



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Atherton

Respondent: NHS Business Services Authority t/a Midlands Lancashire CSU

Heard at: Manchester

On: 10-14 September 2018
and 14 November 2018
(in chambers)

Before: Employment Judge Slater
Mr D Wilson
Mr S T Anslow

REPRESENTATION:

Claimant: Mr R Owen, Employment Specialist, CAB

Respondent: Mr N Grundy of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaints of age discrimination are dismissed on withdrawal.
2. The complaints of discrimination arising from disability are not well founded.
3. The complaint of harassment related to disability in respect of a comment by Marianne Rintoul on 14 June 2017 is well founded.
4. The other complaints of harassment related to disability are not well founded.
5. The complaint of failure to make reasonable adjustments in relation to failure to provide the claimant with a suitable adapted telephone is well founded in relation to the period 16-20 October 2017. The tribunal does not have jurisdiction to consider the complaint in relation to earlier periods.
6. The tribunal does not have jurisdiction to consider the complaint of failure to make reasonable adjustments in relation to the failure to provide the claimant with suitable quality recording devices to enable her to produce minutes of the contract meetings she conducted.

7. There will be a remedy hearing on 18 January 2019 to determine remedy for the successful complaints.

REASONS

Claims and Issues

1. The claimant claimed disability discrimination, complaints of failure to make reasonable adjustments, discrimination arising from disability, harassment related to disability and direct age discrimination. In closing submissions, the claimant's representative informed the Tribunal that the claimant was withdrawing her complaint of age discrimination, which is therefore dismissed on withdrawal. The respondent's representative in closing submissions conceded on behalf of the respondent the issue of disability.

2. Of the issues which had been agreed at the outset of the hearing, the following issues therefore remained to be determined by the Tribunal:

Time Limits

- (1) Are the acts of complaint which predate 5 June 2017 out of time?
- (2) If so, is it just and equitable to extend time?

Failure to make reasonable adjustments – section 20(5) auxiliary aids

- (3) Was there a requirement for the claimant –
 - 7.1 to answer the telephone; and/or
 - 7.2 to produce minutes of contract meetings?
- (4) If so, would the requirement, but for the provision of an auxiliary aid, put the claimant at a substantial disadvantage in relation to:
 - (i) answering the telephone, and/or
 - (ii) the production of minutes of a contract meeting,in comparison with persons who did not have a hearing impairment disability?
- (5) If so, did the respondent take such steps as it was reasonable to have taken to provide an auxiliary aid? The auxiliary aids identified by the claimant are:
 - (i) A suitable adapted telephone;
 - (ii) A suitable quality recording device.
- (6) Did the respondent have actual or constructive knowledge of disability and that the claimant was likely to be placed at the disadvantage?

Discrimination arising from disability – section 15

- (7) Did the respondent and/or the respondent's employee, Marianne Rintoul ("MR"), do the act set out at paragraphs 2(a), 2(b), 2(c), 2(d) and 2(e) of the further information?
- (8) If so, did the act amount to unfavourable treatment?
- (9) If so, was the unfavourable treatment because of something arising in consequence of the claimant's hearing impairment disability?
- (10) If so, was the treatment a proportionate means of achieving a legitimate aim (paragraphs 12 and 23 of the amended ET3)?
- (11) Did the respondent know or could they reasonably be expected to know that the claimant had the disability?

Harassment

- (12) Did the respondent's employee, MR, do the acts set out in paragraphs 3(1), 3(b), 3(c), 3(d) and 3(e) of the further information?
- (13) If so, did the act amount to unwanted conduct?
- (14) If so, was the act related to the claimant's hearing impairment disability?
- (15) If so, did the conduct have the purpose or effect of –
 - 15.1 violating the claimant's dignity; or
 - 15.2 creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

The Facts

3. The claimant began working for the respondent in April 2013, having worked for a predecessor organisation from March 2009.

4. The claimant has had a hearing impairment since childhood (probably caused by measles). This is worse in her left ear. The claimant did not, however, start using any hearing aid until she was nearly 50. In 2005 the claimant started using a hearing aid in her left ear.

5. In July 2014, Marianne Rintoul became the claimant's line manager. Marianne Rintoul was aware from some time before September 2014 that the claimant wore a hearing aid.

6. On 5 September 2014, the claimant was provided with Zest hearing aids for both ears. The claimant understood there had been some deterioration in her hearing in her right ear but that one of the reasons for starting to wear a second aid was that it was better to have two aids for the purposes of locating where sound was coming from. The claimant's patient notes suggest that the audiologist discussed phone use, amongst other things, with the claimant. The claimant says this was not

discussed. Given the amount of information the claimant was given at the time and the passage of time, we find that this may have been discussed but the claimant has forgotten this information. What we have been shown regarding Zest hearing aids indicates that it is possible to use these with the telephone. In practice, since the claimant's right ear did not necessarily need a hearing aid, the claimant found it better to take her right hearing aid out in order to use the phone.

7. In February 2015 the claimant was appointed to a Band 7 role. Marianne Rintoul was on the appointment panel. At the time of the application the claimant indicated on forms that she did not consider herself to have a disability.

8. The claimant, on the basis of her own evidence, had a reasonably good relationship with Marianne Rintoul until some time in 2016.

9. Some time before March 2015, the claimant and Marianne Rintoul had a conversation about telephone use and hearing aids. Marianne Rintoul said she initiated this discussion after seeing the claimant struggling with her hearing aid after a call. Marianne Rintoul said she asked her Function Lead to look into getting appropriate equipment and she expected there to be a discussion between that person and the claimant. She did not know if this had happened. We have been shown no evidence of there being an assessment of the claimant's needs at this time. If there had been a proper assessment of her needs, we consider there would have been some documentary record of this, and it is unlikely that an unsuitable headset would have been ordered for the claimant. We find, on a balance of probabilities, that no proper assessment was done at this time of what was needed to assist the claimant because of her hearing impairment.

10. In March 2015, a binaural telephone headset was purchased. The claimant found this unsuitable and this was returned. Marianne Rintoul says that she asked the claimant to speak to Michael Moir about this but the claimant said that she was managing, so would not bother. The claimant says that Marianne Rintoul said to leave it with her, but nothing further happened. We find, on a balance of probabilities, that the claimant said something along the lines of what Marianne Rintoul reports. This is more consistent with what subsequently occurred than what the claimant says. There was no follow-up from either the claimant or Marianne Rintoul after this conversation about obtaining any other equipment to help the claimant with telephone calls. The claimant did not mention any problems when she had monthly one-to-ones with Marianne Rintoul. We heard no evidence from the claimant that she raised the matter again, although her representative, in submissions, suggested that she had done so.

11. On 15 October 2015, at a time when the claimant says the relationship between her and Marianne Rintoul was still reasonably good, Marianne Rintoul informed the claimant about complaints she had received about the claimant's manner of communication.

