EMPLOYMENT TRIBUNALS

Claimant: **Mrs JE McKeown**

Respondent: **Wirral University Teaching Hospital NHS Foundation Trust**

Heard at: **Liverpool** **On: 23-26 October 2017**

Before: **Employment Judge Maidment**
Members: **Mrs JL Pennie**
Miss JM Stewart

Representation
Claimant: **Ms R Levene, Counsel**
Respondent: **Mr A Gibson, Solicitor**

JUDGMENT having been sent to the parties, but written reasons having been requested by the Claimant at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues

1. The Claimant's complaints in these proceedings are all of disability discrimination related to her suffering from chronic lower back pain. There is no dispute that the Claimant was at all material times a disabled person within the meaning of Section 6 of the Equality Act 2010. She remains in the Respondent's employment.

2. The Claimant alleges a failure to comply with the duty to make reasonable adjustments pursuant to Section 20 of the Act. The PCP relied upon is the requirement to work at x-ray department reception where it is said a reasonable adjustment would have been to transfer her to work as a receptionist at the fracture x-ray on a substantive basis or, alternatively, for a trial period.

3. In addition, the Claimant alleges that the failure to allow her transfer from 15 June 2016 to the fracture x-ray was an act of direct discrimination because of her disability. This claim is pursued alternatively as discrimination arising from disability if the Tribunal finds that the

Respondent's reason for refusing her transfer request was its perception of risk to the Claimant of her working at the fracture x-ray reception.

The evidence

4. The Tribunal having clarified the issues with the parties spent some time privately reading into the witness statements exchanged between the parties and the documentation referred to in an agreed bundle of documents. When each witness came to give evidence she/he was able to confirm the contents of her/his statement and then, subject to brief supplementary questions, be open to be cross examined on it.

5. Due to availability issues the Tribunal heard firstly from Mr Shaun Brown, a Divisional Director, before hearing the Claimant's evidence. The Claimant also relied on a written statement of a former colleague, Pat Moonan, to which the Respondent did not object on the basis that the Tribunal could attach only limited weight to it given that the witness was no present to be cross-examined. The Tribunal then heard on behalf of the Respondent from Mrs Christine Gore, Radiology Office Manager and Nicola McAllister, Patient Services Manager.

6. Having considered all relevant evidence the Tribunal makes the findings of fact as follows.

7. The Claimant commenced her employment with the Respondent on 23 April 1997 and works on the main reception of its x-ray department. Since 2013 she has suffered from chronic lower back pain and has been diagnosed as suffering from disc problems. On 10 November 2010, Mr David Hatch of the Respondent's health and safety team had identified issues with the ergonomic set up of the Claimant's desk, noting that she frequently had to turn her neck to monitor attendance at the reception window and suggesting the relocation of her desk to a position directly facing the window.

8. In August 2012 the Claimant was referred to occupational health regarding work-related stress which arose from the Claimant working in the back office handling telephone appointments and queries and in circumstances where there had been a reduction in staffing and the need for the Claimant to train people up as well as to perform her own daily work.

9. The Claimant was further referred to occupational health in May 2014 in respect of her back pain. By this time the Claimant was working as the receptionist for the main x-ray department. She was working three full days each week. The report of 2 May said that she was likely to qualify as a disabled person. It noted that she needed to change her posture regularly *"however, her pain is aggravated by repetitive frequent twisting movements and by frequent repositioning from sitting to standing."* The Claimant was recorded as stating that she was required to frequently adopt/change her posture. She further noted a separate condition affecting her throat saying that she found it difficult on some days to cope with the

frequency with which she was on the telephone. It was recommended that the Respondent arrange an assessment of her seating to ensure she had a suitable chair. Finally, it was said that the Claimant had identified an area which she felt would be more conducive in terms of managing her condition. This was a reference to the Claimant possibly transferring to work out the Respondent's smaller dedicated reception area for orthopaedic x-rays, known as the fracture or fracture clinic reception.

