EMPLOYMENT TRIBUNALS

Claimant: Miss H Price

Respondent: Elior UK plc

Heard at: Manchester **On:** 4-8 March 2024

Before: **Employment Judge Leach; Ms S Khan; Ms M Dowling.**

REPRESENTATION:

Claimant: Ms Rowarth-Price (claimant's wife)
Respondent: Mr Dhorajiwala (Counsel)

JUDGMENT

The unanimous decision of the Tribunal is as follows:-

1. The claimant succeeds in a complaint of indirect discrimination (section 19 Equality Act 2010) and a complaint of failure to provide reasonable adjustments (section 10/21 Equality Act 2010). The successful complaints relate to the respondent's requirement for the claimant to undertake lone working.

2. Other complaints under sections 19 and 20/21 Equality Act 2010 do not succeed and are dismissed.

3. The complaints under section 15 Equality Act 2010 (discrimination arising) and of constructive unfair dismissal, do not succeed and are dismissed.

The Tribunal is listed to determine remedy on 29 April 2024.

REASONS

A. Introduction

1. The claimant brings complaints under the Equality Act 2010 (protected characteristic disability) as well as a complaint for constructive dismissal. These complaints arise from the way she says she was treated by the respondent when employed by them as a chef manager based at one of their client's sites in Hadfield near Glossop.

B. This hearing

2. The hearing took place over 5 days. We were provided with a file (bundle) of documents. References to page numbers below are to the page numbers of this bundle.

3. We heard evidence from the claimant, the claimant's mother, the claimant's former work colleague, Sasha Ingleson as well as Ms Rowarth Price, the claimant's wife.

4. On the respondent's side we heard evidence from the claimant's former manager, Mark Kinder and from Sharan Crehan, who started to hear the claimant's grievance in December 2021. We were also provided with a statement of Emma Lewis who, at the relevant time, was employed by the respondent as an HR manager. Ms Lewis did not attend the hearing.

Premature claim

5. On day one, Mr Dhorajiwala noted that the complaint of unfair dismissal was a premature claim – in other words that the claim form had been presented before the dismissal and before notice of termination of employment had been given. The unfair dismissal complaint had not been brought within the time limits at section 111(2)(a) of the Employment Rights Act 1996 (ERA) or section 111(3) ERA. Together, these sections require a complaint of unfair dismissal to be presented to the Tribunal after notice of termination of employment has been given and before the end of 3 months from the date of dismissal. They do not permit a complaint to be presented before notice of termination of employment has been given.

6. In our preliminary reading, we had also identified that the claim was premature. We asked the claimant whether she wanted to amend her claim to include a complaint that she was constructively dismissed having given notice on 26 January 2022 for termination of employment on 28 February 2022. The claimant confirmed that she was making that application.

7. We provided the respondent with an opportunity to consider the application and particularly whether they had any objection to it. Having taken instructions, Mr Dhorajiwala told us that the respondent did not object to the application.

Amending the wording of one of the PCPs relied on

8. On day 5 – in the course of deliberations – we identified a concern with the wording of one of the PCPs.

Requiring staff members to work without an assistant when annual leave or sickness cover could not be provided. (we call this PCP1)

9. We comment on this under the heading of Submissions – below.

C. The Issues

10. These were identified at an earlier case management hearing.

11. We set them out below, and include some comments about some of the issues, including those that were identified as no longer requiring a determination.

1. Time limits

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 23rd August 2021 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Unfair dismissal**

<u>Dismissal</u>

2.1 Can the claimant prove that there was a dismissal?

2.1.1 Did the respondent do the following things:

2.1.1.1 Require the claimant to work on her own on a number of occasions despite being told that she was unable to do so and that it made her unwell and exacerbated symptoms of her disability.

2.1.1.2 Require the claimant to work without an assistant meaning she was unable to take any breaks.

2.1.1.3 Remove the chairs she required around the work area to alleviate the pain and discomfort she experienced due to her knee injury.

2.1.1.4 Not provide appropriate support to Sasha Ingleson when the claimant was on sick leave following an operation resulting in Sasha Ingleson contacting the claimant on numerous occasions.

2.1.1.5 Fail to respond to the grievance within the guidance time period on 8th November 2021.

2.1.1.6 Continue to contact the claimant after her grievance meeting despite the claimant indicating she did not wish to speak.

2.1.2 Did that breach the claimant's employment contract which, she says, stated that she would only be asked to do work within her capabilities?

NOTE: At the beginning of the hearing, we considered the 6 alleged actions – listed at 2.1.1 above and noted that this appeared to be a case based on an alleged breach of the term of trust and confidence implied in to every contract of employment (Implied Term) and that we would consider whether the respondent had breached the Implied Term.

Part way through the hearing the claimant noted that she was not complaining that the contact from Sasha Ingleson noted at 2.1.1.4 above was not an act that contributed to her decision to resign.)

2.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.1.4 Was the fundamental breach of contract a reason for the claimant's resignation?

2.1.5 Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Reason

2.2 Has the respondent shown the reason or principal reason for the fundamental breach of contract?

2.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

3. **Remedy for unfair dismissal**

3.1 What basic award is payable to the claimant, if any?

3.2 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.3.1 What financial losses has the dismissal caused the claimant?

3.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.3.3 If not, for what period of loss should the claimant be compensated?

3.3.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.3.5 Did the respondent or the claimant unreasonably fail to comply with it?

3.3.6 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.3.7 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

3.3.8 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.3.9 Does the statutory cap of fifty-two weeks' pay or apply?

NOTE: We decided that this hearing should consider issues of liability only – with the exception of considering the respondent's position on contributory conduct (issues 3.3.7 and 3.3.8).

4. **Disability**

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about between 16th September 2019 and 28th February 2022? The Tribunal will decide:

4.1.1 Did she have a physical or mental impairment: The claimant says the disability is fibromyalgia and torn cartilage in her knee.

NOTE: The claimant told us at the beginning of the hearing that she does not claim that her knee injury amounted to a disability. It is only fibromyalgia that amounts to a disability.

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

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

4.1.4 If so. 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?

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

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

4.1.5.2 if not, were they likely to recur?

NOTE: The respondent admits that the claimant had at all relevant times the impairment of fibromyalgia and that it amounted to a disability. We did not therefore have to consider and decide on the issues above.

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

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

5.1.1 The claimant says the respondent knew of her fibromyalgia from 21st October 2019 when she submitted a sick note with her diagnosis.

5.1.2 The respondent will take further instructions but at present accepts that they knew of the claimants' diagnosis of fibromyalgia from 1st October 2020.

5.1.3 The claimant says the respondent knew about her knee injury from 28th August 2021.

5.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

5.2.1 Require the claimant to work without support on the following occasions:

5.2.1.1. 7 weeks from 16/09/2019
5.2.1.2 47 hours in April 2020
5.2.1.3 21 hours in May 2020
5.2.1.4 42.5 hours in June 2020
5.2.1.5 40 hours in August 2020
5.2.1.6 18th March 2021
5.2.1.7 18th, 19th, and 20th August 2021
5.2.1.8 Claimant to confirm if any further periods claimed

5.2.2 Required to work on 23/09/2019 by Susan Young despite being signed off work by the doctor for a period of work.

5.2.3 Lost 4 weeks' pay following a further sicknote in October 2019

5.2.4 Heated conversation with Mark Kinder on 8th November 2021 who didn't accept that the claimant's fibromyalgia was known to the respondent. This resulted in the claimant feeling she had been 'threatened' with occupational health.

5.2.5 Remove the support cover the claimant had organised to cover her assistants annual leave – on 17th November 2021 by Gill Heath.

5.2.6 Remove the chairs the claimant had within her work area to sit down an alleviate the pain caused by her disability.

5.2.7 Refuse to allow the claimant to have the chairs within the work area without referral to occupational health – said within a grievance meeting on 3rd December 2021 by Sharon Crehan

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

5.3.1 The claimant was unable to work without an assistant due to the symptoms of her disability. Working on her own increased her symptoms and the pain she suffered.

5.3.2 The claimant required chairs within the kitchen work area to alleviate her symptoms.

5.3.3 The claimant was on sick leave from 16th December 2021 until she handed in her notice, the period of which ended on 18th February 2022.

5.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

5.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

5.6 If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

5.6.1 Sustaining its business through the impact of the pandemic.

5.6.2 Complying with Health and Safety Regulations

5.7 The Tribunal will decide in particular:

5.7.1 was the treatment an appropriate and reasonably necessary. way to achieve those aims.

5.7.2 could something less discriminatory have been done instead?

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

6. **Indirect discrimination (Equality Act 2010 section 19)**

6.1 A "PCP" is a provision, criterion, or practice. Did the respondent have the following PCP(s):

6.1.1 Requiring staff members to work without an assistant when annual leave or sickness cover could not be provided. *(PCP1)*

6.1.2 Refusing to allow additional chairs within the kitchen working area for members of staff to sit down*. (PCP2)*

NOTE: The claimant accepts that at no time did she work without the chairs in place, her assertion is that these chairs were removed, and she was told they were a Health and Safety hazard. Mark Kinder stated that he would speak to her about it at a later date, but this did not happen. The claimant was forced to put the chairs back against management orders as no other adjustments were put in place.

NOTE: We comment separately (under the heading of Submissions below) about our concern (shared with the parties) about PCP1.

6.2 Did the respondent apply any of those the PCPs to the claimant?

6.3 Did the respondent apply any such PCP to persons with whom the claimant does not share the characteristic or would it have done so?

6.4 Did the PCP put a person diagnosed with fibromyalgia or a torn cartilage at a particular disadvantage when compared with someone not diagnosed with those conditions? The claimant says that disadvantage was that she was unable to cope with the demands of her job and being required to work under the conditions she was caused her significant pain and distress.

6.5 Did the PCP put the claimant at that disadvantage?

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

6.6.1 Sustaining its business through the impact of the pandemic – the respondent's business suffered due to staff shortages, economic loss, and the disruption of services.

6.6.2 Complying with Health and Safety Regulations

6.7 The Tribunal will decide in particular:

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

6.7.2 could something less discriminatory have been done instead?

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

7. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

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

7.1.1 The claimant says the respondent knew of her fibromyalgia from 21st October 2019 when she submitted a sick note with her diagnosis.

7.1.2 The respondent will take further instructions but at present accepts that they knew of the claimants' diagnosis of fibromyalgia from 1st October 2020.

7.1.3 The claimant says the respondent knew about her knee injury from 28th August 2021.

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

7.2.1 Requiring staff members to work without an assistant when annual leave or sickness cover could not be provided. *(PCP1)*

7.2.2 Refusing to allow additional chairs within the kitchen working area for members of staff to sit down*. (PCP2)*

NOTE: The claimant accepts that at no time did she work without the chairs in place, her assertion is that these chairs were removed and she was told they were a Health and Safety hazard. Mark Kinder stated that he would speak to her about it at a later date but this did not happen. The claimant was forced to put the chairs back against management orders as no other adjustments were put in place.