12. On 16 October 2015, Kathleen Whittaker, an administration officer, sent an email which appears to have arisen following concerns being raised about her standards of notetaking for meetings. Kathleen Whittaker referred to her own hearing problem and also to the recording equipment; writing that they had been unreliable, one in particular producing very poor sound quality.

13. An email from the claimant of 20 October 2015 referred to Kathleen Whittaker having raised previously the unreliability of the recording equipment. The claimant wrote that she had been in meetings where this equipment had failed. She wrote:

“As I see this as an important part of capturing an accurate account of the discussions in all our meetings I would like to request the purchase of two good digital voice recorders where the quality will be much better and their performance more reliable.”

The claimant did not indicate at this stage that she needed better voice recorders because of her own hearing impairment.

14. The claimant gave evidence that, when she chaired meetings, she could not take notes at the same time because she needed to look at speakers to lipread as well as listening to them. The claimant told us that when administration took minutes, the claimant listened to the recording to check the accuracy of the minutes. The claimant also referred in her witness statement and further particulars to meetings she had chaired without an administration person to take notes, and the recording equipment causing her problems because she could not take notes because of her hearing. We accept the claimant's evidence that this did cause her problems. However, we find that the claimant did not bring to Marianne Rintoul's attention that she listened to recordings to check minutes and that the recording equipment caused her a problem because of her hearing. The claimant did not raise this until her claim form in these proceedings. We find that Marianne Rintoul was not aware that the claimant was listening to recordings to check minutes taken by the administration.

15. The claimant had a period of sickness absence from November 2015 until January 2016 due to a reason unrelated to her disability. After her return to work on 11 January 2016, some form of workplace assessment took place, as a result of which a different chair was provided for the claimant. The claimant did not raise any issue about her hearing at this time.

16. The claimant told us that problems with Marianne Rintoul began in 2016, although she could not identify exactly when. We were not able to identify, from the evidence we heard, any particular trigger point for the problems which arose between them.

17. On 1 July 2016, Marianne Rintoul had a conversation with the claimant in which she informed the claimant about complaints she had received about the manner of the claimant's communication. There has been no suggestion that complaints were not raised with Marianne Rintoul. It is not necessary for us to find whether the complaints were justified. We find that Marianne Rintoul raised these matters with the claimant because complaints had been made to her. Marianne Rintoul gave the claimant details of the manner which was being complained about. She provided an example to the claimant on request. She did not identify the complainants because they had asked her not to identify them.

18. The claimant complains that briefings Marianne Rintoul gave from her desk caused her difficulties because of her hearing. Marianne Rintoul accepts that she occasionally gave briefings from her desk and we find that she sometimes gave brief updates from her desk to the team on something which had arisen. The claimant

accepted that briefings from Marianne Rintoul's desk was not the main source of information. Team meetings were held in meeting rooms where more information was provided. Although the claimant's complaint is confined to the period 2016-2017, we find that this was not a practice which started in 2016. It had started some time prior to this.

19. The claimant also complains about Marianne Rintoul giving her impromptu updates when passing the end of the claimant's desk. Again, although this complaint is confined to 2016-2017, there is no evidence that this practice was confined to this period. We find that Marianne Rintoul did sometimes give the claimant impromptu updates when passing her desk. The claimant's evidence is that she occasionally asked Marianne Rintoul to repeat something but she did not tell Marianne Rintoul that this method of communication caused her difficulties because of her hearing.

20. The claimant complains that, in the period 2016-2017, Marianne Rintoul disregarded her requests for support, was inflexible in her approach to the claimant's issues and set unrealistic targets setting her up to fail, and that Marianne Rintoul did not make allowances or recognise the impact of staff turnover, administration support issues and lack of support. It is relevant to these complaints that the claimant and Marianne Rintoul had very different views about the claimant's role; for example, the claimant's management responsibilities and the extent to which the claimant should try to resolve problems or bring these to Marianne Rintoul to resolve them for her. It is also relevant that the claimant and Marianne Rintoul were both working in a difficult situation, under pressure, particularly after a change in deadlines set by NHS England. There were general problems with administrative support.

21. At some point, Marianne Rintoul reduced the number of contracts the claimant had to deal with to assist her with her workload.

22. We find that the claimant felt that Marianne Rintoul was unsupportive. However, we are not satisfied that this reflected anything other than the disagreement between them as to the claimant's role. The claimant has not satisfied us that Marianne Rintoul set her unrealistic targets or set her up to fail. The claimant accepted in evidence that she continued working normal hours throughout this period and, at one point, Marianne Rintoul supported a reduction in the claimant's hours to a nine day fortnight. The claimant never said that difficulties with her workload related to her hearing impairment. She did not tell Marianne Rintoul that she needed more support because her hearing impairment was causing her problems.

23. The claimant alleges that, in September 2016, Marianne Rintoul again informed her about complaints about her behaviour. The claimant has provided no more detail about this, and Marianne Rintoul has no recollection or note of such a discussion. We find, on a balance of probabilities, that nothing of this nature happened in September 2016.

24. In August or September 2016, NHS England directed that all contracts for 2017/2018 had to be completed and signed by the end of December 2016, rather than March 2017. It appears that the claimant thought that Marianne Rintoul had some power to prevent this direction applying to them. We have no evidence that

Marianne Rintoul had such power. The change in deadline put the claimant, and no doubt others, under pressure.

25. It is unclear when, in 2016, the relationship between Marianne Rintoul and the claimant deteriorated, but, by the beginning of 2017, it is clear that they were having difficulties in dealing with each other. The claimant was feeling unsupported by Marianne Rintoul. Marianne Rintoul was feeling that the claimant was not carrying out all the responsibilities of a Band 7 role and was unnecessarily looking to her to provide solutions to problems which the claimant should have resolved herself. It appears that both were feeling frustrated in dealings with each other. At times, this frustration showed itself in the manner in which they dealt with each other. We have heard no evidence that suggests to us that the claimant's hearing impairment played a part in the deterioration of the relationship.

26. The claimant alleges that, in early January 2017, the claimant showed Marianne Rintoul an agenda she had had to send back to administration support as it was littered with mistakes and commented that she could not do her own job properly because of all the issues with administration support, and asked which work Marianne Rintoul wanted her to prioritise. The claimant alleges that Marianne Rintoul responded angrily in an unpleasant manner, telling her it was the claimant's responsibility to deal with it all and to stop telling her about it, and then stormed out of the office in front of other members of the team. The claimant alleges that Marianne Rintoul returned shortly afterwards and curtly instructed the claimant to go to a room where she angrily said to her not to undermine her like that in the office, and that she went on to say severely that administration issues were affecting all the team and that as a Band 7 the claimant just had to get on with it and not to be disrespectful to her. The claimant says that this left her feeling humiliated and intimidated. Marianne Rintoul did not recall any incident in early January. However, she made a note of an incident on 30 January which appears to be very similar. We think it likely that the claimant has mistaken the date and that the incident to which she refers is the one Marianne Rintoul recorded as occurring on 30 January. There was an issue about an agenda; there was a difference in view about how much the claimant should have been doing; Marianne Rintoul was unhappy with the claimant raising a matter she thought she could have sorted out herself, and about the manner in which the claimant was speaking to her in front of other people.