10. The Claimant's line manager, Christine Gore, Radiology Office Manager, wrote to the Claimant on 20 May having received the occupational health report. She noted that the Claimant had requested a trial in the fracture clinic reception. She stated that she had concerns that this was a busy reception area managed by one receptionist at a time *"therefore you would be required to get up and down continuously throughout the day to take referrals to the clinical area. This would be a different level of support that you currently experience in x-ray reception."* Mrs Gore therefore suggested 2 alternative reasonable adjustments for the Claimant to consider. The first was her moving to the booking office again where it was said that she would be more in control of her positioning and not required to frequently get up and down to respond to patient needs. The second was for the Claimant's desk position to be changed to the front of the reception desk with the work trays, from which standard forms were required to be collected moved also to that area. That would mean she would not be needed to get up and down as regularly other than to collect referrals from the printer. Such alternatives had already been discussed with the Claimant such that Mrs Gore recorded that the Claimant had rejected the option of working again in the booking office as she felt it would be too stressful. She was asked to confirm whether she wished to continue in the x-ray reception after the temporary trial of the new seating area which it was said *"will alleviate the repetitive frequent twisting movements, and frequent repositioning from sitting to standing*."

11. Mr Hatch visited the x-ray area where the Claimant worked to observe and assess the Claimant's working area. The Claimant's evidence was that Mr Hatch did not speak to her. The Tribunal accepts her evidence that Mr Hatch certainly did not have any form of discussion with her regarding her difficulties at work and any needs she might have. It is noted that in Mr Hatch's report he referred to some of the processes requiring the Claimant to get up and move around the department and that she did not find those difficult. That might have been his impression but it was not based upon any direct confirmation from the Claimant who indeed would not have said that she found no difficulty in having to get up and down unless she was in full control of any requirement to move. That is not what she had recently told occupational health and their report of 2 May is more likely to be an accurate appraisal of the Claimant's difficulties. Mr Hatch recommended the provision of an office chair and proper footrest.

12. The Claimant's "trial" in the x-ray department with the new arrangements was extended to 14 July.

13. The Claimant emailed Mrs Gore on 23 July stating that the new setup had not made any difference to the amount of times she had to get up and down throughout the day. She repeated her request for a trial working in the fracture clinic reception.

14. The Claimant was again referred to occupational health on 31 July 2014. They reported that the Claimant had been moved so that she no longer sat facing sideways having to twist to see patients arriving at reception. The report recorded that the Claimant was supported by another clerical officer along with up to 3 clinical support workers. Referring to the Claimant's desire to move to the fracture clinic. Mrs Gore said that she had disregarded this suggestion as there was no support, there could be a large number of patients attending the fracture x-ray and she would have to enter the x-ray request for each patient on the system and then take the relevant form through to the clinical area *"therefore up and down a lot more than currently on x-ray reception."*

15. The Claimant raised with Mr Hatch on 12 August that she was not convinced regarding the new setup and was finding that staff had to walk behind her to access the paperwork and that she didn't have enough space to work at. Mrs Gore's own line manager, Carol Wood, Clinical Governance Lead, replied to say that the trays could be easily moved back to the main reception area and indeed alternative arrangements were made.

16. Occupational health reported again on 20 August 2014 saying that the Claimant felt that her condition might be aggravated by the workload and physical activity in the main reception and that she felt she would be able to cope with the workload in the fracture reception which according to her was less. It was recorded that the Claimant also said that there was less physical activity involved including with her not having to answer telephone calls. She felt she would be able to cope with this despite lack of support and referred to previous occasions when an employee with a disability was able to perform her duties on the fracture clinic reception.

17. The evidence is that the Claimant had to cover for the other clerical officer who sat at a desk behind her answering incoming telephone calls when that individual was on her breaks including lunchtime. The Claimant had no phone on her main reception desk. When covering for her colleague this involved her having to get up and walk over to that colleague's desk to answer the telephone.

18. As the Claimant was aware, the desk set up at the fracture reception was similar to that which had existed at the main x-ray reception prior to the recent relocation of the Claimant's desk facing directly towards any persons attending the reception desk. Indeed, at the fracture reception, the receptionist sat in and facing a corner area where her PC was positioned such that it was necessary to turn around and face to the left to see any patient attending the reception area. Given the occupational health reports, it is unlikely that she ever explained this to be the case and

indeed the Claimant's desire to be relocated to the fracture reception was regardless of her having to twist and turn in order to see patients, one of the hazards recently identified and indeed rectified for her in the main x-ray reception area.

19. A further occupational health report was produced dated 15 October where the occupational health physician stated that, whilst appreciating Mrs Gore's concerns, the Claimant felt she would be able to manage the workload in the fracture clinic within the constraints of a back problem saying that she had worked there before and had the motivation to cope with the physical demands with minimal clerical support. The physician commented that he thought the Claimant *"deserves"* a trial in the fracture reception.