NOTE: We comment separately (under the heading of Submissions below) about our concern (shared with the parties) about PCP1. We have identified PCP1A and PCP1B as follows:-

PCP1A. Requiring staff members to work without an assistant when annual leave or sickness cover could not be provided.

PCP1B. Sometimes requiring staff members to work without an assistant.

7.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the additional workload and inability to take breaks or sit down exacerbated the symptoms of her disability and caused her significant pain and distress – to the point that she felt suicidal.

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

7.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

7.5.1 To provide her with an assistant at all times.

7.5.2 To allow for chairs within her working area.

7.6 By what date should the respondent reasonably have taken those steps?

8. **Remedy - General**

8.1 How much should the claimant be awarded?

8.2 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

8.3 Did the respondent or the claimant unreasonably fail to comply with it?

8.4 Is it just and equitable to increase or decrease any award payable to the claimant?

8.5 By what proportion, up to 25%?

NOTE: We decided that this hearing should consider issues of liability only.

D. Findings of Fact

<u>The claimant's employment with the respondent</u>

12. The claimant was employed by the respondent between November 2015 and 28 February 2022. Her last day at work however was 16 December 2021 as she was then absent due to sickness until her final day of employment.

13. The respondent is an outsourcing contractor, providing cleaning and catering services to a range of businesses (their clients). One of the clients they provided catering services for is a business called JD Williams, a catalogue/online shopping brand. Catering services were provided at three JD Williams' sites in the North West, one of them being in Hadfield near Glossop (the Hadfield site).

14. The claimant was employed as a chef manager, running the kitchen at a staff canteen at the Hadfield site.

The claimant's disability.

15. The claimant has suffered from fibromyalgia for some years and was diagnosed with the condition in August 2018. The respondent admits that the claimant's fibromyalgia is a disability for the purposes of section 6 Equality Act 2010.

16. The claim form (and list of issues) also references a knee injury. On day one of this hearing the claimant accepted that the knee injury in itself was not a disability. The claimant was absent for about 10 weeks following an arthroscopy operation on her knee on 28 August 2021. On her return to work following this procedure, she continued to need support to help her carry out her role. We refer to this in more detail below.

17. We have considered an impact statement provided by the claimant and contained in the bundle at pages 73 to 75. The evidence provided in that statement focusses on the impact of the impairment on the claimant when required to work alone (a key issue in this case).

18. We find that the impact of fibromyalgia on the claimant is that she has experiences physical pain and tiredness. The claimant experiences pain particularly in her legs and back as well as her arms wrists and hands. The claimant has had referrals to a pain clinic to help with pain management. She is takes strong (prescribed) pain relief medication as well as Duloxetine, Ropinirole and Lansoprazole to lessen the symptoms of her condition. Although experiencing tiredness the claimant sometimes struggles to sleep. The claimant's exhaustion adversely impacts her social and family life.

19. Generally the claimant is able to manage her pain and tiredness during a working day with pain relief medication and frequent short rests. However when working alone at the Hadfield site, generally the claimant did not have the same opportunity to take rests. She needed to carry out many more tasks and to work more quickly. This resulted in her pain being more pronounced and she sometimes took pain relief beyond the recommended dosage.

The kitchen at the Hadfield site and the claimant's role there.

20. The Hadfield site was the claimant's place of work. The claimant worked in the kitchen and the serving area attached to the kitchen. It was one of the smaller units operated by the respondent. It provided workers at the Hadfield site with

breakfast and lunches. It also provided food and drinks for meetings held at the site whenever requested by the claimant.

21. The serving area included some hotplates (generally breakfast is provided on a self-service basis so hotplates kept the food warm during a self-service period) and an industrial style toaster (generally customers would toast their own bread at breakfast time when serving themselves to a breakfast). There was also a till area where payments for food were taken. Behind these areas of course was the commercial kitchen itself.

22. The claimant worked as one of a team of 2. As we detail below, 2 employees were not always working in the kitchen but 2 was the appropriate staffing level for the kitchen. The kitchen needed a chef manager and kitchen assistant (KA).

23. The period of time that we considered included periods of National lockdown and when other covid restrictions were in place. Outside of these times the claimant's role would be as follows:-

a. Opening and closing the canteen
b. Cooking breakfasts and lunches
c. Serving breakfast and lunches (although breakfast was mainly provided on a self-service basis and the Kitchen assistant would have helped with service and taking payments through the till)
d. Cleaning – including fryers and ovens – although the kitchen assistant would do most of this.
e. Stock taking and ordering including reporting of stock;
f. Cashing up at the end of a working day;
g. Monthly banking;
h. Health and safety paperwork
i. Creating weekly menus
j. Hospitality requests from JD Williams. These included drinks and buffet lunches for meetings.
k. Managing the kitchen assistant.

24. During periods when Covid restrictions were in place there were some changes to the operation of the kitchen:-

a. Disposable cutlery and plates were used thus reducing washing up requirements;
b. Regular (throughout the day) "Covid cleans" were needed in the kitchen and serving area.
c. Breakfasts were not self service and therefore required more effort from the claimant as breakfasts were plated up.

25. JD Williams' cleaning staff were responsible for the cleanliness of the canteen itself (the area where workers sat and ate) although the claimant and Kitchen

Assistant were able to use the seating in the canteen to take their separate 30-minute morning breaks (we accept the evidence of Sasha Ingleson (SI) on this). In fact the claimant seldom used this seating area during her 30-minute break as she would usually sit elsewhere on the Hadfield site. She would often meet and sit with her wife who was also based at the Hadfield site (but working for JD Williams).

26. When lone working the claimant generally didn't take a break at all. Sometimes her wife (Ms Rowley-Price) would visit the canteen so she could look after the till whilst the claimant had a short toilet break. Otherwise the claimant needed to be busy throughout the whole of her 8-hour working shift in order to ensure that the kitchen produced the food required, was cleaned throughout the day as required and any administrative tasks were completed. The claimant has been commended for her high standards; her kitchen regularly received 5-star cleanliness ratings.

Arrangements for cover.

27. As noted above, the kitchen was staffed by 2 people. When either the claimant or the KA was absent then either cover was arranged for the absent employee or the other employee was left to cope by themselves.

28. MK told us that it was not possible to find cover at a Kitchen Assistant/Porter level, particularly given the location of the Hadfield Site and its distance from Manchester where the agencies that the respondent used, were based. He gave evidence that any alternative cover arranged would be at the level of chef. This evidence is not consistent with information about cover arranged in December 2021. We note particularly the terms of an email from one of the respondent's managers called Lisa Wright dated 26 November 2021 (page 116) which includes the following information *"I have booked KP/GA to cover Sasha Monday 6 Dec to Friday 17 Dec."* (KP/GA means Kitchen Porter/General Assistant – different terminology for a KA)

29. We comment later in this judgment on arrangements in December 2021 to provide cover but we note here that this email indicates that where a bit of advance planning was undertaken, KA cover for a 2-week period was arranged.

30. Where a kitchen operated by the respondent was large enough to require a number of chefs to be based there, then arrangements to cover for holidays or other absences could be more easily arranged within the particular kitchen. That location could manage and rota its own absences As the larger number of chefs could manage when I of their number was absent. Where – as here- the location's staffing level was 2 then relief cover for an absent employee (50% of that location's workforce) would need to come externally– either in house or from an agency (or, as we heard, not at all).

31. In locations where cover could be arranged by using the resources of that location (by for example staggering holidays) then responsibility for arranging cover was with the most senior chef(s) in that location. Where, as at the Hadfield site, it was

not possible to absorb absence within the rest of the workforce at that location then responsibility was with the respondent's area or operations managers to monitor absences and ensure cover where required.

32. The respondent directly employed relief chefs (so chefs who were not permanently assigned to any location) to cover chefs during absences in a particular area. We also heard evidence of more senior managers covering for chef duties. MK gave evidence that he was himself covering chef duties at a larger location during October/November 2021.

33. At all relevant times, the respondent also had arrangements with 3 workforce agencies and could hire cover chefs (and assistants) from these. The respondent's strong preference was to cover an absent employee with an internal relief chef. Hiring an agency chef was expensive. MK told us that cover was at no time refused because of the cost of an agency chef; that there was a shortage of available agency chefs and that it was availability rather than cost that meant that the respondent did not provide agency cover.

34. We find that the arrangements for cover (where not being arranged from the resources within a particular location) at the Hadfield site up to the end of November 2021 generally (as we note below) did not apply at all. We find that they did not apply because there was no intention for cover to be arranged to assist the claimant, until her return from long term absence in November 2021.

35. We have not heard or seen evidence - for example, correspondence, booking forms, invoices etc of agencies contacted in attempts to cover the absences that we have considered in this case. We accept that a shortage of agency chefs may have been an issue but we have seen no evidence of the respondent trying to book an agency chef for specific dates and being told by the agency that no one is available. The evidence we have about positive steps to arrange cover for the claimant - Lisa Wright's email noted above - indicates that it was possible in December, a particularly busy month for catering workers.

36. When the claimant (the chef) was absent then it was more likely that cover would be arranged although again, this did not always apply. We heard from SI that she had also sometimes been required to work on her own at the Hadfield site. She told us (and we accept her evidence) that when she did so, she would not always be able to complete the tasks required of her so that some tasks – particularly cleaning tasks – would be left until the following day.

37. The claimant was given extra pay for those days that she ran the kitchen alone. For some time this was an extra 2 hours pay per day for an 8-hour shift (therefore paid 10 hours at her normal rate rather than 8 hours). From November 2021 (the date that MK became the claimant's manager) the rate changed to an extra 2.5 hours pay per day of lone working. The respondent recorded this in their records

as overtime. The claimant's overtime records (and therefore the records of the days when she worked alone) are at pages 144 – 147.

Knowledge of the claimant's Fibromyalgia

38. In its grounds of resistance the respondent accepted that from October 2020 it was aware that the claimant suffered from Fibromyalgia and that lone working was difficult for her. (para 8 of GOR) although it has now been accepted - during this hearing - that knowledge went back to October 2019.

39. This is consistent with the claimant's position as she says (para 3 of her witness statement) that she told the respondent a year before this - in late October 2019 - when she provided a medical form (a fit note) dated 21 October 2019 specifically stating fibromyalgia. It is also accepted that (1) that the fit note (page 84) was provided because the claimant needed to be off work for a 4-week period (2) the claimant's long period of sickness absence came after the claimant had spent a long period of time (a month or more) operating the kitchen by herself.

40. Also included in the bundle is a fit note for September 2019 (this also refers to fibromyalgia) that the claimant did not hand in because (in her words and we accept her evidence) she was "guilted" in to working in September as she was told by her manager at the time, Susan Young, that there was no cover.

41. Either during the claimant's sickness absence in October 2019 or on her return from that sickness absence, the claimant spoke with Susan Young about her fibromyalgia and the impact it had on her. Whilst it seems little action was then taken by the respondent when provided with this information it was noted by Susan Young that lone working was difficult for the claimant.