27. We find, on a balance of probabilities, that Marianne Rintoul did speak in an unpleasant tone to the claimant before asking her to come into a meeting in a private room. We have heard no evidence that suggests that the way Marianne Rintoul reacted to the claimant was anything to do with the claimant's hearing impairment.

28. The claimant alleges that, on 29 January 2017, after Marianne Rintoul had tried to address the administrative support issue the claimant raised with her about the first diary entry sent to her by administrative support being incorrect, Marianne Rintoul argued that it was correct, would not listen to the claimant and told her in a dismissive and unpleasant manner, in front of the team in the open office, to go away and sort it out herself. From notes taken by Marianne Rintoul, we think the incident referred to, in fact, occurred on 30 January 2017. We find that the incident this took place later on the same day as the agenda incident. We find that Marianne Rintoul was working on a tracker of meetings with Anne Brierley. The claimant came in. It is clear from the note made by Marianne Rintoul that she was unhappy about the

manner of the claimant's interruption. It is common ground that she told the claimant to go away and write down the correct and incorrect dates. Anne Brierley provided a witness statement but did not attend to give evidence, so we approach her witness statement with caution. However, we accept her evidence in that statement so far as it is consistent with evidence she gave to the investigation in November 2017. We find, based on this, that Marianne Rintoul spoke to the claimant in a way that mortified and embarrassed Anne Brierley. Anne Brierley found the way that Marianne Rintoul spoke to the claimant to be "disgusting". We find that Marianne Rintoul did speak to the claimant in an unpleasant manner. However, there is no evidence that the way she spoke to the claimant was related to the claimant's hearing impairment.

29. On 31 January 2017, the claimant alleges that, following on from a meeting with Marianne Rintoul and a new contract manager, Marianne Rintoul told the claimant that she had not engaged at the meeting and said she was finding the claimant difficult and that once again she had undermined her. The claimant says she disputed this and Marianne Rintoul stated in an unpleasant manner that she was now arguing with her, being disrespectful and that she would not allow her teenage daughter to talk to her the way the claimant spoke to her. The claimant says that Marianne Rintoul became angry and said the claimant should hold a mirror up to herself and see what she was like. We find that, by this stage, both Marianne Rintoul and the claimant were unhappy with each other. It is common ground that Marianne Rintoul did say that she would not let her teenage daughter speak to her in the way that the claimant spoke to her and that the claimant should hold a mirror up to herself. We find that the claimant repeated comments made to her about Marianne Rintoul being a "crap manager". We find no evidence that the way Marianne Rintoul behaved on this day was related to the claimant's hearing impairment.

30. We find that the claimant was very upset following this incident and, on 2 February 2017, she started a period of long-term sick leave.

31. On 9 February 2017, the claimant presented her first grievance, which was incorrectly dated 9 January 2017. The claimant made no reference in this grievance to her hearing or to disability or age discrimination. She made no mention of problems with recording devices. She sent her grievance to Marianne Rintoul and to Human Resources.

32. The claimant complained in her grievance about lack of administrative support, lack of support by Marianne Rintoul and what the claimant considered to be unrealistic expectations of completion of her programme of works and setting of unrealistic targets. The claimant complained of what she described as harassment and intimidation by Marianne Rintoul, referring to the matters which she brought as complaints of disability and age related harassment referred to in her further particulars at 3(b), 3(c), 3(d) and 3(e). However, in her grievance, she made no connection between the matters complained of and her hearing or age.

33. There is no evidence that Marianne Rintoul, herself, replied to this grievance, and the claimant says there was no response. Marianne Rintoul could not remember responding and there is nothing in the bundle to suggest that she did so. However, the matter was then handled by HR. We have evidence that Marianne Rintoul was in contact with the claimant about sick leave until, in April 2017, Janet

Barnsley was appointed to be the manager supporting the claimant's absence in the place of Marianne Rintoul.

34. On 13 February 2017, the grievance was acknowledged by Gavin Turner of HR. He asked to ring the claimant the following day. An email of 24 March 2017 from Cath Owen indicated that there had, by then, been discussion with the claimant about mediation. This had not been progressed at that stage because the claimant was not well enough.

35. An Occupational Health report was obtained on 29 March 2017. This noted that the claimant had been absent from work since 1 February 2017 due to stress which she attributed to work issues. The report stated that this appeared mainly around a strained relationship with her manager against whom she had submitted a grievance. It recorded that mediation had been discussed with the claimant and the claimant had told the Occupational Health adviser that she was willing to participate in mediation. The adviser expressed the view that the claimant was not fit for work, writing:

“The barrier to work appears to be the ongoing perceived work issues and a successful and sustainable return to work is unlikely until a practical way forward has been found. As soon as it is feasible, I advise a meeting and mediation if required to hopefully find a pragmatic solution. Once a practical way forward has been achieved, a therapeutic and successful return to work is anticipated.”

36. The report stated that no adjustments had been identified as being required upon the claimant's return at this point, and that she advised a stress risk assessment prior to a return to work. There was no reference in the report to any difficulties caused by the claimant's hearing impairment.

37. On 25 April 2017, there was a meeting between Catherine Owen, Janet Barnsley and the claimant. The claimant was accompanied by a colleague, Victoria Gaye. At this meeting, the claimant confirmed her agreement to try mediation. However, she asked for a response from Marianne Rintoul before they had a mediation meeting.

38. The claimant has complained that the respondent failed to take her grievance seriously, unreasonably delaying the process, contrary to its own grievance policy and procedures. We find that the delays up to this point were due to concern for the claimant's health and welfare and the expressed agreement to participate in mediation.

39. On 23 May 2017, Marianne Rintoul provided a written response to the claimant's grievance, as had been requested by the claimant before mediation could take place. A copy of this was provided to the claimant.

40. On 1 June 2017, the claimant had an individual meeting with a mediator in preparation for the mediation meeting with Marianne Rintoul. The mediator also had an individual meeting with Marianne Rintoul. The mediation meeting with all parties took place on 14 June 2017. In preparation for this meeting, Marianne Rintoul made notes to take into the mediation. These included a question:

“How does Susan think it makes me/colleagues feel when she challenges aggressively, pulls faces, rolls eyes, etc.?”

41. We note in Marianne Rintoul's notes of the conversation on 31 January 2017, that she recorded the claimant as pulling faces and rolling her eyes. We find that this was behaviour which Marianne Rintoul had observed prior to the mediation meeting.

