of exceptional organisational demand, where a pressing staff requirement arises which could not be reasonably anticipated and which necessitates a change of working pattern. It is not possible to produce an exhaustive list of all the potential reasons which might necessitate such changes. However, by way of example, changes to scheduled duties*

*would be justified by unforeseen public order situations, major disasters, extraordinary levels of sickness and other non-planned events which impact on levels of necessary staffing to maintain public safety.*

*2.7 Repeating events where policing demand can be foreseen in advance, such as New Years' Eve, Halloween, Bonfire Night etc., or large scale events and religious festivals which are known about well in advance do not qualify as exigencies of duty.*

*2.8 The underlying principle is that where events are foreseeable in advance, it is reasonable for staff to have their working patterns planned with good notice.*

66. We note that the paragraphs 5.5 and 5.6 of the Contractual Variation Policy to which Ms Russell referred in her letter to the Claimant mentioned above, do not appear in either the contract of employment or the handbook, and Policy itself was not before us.
67. The Respondent contends that the change it wished to make to the Claimant's working hours was one that it was permitted to make by her contract. The Claimant disputes this. This question is important for the following reason; if the Respondent was entitled to change the Claimant's working pattern, the position should she refuse to comply with the new working rota may be different from if the Respondent was not entitled to do so.
68. The Claimant contends that the change to her working pattern that the Respondent required is not a change that it was permitted to require of her by her contract of employment. Her position is that the Respondent sought to impose a new contract of employment upon her. It is not in dispute that, if there was a new contract of employment, the Claimant did not accept it.
69. The tribunal considers that the Claimant's contract of employment clearly referred to the handbook and its provisions. The handbook provided, in clear terms, at 2.3, that the Respondent could change the Claimant's start and finish times and rest days. The tribunal considers that provided the Respondent with the power to make the changes that it did.
70. 2.4 of the handbook required that the Respondent undertake appropriate consultation. The Respondent did undertake consultations, and the compliance of these consultations with the requirements of 2.4 was not disputed before us. We accept that the Respondent did undertake the consultation as required by 2.4 the handbook.
71. The Respondent did not contend that paragraphs 2.5 or 2.6, dealing with 'exigencies of duty', apply to the situation before us.
72. The Claimant was not represented at the hearing. She presented her case with courtesy, and prepared helpful written closing submissions. In order to assist her in understanding the Respondent's case, the tribunal asked her if she agreed that 2.3 allowed the Respondent, subject to appropriate consultation, to change your working pattern. She did not agree. However, despite being permitted twice to take a break from her closing submissions to seek advice by telephone, she was unable to

explain why 2.3 of the handbook did not cover what the Respondent sought to do.

73. We mean no criticism of the Claimant in that. We consider that 2.3 plainly permitted the Respondent to change her working pattern, and a professional advocate would have struggled to argue otherwise.
74. We recognise that there has been some loose terminology in this case. There has been talk of the change to working hours as being a contractual variation. That may make one think that the contract of employment was being varied. But that would be incorrect. The contract – subject to the admitted modification to reduce the Claimant’s working hours from 37 per week to 35 per week – remained in force. What happened was, the Respondent exercised his right pursuant to clause 2.3, to vary the Claimant’s start and finish time and rest days. Provided that proper consultation had taken place, he was entitled to do so. He had good business reasons for doing so, and the contrary was not argued before us.
75. There has also been some confusion about the notice that the Respondent was required to give of changes to the Claimant’s working schedule. There appears to us to be a tension between the provisions of the contract insofar as notice of variations of conditions of service are concerned, and the provisions of the handbook. The contract itself appears to require that the Claimant have had seven weeks’ notice of the changes. But the handbook, which is expressly referred to in the contract, provides that she should have had 12 months’ notice.
76. We consider that the provisions of the handbook should prevail. It provides for more detailed provisions regarding changes to the Claimant’s conditions of service. The Respondent has chosen to refer to the handbook in the contract of employment. It seems right to us that the correct interpretation of the contract is that the more detailed provisions in the handbook should apply to resolve this tension. We are also mindful of the *contra proferentum* principle.
77. That does not mean that the Respondent was not able to require that the Claimant work to the new roster. It merely means that she was entitled to 12 months notice of her rest days.

#### Findings on specific issues

78. Turning to the list of issues, the tribunal finds that the Claimant was dismissed for some other substantial reason as per s98(1)(b) of the Employment Rights Act 1996, namely for refusing to work according to the new roster.
79. Was that dismissal fair? The Claimant had been told in February 2019 that she was required to work the new roster. A new roster was prepared, showing her to be scheduled to work on 02.032019. The Respondent’s case is that the rota had been sent out in November 2018, but at that point she had not been notified that she was to work the new rota. The Claimant’s email of 22.02.2019 refers specifically to her having been

scheduled to work on 02.03.2019, indicating that she had seen the rota by that date. We find that the Claimant was aware of the rota by no later than 19.02.2019, the date of the meeting referred to in that email.