20. On 20 November Mrs Gore emailed Mr Hatch saying that the x-ray reception area had been modified but that the Claimant was requesting a trial in the fracture clinic which she felt was unsuitable as it was not paperless and could have significant volume of patients attending repeating again that the receptionist was constantly up and down taking the referrals into the clinical area. She said it was felt that Mr Hatch's input was required. Mr Hatch responded commenting that it was evident that the very real risk of the Claimant working in fracture clinic had been carefully thought through and offering to meet.

21. Mrs Gore emailed the Claimant's union representative on 10 December commenting amongst other things that Mrs Woods own line manager, Pam Black, had made the decision for a risk assessment to be carried out. Mrs Gore responded flagging up the need to fix a date for the risk assessment, noting that there was no record of steps being taken to provide the Claimant with the required chair and finally that she was no longer dealing with the matter but that effectively she had handed it over to Mrs Wood to oversee. No risk assessment ever took place and Mrs Gore was unable to explain why this step had not been completed. It appears that Mr Hatch's position was that this was a matter for the Claimant's managers to complete.

22. Mr Hatch did review the working area of the fracture x-ray reception and reported back to Mrs Wood on 14 January 2015. He noted that the area was staffed by a single receptionist but that use was made of another work terminal by other staff from time to time. A clinical support worker worked in the fracture x-ray whose primary role was to assist with patients but who also from time to time worked within the reception area. He commented on the layout of the desk saying that users were restricted to sitting in the angled corner and had to push back before turning their chair when greeting any person at the reception window. He stated that: *"if an employee has an existing musculoskeletal problem this repeated action could aggravate it."* He went on to say that he understood that the fracture clinic was a busy area and had not yet gone paperless.

23. Mr Hatch forwarded this report to the Claimant commenting that he had identified workstation issues that would affect any user particularly someone with an already identified musculoskeletal issue. He felt that moving her to the fracture clinic would be inadvisable. The Claimant responded referring to a report completed by Access to Work in September 2014 for another member of staff who had previously worked there. This related to a Mrs Moonan who had had an operation on her ankle. She worked at the fracture x-ray reception but was absent due to sickness and, as it turns out, did not indeed return to work. A shallow worktop was recommended to be removed to avoid Mrs Moonan knocking her ankle. It was also noted however that the position of the desk was not ergonomically correct with the need to twist in order to see patients at the window. Mr Hatch responded to the Claimant saying that there were improvements needed to the fracture x-ray reception whoever worked there.

24. Mrs Wood emailed the Claimant on 17 February saying that there was no vacant position in the fracture clinic and therefore she could not be moved. She also rejected that it would be less demanding there as the Claimant would have to work alone with no clerical support. The Tribunal notes that the fracture x-ray reception was an area into which the Respondent rotated a variety of staff including in-house bank staff and, more latterly, agency bank staff, not least because the nature of the role that was of quite a repetitive and straightforward nature requiring less staff training. Had a decision been taken that the Claimant could work in this area, the Respondent could have easily accommodated her working hours within it.

25. Mr Hatch emailed the Claimant's union representative on 12 March referring to the poor set up of the workstation there and saying that, regardless of any move for the Claimant going ahead or not, the fracture clinic reception would need altering for whoever was working there.

26. The Claimant lodged a grievance on 4 August. In this she said that Mrs Gore had deliberately and consistently prevented a trial period in the fracture clinic. She referred to the reason given is being the unsuitable workstation position there but noted that alterations to this had been assessed through Access to Work for Mrs Moonan, but had never been actioned. She felt that Mrs Gore had some personal issue with her.

27. This stage 1 grievance was dealt with by Mrs Nici McAllister, Patient Services Manager, who wrote to arrange a grievance meeting stating the issues to be discussed as being workstation access/suitability and trial period in the fracture clinic. The meeting ultimately took place on 13 October, with the Claimant accompanied by a union representative. At this meeting the Claimant commented that she had worked in fracture clinic before and the work load was lighter. She confirmed that she still hadn't received her adapted chair. When comparing working on the main reception to the fracture clinic she commented that on the main reception she was *"frequently up and down, taking phone calls, queries from clinicians, volume of patients/more demanding."* As regards the fracture

clinic, she said there were not as many patients and the flow was more controlled.