42. During the mediation meeting on 14 June 2017, Marianne Rintoul accused the claimant of giving her the “evil eye”. The claimant got upset and left the room. After the mediator had spoken individually to the claimant and Marianne Rintoul, the meeting resumed and carried on for at least an hour. During the meeting, there was no mention by the claimant of any difficulties caused by her hearing impairment or of age discrimination. At the end of the meeting, it was agreed that there would be a second mediation but the claimant subsequently withdrew her agreement to this. We find that, during this mediation meeting, the claimant was making faces and rolling eyes in the way which Marianne Rintoul had noted on previous occasions. We find she was also staring at Marianne Rintoul. We find that the mediator may not have observed the claimant's face pulling and rolling eyes because of her position, sitting next to the claimant and opposite Marianne Rintoul when Marianne Rintoul was speaking.

43. On 28 June 2017, the claimant sent an email to Janet Barnsley and Catherine Owen in which she said that she did not wish to continue with mediation. She asked to go down the next stage of the grievance process, unless there were any other options/solutions.

44. On 6 July 2017, the claimant presented a second grievance. It is clear it was sent on 6 July 2017 but the letter is incorrectly dated 7 July 2017. The claimant sent this after speaking to ACAS. The claimant's evidence was inconsistent as to whether she had spoken to Mr Owen of the CAB before she sent this grievance. This grievance contains the claimant's first reference to discrimination. It includes an allegation that Marianne Rintoul discriminated against her as she had a hearing impairment. There is no reference to age discrimination. The claimant alleged that, at the mediation meeting, Marianne Rintoul accused her of “giving her the evil eye”. The claimant wrote that, as she was partially deaf, which Marianne Rintoul was aware of, she tended to look intently at people when they are talking, especially their mouths. The claimant referred to a special telephone being ordered for her, as she had to take out her hearing aid in order to hear when answering an incoming and outgoing call, as her hearing aid was not conducive to this (although from the invoice, it appears that it was a headset which had been ordered). The claimant wrote that the telephone which came was not suitable and was returned and she never got the requested adapted phone. The claimant did not refer to taking any steps herself to follow this up and did not allege in the grievance that she asked Marianne Rintoul to do so but that Marianne Rintoul failed to do so.

45. The claimant also referred to Marianne Rintoul sharing information to the team from her desk and giving her impromptu updates whilst passing the end of her desk. She referred to this in the context of difficulties with her hearing impairment. The claimant made no reference to problems with recording devices and her hearing impairment.

46. The remainder of the grievance makes no link between any problems with the claimant's hearing impairment and the problems she raises about lack of support, unrealistic expectations, the setting of unrealistic targets or what she put under the heading of "harassment and intimidation".

47. The respondent decided to carry out what they have described as "a preliminary investigation". From the evidence we have heard from the respondent's witnesses, we accept that the respondent was confused as to which policy they should apply. Their grievance procedure would potentially apply to some of the claimant's complaints and their Dignity at Work policy to other parts of her complaints. The respondent decided to carry out a preliminary investigation, at the end of which they would decide what action, if any, was required and under what policy. We note that neither the grievance policy nor the Dignity at Work provides for this preliminary investigation process which they undertook.

48. Pamela Hughes was asked to conduct the investigation. She understood her role to be to carry out an investigation into the facts to enable the commissioning officer, Beth Goodman, to decide whether to take further action. This, she understood, would explore what could happen, which policy would be appropriate and whether there were facts to support further action.

49. Pamela Hughes interviewed the claimant on 1 August 2017. Pamela Hughes was aware from the second grievance that the claimant had a hearing impairment. The claimant told Pamela Hughes that she had expected the process to go formal sooner. Pamela Hughes explained the rationale for the process they were following. The claimant expressed a desire to get back to work. Pamela Hughes also interviewed Marianne Rintoul. Both the claimant and Marianne Rintoul expressed a desire not to work together again, and Pamela Hughes understood from the conversations that both of them wanted to put this matter behind them. The claimant accepted in evidence that Pamela Hughes conducted her investigation in good faith.

50. Pamela Hughes did not find evidence to support progression of a claim under the policy. She did not find any evidence of discrimination against the claimant because of her hearing.

51. During their meeting, the claimant explained to Pamela Hughes that she had difficulty with the telephone. Pamela Hughes formed the view that the process of an assessment of the claimant's needs relating to hearing loss had gone awry, so she recommended a new assessment. Pamela Hughes' view was that the claimant was at a disadvantage until they sorted out equipment for her.

52. Pamela Hughes produced a preliminary investigation report dated 9 August 2017. She wrote that she had not found evidence that the claimant was treated any differently to other colleagues or that Marianne Rintoul disregarded the claimant's requests for support. She wrote:

"Aligned to this is a concern that Susan's hearing loss is a reason for Marianne discriminating against her. When I met Susan her hearing loss was not obvious, as she wore a hearing aid and the air conditioning had been turned off/low. Susan did not disclose the level of her hearing loss compared to a 'normal' hearing reading (as tested by NHS Audiology teams), therefore unless otherwise indicated, one would assume Susan's hearing aid

compensated for her hearing loss to enable her to work without disclosing any loss.

“I asked Marianne when/if she was formally advised Susan had a hearing loss that required additional support. Marianne can’t recall being advised, but reported she had observed the telephone volume at a raised level, and from this dialogue an order was placed for a special telephone. Marianne does not recall if this was delivered or what the current position is. Susan reports a telephone was delivered, it was not right (usually devices should be tested by the user before purchase) and was returned, but no replacement has been received.

“I asked Marianne once she knew of Susan’s hearing loss what action did she take. She reports speaking ‘face on’ and walking to Susan’s desk rather than shouting from her own desk. Susan reports that Marianne gave updates at her desk rather than in a private meeting where Susan could hear well and considers this was ‘rude’ of Marianne.

“Susan reports Marianne both micromanages and then has a ‘hands off’, ‘sort it yourself’ approach. This inconsistency may not be helpful and requires good communication so that both parties understand why this is the case.

“It would appear that these colleagues/line manager and team member have been unable to articulate and agree a mode of communication that is satisfactory to both parties, but I find no evidence that supports discrimination, however difficulties in one-to-one communications are apparent between these two colleagues.”

53. In the section of the outcome Pamela Hughes wrote:

“Both individuals report their desire to ‘close’ this episode as quickly as possible as it has gone on for over six months. Both individuals want to see Susan back in work, fit and well, and both say they should not work together in the future. Both appear to prefer to avoid a formal grievance procedure. Susan has been ‘discharged’ from Occupational Health at August 2017.”

54. Pamela Hughes then made a number of recommendations, which included that an assessment should be completed within one week of the claimant returning to work, so that any equipment she may need was identified, ordered and made available for her to take with her in any role/office location she worked in.