42. To support our findings about this discussion we note that the respondent accepts that Susan Young told her successor Mark Kinder (MK) in October 2020 that the claimant had difficulties with lone working (para 8 of the GOR).

43. In evidence to the Tribunal MK has stated that he initially understood that the claimant preferred not to work alone, not that she had difficulties when being asked to work alone. We find:-

a. The conversation that the claimant had with Susan Young in October/November 2019 linked her difficulties in working alone with the effects of the fibromyalgia.
b. The respondent was aware of this from that date – October 2019
c. That information was provided to MK when he took over responsibility in October 2020
d. We accept the claimant's evidence that she mentioned her fibromyalgia to MK from October 2020 onwards. She did so in the context of lone working. This is also consistent with some of MK's evidence to the Tribunal; his evidence to us was that at the time he was being told by the claimant that

she suffered from fibromyalgia (2020 and 2021) he considered this; he had friends with fibromyalgia; he did not understand the condition was a disability.

e. MK knew (or should have known) that this was not a lifestyle preference for the claimant. Her requests for cover were directly linked by the claimant to her fibromyalgia.

Period November 2019 to October 2020

44. We have heard evidence about the position in 2019 and 2020. The evidence is far from complete and as we note below, we find some of it to be unreliable. Based on the evidence we have been provided we find as follows:-

a. The claimant continued to be managed by Susan Young throughout this period. The claimant was mistaken when giving evidence that MK had become her manager in March 2020. During the course of the hearing, sufficient evidence was disclosed by the respondent (particularly emails from October and November 2020) which satisfied us that the management change came at the beginning of November 2020 and not before.
b. There is no dispute that the claimant worked alone for a large part of the coronavirus lockdown period from March to July 2020 (a total of 69 lone working days for this 5-month period).
c. The circumstances in the kitchen were different to the times before and after this highly unusual period.
d. The workload was less. Orders reduced in the pandemic period and we have no difficulty in finding that reduction in customers will have been particularly acute during the first lockdown period – the period March to July/August 2020. Some activities – notably regular cleaning did increase but overall activities reduced considerably during this period.
e. The claimant also had Leanne Warmishan with her in March 2020 although was absent from 5 April 2020 until her termination of employment in June 2020
f. A replacement KA (SI) started on 4 August 2020
g. The claimant did not raise any concerns or complaints with the respondent during this period.
h. The claimant did not take any sickness absence during this period and based on the medical records that we have seen, did not speak with her doctor about any health-related issues – other than the orthopaedic issue – her knee.
i. In her evidence for this hearing, the claimant gave evidence that her fibromyalgia and mental health took a turn for the worse in beginning of 2020. She also gave evidence that she made a number of requests for cover that went ignored. We consider it likely that she was confused, probably confusing the position with that at the end of 2019. This is also supported by the terms of the claimant's grievance of November 2021 (pages 106-7) which specifically refers to her issues starting when she was required to work alone and then endured a 4-week sickness period (in other words the position in late 2019).

45. We comment in more detail about this grievance later. But for these purposes we note that the claimant does not raise at all in this grievance any issue about a period of lockdown before Mark Kinder was her manager even though the grievance refers back to (and grieves about) the position the claimant was in in 2019.

46. It is also relevant to note our own finding (based on our collective knowledge and recollections as well as publicised Government announcements) that the position that the country was in in March 2020 was unique. Many people were very worried indeed about coronavirus; everyone was told to socially distance and to stay at home unless it was essential to go to work; only essential shops were open, hospitality venues (including cafes and restaurants) were closed. For some reason (not given to us) the kitchen at the Hadfield site remained open. In so far as that was permitted under the regulations in place at the time (and we assume it must have been) then it must have been the case that (1) the demands for cooked meals in a shared space fell dramatically during this first period and (2) no more than one person could work in the small kitchen otherwise social distancing requirements would not have been adhered to.

47. We summarise the position up to the end of October 2020 (based on the evidence provided) as a unique one and the claimant's lone working during this period was manageable for her.

The claimant's work from beginning November 2020

48. At the beginning of November 2020, MK became the operational manager to whom the claimant reported He returned from a period of absence. He had been furloughed from early April 2020 and his first day back at work was 2 November 2020. As already noted, he was made aware of the claimant's fibromyalgia and her difficulty in lone working.

49. Also by this time the respondent had appointed a new Kitchen Assistant – (SI).

50. The respondent's position is that for the 13 months that followed – i.e. 1 November 2020 to 30 November 2021, the position regarding cover for lone working greatly improved; that the claimant was only required to work alone for 11.5 days within this period and yet SI took 27 days (we calculate 28 days) of leave.

51. Whilst the claimant acknowledges that she was only required to work 11.5 lone days during this period – she was still required to work alone on these days and (2) that there were only a small number of days because SI purposefully did not book holidays, knowing that if she did, she would leave the claimant unsupported.

52. It is not disputed that in 2021, SI did leave a lot of her annual leave entitlement until the end of the year. We accept that in part the reason for this was that SI did not want to leave her friend (the claimant) unsupported . The other main reason was that the claimant was herself off for a period of 10 weeks (from 18 August

2021) for an operation on her knee – and recovery period). SI was told that she could not be off at the same time as the claimant. That meant that any leave that she had left to take in 2021 (and she had a considerable amount – 20 days) had to be left until the claimant's return.

53. We have considered carefully the records for this period and the extent to which it appears the respondent sought to arrange cover for the claimant. Our findings are below.

54. Firstly, a general finding regarding the records provided to us. The records of the claimant's "overtime" dates (143-146) show dates that in places match exactly the dates when SI was absent (her attendance records being at page 182) and in other places are out by a few days. The evidence provided to us is that the only time the claimant worked alone in the kitchen (and therefore received an overtime payment) was when the kitchen assistant (SI) was absent. We have found therefore that those dates that do not match are due to a slight inaccuracy (for example relating to different pay periods). This means that for the first half of 2021, absences correspond with a date when overtime was paid.

a. In January 2021 SI has 2 days holiday and there are 2 days when the claimant works alone.

b. March and April 2021 records show that the claimant had 6 days of lone working. SI has one days leave in March and 5 days in April (therefore a total of 6 days). The records show that SI had a week's leave – for the week commencing 5 April 2021. According to the records the claimant was not paid overtime for this week but was paid overtime for the previous week.

c. There is no more overtime recorded for the claimant until November 2021 (a period we comment on next). SI did have 2 more absence days 18-20 August - but the claimant could not cover these dates as she was by then absent to have her knee operation.

55. From the evidence provided we are satisfied that for every day that SI was absent in the period 1 November 2020 to 1 November 2021 the claimant was required to work alone (except the 2 days in August when the claimant was also absent due to planned surgery) . We find that the respondent did not make any attempt to assist the claimant on these days by finding cover. Our conclusion is supported by (1) the very fact that cover was not provided and (2) the lack of any evidence – either internal emails or evidence of contact with external agencies – which shows that attempts were made to find cover.

56. We also accept the claimant's evidence that she asked MK to arrange cover on these dates but her requests were ignored.

<u>Claimant's absence from 18 August to 5 November 2021 inclusive</u>

57. The claimant was absent for a pre-planned operation. The respondent knew that the claimant would be absent for around 8 weeks although the claimant had to delay her return to work for another 2 weeks, returning on 8 November 2021.

58. During the absence the claimant was contacted by SI who told the claimant that 2 chairs had been moved from the kitchen. The chairs had been present in the kitchen during the whole time that the claimant had worked at Hadfield site; since 2015. It is unclear from the evidence which manager initiated the removal of the chairs. MK indicated that it was him and he required the chairs to be removed for health and safety reasons.

59. In the more recent years of her employment and following the onset of her fibromyalgia the claimant told us (and we accept) that she had benefitted from these chairs. It is also apparent from messages exchanged between the claimant and SI that SI also considered the chairs to be beneficial. We note the following exchange between the claimant and SI on 15 October 2021 (page 102):-

Claimant They have no right to take them away

SI. They are at the back door. Am in fucking agony with my back and now I cant sit down.

Claimant. Don't you worry I'm dealing with it.

60. Focussing on the benefits to the claimant, we accept that the presence of the chairs enabled her to sit down and take short rests during a busy shift. She used them mainly in the morning because there was a lot more physical work in the morning when the claimant was cooking and prepping. To avoid standing too long she would sit down to take the edge off pain in her legs and lower back. She told us (and we accept) that she tended to use the chairs for short respite at least 5 times a day.

61. We also note the following findings in connection with the chairs:

a. When the claimant was working alone, there was much less opportunity to use the chairs.

b. Health and safety inspections took place on various occasions throughout the year, every year. The local authority carried out inspections; as did the client itself and the respondent's Health and safety team. There had been no reference to chairs in any of these inspections over the previous 6 or so years.

c. By October 2021, the date that MK removed the chairs from the kitchen area, he had by then visited the site about 11 or 12 times (his evidence was that he visited about once a month) and had not previously raised issue of chairs before. In his evidence, MK referred to his decision that the chairs should be removed as a light bulb moment.

62. On 19 October 2021 (still during claimant's sickness absence) the claimant contacted MK. The bundle does not contain the whole of the claimant's message but it is clear from that part included that the claimant initiated the contact about the chairs and put forward her reasons why she benefitted from them. To summarise the message:-

a. The claimant reminded MK about her disability.
b. She uses the chairs to sit down when she needs to.
c. Her disability means that she needs to sit down outside of her break time.
d. Neither the council nor the respondent's own health and safety team had ever raised a concern about the chairs
e. The law requires an employer to provide equipment to help the claimant manage her disability in the workplace.

63. MK replied to say they would discuss this on the claimant's return from sick leave. In fact the issue was not discussed between them.

Claimant's return to work on 8 November 2021.

64. Immediately following the claimant's return to work on 8 November 2021 she submitted a written grievance to Gill Heath (the manager who is more senior than MK) The written grievance is at page 106-107 it is timed as being sent/received at 07.48am.

65. There is some dispute about whether MK knew about this grievance when he next spoke to the claimant which was later that day. As the claimant reported in a later message to Gill Heath, the phone call between MK and the claimant did not go well.

66. The claimant's version of the call is that MK told her that he was referring her to occupational health to check whether she was up to the job, that it was a threat. MK's version is that the call was a welfare call. The claimant told him in that call that she could not work alone and that the chairs were there to assist her when working. MK was surprised as there was nothing recorded on the claimant's personnel file about reasonable adjustments that had been recommended by her doctor. (We comment on reasonable adjustments below).

67. As for knowledge of the grievance, MK told us that as far as he could recall, he had been told that a grievance had been raised about him at the time of the call but not by whom. He recalls he did not learn until much later in the year that the claimant had raised a grievance about him.