28. After the meeting Mrs McAllister corresponded with Mr Hatch who confirmed the previous steps he had taken. A grievance outcome decision was issued dated 26 October. This rejected the Claimant's contention that Mrs Gore's treatment of her had been personal. As regards the refusal of a trial period despite occupational health advice, Mrs McAllister noted that occupational health had not visited the location. It was noted that the Claimant had had adaptations to her desk and a foot rest supplied but not the recommended chair - it was confirmed that this would now be provided. There was no engagement with any issues around workload and the Claimant's difficulties in having to get up and down.

29. The Claimant appealed this grievance outcome by letter of 16 November. This was to be heard by Mr Shaun Brown, Divisional Director Diagnostics and Clinical Support. In response to a request for an outline of her issues, the Claimant advised that she had not received a suitable chair and that occupational health recommendations had been rejected by Mrs Gore on all three occasions they provided reports on her behalf.

30. Mr Brown met with the Claimant and her union representative on 11 February 2016. When asked about the differences in work areas the Claimant again stated that there weren't as many patients in the fracture x-ray area and she also thought that she was getting up to answer the phones more in the main x-ray reception. Mr Brown spoke to Mr Hatch on 29 February 2015 to understand his assessments. Mr Brown provided his outcome by letter of 31 March. This upheld the Claimant's grievance regarding the delay in supplying the specialist chair. On investigation, he had discovered that whilst an order had been placed this had been cancelled unilaterally by someone within procurement but he had now ensured that the order would be actioned and it was anticipated that the Claimant would have her chair by 14 April 2016. He, however, could not support the Claimant's request for a transfer as he believed it could be detrimental to her well-being and there were no vacant posts. He said that it was evident that a move to fracture clinic would not mitigate any symptoms the Claimant experienced and that significant attempts had been made to ensure that the Claimant's original work area was safe.

31. The Claimant elevated her grievance to the final stage 3 by email of 27 April. The Claimant was invited to and attended a hearing on 13 June 2016 before Mr Michael Coupe, Director of Strategy. Mr Brown attended and presented a management case in support of his stage 2 decision which was accompanied by a further consolidated report of Mr Hatch regarding his assessment of the workplace areas. The Claimant submitted her own statement of case. She noted that a chair had been provided on 18 April. As regards a trial within the fracture clinic, she said that she could guarantee that the difference in physical activity and demands would be considerably less.

32. The Claimant also produced a graph showing the number of patients/phone calls/queries received in the main x-ray and fracture clinic on particular dates when she was working in the main x-ray department. The Claimant recorded on each day she was working the number of patients she had seen, the phone calls taken by her and the queries dealt with but did not provide a differential breakdown between those various activities. The fracture clinic figures she produced were records of the number of patients seen in the fracture clinic on those particular days. The Respondent said that it could not say whether the figures produced were accurate or not but certainly there was not, during internal process and before the Tribunal, any alternative information produced directly on point. The Respondent has since produced some figures showing the number of patients who attended fracture clinic on particular days, who could potentially have been sent thereafter for an x-ray. These figures showed a fluctuation in numbers of patients from day to day but the Respondent recognised that not every patient seen in the fracture clinic would have been referred for an x-ray and could not contradict the Claimant's assertion that in actuality only around 1/3 of those seen in the fracture clinic on any particular day would be sent for immediate x-ray.

33. The Claimant's figures illustrate a fluctuation in the number of patients x-rayed within the fracture clinic area, with a high point of 79 patients seen on one particular day. The Tribunal can and does accept that more patients would be seen at the main x-ray department than at the fracture x-ray reception. The Tribunal notes, however, that each of the patients attending the fracture clinic would have to have their details inputted onto the computer and the receptionist would then have to get up from the reception desk and take a printed form to the radiographer. As regards the main x-ray clinic, the system was, in contrast to the fracture clinic, paperless. This meant that the Claimant would not have to ordinarily move from her reception chair when seeing a patient in the main x-ray area. The occasions upon which she would have to get up would be when answering the telephone covering for her clerical officer colleague. Again, this involved getting up and going over to that person's desk to pick up the phone. In addition, doctors and other clinicians regularly visited the main x-ray reception in contrast to the fracture x-ray reception and on occasions the Claimant would have to get up to assist and direct such individuals to wherever they needed to go. The data produced by the Claimant therefore shows that in fracture clinic there would be a variable but sometimes frequent need during the course of a day to get up to assist patients in particular in taking the relevant x-ray form to the radiographer but does not show the number of occasions the Claimant would have to get up from her desk in the main x-ray department.