55. Beth Goodman, the commissioning officer, then produced an outcome letter dated 30 August 2017 which was largely based on Pamela Hughes’ recommendations. This was prepared by Beth Goodman with assistance from HR. The claimant accepted that Beth Goodman approached this matter in good faith, although she considered her to be misguided. In her letter, under the heading of ‘Discrimination due to hearing loss,’ Ms Goodman wrote:

“From the discussions held it is understood that your hearing loss is mitigated by use of a hearing aid and you make adjustments in meeting rooms, on the telephone and where you sit at meetings. It was reported that Marianne waits to gain your attention, and speaks directly to your face – features of a

supportive not discriminatory approach. Support was provided by provision of a particular telephone and this was not suitable. The issue found is one of lack of follow up to replace the unsuitable device rather than sufficient material to progress to a formal process.”

56. In relation to all the complaints, Ms Goodman wrote that they would not be progressed to a formal process. She wrote:

“Therefore, this letter closes the matter giving you a response to the concerns raised and outcome expressed and ensuring arrangements are in place to prevent any occurrence in the future.”

57. She referred to a temporary change in line management and work at a different location on an interim basis, although the claimant's substantive role remained unchanged. She set out points about the ways the new temporary line manager would look to support the claimant, which included “identifying equipment/other support that the MLCSU can provide to enable you to perform at your best”. She apologised for delays in the process.

58. On 31 August 2017, the claimant emailed Louise Hodges, her new temporary line manager. She referred to the letter she had received from Beth Goodman and commented that she really did not know what to make of it. She wrote:

“I have read the grievance policy and this letter doesn't relate to a stage in the process.”

59. On 4 September 2017, Beth Goodman wrote to others in the organisation referring to a call from Louise Hodges about communication she had received from the claimant. Ms Goodman wrote:

“It appears that Susan is unhappy with the response she has received (below), and is keen for this to move to a formal process (Louise made some muting's around a possible constructive dismissal claim).”

60. Beth Goodman commented that there were two specific areas of the management of this case in terms of HR advice received that seemed at odds with their policy:

- (1) The role of commissioning manager which is not mentioned in the Lancashire policy; and
- (2) The scheme of delegation/process.

61. On 5 September 2017, the claimant contacted ACAS under the early conciliation procedure. The ACAS early conciliation certificate was issued on 22 September 2017.

62. On 28 September 2017, Pamela Hughes and Beth Goodman had a meeting with the claimant at the claimant's home. During this meeting, the claimant said she was unclear as to the process followed. Beth Goodman commented that she had some sympathy with that. The claimant mentioned she had an East Lancs policy and a CSU policy was then shared with her. The claimant indicated she was unhappy

with the outcome and wanted to appeal/progress to a formal process. At the meeting, the claimant agreed to return to work on interim arrangements on 16 October 2017.

63. On 16 October 2017, the claimant returned to work on a phased return in a temporary role. An appeal hearing took place the same day. This was conducted by Linda Riley. One of the outcomes sought from the claimant was that adjustments should be made to support her with her hearing disability.

64. The claimant presented her claim to the Tribunal on 20 October 2017. This contained the first reference to age discrimination and to the need for recording devices in relation to her disability discrimination claim.

65. We note that an assessment of the claimant's needs had not taken place by 20 October 2017, when the claimant presented her claim. We heard no evidence from the respondent as to why no assessment was done prior to the claimant's return to work, once the date for her return to work had been arranged, in anticipation of her return, or during the period 16-20 October 2017.

66. On 24 October 2017, Ms Riley wrote with an outcome of the grievance hearing. This included the statement that HR and management had been of the view that both parties had no desire originally to go down a formal route and that the evidence pointed to this conclusion and explained the rationale for Beth Goodman's letter. However, the claimant had informed the panel that she had wanted to invoke the formal process and this had been her expectation. Ms Riley wrote:

"I concluded there does seem to be some confusion regarding the understanding and expectations of those involved in this case. Therefore my decision is to commission a formal investigation."

67. Elaine Johnson conducted the investigation under the Dignity at Work policy. She produced an investigation report on 22 December 2017. The claimant said, in evidence, that she had not seen this prior to these proceedings; she had not received an outcome to the investigation.

68. On 18 January 2018, Ms Riley wrote with an outcome to the formal investigation process. She informed the claimant that the formal investigation process had concluded. She wrote:

"I have carefully considered the recommendations within the report and can assure you that appropriate actions are being taken in relation to the findings."

69. She advised the claimant in that letter of the conclusions which had been reached. She wrote that, due to the conclusion of the formal process, they now required the claimant to return to her substantive role with effect from 13 February 2018. The claimant was informed that, as a temporary arrangement, with effect from 13 February 2018, her operational line manager would be Carolyn Craven. We do not deal in any more detail with the outcome of this investigation since this post-dated the claim brought to the Tribunal and does not form part of the complaints the Tribunal has to consider.

70. On 28 February 2018, an Occupational Health report referred to the claimant being due to return to her substantive post the next day following an eight month break in an alternative role within the business. The report referred to the claimant confirming that she has bilateral hearing loss, wears bilateral hearing aids, but benefits from lip reading during conversations. The Occupational Health adviser wrote:

“Please note this individual is considered to have an ‘automatic’ disability for the purposes of UK disability discrimination legislation for her hearing loss.”

71. At some point following the return of the claimant to her substantive role, an assessment was carried out of what equipment was needed to assist the claimant. The claimant informed us that she has now been provided with a pen which works with her new hearing aids to assist in meetings and on the phone, and she was awaiting training in the use of this pen.

72. The claimant gave no evidence as to why she had not presented her claim to the tribunal at an earlier date.

Submissions

73. Mr Grundy, for the respondent, produced written submissions and made additional oral submissions. Mr Owen, for the claimant, made oral submissions.

74. We do not seek to summarise submissions about the evidence and the findings of fact each representative urged us to make.

75. We summarise the principal arguments by both representatives in relation to the claims as follows.

Submissions in relation to the reasonable adjustment claims

76. The respondent submitted that the claimant was not, on the evidence, at a substantial disadvantage in comparison with persons without a hearing impairment in 2016/2017. The matter was not taken further after the incorrect headset was obtained in 2015 because of what the claimant said. The claimant did not raise the issue again throughout 2016. The claimant was not at a substantial disadvantage in relation to the production of minutes of meeting; it was not her role to listen to the recordings. There was nothing which MR saw in 2016 which gave rise to knowledge that the claimant was likely to be placed at a substantial disadvantage and/or that she had a disability.

77. The respondent submitted that, if there was a failure to make reasonable adjustments, this continued until the claimant went off work sick. The complaint was out of time.

78. The claimant submitted that discrimination continued up to and after the claim was presented. Mr Owen suggested there should have been action when the claimant was off sick in preparation for her return to work. The claimant submitted that the requirements to deal with telephone calls and to check and provide accurate minutes put the claimant at a substantial disadvantage. Provision of suitable telephone adaptations and effective recording equipment would have alleviated the

disadvantage. The employer should be pro-active; people with disabilities often make light of them. The respondent should, at least, have had a discussion with the claimant if not a formal risk assessment.