68. We find as follows:-

a. By the time of the call MK had been informed not just about a grievance generally but that it was the claimant who had raised a grievance. This would

have been in his mind during the call and had some impact on his conduct in this discussion.

b. MK had been told by the claimant that there was a need for the chairs because of her disability (see above). That had prompted a call with HR, prior to his call with the claimant. They had recommended that the claimant be referred for an Occupational Health assessment. He raised this with the claimant in their call.

c. The issue of arranging cover was also raised in the call – because the claimant knew that SI would be absent on annual leave . We accept the claimant's evidence that MK was quite dismissive of the claimant's request/requirement for cover at this stage– noting that the claimant's site turned over less than other sites where cover did not need to be arranged. He thought that the claimant should be able to mange to "hold the fort" in this small site during SI's absence.

d. Whilst the claimant perceived MK's comment about an occupational health referral as a threat it was not said as a threat. MK raised the proposal to refer to OH in a matter-of-fact way. He did so because he was following a recommendation from the respondents HR resource. The proposal was raised in a call that was not going well which is why the claimant saw it as a threat even though it was not put as such.

69. The claimant decided to place the chairs back in the kitchen on her return to work on 8 November 2021 even though she had not been given express permission to do so.

70. The claimant contacted Gill Heath late on 8 November – by text/WhatsApp (page 105). The claimant's message included the following.

> *As Mark threatened me with occupational health to see if I'm actually capable of doing my job, bear in mind this is the first day back from invasive knee surgery, he Is forcing me to work on my own for 2 weeks after this week, which I think is unfair due to multiple reason, he also was saying how my canteen doesn't take much money and another canteen that takes much more money and is managing to work on her own, I'm left wondering if this woman has also got fibromyalgia and just come back from knee surgery,*
>
> *I'm capable to do my job, it's only a problem when Mark forces me to work on my own as this is when it makes me really ill.*
>
> *I would like to let you know that I am seeking legal advice regarding this matter.*

71. Gill Heath called the claimant in response and also sent a text reply, looking to assure the claimant that a referral to OH was not threatening although it is apparent from her evidence to us that the claimant was not satisfied with GH assurances. She sought to assure her that a referral would be mutually beneficial.

Terms of the claimant's grievance

72. We repeat below a long extract from the terms of the claimant's grievance. We do so because we find that it reflects the claimant's position as at the 8 November 2021.

> *I have a disability and require these chairs as I can't stand for too long, which Mark is aware of, also Sasha has back issues, when we require to sit for few minutes, the service is never affected as this is done when no one is in, Mark says the chairs are a health and safety hazard even though I know that's not true because the client h&s, companies h&s and the council have never mentioned this or had a problem, was only a problem when Mandy mentioned it.*
>
> *Mark has done nothing to try help me get back to work, he only ever got in contact when my sick note was due to run out, he reads messages but doesn't reply.*
>
> *All I have had is stress after stress while recovering from surgery as Sasha contacted me a lot due to the way she was being treated and Lisa nor Mark was responding to her, I was the only one who she could turn to.*
>
> *I use to enjoy work and working for Eilor but now I'm filled with anxiety and dread every time I'm due in work, it's affecting my mental health and my physical health.*
>
> *It all started when Sue forced me to work through a 2-week sick note which then resulted in me being extremely ill and taking 4 weeks and losing money.*
>
> *Mark does the same even after I have explained to him multiple times that I can't physically work on my own anymore due to my disability, I have in the past yes but my physical health is declining, especially with my legs and he is very aware of this, he said that agency cost too much and had the cheek to use my disability against me, saying just trying to protect you from covid so don't want agency in with you, forcing me to work on my own is not protecting me intact it makes me extremely ill.*
>
> *Sasha doesn't like taking holidays because she doesn't want me to be left on my own and I dread when she is off and it shouldn't be like that.*

I feel like I'm being discriminated against and constantly forced to do things that affect my disability/illness, despite them knowing how it affects me. Sasha is off work for 2 weeks soon and I have asked for help to be booked but yet again read msgs but no reply, if I am forced to do this on my own I will have no choice but to not come into work (which you know I don't take lightly and never take sick days, if avoided) as not only have I got a disability I am returning from intensive knee surgery which took longer than expected to heal.

I have so much anxiety on returning after knee surgery, as I feel my health will not be protected.

It's got to the point of dread and anxiety that I have been so close to handing in my notice, as its getting to much on my physical and mental state, I shouldn't be treated this way, what happened to compassion and duty of care?.

Cover for SI's absence in November 2021

73. The Claimant knew on (and before) her return to work on 8 November that SI would be taking a significant amount of annual leave; SI was scheduled to take 2 weeks from 15 – 26 November inclusive and 2 weeks from 6 to 17 December 2021.

74. Whilst the welfare call took place with MK on 8 November 2021, as noted above this did not go well and did not result in any commitment by MK to look in to arranging cover for the claimant.

75. The claimant had a return-to-work meeting early on 12 November 2021. The meeting was with Andrew Howarth (A H). There is a return to work pro forma used by the respondent. The terms of the form "guide " a discussion between manager and returning employee. This form was completed by A H, not MK (see page 108-110). MK told us that he was by that time busy on another contract, covering chef duties.

76. The claimant raised with A H the issue of cover in anticipation of SI's absence. She also stated clearly that she cannot work alone. This is confirmed by a handwritten entry on the form. This was effectively a confirmation of the message she had given to MK on 8 November 2021. It was also confirmation of the messages provided previously and particularly to Susan Young although on this occasion she was not just noting her difficulty that she had in working alone. On her return from her knee operation, she was more in need of assistance than before. A combination of her fibromyalgia and the ongoing (but reducing) effects of surgery meant that she gave a very clear message that she could not work alone, not just that she had difficulties working alone.

77. Helpfully A H told the claimant during the RTW meeting that he should be able to help by covering for SI.

78. This prompted the claimant to contact MK. She messaged him at 07.28 on 12 November,– *"Hi has cover been arranged? I have Andy here who said he is available."*

79. At that stage no efforts had been made to arrange cover for the claimant even though SI's absence was known well in advance and also that the claimant had specifically raised the issue with MK on Monday 8 November 2021. Her first day back in work.

80. MK responded at 1pm on 12 November *"We have managed to free Andy up to support you, I cannot promise that I will not need to take him away if circumstances change but this is our only option at this point."*

81. A H did attend the Hadfield site to work with the claimant on the first 2 days of SI's absence. 15 and 16 November 2021. He attended for a short time on 17 November 2021 but was then called away because the chef at another site operated by the respondents (a care home) was unexpectedly absent on that day. . A H did not attend on 18 or 19 November 2021 either.

82. The respondent had arranged cover for the following week (commencing 22 November) except for 24 November 2021 when the claimant was required to work alone. By that stage responsibility for arranging cover had been taken away from MK and the claimant was in direct contact with Lisa Wright (see page 113 for example).

83. On 24 November 2021 the claimant emailed Lisa Wright about SI's next tranche of holidays, noting as follows:- "I won't be able to do 2 weeks on my own, I struggle with 1 day, yourself and the company know this as I have mentioned multiple times I'm unable to work on my own due to my disability (fibromyalgia) also returned from invasive knee surgery, I will need cover.

84. In fact there were no issues in the 2 weeks that SI took holiday in December 2021 (from Monday 6 December 2021). Lisa Wright had arranged over for the whole period. It is apparent from an email from Lisa Wright to the claimant dated 26 November 2021 that Lisa Wright had been able to quickly contact an agency and arrange appropriate cover for the entire 2-week period. (page 116). It is also apparent that cover for most of that 2-week period was provided by an agency Kitchen assistant (not a chef). We find, had the respondent made arrangements to cover the first of SI's 2-week absence periods (beginning 15 November 2021) some weeks before the absence period, there would not have been an issue in arranging cover for the whole of that period. As it was, cover was only arranged right at the end of the week prior and only because of the claimant's persistence.

<u>Reference to the grievance policy and the timescales</u>

85. The claimant's grievance was received by the respondent on 8 November 2021. The claimant did not receive a formal response to that grievance until 24 November 2021, 12 working days after the grievance was sent.

86. The grievance hearing was scheduled for 3 December 2021, the 20th working day after the grievance was sent.

87. The respondent's grievance policy provides as follows:-

"The Manager receiving the grievance will usually send you a written acknowledgement of its receipt (normally within seven working days of receipt of the grievance) and arrange a meeting with you as soon as is reasonably practicable (normally within ten working days of receipt of the grievance). You have the right to be accompanied to the formal grievance hearing by a fellow work colleague or a Trade Union Representative."

88. Sharon Crehan (SC) was appointed to hear the claimant's grievance. We accept that the respondent looked for a manager from another region who could consider the grievance impartially and that it took a little time to identify SC as an impartial manager who had capacity. We accept SC's evidence that there was some shortfall in the number of managers at an appropriate level to hear the grievance. The step of identifying SC was the reason for the slight delay.

Hearing on 3 December 2021

89. The meeting took place by Teams. It was an audio teams call only, not a video call.

90. We have been provided with notes of this hearing – page 117. SC also gave evidence at the Tribunal. As for making findings about what was said at this hearing, we had the claimant's evidence, SC's evidence, the notes of the hearing and also evidence from Ms Rowarth-Price who says she overheard some of the discussion;

91. There are some differences in accounts as to what was said. The claimant and ARP say that some things were said that were not in the notes. SC told us that the notes were taken by her and then typed up soon afterwards. They were not sent to the claimant for her own records/checking because of what happened next (as we detail below).

92. An important finding of fact that we need to make is how occupational health (OH) was referenced in this meeting. The claimant's version of events is that it effectively continued to be referred to in a threatening type of way; SC's evidence is that she sought to reassure the claimant about a referral to OH.

93. We accept the evidence provided by SC. We found her to be an impressive witness who understood the task that she had and who sought to handle the grievance responsibly and effectively. Whilst the claimant may well be right to be critical about the respondent for some of its previous actions, our sense here is that the claimant's position was being considered by a manager who was looking to do the right thing; who wanted to better understand the claimant's condition and the

impact/restrictions that arose and to consider what reasonable adjustments should be made.

94. Unfortunately this meeting did not go well or end well. By this stage the claimant was frustrated and distressed. She considered that she had not been listened to. She had first told the respondent about the fibromyalgia in October 2019, about her difficulties working alone. It was only now some 2 years later and on her return from surgery, that she was told about a referral to OH. We can understand the claimant's frustration but at the same time we have no criticism of SC's handling of the grievance. We also find that the claimant should have accepted at face value the reassurances provided by Gill Heath in November 2021 and now by SC.

95. There was also a reference to the chairs located in the kitchen. We find that SC's reference to these was reasonable. SC wanted to understand the issue as part of her consideration of the grievance.

96. It is not disputed that towards the end of the discussion, the claimant referred to suicide and hurting herself. The claimant is adamant that she made these references in the past tense. SC perceived a risk that the claimant might be unwell and may do harm to herself. It is possible that both are right here. However we are clear that when the claimant ended the meeting abruptly, SC tried to contact the claimant because of a genuine concern about her welfare and for no other reason.