34. By letter of 15 June 2016, Mr Coupe wrote to the Claimant with his letter of outcome which supported Mr Brown's decision at stage 2 to reject her grievance. His decision letter noted that there was an agreement that all reasonable adjustments had now been made in the main x-ray department which was ergonomically correct for her. It was said that any issues the Claimant felt she was having with regard to workload should be raised with

local management and that any reasonable adjustments would always be considered on a case by case basis. It was noted that management had apologised for the unacceptable time it took to implement all adjustments.

35. The outcome went on to note a number of further recommendations. These were stated to be that a full health and safety risk assessment be carried out on the fracture clinic reception to ascertain whether this would be suitable for the Claimant, that this be carried out within four weeks and that if the report stated that this would not cause any exacerbation of the Claimant's medical condition, that she should join the rota on a trial basis. These recommendations do not confront the fact that the ergonomic design of the fracture clinic reception workstation was a health and safety risk for the Claimant and therefore in that sense not suitable for her and that the report was therefore unlikely to say that working in that area, unless it was rebuilt, would not risk an exacerbation of the Claimant's condition.

36. A report was thereafter produced again by Mr Hatch which was described as a health and safety and ergonomic review of the fracture clinic reception area on 15 July 2016. This was not dissimilar in content from his previous assessments. It repeated that the receptionist was restricted to sitting in the angled corner of the desk and that the fracture clinic was a busy area and had not yet gone paperless. This report was provided to the Claimant by Mr Hatch who stated: *"basically says the same as last time. Regardless of who it is for the reception area needs a little bit of an update to address some ergonomic and accessibility issues."*

37. Whilst no specific decision has been evidenced, it is clear that the Respondent did not regard there as having been any new information which might suggest that the fracture reception could be a suitable place of work for the Claimant. No further steps were taken regarding any possible change in her working arrangements.

Applicable Law

38. The duty to make reasonable adjustments arises under Section 20 of the 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons

who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

39. The Tribunal must identify the provision, criterion or practice applied/physical feature/auxiliary aid, the non disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. 'Substantial' in this context means more than minor or trivial.

40. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

41. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which as well as the employer's size and resources will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

42. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

43. It is not permissible for the Tribunal to seek to come up with its own solution in terms of a reasonable adjustment without giving the parties an opportunity to deal with the matter (**Newcastle City Council –v- Spires 2011 EAT**). In this case prior to submissions, the Tribunal raised that it had emerged from evidence that, in particular, the Claimant was having to get up from her desk in her current role in circumstances where that might be limited, for instance in providing a telephone on her desk or enabling others to answer the calls of her clerical officer colleague when that colleague was absent at her break times.

44. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the Respondent to have to take in order to prevent the PCP/physical feature/lack of auxiliary aid creating the substantial disadvantage for the Claimant. This is an objective test where the Tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

45. The Claimant also complains of direct discrimination. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

46. *"Disability"* is one of the protected characteristics listed in Section 4. Section 23 provides that on a comparison of cases for the purpose of Section 13 *"there must be no material difference between the circumstances relating to each case".*

47. The Act deals with the burden of proof at Section 136(2) as follows:-
"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".

48. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

49. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At this second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

50. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. More recently the Supreme Court in **Hewage v Grampian Health Board**

[2012] UKSC 37 made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

51. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-
"(1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability,and
A cannot show that treatment is a proportionate means of achieving a legitimate aim."

52. Section 123 of the Equality Act 2010 provides for a three month time limit for the bringing of complaints to an Employment Tribunal. This runs from the date of the act complained of and conduct extending over a period of time is to be treated as done at the end of the period. A failure to comply with a duty to make reasonable adjustments is an omission rather than an act. A failure to do something is to be treated as occurring when the person in question decided on it. This may be when he does an act inconsistent with doing it. Alternatively, if there is no inconsistent act, time runs from the expiry of the period in which the person might reasonably have been expected to implement the adjustment. The Tribunal has an ability to extend time if it is just and equitable to do so. No submission is pursued on behalf of the Respondent of a jurisdictional nature based on applicable time limits.