Submissions in relation to the discrimination arising from disability claim

79. Mr Grundy submitted for the respondent that the case does not fit into s.15; he questioned what was the “something” arising in consequence of disability. He referred to the guidance in *Paisner v NHS England and another [2016] IRLR 170 EAT*. He submitted, in relation to all the allegations, that there was no unfavourable treatment and the treatment was not because of something arising in consequence of disability.

80. Mr Owen submitted for the claimant that the “something arising” was the effects of the claimant’s hearing impairment which caused the difficulty using the telephone, dealing with team minutes and involvement in discussions in the area. When asked how the claimant said that what Ms Rintoul did was because of this, Mr Owen said it was difficult to see the link.

Submissions in relation to harassment

81. The respondent submitted that the alleged conduct did not relate to disability.

82. The claimant submitted that all the alleged conduct related to disability. The hearing disability meant the claimant was taking more time to deal with some issues than she would otherwise and this was something Ms Rintoul did not like.

The Law

Discrimination arising from disability

83. Section 15 of the Equality Act 2010 (EqA) provides:

- “(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.”

84. Mrs Justice Simler, in *Pnaiser v NHS England and anor 2016 IRLR 170, EAT*, summarised the proper approach to section 15 claims, based on the authorities, in paragraph 31 as follows:

- “(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
- (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A

is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

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

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

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

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

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

whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

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

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

Harassment

85. Section 26 EqA defines harassment as follows:

"(1) A person (A) harasses another (B) if –

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) The conduct has the purpose or effect of –
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

.....

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect."

86. Subsection (5) lists relevant protected characteristics which include disability.

87. Section 40 prohibits harassment by an employer of an employee

The duty to make reasonable adjustments

88. The provisions relating to the duty to make adjustments are included in section 20 EqA and Schedule 8 to that Act. Schedule 8 imposes the duty on employers in relation to employees. The relevant part of section 20, for this case is section 20(5), which provides:

“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.”

89. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

90. “Substantial” in the context of section 20 means “more than minor or trivial”: section 212(1) EqA.

Burden of proof

91. Section 136 EqA provides:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

Time limits

92. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

93. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the normal time limit.

Conclusions

Discrimination arising from disability

94. The complaint at 2(a) in the further particulars is as follows:

“During 2016 and 2017 the claimant’s line manager, Marianne Rintoul, frequently gave briefings and shared information to the team from her desk which was some distance away from the claimant at the opposite end of the

office. Her colleagues had to make the claimant aware that Marianne was speaking and even when they did the claimant could not hear her. Marianne failed to ensure that she had the claimant's attention before starting to speak on these occasions. This was unfavourable treatment.”

95. The complaint at 2(b) in the further particulars is as follows:

“During 2016 and 2017 Marianne Rintoul regularly gave the claimant impromptu updates on specific contracts whilst passing the end of her desk. She knew the claimant found it difficult to hear and concentrate due to the background noise in the office. She did not give these updates to the claimant in a more private and quiet location. This was unfavourable treatment.”

96. We deal with these two complaints together.

97. It is not disputed that, at times, Marianne Rintoul gave information to the team from her desk and, at times, gave the claimant impromptu updates whilst passing the end of the claimant's desk. Although the complaints relate to 2016 and 2017, the evidence does not suggest that this was something which started only during 2016. These were not the main ways that Marianne Rintoul gave out pieces of information which had come to her notice. Team meetings were held in meeting rooms for the main conveyance of information.

98. We conclude, in relation to these two complaints, that the claimant has not proved facts from which we could conclude that the way Marianne Rintoul gave out information and updates was because of something arising in consequence of the claimant's hearing impairment. The claimant points to no evidence which could lead us to such a conclusion. For this reason, the complaints at 2(a) and 2(b) are not well-founded.

99. The complaint at 2(c) of the further particulars is as follows:

“Throughout 2016 and 2017 Marianne Rintoul disregarded the claimant's requests for support. She was inflexible in her approach to the claimant's issues and set up unrealistic targets for her which were unachievable, setting her up to fail. At no time did Marianne make any allowances or recognise the impact of the issues which the claimant raised with her regarding the adverse impact on her of the staff turnover in the team, the admin support issues and lack of support. This was unfavourable treatment.”

100. This is a complaint about the way in which Marianne Rintoul managed the claimant. The claimant has not proved facts from which we could conclude that Marianne Rintoul managed the claimant in this way because of something arising in consequence of the claimant's disability. The claimant has pointed to no facts which would allow us to reach such a conclusion. We conclude that this complaint is not well founded.

101. The complaint at 2(d) of the further particulars is as follows:

“The respondent failed to take the claimant's grievance made on 9 February 2017 seriously, unreasonably delaying the process contrary to its own grievance policy and procedures (the first meeting with the claimant not taking

place until 25 April 2017). Following the unsuccessful mediation meeting on 1 June 2017 the claimant insisted that her formal grievance proceed. However, following what the respondent described as a preliminary investigation on 29 September the claimant was advised that her complaint 'would not progress to a formal investigation'. Her complaint was not properly investigated and no decision on her grievance was formally made. When the claimant raised this in writing the respondent held what was described as a 'formal appeal meeting'. This was unfavourable treatment."

102. We have found that the delay prior to the mediation was due to the claimant's health and to making arrangements for the mediation in which the claimant had agreed to participate. After the mediation failed, we have found that there was confusion on the respondent's part about the applicable policies. The respondent adopted a process which does not appear in any of their procedures. However, there is no evidence which would indicate that this confusion and process was because of something arising in consequence of the claimant's disability. The claimant has not proved facts from which we could conclude that the way the respondent dealt with her grievance was because of something arising in consequence of her disability. We conclude, therefore, that this complaint is not well-founded.

103. The complaint at 2(e) of the further particulars is as follows:

"The respondent failed at any time to carry out a risk assessment in respect of the claimant. This was unfavourable treatment."

104. We understand the reference to a risk assessment to be to a disability needs assessment. We conclude that this was unfavourable treatment in that the failure to carry out a needs assessment meant that the claimant did not receive an adaptation which would have assisted her in performing her duties; the claimant consequently continued to have difficulties using the telephone and managing in meetings.

105. We conclude that the reason the respondent did nothing in the period March 2015 to 6 July 2017 was because, as we have found, the claimant said to Marianne Rintoul after an unsuitable headset had arrived and Marianne Rintoul had suggested that the claimant speak to Mr Moir, words to the effect "not to bother, she was managing". Marianne Rintoul took what the claimant said at face value and took no further action in relation to the telephone. Marianne Rintoul took no further action because of the claimant saying these words. We have no evidence to suggest that the claimant saying these words was something arising in consequence of her disability. The claimant did not raise with Marianne Rintoul that she was having problems in meetings, so there was nothing to alert Marianne Rintoul to a need to take any action to alleviate these problems. We conclude that Marianne Rintoul did not take any action to arrange an assessment for any assistance other than in relation to the telephone because she was not aware the claimant was encountering any other difficulties.