80. She had consistently refused to work the new rota. Her refusal was at no time stated to be based on her entitlement to 12 months notice. At no point did she say, "*I'm entitled to 12 months notice and will work the new roster after February 2020*". She made it abundantly clear that she was not going to work the new roster.
81. Was it fair for the Respondent to start the process before February 2020? On balance, we think it was. The Claimant's consistent and clear position meant that the Respondent could be confident that, no matter what, she was not going to work the new roster. Had the Claimant said in February or March 2020, something like "*I've had 12 months notice now so will work the new roster*", or something to similar effect but seeking to discuss possible flexibility, the tribunal considers that the Respondent would likely have sought to engage with the Claimant about any flexibility, and not dismissed her.
82. The process by which the Claimant was dismissed appears to us to have been fair. Indeed, whilst there was some frustration in the Respondent's organisation at the position, the organisation appears to have behaved with sympathy and consideration towards the Claimant.
83. There is the question of the appeal. As stated above, this was an admitted mistake. But it was a genuine mistake rather than a deliberate attempt to withhold a right of appeal, and it is one of the Respondent offered to put right. The Claimant did not take advantage of that right, despite being invited to do so. We do not think that the impact of that, in the circumstances of this case position, was unfair.
84. It is admitted that the Claimant was disabled within the meaning of s6 of the Equality Act 2010.
85. The Claimant asserts that "something" arising from her disability was the inability to perform the new work rota. The tribunal does not accept this. In his case management order, employment Judge Cadney said the following:

*Evidence – The Claimant should understand that if she intends to pursue the claims for disability discrimination / age discrimination she will need to adduce evidence of the following factual contentions. In the absence of being able to adduce such evidence it will be very difficult for her to succeed in those claims :-*

- i) That her disability placed her at a substantial disadvantage in being able to perform the new shift pattern; and/or*
- ii) That any inability to perform the new shift pattern is "something arising from disability" (i.e. that her inability to perform the new shift pattern is casually (sic) linked to her disability).*

*iii) That people over the age of sixty were less able to perform the new shift pattern than those in younger age groups and that that reason also applied to her.*

86. The Claimant produced no expert evidence to support any of these contentions. That may not necessarily be fatal to such a claim. But the Claimant was further unable to give any detail as to why her disability may have prevented her from working the new rota.
87. The more fundamental difficulty for the Claimant is that the tribunal does not accept that she was unable to work the new rota. She was unwilling to do so. The tribunal has some sympathy with that position. Having cared for her mother, it may not be unreasonable for the Claimant to want her weekends off. But that does not change the position that the Claimant was simply unwilling to work the new roster, rather than being unable to do so.
88. The tribunal does not find that the Claimant was dismissed because of something arising from her disability. She was dismissed because she refused to work a new rota that had been lawfully required of her.
89. The requirement to work the new rota was a PCP. The tribunal does not accept that it puts the Claimant at a substantial disadvantage in comparison with the person who is not disabled. We were told of two employees who had had cancer working the new rota. We had no satisfactory evidence that the Claimant would be at any disadvantage working because of everything arising from disability. We had nothing at all, apart from a document from 2014, relating to a request that the Claimant be paid in full whilst on sick leave (a request that was granted), and the Claimant's assertion that it would just be too much for her. The Claimant was offered a referral to occupational health, she was asked if she would see her GP, and it seems to the tribunal that the Respondent was keen to learn of any thing the Claimant might be able to say that would have justified their being exempt from the new rota. The Claimant's protestations that it would be too much for her must be judged in the light of her refusal to engage with the Respondent's offers. The tribunal is satisfied that the true reason she did not wish to work the new roster was because she wanted to continue with her working pattern, and believed – mistakenly – that she had a contractual right to do so.
90. The tribunal is not satisfied that the PCP placed the Claimant at any disadvantage relating to her age. We are not persuaded that persons over the age of 60 are less able to meet the requirement of performing the new shift rota. The Claimant has produced nothing more than her own assertion that this is so. We were told, and we accept that members of the Clerical Officer team over the age of 60 are working the new rota.
91. The Claimant's claims are therefore dismissed.

Employment Judge Hughes  
Date: 19 June 2022

Judgment & reasons sent to the parties: 29 June 2022

FOR THE TRIBUNAL OFFICE