53. Applying those findings of facts to the legal principles the Tribunal reaches the following conclusions.

Conclusions

54. With some skill, Ms Levene has exposed within the Respondent and its managers a number of failings in addressing the Claimant's genuine disability related needs. The Respondent's witnesses have recognised that it was unacceptable for the provision of the Claimant's chair to be delayed for a period of around two years when it is clear that, when Mr Brown eventually escalated the matter, a chair was provided very quickly. Similarly, it took a considerable period of time for an area to be cut out of the Claimant's desk which enabled her to sit and stretch out her legs more comfortably. That was not ultimately a difficult adaptation to put in place. Granted the Claimant did not chase the provision of the chair, understanding that sometimes these things take time, but she ought not have to have needed to. Her immediate line manager, Mrs Gore, was fully aware that the Claimant should be sitting at a more suitable chair and appeared not to notice that this had never arrived.

55. There was no proper risk assessment undertaken which would, of necessity, have had to have involved the Claimant and where, if relatively standard questions had been asked and any assessor gone through the Claimant's duties with her, her full needs would have been far clearer. Occupational health was never provided with more detail regarding the Claimant's role and requested transfer in terms of how the fracture clinic reception operated so that it might have been able to provide more informed recommendations.

56. The Respondent did not engage with the Claimant's workload issues and, when her correspondence and notes of grievance meetings are properly considered, it is evident that the Claimant was pointing to difficulties in her current role in terms of the need to get up and down outside of her control to answer the telephone and to deal with requests and visits from clinicians to the main x-ray reception. The Respondent's concentration (and certainly that in Mr Hatch's reports) was on the ergonomics of the respective potential work locations.

57. The focus of the Respondent's enquiries quickly became their rebuttal of the Claimant's assertions that she would be better able to cope working at the fracture reception. This was undoubtedly in part due to the Claimant's own approach where her focus was certainly on obtaining a transfer to the fracture reception rather than on changes to her existing working environment in the main x-ray reception. Indeed, the Claimant wanted to move to fracture clinic regardless of the desk position there which would inevitably involve her in twisting movements which she was medically advised to avoid. The Claimant now, of course, before the Tribunal takes the position that a move to fracture clinic reception was dependent on the Respondent firstly rebuilding the desk area and positioning it so as to directly face the window where patients arrived. The Claimant also failed to raise in explicit terms difficulty she was having on a day-to-day basis in having to get up and down from her workstation, albeit it has to be recognised that the Respondent had been told of these difficulties, the Claimant did not feel that she should have to be re-raising them and she had lost confidence in Mrs Gore as a manager who, she believed, was unwilling to help her.

58. The primary claim in these proceedings is one of a failure to make reasonable adjustments. This is an important remedy for disabled workers distinct from the other protected characteristics and one which requires, where reasonable, employers to take positive action to help a disabled worker and to effectively create a level playing field. Its focus is on practical outcomes which remove disadvantages and not on matters of process and procedure. Employers might satisfy the duty even if refusing to recognise that a person is disabled and if steps are taken which have the effect but did not have the purpose of assisting a disabled person. An employer might not be in breach of the duty if it refused to do anything, but the circumstances are such that nothing could reasonably have been done to alleviate the disabled person's disadvantage.

59. The Tribunal accepts that the requirement of the Claimant to work in the main x-ray reception area put her at a substantial disadvantage compared to non-disabled employees because she struggled due to her back impairment in terms of the movements required of her at the reception desk and in having to get up and down during the course of her working day without having control over the timing and frequency.

60. There is no argument but that the Respondent was aware of the Claimant's disability including from occupational health advice and separately of the disadvantage the Claimant suffered. As set out already, the Claimant made the Respondent aware at various stages of her issues with workload and having to get up and down apart from the more immediate and obvious difficulty she had having to twist round from a workplace facing to one side in order to be able to interact with patients and any other people requiring attention at the front reception desk.

61. The duty to make reasonable adjustments certainly arose and indeed the Respondent recognised that it did and sought to make those adjustments. It succeeded to an extent in that the Claimant's workstation was moved to a position where she did not have to twist around in order to deal with people at the reception desk. This was, for the Claimant, significant progress and of real benefit. The Respondent offered to the Claimant the possibility of her working in the back office where she would not have to interact with visitors, where the role was essentially sedentary and where she might determine herself when it would be helpful for her to get up and move around. This was not, however, a reasonable move for the Claimant in circumstances where she had an issue with her throat which impacted on her ability to spend significant amounts of time on the telephone and involved a return to work in an area where she had previously suffered from work-related stress, albeit the systems of work in that area had changed since she had worked there previously.