106. We then consider the period from the date of her second grievance sent on 6 July 2017, in which the claimant raises the matter of difficulties with the telephone until the date of her claim to this Tribunal on 20 October 2017.

107. On 5 August 2017, Pamela Hughes' report recommended an assessment to be carried out within a week of the claimant returning to work. On 30 August 2017,

Beth Goodman wrote that the claimant's new temporary line manager should support her by identifying equipment/other support but gave no specific timeframe. The claimant returned to work on a phased return in a temporary role on 16 October 2017. This phased return to work must have been arranged some time before 16 October. Up to 16 October 2017, we conclude that no assessment had been done because the claimant was on sick leave. No assessment was then done in the period when the claimant was back at work, prior to presentation of the Tribunal claim, which is the period 16-20 October 2017. The only evidence the Tribunal heard as to when the assessment was done was that this had been "recent". We have heard no evidence about why the assessment was not done in the period 16-20 October 2017.

108. We conclude that the claimant has not proved facts from which we could conclude that the reason the respondent did not do the assessment in the period 16-20 October 2017 was because of something arising in consequence of her disability. The claimant has not identified what the "something" in this context is. The evidence that there was some further delay, following presentation of the claim, in carrying out the assessment, does not allow us to conclude that the reason no assessment was done in the period 16-20 October 2017 was because of something arising in consequence of the claimant's disability. We, therefore, conclude that this complaint is not well-founded.

Harassment

109. These complaints were, until closing submissions, pursued as complaints of harassment related to disability and age. In closing submissions, the claimant withdrew the complaints of age discrimination. We, therefore, consider these as complaints of harassment related to disability only.

110. The complaint at paragraph 3(a) of the further particulars is as follows:

"On two occasions in 2016, once in July and once in September, Marianne Rintoul took the claimant into a room and informed her that a complaint had been made about her behaviour and something that she had said and the way that she had said it had been reported to her. Marianne refused to tell her to whom she had said it, when she had said it or what she had said. The claimant found this intimidating and hostile, reducing her to tears."

111. We found that Marianne Rintoul passed on this information because complaints had been made to her. We accept that this was unwanted conduct. However, there is no evidence that would allow us to conclude that it was related in any way to the claimant's disability. The essence of the claimant's complaint appears to be that Marianne Rintoul raised these complaints with her without the level of detail that the claimant would have liked to receive. There is no evidence which would allow us to conclude that there was a link between this and the claimant's disability. The claimant has failed to prove facts from which we could conclude that the way Marianne Rintoul behaved on this occasion was related to the claimant's hearing impairment. We, therefore, conclude that this complaint is not well-founded.

112. We deal with complaints 3(b), 3(c) and 3(d) together. These complaints are as follows:

- “3(b) In early January 2017 on an occasion whilst Marianne Rintoul was standing next to the claimant's desk the claimant showed her an agenda that she had to send back to admin support as it was littered with mistakes and commented that she couldn't do her own job properly because of all the issues with admin support and which work did she want her to prioritise. Marianne responded angrily in an unpleasant manner that it was the claimant's responsibility to deal with it all and to stop telling her about it and then stormed out of the office. This was done in front of other members of the team who then commented to the claimant about the incident. Marianne returned shortly afterwards, curtly instructed the claimant to a room where she angrily said to her not to undermine her like that in the office. She went on to say severely that admin issues were affecting all the team and that as a Band 7, the claimant just had to get on with it and not to be disrespectful to her. The manner in which she spoke to the claimant during this whole incident resulted in the claimant feeling humiliated and intimidated.”
- “3(c) On 29 January 2017 after Marianne had tried to address the admin support issues the claimant raised with her that the first diary entry sent to her by admin support was incorrect, Marianne argued that was not correct and would not listen to the claimant and told her in a dismissive and unpleasant manner in front of the team in the open office to go away and sort it out herself. The claimant was humiliated and embarrassed.”
- “3(d) On Tuesday 31 January 2017 following on from a meeting with Marianne and a new Contract Manager, Marianne told the claimant that she had not engaged at the meeting and said she was finding the claimant difficult and that once again she had undermined her. The claimant disputed this and Marianne stated in an unpleasant manner that she was now arguing with her, being disrespectful and that she wouldn't allow her teenage daughter to talk to her the way the claimant spoke to her. Marianne became angry and said the claimant should hold a mirror up to herself and see what she was like. The claimant was belittled, demeaned, humiliated and offended by Marianne's attitude and words. The claimant was made to feel inadequate and incapable because of her disability and age.”

113. We conclude that the conduct which we found in our facts to have occurred was unwanted and created the requisite effect for harassment within the statutory definition. However, there is no evidence, on the basis of which we could conclude, that Marianne Rintoul's conduct was related to the claimant's hearing impairment. The claimant has failed to prove facts from which we could conclude that the conduct that the conduct was related to disability. We, therefore, conclude that these complaints are not well-founded.

114. We now turn to the complaint of harassment in paragraph 3(e) of the further particulars. This is as follows:

“On 14 June 2017 during a mediation meeting with Marianne Rintoul the claimant was looking intently directly at her in order to concentrate and understand what she was saying. This is something the claimant normally does, and which Marianne was fully aware of. Marianne accused the claimant in an unpleasant manner of ‘giving her the evil eye’. The claimant found this very upsetting, humiliating and offensive.”

115. We found that the claimant was staring at Marianne Rintoul during the mediation meeting. We also found that the claimant was making faces and rolling her eyes. In relation to the claimant staring at Marianne Rintoul, we consider that this, coupled with the claimant's reliance on looking at people's lips as well as listening to them to understand what they are saying, proves facts from which we could conclude that Marianne Rintoul's comment was related to the claimant's hearing impairment and, therefore, to disability. We, therefore, look to the explanation provided by the respondent; the burden being on the respondent to show that the conduct was not related to disability.

116. The nature of the comment i.e. that the claimant was giving her the “evil eye”, appears to relate to the claimant's staring at Marianne Rintoul. Marianne Rintoul has said that she made the comment because the claimant was making faces and rolling her eyes at her. However, this explanation does not sit easily with the nature of the comment. If Marianne Rintoul had been complaining about the claimant making faces and rolling her eyes, we would have expected the comment to relate to this specific conduct. Marianne Rintoul has not, therefore, satisfied us that the comment was not related in any way to the claimant's disability. We conclude that the comment was unwanted and it created the requisite effect for the definition of harassment. The claimant was clearly upset at the comment. We conclude, therefore, that this complaint is well-founded. The complaint was presented in time.

Failure to make reasonable adjustments

117. The claimant brings this complaint under section 20(5) of the Equality Act 2010. It relates to the failure to provide auxiliary aids, putting an employee at a substantial disadvantage in comparison with persons who are not disabled. The claimant relies on two matters:

- (a) “During 2016 and 2017 the respondent failed to provide the claimant with a suitable adapted telephone. This would have removed the disadvantage of having to remove her hearing aids every time she needed to take an incoming call.”
- (b) “During 2016 and 2017 the respondent failed to provide the claimant with suitable quality recording devices to enable her to produce minutes of the contract meetings she conducted. This would have removed the disadvantage of her not being able to make contemporaneous handwritten notes efficiently due to her hearing impediment.”