97. Ultimately SC was able to speak with the claimant's mother. We accept SC's evidence regarding contact. We have no criticism of her actions. On the contrary, they are the actions of a concerned and responsible manager. The extent of the contact that was made was proportionate.

98. Later that day, the claimant received support contact numbers from the respondent – email from Gill Heath 3 December 2021 (page 118-120).

<u>Further contact on 6 December 2021</u>

99. The 3 December 2021 – the day of the grievance meeting- was a Friday.

100. On Monday 6 December 2021, the claimant emailed SC to express dissatisfaction about the grievance meeting. She copied in Gill Heath (GH) the respondent's regional managing director . GH contacted the claimant by email later that day. Her email said *"my colleague from HR Emma is going to give you a call today, not about the grievance but to check in on you, checking how you are. If you wish for Aimee to be there with you that's no problem."*

101. We were provided with a witness statement from Emma Lewis (EL). EL no longer works for the respondent and did not attend to give evidence. Before her employment with the respondent ended she was employed as an HR Business Partner.

102. Although we did not hear EL's evidence in person, having read the sections of her statement that deal with EL's contact with the claimant on 6 December 2021, we accept that evidence. It is consistent with the messages from Gill Heath and by SC's comments at the grievance. It is not disputed that EL spoke with the claimant. We find that EL also sought to reassure the claimant about how an occupational health referral would work and why it would be helpful. In the same call EL also asked the claimant whether she wanted to continue with the grievance and what adjustments might be in place to assist.

103. The claimant's case is that she had been told before her call with EL that the grievance would not be referred to. When the term "grievance" was used by EL, Ms Rowarth Price took over the call. On behalf of the claimant, Ms Rowarth Price told EL that the claimant was promised that the call would not deal with the grievance (or words to that effect).

104. In an email from the claimant to Gill Health on 8 December 2021, the claimant stated that the claimant had felt "tricked under false pretences" into the call. The claimant also said that she did not want another meeting, effectively closing the process. She continued to attend work.

105. We note that the claimant does not in her witness statement provide evidence about her call with EL.

106. We are satisfied, from what we have read and heard that was not EL's intention. Whilst the grievance was referred to it was done so in the context of EL wanting to understand whether anything could be arranged to help the claimant continue with the process. This is consistent with the terms of an email that GH sent to the claimant a couple of days later – on 8 December 2021 (page 125).

> *Hi*
>
> *I'm sorry to hear you feel you were tricked into having a call with Emma from HR yesterday.*
>
> *I spoke to Emma and asked her to give you a call, as we were concerned about your welfare following the grievance meeting held with Sharon on Friday, due to how distressed you were at the time.*
>
> *Emma wanted to check-in with you and also confirm that you had received our Colleague Assistance Programme/Mental First Aider details and to see if there was anything more we could do to support you. She also wanted to confirm our occupational health referral process and why/how we refer colleagues, as you had initially indicated that you felt we were threatening you with occupational health, and you didn't understand why we had suggested referring you in the first place. As Emma and the HR department support with these referrals, I just thought this might reassure you and help you to understand why we refer our colleagues to this service.*
>
> *I also asked her to check if you wanted to reconvene your grievance or whether you wanted to put this on hold for the time being. We didn't know how you were feeling following our meeting on Friday and whether you expected this to be reconvened at some point. Emma also wanted to check to see whether there were any reasonable adjustments we could*

make to the process to help you feel more comfortable, e.g. submitting a written response to questions or assigning a different manager etc.

I appreciate that you have now confirmed you do not want another meeting at this time, but should you change your mind, please just let me know or get in touch with Emma.

Kind regards

Claimant's absence from 16 December 2021

107. The claimant continued in work until 16 December 2021. On that day she attended a medical appointment with the surgeon at Highfield Hospital who had operated on her knee. Although the operation first appeared to have had a positive outcome, she had developed symptoms again. A short note from the surgeon dated 16 December confirmed the onset of symptoms again and recommended an MRI scan. The claimant was signed as not fit to work for a period of 6 weeks, due to the onset of pain in her knee. There was an exchange of emails between the claimant and Gill Heath on 16 December 2021. This included the following comment from the claimant:-

I was fit to return to work after my surgery as my physio cleared me to come back, I'm unwell from the negligence from yourself and other management, making me work on my own a week after returning from sick leave due to my surgery, when I clearly stated that I cannot due to returning from surgery aswell as my disability.

108. Following that appointment, the claimant remained absent and did not return to work before her employment ended.

109. The claimant's evidence is that the set back with the knee was caused by her lone working. That evidence is consistent with what the claimant told the surgeon. A short report from the surgeon dated April 2022 (page 138) notes that the claimant had a meniscal tear in her right knee, that the operation appeared to have been a success but that in December 2021 the claimant complained of pain again that she blamed on a requirement for her to carry out heavy duties working alone. A subsequent MRI scan showed that there was indeed a tear and the claimant was listed for another arthroscopy.

110. The claimant resigned at the end of the 6-week period covered by the fit note. The claimant gave contractual notice which was 4 weeks. The whole of the notice period was covered by a fit note stating that the claimant was not fit to work (copy at page 130). The condition stated on this fit note was fibromyalgia.

Termination of claimant's employment

111. It is clear to us that by early January 2022, the claimant had made her mind up that she was leaving her employment even though she did not hand in notice of resignation until 26 January 2022. The claimant had made clear on the Employment Tribunal claim form dated 12 January 2022 that she was bringing a claim of constructive unfair dismissal (see earlier).

112. The terms of the claimant's resignation letter are set out below:-

Please accept this letter as my resignation from my current position of Catering Manager on N Brown Hadfield. I have taken this decision based on the actions and treatment I have received from the management team within Elior and I feel like I have been left with no option but to resign due to this under the grounds of constructive dismissal.

I have been discriminated against due to my disability by multiple managers within the company, in fact it's been questioned by management whether I even have a disability. My health condition has been continuously ignored by management expecting and forcing me to repeatedly work on my own, despite my pleas for help and persistent explaining to multiple managers about my disability fibromyalgia and the impacts lone working has on my physical health and my mental health. Adding to this is the fact that I was forced to work on my own one week after returning from knee surgery which has resulted in damage being caused to my knee after only just having surgery to fix it.

The company refused to make reasonable adjustments in the workplace to help me conduct my day-to-day duties, in fact after management discovered I had these in place they purposely had them removed whilst I was on sick leave and denied my requests to have them reinstated or a suitable replacement be put in place before my return.

I have clearly stated on multiple occasions to multiple managers that due to my disability I can't physically cope with the extra workload of working on my own. This is a breach of my employment contract which states 'The Company, therefore, reserves the right, upon reasonable notice, to require you to undertake alternative duties within any department of the company which fall within your capabilities.' I have also stated to the same members of Eliors management team that when forced to work on my own I don't get my legal break entitlement due to the additional duties I am expected to do.

I have tried to proceed with the company's grievance procedure; however the insensitive remarks made to me during the meeting gave me no hope that this matter would be resolved. I was interrogated and blackmailed with occupational health, I was told if I don't consent to occupational health I can't have my chairs reinstated; these being the reasonable adjustments I have previously mentioned in this letter.

Due to the above I feel like Elior has given me no choice but to leave the business, not only to protect my physical health but also my mental health, both I feel has taken a rapid decline due to the treatment I have received from the company. Elior have proven on more than one occasion that they have no compassion and no intentions of protecting me from the harm they are inflicting upon me. The continued stress from yourselves is becoming too much for my mental health, I'm not eating, not sleeping and have been put through so much physical, mental and emotional pain due to your negligence. It's affected me that much I have contemplated suicide just to escape the situation you continuously put me in. I dread and am full of anxiety at the thought of coming into work.

All of the stress Elior has caused me has only been amplified by the countless issues I have had regarding my wages in the periods I have been on sick leave. The most recent of which was the delayed submission of my sick note which was issued to myself on 16/12/2021 and I supplied to the company via email that same day, however management took it upon themselves to change the date of my sick note to the 20/12/2021 and process it on the same date meaning it has missed the cut off date of 17/12/2021 for any alterations to be made to my pending wages. This resulted in me being overpaid in December 2021 leaving my January 2022 wages to equate to nothing; the only saving grace was a tax refund payment had it not been for this I would have received nothing, now causing me financial stress on top of what I have mentioned above.

My last day of employment will be the 28th February 2022 in accordance with my 4 week notice period.

The reasons for the claimant's resignation.

113. We need to make findings about why the claimant resigned. The terms of the letter noted above were not put together in haste. The claimant had decided by 12 January 2022 latest (2 weeks before sending the letter) that she was resigning and bringing a constructive dismissal complaint. The letter was not finalised and sent until 2 weeks' later. We find that the letter accurately records the claimant's reasons for resigning.

114. That letter deals with 3 broad areas:-

a. A reason that we summarise as the ongoing treatment of her in relation to her disability.
b. The second is the treatment of the claimant during the grievance period.
c. wages issues, seemingly regarding sick pay.

115. The wages issue was not a reason for the claimant's decision to resign. This is evident from the terms of the letter itself (the sixth paragraph from the extract quoted above, which starts "*due to the above*" makes this clear) and it is not included in the list of reasons for resignation put forward in this claim (see list of issues).

116. This leaves the other 2 areas covered in the letter – the treatment over a period of time in failing to recognise in any adequate way the claimant's disability, failing to provide cover when needed, including in November 2021 and the more recent treatment the claimant refers to – taking away her reasonable adjustment (the chairs) and the way the claimant says she was treated during the grievance process.

117. The respondent replied to provide the claimant with an opportunity to reconsider her decision. Their letter made clear that they would welcome the opportunity to consider the claimant's grievance but they could not because the claimant had refused to continue with the process. It also confirmed that in December 2021 they had offered to appoint a different manager to deal with the grievance and they repeated this offer (Page 134).

E. Submissions

118. Mr Dhorajiwala provided a helpful written submissions document and also addressed us verbally on some discrete issues.

119. Ms Rowarth Price provided submissions on behalf of the claimant Whilst not addressing us on legal issues in the way that Mr Dhorajiwala had, she focussed on the evidence we heard and made clear and succinct points on this which were very helpful.

120. We have taken the submissions in to account when making our findings of fact and in our conclusions. (below). We do however summarise discussions about

concerns raised by us about the wording of PCP1. We identified our concern on day 5 of the hearing. We were in the middle of our decision-making discussions. The parties were available and we called them back in to the hearing in order to raise and discus our concern.

121. The concern is with the wording of PCP1.
Requiring staff members to work without an assistant when annual leave or sickness cover could not be provided. (we call this PCP1)

122. If the wording of the PCP above was strictly applied, it would require us to consider whether reasonable adjustments could have been made on those occasions when the provision of cover was impossible.