62. The Claimant maintains, however, that it would have been a reasonable adjustment to relocate her to work her shifts at the fracture x-ray reception. A move to that reception without any alterations to its layout would not have alleviated the Claimant's disability related disadvantages. It would have involved her reverting to a seating position in a corner where she would have had to adjust her posture and twist herself around to face any patients arriving at reception.

63. If the Claimant could, with a rebuilding of the desk area, have been able to work safely and comfortably there, then undoubtedly the Tribunal concludes it would have been a reasonable adjustment to adapt the desk area. The work required was not substantial and whilst it has never been costed similar work elsewhere and indeed in the Claimant's main x-ray reception has been undertaken by the Respondent's in-house maintenance team. Furthermore, the area had, through Mr Hatch's assessments, been recognised as unsafe for any worker. Certainly, the layout had the significant risk of exacerbating any employees' pre-existing musculoskeletal impairments – and indeed employees with such

impairments had been required to work there – but also the health and safety risk had been identified of the physical arrangement causing musculoskeletal complaints. Given the rotational nature of the staffing on this reception this affected a significant number of workers. There was and is a health and safety imperative for this workstation to be reconfigured regardless.

64. If the workstation was rebuilt there was no reason, from a pure staffing point of view, why the Claimant could not reasonably have been allocated a permanent shift in that area. There was significant flexibility regarding the staffing of that area and whilst it was a preferred area to call upon agency or bank staff cover, given the relatively repetitive nature of the tasks involved there and the lack of training required, the use of such staff in that area was still possible given that in particular the Claimant only worked 3 shifts each week and would obviously take periods of annual leave.

65. However, the rebuilding of the area only works as a reasonable adjustment, so as to allow the Claimant to work at the fracture reception, if her then working at the fracture reception might alleviate her disadvantages. In this context, there has to be a prospect, albeit not a "good or real prospect", of the adjustment being effective. On the evidence, the Tribunal cannot conclude that such a prospect existed.
66. The Claimant's workload issue in main reception related to phone calls and clinician visits where she might have to get up and down without such movements being within her control. On main reception, her issue was not related to patient needs and their attendance at reception, not least because of the paperless system in operation in the main x-ray reception.

67. The figures produced by the Claimant and indeed evidence from the Respondent's own witnesses support the contention that the main reception was a busy area in terms of patient numbers – more patients would call at the main reception desk on average than at the x-ray reception in fracture clinic. However, again patient attendance was not the source of the Claimant's difficulty in the main x-ray reception.

68. In the fracture reception, the Claimant might have to deal with fewer patients but each patient visit necessitated her producing a paper record getting up from her workstation and taking this to the radiographer before returning to her seat at the reception desk. She rarely had a need to answer the telephone there or to deal with visiting clinicians but she would still be in a situation of having no control over when she had to get up and down from her seat at reception. The Claimant's figures for patients x-rayed at fracture clinic on particular days show a fluctuation in numbers but also, inevitably, an uncertainty as to numbers and inevitably on some days a significant number of patient visits, up to 79 in one day over the 14 days for which she compiled statistics. That number of patients would involve the Claimant having to get up and down on average over the working day approximately 10 times per hour. Again, this is a situation the Claimant had no control over and, at fracture x-ray, little scope for support

in that the clinical support worker there had a primary function of assisting patients and there would be no other clerical employee there other than the Claimant.

69. In these circumstances, it would not have been a reasonable adjustment for the Claimant to have been moved to the fracture x-ray reception and the Respondent did not fail in its duty to make reasonable adjustments in failing to effect that move.

70. Obviously, adaptations need to be made to the fracture reception regardless of this case and there is no reason then why working practices could not be reviewed to see whether the area might be made a suitable location for a reception worker with mobility impairments. The evidence before the Tribunal is not such as to allow it to reach a positive conclusion in this regard.

71. The evidence before the Tribunal has**,** however, illustrated that further steps might easily have been taken within the Claimant's existing workplace on main x-ray reception which would have further, that is to say in addition to changing the physical location of her desk, alleviated the disadvantage she suffered.