118. Dealing with the first matter, we conclude that the failure to provide a suitably adapted telephone did put the claimant at a substantial disadvantage. This is shown by the claimant removing her right hearing aid in order to use the phone. Marianne Rintoul knew that the claimant was at a disadvantage in relation to telephone use

because of her hearing impairment, because she had seen the claimant fiddling with her hearing aids after using the phone. Marianne Rintoul thought something was needed and had suggested they obtain something, which had led to the unsuitable headset being procured. We conclude that, from March 2015 onwards, the respondent, through Marianne Rintoul, had the requisite knowledge that the claimant both had a disability and was put at a substantial disadvantage by the failure to provide a suitable auxiliary aid. Although the claimant, we have found, said not to bother and she would manage, after the unsuitable headset had been tried, we consider that Marianne Rintoul should not have left the matter there. An employer has an obligation to take reasonable steps to alleviate a disadvantage if they are alerted to the problem. Had Marianne Rintoul tried to persuade the claimant to have a proper assessment and the claimant refused to do so, then the situation would have been different. Subject to the time limit issue, we would find the complaint of a failure to make reasonable adjustments to be well-founded.

119. We do not consider that there was a failure to make reasonable adjustments in the period when the claimant was off sick. During periods when the claimant was not at work, she was not at a disadvantage by not having suitable telephone equipment provided. The respondent was not, therefore, during periods of the claimant's absence, failing to make reasonable adjustments. There was a period of failure from March 2015 until the claimant's sickness absence beginning in November 2015, although this precedes the period in relation to which the claim is brought. There is a period of failure from when the claimant returned to work on 11 January 2016 until she went off work on long-term sickness at the beginning of February 2017. She did not then return to work until 16 October 2017. She presented her claim on 20 October 2017.

120. We have to consider whether there can be said to be a failure in the period 16-20 October 2017 or whether an employer has a grace period in which to carry out an assessment and provide the requisite equipment once the employee returns to work.

121. The respondent was aware, from the claimant's grievance in July 2017, that the claimant was complaining that suitable telephone equipment had not been provided to alleviate problems caused by hearing loss. In August 2017, Pamela Hughes had made a recommendation that an assessment should be completed within one week of the claimant returning to work. On 28 September 2017, the respondent was aware that the claimant would be returning to work on 16 October 2017. We heard no evidence as to why an assessment was not done prior to the claimant's return to work or in the period 16-20 October 2017. All jobs the claimant was likely to do would be likely to involve at least some use of the telephone. The respondent should have been aware, therefore, that the claimant was likely to be at a disadvantage due to her hearing loss in using the telephone from the time she returned to work. Although an assessment prior to the claimant's return to work might not have resulted in the necessary equipment being available immediately on the claimant's return to work, if the equipment was not in stock and available for immediate delivery, the process would have been set in train. If that had been the case, we would not consider there to have been a failure to make reasonable adjustments in the period 16-20 October 2017. However, in the absence of any such steps, we conclude that there was a failure to make reasonable adjustments in the period 16-20 October 2017. The complaint in relation to that period is well founded.

Since the tribunal claim was presented on 20 October 2017 and no amendment has been made to add a complaint in relation to any period after the presentation of the claim, we do not make any decision in relation to what happened after 20 October 2017.

122. The complaint in relation to the period 11 January 2016 until early February 2017 is out of time unless the failure to make reasonable adjustments in that period forms part of a continuing act of discrimination ending with the failure in the period 16-20 October 2017. We conclude that it does not form part of a continuing act of discrimination since there is a break in the failure to make reasonable adjustments during the period of sick leave.

123. We must consider whether it is just and equitable to consider the complaint in respect of the period 11 January 2016 until early February 2017 out of time. Although the tribunal has a wide discretion to consider complaints out of time, there must be some material on which the tribunal can reach the conclusion that it would be just and equitable, in all the circumstances, to consider the complaint out of time. The claimant has given no evidence as to her reasons for not bringing a complaint to the tribunal about this matter earlier. Although the issue dated back to March 2015, the claimant made no internal complaint about it until her grievance in July 2017. In these circumstances, we do not consider that we have any material before us which would make it appropriate for us to exercise our discretion to consider the complaint out of time. We conclude that we do not have jurisdiction to consider the complaint in relation to the period 11 January 2016 until February 2017.

124. Turning to the second matter, we conclude that the claimant was at a substantial disadvantage by a failure to provide suitable quality recording devices. This related both to meetings that the claimant chaired without an admin person present to take notes and also to meetings where there was an admin person present.

125. In relation to the meetings which the claimant chaired, where no admin person was present so the claimant was required to make the note of the meeting, we conclude that the claimant was not able to take a proper note because she needed to look at the lips of the speakers. She was at a disadvantage in this way compared to people without a hearing impairment. She had more need to rely on the recording equipment than a person without a hearing impairment.

126. In relation to meetings where another person took minutes, we conclude that the claimant still needed to check the notes made and had more recourse to the recording than a person without a hearing impairment would have done, because she was not able to make as good notes herself as someone without the impairment, because she needed to look at the speaker's lips.

127. We accept that the respondent did not have actual knowledge that the claimant was put at this disadvantage, but conclude that they ought reasonably to have known that the claimant was put at this disadvantage. Had the respondent managers applied their minds to the matter, they should have realised that the claimant was not able to make notes in the same way as a person without a hearing impairment because of her need to look at people's lips when they were speaking, and that the provision of quality recording devices would help to alleviate the disadvantage.

128. Subject to the time limit issue, we would conclude that this complaint of a failure to make reasonable adjustments was well-founded. The claimant was disadvantaged in this way up to the time she went off sick. We have heard no evidence that she chaired any meetings in the period 16-20 October 2017. We conclude, therefore that the complaint is presented out of time and we, therefore, have to consider whether it is just and equitable, in all the circumstances, to consider the complaint out of time.

129. Although the tribunal has a wide discretion to consider complaints out of time, there must be some material on which the tribunal can reach the conclusion that it would be just and equitable, in all the circumstances, to consider the complaint out of time. The claimant has given no evidence as to her reasons for not bringing a complaint to the tribunal about this matter earlier. We note that the claimant did not raise this matter at all until her claim form to the Tribunal which was presented on 20 October 2017. In these circumstances, we do not consider that we have any material before us which would make it appropriate for us to exercise our discretion to consider the complaint out of time. We conclude that we do not have jurisdiction to consider the complaint of failure to make reasonable adjustments in relation to the failure to provide suitable quality recording devices

Employment Judge Slater

Date: 14 November 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

20 November 2018

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