123. Having heard the evidence we were concerned that this was not the complaint we were asked to consider and determine. Put in straightforward terms, the complaint that we were asked to determine was effectively whether the respondent had tried hard enough to arrange cover when the claimant's colleague was absent. If the case was determined on the basis of PCP1, we would need to start on the basis that the respondent had tried hard enough – and that the arrangement of cover was impossible.

124. We invited representations from Mr Dhorajiwala who, having taken instructions, accepted the reasons why we were looking to change the wording of the PCP but proposed an alternative form of wording "*Requiring staff members to work without an assistant when annual or sickness cover <u>was not able to be</u> provided"* (proposed replacement words underlined). This was discussed with Mr Dhorajiwala and concern raised by us that there was no practical difference between the new wording and the old.

125. The wording that we proposed was *"requiring staff members to work without an assistant when annual or sickness cover <u>was not</u> provided."*

126. Mr Dhorajiwala recognised the existing wording was problematic but considered our proposal to be too wide.

127. In our deliberations we discussed the respondent's alternative and our own. We also considered another version of the PCP - *"sometimes requiring staff members to work without an assistant."*

128. We decided that the alternative wording proposed by the respondent was of no practical difference to the original wording. We also decided that both PCP wording options proposed by us were (or should be) uncontroversial. On the facts, those PCPs were clearly applied and we decided that we should consider and determine the case based on these.

129. In reaching our decision we reviewed again the terms of the claim form. The relevant paragraphs in the claim form make clear that one of the claimant's

complaints is that the respondent did not try hard enough to arrange cover. We note the following extract particularly:

> *On the 18/03/2021 I asked covering manager Matthew Fay if he had booked cover, he said he would call me later but never did and I was left on my own again. On the 29/07/2021 I emailed Mark Kinder asking for help, he rang me in response and told me agency costs too much an hour so I was forced to work on my own despite Mark Kinder knowing how much I struggle, as well as me explaining to him how it makes me severely ill due to my fibromyalgia.*

130. Whilst this extract only specifically refers to 2 dates, the rest of the claim – and the evidence provided (see for example emails of March 2021 at pages 96-98) is consistent with the respondent knowing that the claimant had difficulty in working alone but either ignored it altogether or did not try hard enough to arrange cover?

131. We decided that it was fair and just to determine the complaints of indirect discrimination and a failure to make reasonable adjustments by applying the 2 PCPs we identified. MK had provided evidence about the difficulties in arranging cover and how it was impossible. He had told us about the agencies that the respondent used, about how it was not possible to engage Kitchen assistants and about arrangements with internal relief chefs. It was clear to us that the respondent had attended the Tribunal, ready and able to provide evidence about the difficulty in arranging replacements. The respondent was not disadvantaged in our decision to amend the PCP wording. The claimant would have been severely disadvantaged had we not done so and only applied the wording of PCP1.

The Law

Constructive Dismissal

132. The claimant claims (1) that her resignation amounted to a constructive dismissal and (2) that this dismissal was unfair under s98 of the Employment Rights Act 1996.

133. Dismissal for the purposes of s98 includes the circumstances stated at s95(1)(c). *" …..an employee is dismissed by his employer if…….the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

134. In considering the issue of constructive dismissal, an Employment Tribunal is required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts to a fundamental breach of the contract (**Western Excavating (ECC) Limited v. Sharp [1978] QC 761) ("Western Excavating") .**

135. It is an implied term of every employment contract that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. I refer to this term as "the Implied Term."

136. In considering the Implied Term, Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited* [1981] ICR 666, said that the tribunal must *"look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

137. A breach of the Implied Term is, by itself, a fundamental breach of contract (see for example the EAT's judgment in **Morrow v. Morrison Stores EAT/O275/00** at paragraph 23)

138. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" is not, by itself, a breach of contract: **Lewis v Motorworld Garages Limited [1986] ICR 157 CA**.

139. In the judgment of the Court of Appeal in **Omilaju v Waltham Forest London Borough Council [2005] 1 All ER 75 ("Omilaju")** Dyson LJ stated as follows in relation to the last straw.

"A final straw, not in itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach although what it adds may be relatively insignificant."

140. The Court of Appeal decision in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833**, commented on the last straw doctrine. The judgment included guidance to Employment Tribunals deciding on constructive dismissal claims. At paragraph 55 of the judgment, Underhill LJ states:-

In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in [LB Waltham Forest v. Omilaju [2005] ICR 481] *of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the* [implied term of trust and confidence]*? ……*

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

141. Once a repudiatory breach of contract has been established, it is necessary to consider the part it played in the claimant's decision to resign. The following passage from the judgment of the Court of Appeal in **Nottinghamshire County Council v. Meikle [2004] IRLR 703**, is helpful.

> *It has been held by the EAT in Jones v Sirl and Son (Furnishers) Ltd [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the Western Excavating case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation.*

142. In the event that an Employment Tribunal decides that the termination of a claimant's employment falls within s95(1) the employer must show the reason for dismissal and that the reason for dismissal was a potentially fair one under s98(1) and (2) ERA. In a constructive dismissal claim, the reason for dismissal is the reason why the employer breached the contract of employment (*Berriman v. Delabole Slate Limited [1985] IRLR 305* at para 12).

143. A delay in resigning may indicate that the employee has affirmed the contract, so losing the right to claim constructive dismissal In **Western Excavating** Lord Denning stated that the employee.

'must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'

144. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908, CA**, the Court of Appeal confirmed this although in his judgment Lord Justice Jacob noted the requirement for Tribunals to review the particular facts of a case very carefully before deciding whether the employee has affirmed the contract.

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

145. In the recent case of **Leaney v. Loughborough University [2023] EAT 155**, the EAT held that the correct approach is for a Tribunal to focus on what conduct there was during the relevant period that might or might not have amounted to an express or implied communication of affirmation. The judgment includes the following guidance.

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

Time Limits

146. Section 123 EqA provides that complaints may not be brought after the end of 3 months "starting *with* the *date of the act to which the complaint relates"* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

147. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *"such other period as the employment tribunal thinks just and equitable."*

148. Section 123(3)(a) provides that *"conduct extending over a period is to be treated as done* at *the end of that period."* (We refer to this below as a continuing act).

149. The EqA itself does not set out what Tribunals should take into account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

a. **British Coal v. Keeble EAT 496/96** in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

b. **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT**. This case noted that the issue of the balance of prejudice and the potential merits of the claim were relevant considerations to whether to grant an extension of time.

150. We note the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre [2003] IRLR 434** (particularly paragraph 23-25).

151. As for the exercise of its power under section 123(1) we note the following passage from paragraph 25 of the judgment of Leggat LJ in Abertawe Bro Morgannwg University Local Health Board v. Morgan 2018 EWCA Civ 640

> *the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.*

152. We have considered whether the complaints (or some of them) amount to a continuing act for the purposes of section123 (3)(a).

153. We note that we must distinguish between a succession of unconnected or isolated specific acts and an ongoing situation or continuing state of affairs such as (but these are examples only) an ongoing discriminatory regime, policy, scheme or regime. **Commissioner of Police of the Metropolis v. Hendrix 2002 EWCA Civ 1686** (see particularly paragraphs 51 and 52).

154. We also note the Court of Appeal's judgment in **Lyfar v. Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548**, which Mr. Dhorajiwala referred us to particularly on the point that it is permissible (where the findings of fact indicate) to divide a long list of acts being complained of in to groups of different conduct when considering whether there has been conduct extending over a period of time.

s.15 EqA 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.

155. Subsection 2 above does not apply to this case. The respondent now accepts it knew that the claimant had the disability.

156. In **Secretary of State for Justice and anr v Dunn UKEAT 0234/16** the Employment Appeal Tribunal ("EAT") noted 4 findings to be made, for the claimant to succeed in a section 15 claim:-

a. there must be *unfavourable treatment;*

b. there must be *something* that arises in consequence of the claimant's disability;

c. the unfavourable treatment must be *because of* (i.e. caused by) the something that arises in consequence of the disability; and

d. the alleged discriminator cannot show that the unfavourable treatment is *a* proportionate *means of achieving a legitimate aim*.

157. In **Paisner v.NHS England (UKEAT/0137/15/LA)** the EAT provided guidance to Employment Tribunals when considering these claims which we summarise below.

a. The Tribunal should decide what caused the treatment complained of – or what the reason for that treatment was.

b. There may be more than one cause. The "something" might not be the sole or main cause but it must have a significant impact.

c. Motives are irrelevant.

d. The Tribunal should decide whether the/a cause is "*something arising in consequence of"* the claimant's disability. There could be a range of causal links under the expression *"something arising in consequence of…"*

158. When deciding whether a measure is proportionate in the context of the legitimate aim being pursued (s15(1)(b) EqA above) a tribunal must weigh the real needs of the employer against the discriminatory effect of the proposal. (see **DWP v. Boyers UKEAT/0282/19).**

Section 19 – Indirect discrimination

159. This required the application of a PCP – see below.

Objective justification

160. There is a potential defence to a claim under section 19 – where the employer can show that the application of the PCP was a proportionate means of achieving a legitimate aim.

161. The EHRC Code of Practice on Employment 2011 (Code) notes that the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration (see para 4.28 of the Code).

162. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (para 4.29).

163. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only viable way of achieving the legitimate aim; it is sufficient that the same aim could not have been achieved by less discriminatory means — para 4.31.

164. The following is stated at paragraph 4.30 of the Code.

> *'Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion, or practice as against the employer's reasons for applying it, taking into account all the relevant facts.'*

Duty to Make Reasonable Adjustments

165. The claimant raises claims under s20(3) EqA. This imposes a duty on an employer *"where a provision* criterion *or practice of [the employer] 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."*

166. We note that, for the duty to make reasonable adjustments to apply, a claimant needs to show that s/he has been put to a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled.

PCPs

167. For a provision criterion or practice to be valid PCP, it must be more widely applied (or would be more widely applied).

168. Chapter 4 of the EHRC Code of practice on Employment 2011 at paragraph 4.5 says this in relation to PCPs:-

> *The phrase provision criterion or practice is not defined by the Act but it should be construed widely so as to include for example any formal or informal policies rules practices arrangements criteria conditions prerequisites qualifications or provisions. A provision criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a one off or discretionary decision."*

169. Whilst PCPs should be construed widely, there are limits. The word "practice" indicates some degree of repetition and where a PCP was identified from what happened on a single occasion, there must be some evidence of a more general practice. Paragraph 59 of the judgment in **Gan Menachem Hendon Limited v Ms Zelda De Groen UKEAT/0059/18:-**

> *So, while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred.*

170. We must decide whether a PCP placed the claimant at a particular (s19) or substantial (s20) disadvantage. We note the terms of section 212 EQA, that *"substantial means more than minor or trivial."*

171. Where we decide that a PCP puts the claimant at a disadvantage then we need to consider the issue of reasonable adjustments. There is no duty to take measures that would impose a disproportionate burden on the employer.