72. Again, the Claimant's difficulty in having no control over her need to get up and down during the working day within this area related to her taking phone calls when the other clerical officer was absent on breaks for lunch and in having from time to time to assist in directing visiting clinicians. The Respondent was aware of the Claimant's issue in terms of having to get up and down, how this would impact on her back pain and was fully aware of the instances where the Claimant would be required to move around. Mrs McAllister, on her evidence, had spoken to the Claimant and understood the Claimant's issue in having to get up and turn around to answer a telephone on a desk behind her when the clerical officer was not there. The need to get up and assist clinicians was obvious as well. The Respondent of course on the Tribunal's findings did not sufficiently engage with the workload issue at all, in part arising out of a focus on the Claimant's request to relocate which then prevented (albeit not reasonably) a view being taken of the bigger picture and further and continuing consideration being given to the adaptation of the Claimant's existing workplace.

73. The Tribunal concludes that it would have been a reasonable adjustment for the Respondent to have made arrangements so that the Claimant could either have telephone calls diverted to a telephone at her reception desk when the clerical officer was not present to take those calls or alternatively to have ensured that the calls were diverted to other staff including those located in the back office. The Tribunal sees no reasonable impediment upon the provision of this adjustment which the Respondent accepted appears to be a relatively unproblematical step to take. The Claimant raises that there might be a potential issue regarding confidentiality in her answering the phone at the main reception desk, but

the Tribunal does not consider that she would have to effectively broadcast publicly any personal or sensitive information identifying any patient or other individual given both the nature of her role in terms of processing appointments (rather than diagnosing medical conditions) and her ability to control what might be overheard by any member of the public.

74. Similarly, the Tribunal considers that a further reasonable adjustment ought to have been put in place so that the Claimant was in a position to call for the assistance of another staff member if she required it when dealing with a visiting clinician who might, for instance, need to be met and directed to a particular area. The Tribunal recognises that it cannot be overly prescriptive in terms of such an adjustment given the fluctuating circumstances and staffing during the course of any working day which is bound to occur within the x-ray reception area. Nevertheless, it would have constituted a reasonable adjustment of benefit to the Claimant for there to have been in place at the very least a formal recognition of her difficulty in getting up and down to deal with visitors and a mechanism for her to seek the assistance of other staff members who in turn would be aware of the need/reason for providing such assistance. Indeed, this could be provided without any embarrassment in circumstances where it will be obvious to any visitor that a person manning reception might need to stay in place and not be able to wander off leaving the area unattended for any period of time.

75. In conclusion, the Respondent failed in its duty to make reasonable adjustments in addressing the Claimant's disadvantage in having to get up and down without being able to control her movements to answer the telephone and deal with clinician visitors and in circumstances where it ought reasonably to have provided a telephone on the Claimant's desk or an alternative cascading system of telephone calls so that the Claimant did not need to leave her desk to answer the telephone and also to have enabled the Claimant to call upon the assistance of other staff members in her dealings with visiting clinicians. The Claimant's complaints of a failure to make reasonable adjustments succeed to this extent.

76. The Claimant brings a further complaint alleging discrimination arising from disability in that it is said that the Respondent's reason for not allowing her to transfer to fracture clinic was its perception of risk to the Claimant in that area. Indeed, the Respondent did perceive the Claimant to be at risk if moved to that area and this arose in consequence of her disability. However, in refusing her transfer the Respondent acted in pursuit of its legitimate aim to ensure the health and safety of the Claimant. It also acted proportionately in so doing. Its perception of risk to the Claimant was genuine and accurate and it did not fail to make any reasonable adjustments in its refusal to relocate the Claimant as already found.

77. The Claimant's complaint of direct discrimination must also fail. Whilst the identity of any final decision maker may be unclear or any decision at all

being evident, the Respondent's position was consistent over a period indeed of over 2 years and based upon almost identical assessments made by Mr Hatch which were undoubtedly accurate in terms of the layout of the workstation – the concentration throughout of his assessments.

78. There are no facts from which the Tribunal could conclude that any person with similar issues to the Claimant but not a disabled person would have been treated differently. The reason for the refusal was a genuine belief that the fracture clinic did not provide a safer working environment for the Claimant unrelated to her being a disabled person.

Employment Judge Maidment

15 November 2017
Date

REASONS SENT TO THE PARTIES ON

22 December 2017

FOR THE TRIBUNAL OFFICE