Burden of Proof

172. We are required to apply the burden of proof provisions under section 136 EqA when considering complaints raised under the EqA.

Section 136 states:

> *This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has 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."*

173. We have also considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. The annex to the judgment sets out guidance. (the amended Barton guidance)

174. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassey v. Nomura International [2007] ICR 867,** where the following was noted in the judgment:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

F. Discussions and conclusions

175. We set out below our decisions on the various issues identified.

Time Limits

176. Whilst accepting that the primary time limit in section 123 Equality Act 2010 provides a "cut-off date" of August 2021, we have decided that it is just and equitable to consider claims dating back to November 2020 but not before. These are our reasons:-

a. We have heard evidence from MK about the respondent's treatment/management of the claimant from the date that he became her manager. We are satisfied that the evidence from both parties is sufficiently reliable from that date in order for us to be able to reach fair decisions. The respondent is not in any way prejudiced by our decision to allow complaints from this much earlier date, other than having to provide responses to the complaints themselves (which, by the time of the hearing, it had already prepared).

b. The evidence in the period up to end October 2020 is not reliable. At all relevant times up to then the claimant was managed by a different manager(Susan Young) who is not longer employed by the respondent, having left in October 2020. The respondent would be prejudiced by its inability to provide a witness for this period.
c. The claimant's evidence for the period pre-dating November 2020 is not reliable. Her evidence was that MK managed her from March 2020. We are satisfied that he did not. He only took over management responsibilities from November 2020 and had been furloughed in the period before then. The claimant's poor recollection also accounts for her inability to give reliable evidence about her work during the first (and strict lock down) when she appeared to spend most days working alone. We set out such findings about this period as we were able from the information provided (see para 44 particularly)

177. We have considered whether the respondent's actions as alleged, amount to conduct extending over a period of time for the purposes of section 123 Equality Act 2010. Mr Dhorajiwala's submission (relying on **Lyfar**) is that we should draw a distinction between the period when MK managed the claimant from the earlier period. We are persuaded by this – although the practical effect is the same as the just and equitable extension that we have decided to apply.

178. This is a case where there might have been a conduct extending over a period when the claimant was managed by 2 managers, particularly having regard to the finding we have made, that MK was made aware when he started to manage the claimant, of her impairment and her difficulty in lone working. However, as noted above the unreliability of the evidence pre-dating November 2020 is such that we cannot make a finding that the conduct about which we are critical (see below) that occurred during the time that MK managed the claimant, extended further back.

.

2. <u>Unfair Dismissal</u>

2.1 Can the claimant prove that there was a dismissal?

2.1.1 Did the respondent do the following things:

2.1.1.1 Require the claimant to work on her own on a number of occasions despite being told that she was unable to do so and that it made her unwell and exacerbated symptoms of her disability.

179. Yes. The respondent was told in October 2019 that the claimant had fibromyalgia and had difficulties with lone working. Even so the respondent required the claimant to work alone on a number of occasions in 2021.

2.1.1.2 Require the claimant to work without an assistant meaning she was unable to take any breaks.

180. Yes, on those occasions she was required to work alone.

2.1.1.3 Remove the chairs she required around the work area to alleviate the pain and discomfort she experienced due to her knee injury.

181. Yes. The respondent did this October 2021 during the claimant's extended sickness absence. The claimant relaced the chairs immediately on her own which meant that she did not at any relevant period work in the kitchen without the chairs.

2.1.1.4 Not provide appropriate support to Sasha Ingleson when the claimant was on sick leave following an operation resulting in Sasha Ingleson contacting the claimant on numerous occasions.

182. The claimant did not pursue this as a factor contributing to her decision to resign.

2.1.1.5 Fail to respond to the grievance within the guidance time period on 8th November 2021.

183. The respondent responded a little later than the non-contractual timescales noted in its grievance policy.

2.1.1.6 Continue to contact the claimant after her grievance meeting despite the claimant indicating she did not wish to speak.

184. As we have made clear in our findings of fact, we have no criticism of the respondent's actions in relation to the grievance. SC did contact the claimant after the grievance meeting had abruptly ended. She did so because of genuine concern for the claimant's welfare.

2.1.2 Did that breach the claimant's employment contract which, she says, stated that she would only be asked to do work within her capabilities?

185. As made clear earlier in this decision, we discussed the constructive dismissal case and that it appeared to be an allegation that there was a breach of the Implied Term. We have made a decision on that basis.

186. In addition and specifically on the issue of the express term – the claimant was not at any stage given work that was not within her capabilities. She was being asked to do too much work, in that the lone working was difficult for her. But all of the work she was being asked to do was within her capabilities.

187. We have considered under 2.1.3 below whether the alleged failures taken as a whole, amount to a breach of the Implied Term. A breach of the Implied Term is of itself, a fundamental breach.

2.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

188. We have applied our findings of fact to the decision-making guidance set out by the Court of appeal in **Kaur**. Our conclusions under each stage are as follows:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

189. This was the act of continuing to contact the claimant after the grievance hearing. Having heard the claimant's evidence we include here not just SC's calls immediately following the grievance but also the contact by EL on 6 December 2021.

(2) Has he or she affirmed the contract since that act?

190. The claimant continued to attend work between 6 December and 16 December 2021. The claimant cannot be said to have been allowing the respondent an opportunity to put things right through its grievance process, the claimant having by then decided to effectively abandon the grievance.

191. SI was absent throughout this period and the claimant was provided with a support worker for every day of that 2-week absence. It was (or must have been) apparent to the claimant that her decision to raise her concerns with senior managers (including the respondent's regional managing director) had the desired effect. The employer made the adjustments required, particularly arranging cover to ensure that the claimant did not work alone.

192. The claimant (1) should have recognised that the adjustments were being made and (2) the respondent had acted reasonably in trying to address the grievance and out of concern for the claimant's welfare (3) continued in her employment for some time after the 6 December. Even so, we conclude that she had not affirmed the contract. The grievance process ended in unhappy circumstances. As already noted, we do not attach any responsibility on the respondent for this; we do attach responsibility to the claimant. However the decision not to continue with the grievance process in this case did not amount to an act which affirmed the contract. We also note that by 2 January the claimant had commenced an ACAS early conciliation process and by 12 January she issued her Tribunal claim alleging constructive dismissal.

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

193. It was not. As we make clear in our finding of fact, we have no criticism of the respondent's continuing contact with the claimant after the grievance hearing had been abruptly ended.

(4) If not, was it nevertheless a part (applying the approach explained in [. Omilaju] *of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the* [Implied Term]*? ……*

194. It was not. The respondent's actions during the (abandoned) grievance process should have helped repair what had by the stage of the grievance become a strained relationship.

195. Sometimes (as here) employment relationships are strained. Sometimes (as here) employers fail to act as they should. The claimant raised a grievance and was afforded an opportunity to have her grievance addressed. The claimant's criticisms of the respondent's actions in trying to address the claimant's grievance are

unfounded. She cannot rely on these actions as a last straw; as being a part of a course of conduct that, when viewed cumulatively, amounts to a breach of the Implied Term.

(5) Did the employee resign in response (or partly in response) to that breach?

196. The claimant resigned for a combination of reasons as noted in the resignation letter and this claim. We are critical of the respondent's failure to arrange cover for the claimant (see our conclusions below). However, the main cause of her resignation was her mistaken view that the grievance had been badly handled. Had she not formed this mistaken view; had she not taken the step of abandoning the grievance procedure then, from the evidence we have heard, we find there was a strong likelihood that the required adjustments would have been met going forwards (as they had been met in December 2021).

2.1.4 Was the fundamental breach of contract a reason for the claimant's resignation?

197. See above.

2.1.5 Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

198. See above.

3. Remedy for Unfair dismissal

199. Whilst we do not need to consider the issues under this heading, we note that had we made a finding of constructive dismissal we would have decided that the claimant, by her actions in the grievance process, contributed considerable to that unfair dismissal and would have made a large percentage deduction to any award.

4. Disability

200. We do not need to make findings under this heading.

Discrimination arising from disability (Equality Act 2010 section 15)

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

5.1.1 The claimant says the respondent knew of her fibromyalgia from 21st October 2019 when she submitted a sick note with her diagnosis.
5.1.2 The respondent will take further instructions but at present accepts that they knew of the claimants' diagnosis of fibromyalgia from 1st October 2020.
5.1.3 The claimant says the respondent knew about her knee injury from 28th August 2021.

201. The respondent accepted during this hearing that it knew of the claimant's diagnosis of fibromyalgia from October 2019.

5.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

5.2.1 Require the claimant to work without support on the following occasions:

5.2.1.1. 7 weeks from 16/09/2019
5.2.1.2 47 hours in April 2020
5.2.1.3 21 hours in May 2020
5.2.1.4 42.5 hours in June 2020
5.2.1.5 40 hours in August 2020
5.2.1.6 18th March 2021
5.2.1.7 18th, 19th, and 20th August 2021 (it was noted that these dates are wrong. The relevant dates are November 2021)
5.2.1.8 Claimant to confirm if any further periods claimed

202. We have made findings in relation to 5.2.1.6 and 5.2.1.7. The claimant was required to work without support on these dates and that was unfavourable treatment. However the claimant was not required to work on these dates because of any of the things listed in issue 5.3 (see below). The claimant was required to work alone on those dates because SI was on leave and no cover had been arranged.

5.2.2 Required to work on 23/09/2019 by Susan Young despite being signed off work by the doctor for a period of work.

203. This complaint is out of time.

5.2.3 Lost 4 weeks' pay following a further sicknote in October 2019

204. This complaint is out of time.

5.2.4 Heated conversation with Mark Kinder on 8th November 2021 who didn't accept that the claimant's fibromyalgia was known to the respondent. This resulted in the claimant feeling she had been 'threatened' with occupational health.

205. MK did say that the respondent wanted to refer the claimant to an occupational health appointment. He did not say that he did not accept the claimant's fibromyalgia was known to the respondent (and the claimant did not give evidence that he made this statement). Rather that was the claimant's understanding from the reference to an occupational health appointment. Whilst the claimant construed it as such, MK's reference to occupational health did not amount to unfavourable treatment (see our findings of fact at para 68).

5.2.5 Remove the support cover the claimant had organized to cover her assistants annual leave – on 17th November 2021 by Gill Heath.

206. That happened and it amounted unfavourable treatment. However it did not happen because of any of the things listed at 5.3 below. The cover that had been arranged at the last minute, was removed on that day because of an urgent need for a cook at a care home.

5.2.6 Remove the chairs the claimant had within her work area to sit down an alleviate the pain caused by her disability.

207. The chairs were removed during the claimant's sickness absence but not because of any of the things listed at 5.3 below. They were removed because a decision was taken, arbitrarily, that they posed a health and safety risk.

> *5.2.7 Refuse to allow the claimant to have the chairs within the work area without referral to occupational health – said within a grievance meeting on 3rd December 2021 by Sharon Crehan.*

208. That did not happen. SC wanted the claimant to attend an occupational health appointment to aid an understanding of the claimant's needs. However it was not put as an ultimatum.

> *5.3 Did the following things arise in consequence of the claimant's disability:*
>
> *5.3.1 The claimant was unable to work without an assistant due to the symptoms of her disability. Working on her own increased her symptoms and the pain she suffered.*
>
> *5.3.2 The claimant required chairs within the kitchen work area to alleviate her symptoms.*
>
> *5.3.3 The claimant was on sick leave from 16th December 2021 until she handed in her notice, the period of which ended on 18th February 2022.*

209. See our responses above. We also note here that we discussed our concern with the parties (particularly the claimant) about framing the claimant's complaints as section 15 claims.

> *5.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?*
>
> *5.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?*
>
> *5.6 If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:*
>
> *5.6.1 Sustaining its business through the impact of the pandemic.*
>
> *5.6.2 Complying with Health and Safety Regulations*
>
> *5.7 The Tribunal will decide in particular:*
>
> *5.7.1 was the treatment an appropriate and reasonably necessary. way to achieve those aims.*
>
> *5.7.2 could something less discriminatory have been done instead?*
>
> *5.7.3 how should the needs of the claimant and the respondent be balanced?*

210. We do not need to make findings in relation to issues 5.4 to 5.7 above.

<u>Indirect discrimination</u>

6.1 A "PCP" is a provision, criterion, or practice. Did the respondent have the following PCP(s):

6.1.1 Requiring staff members to work without an assistant when annual leave or sickness cover could not be provided. (PCP1)

6.1.2 Refusing to allow additional chairs within the kitchen working area for members of staff to sit down. (PCP2)

NOTE: The claimant accepts that at no time did she work without the chairs in place, her assertion is that these chairs were removed, and she was told they were a Health and Safety hazard. Mark Kinder stated that he would speak to her about it at a later date, but this did not happen. The claimant was forced to put the chairs back against management orders as no other adjustments were put in place.

211. We refer to the submissions section above and our decision to widen the first PCP. We have referred to the PCPs as follows:

PCP 1 – requiring staff members to work without an assistant when annual leave or sickness cover could not be provided.

PCP 1A. requiring staff members to work without an assistant when annual leave cover was not provided.

PCP 1B. sometimes requiring staff members to work without an assistant.

PCP 2. Refusing to allow additional chairs within the kitchen working area for members of staff to sit down.

6.2 Did the respondent apply any of those the PCPs to the claimant?

6.3 Did the respondent apply any such PCP to persons with whom the claimant does not share the characteristic or would it have done so?

212. The respondent accepts that PCP 1 was applied both generally and to the claimant although it disputes that it put employees with the claimant's disability at a particular disadvantage and also disputes that the claimant was disadvantaged. As noted however, the terms of PCP 1 are uncontroversial. We are sure that there were times within the respondent organisation when significant attempts to find cover were made and the respondent could not (or was unable to) provide it. On those occasions staff members (chefs) may work without an assistant as the only alternative may be closing the relevant kitchen altogether.

213. As for PCP 1A and 1B, we have no difficulty in finding that both were applied by the respondent to the claimant and to its wider workforce. Sometimes staff members (chefs) were required to work without an assistant. We know that happened to the claimant. We also know from evidence that sometimes happened to SI, when the claimant was absent (see para 36 above). The respondent's evidence is that

cover was sometimes difficult to arrange particularly due to a shortage of relevant agency workers. We are satisfied that the PCP was applied.

214. As for PCP 2, this may have been a PCP of general application in the respondent's kitchens. But it was not applied at any time the claimant was in the workplace. The rest of our paragraphs under issue 6 (indirect discrimination) therefore only relate to the lone working issue.

> *6.4 Did the PCP put a person diagnosed with fibromyalgia ~~or a torn cartilage~~ at a particular disadvantage when compared with someone not diagnosed with those conditions? The claimant says that disadvantage was that she was unable to cope with the demands of her job and being required to work under the conditions she was caused her significant pain and distress.*

215. Mr Dhorajiwala made submissions that the application of the PCPs did not put those with the claimant's disability at a disadvantage. It is not in dispute that the claimant has fibromyalgia. She described her symptoms in her impact statement. We note that she suffered from increased pain; increased fatigue and a need to go to bed when arriving home from work; that she could not stand for prolonged periods of time due to pain in her legs and back as well as pain in arms, wrists and hands.

216. This evidence was not challenged. We are satisfied that the symptoms described by the claimant are typical symptoms or someone suffering from fibromyalgia. We take judicial notice of the symptoms listed on the NHS website, the first 2 of which are: (1) increased sensitivity to pain and (2) muscle stiffness. We are satisfied that a person suffering from fibromyalgia would be put at a disadvantage by being less able to cope with the more physical and relentless work of working without an assistant than of working with an assistant.

> *6.5 Did the PCP put the claimant at that disadvantage?*

217. In his submissions, Mr Dhorajiwala noted that the claimant worked alone on significant number of days in the period March to July 2020 without complaint. We have made findings about this period. We have referred to this as a "unique" period when the workload will have been reduced substantially during this period.

218. This did not apply to the period that pre-dated and post-dated the strict lockdown period of 2020.

219. In October 2019 the respondent was told about the claimant's difficulty with lone working. Likewise in October 2020. Given the respondent's awareness, the claimant should not have to complain on each and every occasion the respondent puts her in difficulty.

220. When working alone, the claimant was required to be on her feet undertaking physical work for a full (or practically full) working 8-hour shift. She was unable to sit down/rest. Whilst this would disadvantage any employee it was a particular disadvantage to the claimant – she needed greater frequency to manage her condition and the need for her was not just because she was tired and would benefit from a rest – even a short rest - to help manage and reduce pain.

221. The claimants physical condition on her return from surgery was worsened because of the surgery and her need to recover. However we are satisfied that the fibromyalgia remained as a constant and underlying issue.

222. We find that the claimant was disadvantaged by the application of this PCP. Lone working was difficult for the claimant because of her fibromyalgia. We accept her evidence. It was not always impossible for her (sometimes it was – particularly in October 2019 when the claimant was absent due to sickness for 4 weeks) but a claimant does not have to prove that compliance with a PCP is impossible in order to show disadvantage.

> *6.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:*
>
> *6.6.1 Sustaining its business through the impact of the pandemic – the respondent's business suffered due to staff shortages, economic loss, and the disruption of services.*
>
> *6.6.2 Complying with Health and Safety Regulations*

223. Regarding 6.6.1. We accept that sustaining business during a period of staff shortages is a legitimate aim, whether during a pandemic or otherwise.

> 6.7 *The Tribunal will decide in particular:*
>
> *6.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims?*
>
> *6.7.2 could something less discriminatory have been done instead?*
>
> *6.7.3 how should the needs of the claimant and the respondent be balanced?*

224. PCP 1; requiring lone working was the only way that the legitimate aim could be met. If it was impossible to find anyone to assist a staff member then the only options were to close the kitchen (which would defeat the legitimate aim) or require a staff member (but not necessarily a disabled staff member) to work alone.

225. PCP1A and B. The application of these PCPs would only be a proportionate means of achieving a legitimate aim if all reasonable steps had been taken to identify a worker to cover for an absent colleague.

226. In his submissions Mr Dhorajiwala noted that during the post October 2020 period the respondent frequently arranged internal or agency cover where possible. We disagree:-

a. Cover was not arranged for any absence between November 2020 and November 2021. This resulted in frustration and uncertainty for the claimant, in addition to the physical disadvantages the claimant suffered from lone working.

b. There is no evidence of attempts to arrange cover either. Evidence such as correspondence with employment agencies would have been straightforward to provide. (a point noted by Ms Rowarth-Price in her own closing submissions).
c. Cover would not have been arranged for the period of absence commencing 15 November 2021 had the claimant not taken steps herself – on 12 November 2021 (one working day before).
d. When cover was arranged well in advance of an absence (the only example of this being to cover SI's absence in December 2021) there were no issues.

227. Our conclusion is that the respondent did not take all reasonable steps and therefore has not shown that it applied proportionate means of achieving the legitimate aim of sustaining business during a period of staff shortages.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

> 7.1 *Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?*
>
> > *7.1.1 The claimant says the respondent knew of her fibromyalgia from 21st October 2019 when she submitted a sick note with her diagnosis.*
> >
> > *7.1.2 The respondent will take further instructions but at present accepts that they knew of the claimants' diagnosis of fibromyalgia from 1st October 2020.*

228. It is not now disputed that the respondent knew about this in October 2019.

> > *7.1.3 The claimant says the respondent knew about her knee injury from 28th August 2021.*

229. This is irrelevant to the claimant's disability discrimination complaint.

> *7.2 A "PCP" is a provision, criterion, or practice. Did the respondent have the following PCPs:*
>
> > *7.2.1 Requiring staff members to work without an assistant when annual leave or sickness cover could not be provided. (PCP1)*
> >
> > *7.2.2 Refusing to allow additional chairs within the kitchen working area for members of staff to sit down. (PCP2)*
> >
> > > *NOTE: The claimant accepts that at no time did she work without the chairs in place, her assertion is that these chairs were removed and she was told they were a Health and Safety hazard. Mark Kinder stated that he would speak to her about it at a later date but this did not happen. The claimant was forced to put the chairs back against management orders as no other adjustments were put in place.*

230. We refer to our conclusions above (under indirect discrimination) regarding the PCPs. Our conclusions below relate only to PCPs IA and 1B.

7.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the additional workload and inability to take breaks or sit down exacerbated the symptoms of her disability and caused her significant pain and distress – to the point that she felt suicidal.

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

231. See our conclusions above under indirect discrimination.

7.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

7.5.1 To provide her with an assistant at all times.

7.5.2 To allow for chairs within her working area.

7.6 By what date should the respondent reasonably have taken those steps?

232. The respondent should have applied a reasonable adjustment of taking all reasonable steps to arrange cover when the claimant's work colleague and KA was absent. That is what the claimant had been asking for, for a considerable period of time. They made this adjustment from December 2021 but not before.

233. We have considered the adjustments made in November 2021 – A H covering for SI over the weeks commencing 15 November 2021. This last-minute cover did not meet the reasonable adjustment of taking all reasonable steps to arrange cover. Given the risk that A H chef might be called away (recognised by MK in his email of 12 November 2021 – para 75 above) dedicated cover should have been organised. The respondent itself demonstrated the practicability of this when it took the step in December. Had the respondent properly planned for Sis absence – as it should have done – the claimant would not have been left to work alone for a number of days in November.

234. Had the respondent complained with its duty to make reasonable adjustments, the claimant would not have been left to work alone for 2 days in January 2021 and 6 days in March and April 2021.

Employment Judge Leach

Date: 25 March 2024

JUDGMENT SENT TO THE PARTIES ON

26 March 2024

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE