EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss D Japal	**V**	**London Borough of Islington**

Heard at: Watford **On:** 21, 22 and 23 November 2018

Before: Employment Judge McNeill QC
Mr D. Bean
Mr R. Leslie

Appearances:

For the Claimant: Mr R Fitzpatrick, Counsel
For the Respondent: Mr F McCombie, Counsel

JUDGMENT having been sent to the parties on 9 January 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant brought claims against the respondent for disability discrimination contrary to sections 21 and 15 of the Equality Act 2010 (EQA). The issues between the parties were set out in a case management summary dated 20 December 2017.

2. The main issues raised by the section 21 claim were:

(i) whether the respondent had a provision, criterion or practice (PCP) of requiring staff to share work stations by hot desking;
(ii) whether such a PCP (if made out) put the claimant at a substantial disadvantage in comparison with persons who were not disabled; and
(iii) if so, whether the respondent took such steps as it was reasonable to have to take to avoid that disadvantage.

3. The main issues raised by the section 15 claim were:

(i) whether the treatment alleged by the claimant, namely the alleged failure to provide her with a dedicated workstation, took place;

(ii) if so, whether that treatment was unfavourable to the claimant;
(iii) if so, whether such treatment was because of an inability to hot desk said to arise from the claimant's fibromyalgia and/or asthma.
(iv) The list of issues referred to a potential defence of justification but that was not pursued by the respondent.

4. There were time limit issues which were argued before the tribunal.

Findings of Fact

5. The claimant has worked for the respondent since 1984. There was a period between April 2004 and April 2012 when she was employed by Homes for Islington under a TUPE transfer but there was no dispute that she had continuous service with the respondent since 1984.

6. The claimant remains in the respondent's employment in an Application Support post. Her work involves working in front of a computer screen.

7. The claimant has a number of health issues which include asthma and fibromyalgia. The respondent accepts that by reasons of those two conditions she has at all times relevant to these claims, been a disabled person within the meaning of section 6 of the EQA.

8. The claimant's fibromyalgia causes her pain and fatigue. Her symptoms fluctuate, but at their worst cause muscular pain all over her body, particularly in her arms, legs, back and neck, sometimes to the extent that she struggles to stand and walk. Her condition means that she is sensitive to pain and sometimes gets headaches and migraines. The claimant takes daily medication and has regular medical appointments. The position in which she sits at work has a significant impact on her condition. She needs support for her arms and legs and can get severe pins and needles if she sits incorrectly in front of a computer for too long. Her asthma is triggered by sitting in the direct path of air conditioning units.

9. The respondent was aware of the claimant's fibromyalgia and asthma from 20 September 2013. On that date, the claimant's then Business Support Manager, Mr Mark Street, was sent a report from a Dr Laura Crawford, an Occupational Health Physician. The claimant had been absent from work and the report addressed, among other matters, a phased return to work plan. In the report, Dr Crawford described the claimant's main symptoms as aches and pains and tiredness when her condition flared up. She had good and bad days. When her symptoms were most active she was extremely tired by the time she returned from work and had to rest at home. She described an ache and tingling in her arms. When at its worst, her condition also affected her concentration and memory. Dr Crawford then referred to the claimant's asthma which was relatively stable at that time. In relation to the claimant's work, Dr Crawford advised, with reference to the claimant's fibromyalgia, that she should ensure that she took her allocated breaks and used these to rest.

10. Dr Crawford noted that the claimant shared work stations. Longer

term, depending on her role, it might be appropriate to ensure that she had a work station assessment so as to ensure that her work station was correctly set up, particularly in relation to supporting her forearms when her symptoms of fibromyalgia were most active. There was a reference to the need for the claimant to sit down. Towards the end of the report it was stated: "*the adjustments relevant are those I have already mentioned which are mainly in relation to ensuring that she takes appropriate breaks and her work station is properly adjusted."*

11. At the time of that report, the respondent had been operating a hot desking policy since 2012. It had a written policy which included a section headed "Work Types" which included two relevant categories of worker. The first category was "office based mobile worker guide 7:10": that meant that there were seven work stations per ten employees. The relevant workers were those based in the Islington offices who spent a reasonable proportion of their working time away from their desk, either in meetings, at other sites, working at home or with clients. Those staff were comfortable sharing desks and would work to the 7:10 desk-to-staff ratio. The majority of council staff fell within this worker type. This was the "ordinary" hot desking policy.

12. The second relevant category of worker was "fixed desk worker guide 10:10". These were fixed desk workers who were allocated a desk each purely on the basis of a specific "DDA" (reference to the now superseded Disability Discrimination Act) or IT based requirement. In these cases, it was stated that, where possible, the respondent's layouts would include height adjustable desks and fully ergonomic flexible chairs. It was stated that the respondent's aim was to accommodate "DDA chairs" as necessary.

13. In around 2013, the respondent was undergoing a re-organisation and the claimant brought a grievance. The precise details of her grievance were not adduced in evidence before the tribunal but the tribunal was given to understand that it included a grievance in relation to the provision of training and also made reference to medical matters. The respondent indicated during the course of the re-organisation that it would assimilate the claimant into an Application Support post provided that she withdrew her grievance. The claimant was initially not happy with the condition that she must withdraw her grievance in order to have a post, in particular given that this was a situation in which there were not going to be any redundancies. She said that she had suffered discrimination. This allegation related to her occupational health assessment and the recommendations of 20 September 2013 and the respondent's failure to act on the recommendations. From the respondent's perspective, it understood that when the claimant accepted assimilation to the Application Support post it was on the basis that the grievances were withdrawn and that the claimant agreed that the occupational health recommendations were in place.

14. In a letter to the claimant dated 22 November 2013 (Friday) Mr Michael Walcott, Head of Information Services, who gave evidence to the tribunal, said: "*our final question to you at the meeting on Monday focused on the report from the occupational health assessment and you agreed that there was nothing outstanding and that all of the recommendations were in place*". That letter was plainly referring to the occupational health letter of 20 September 2013. A Display Screen Equipment (DSE) assessment relating to

the claimant had just taken place but this took place only on Thursday 21 November 2013, after the meeting on the Monday.

15. The DSE assessment was carried out on 21 November 2013 by a health and safety consultant, Sheila Robin. She recommended a number of remedial actions. These related to the claimant's sitting position, providing a document holder, providing a telephone headset, how the claimant typed, a chair and in particular that a label should be put on the claimant's chair, which should only be used by the claimant. A further recommendation was made that the chair should be moved away from any work station when not in use. Under the heading "compliance or comment" it was stated: "*Debbie [the claimant] would find it easier if she had a dedicated work station. Recommended remedial action: if possible, a dedicated work station should be available for Debbie. Discussed with Mark [Street] the most suitable option*".

16. Following that report in November 2013 there was a notable absence of evidence as to what then took place. There was no evidence of steps taken in 2014 to implement Ms Robin's recommendations. There was no evidence that consideration was given to providing a dedicated work station for the claimant at that time. The claimant did send an email to her then manager on 7 July 2014 referring to her fibromyalgia and indicating that she was stressed.

17. An email dated 20 April 2015 evidenced that the claimant was at that time discussing with Mr Walcott a hands-free set up. She was also asking about a chair. She then said:

> "with regards to the work station, I had moved to Sharon's management when the report was issued so this was not discussed with Mark. Initially this was set up but was withdrawn by Sharon after a complaint from Sian, not sure why as this was not discussed with me."

18. For a time a dedicated work station for the claimant was in place but it was removed, in March or April 2015, after an incident with a colleague. The claimant was not happy with the dedicated workstation because it was positioned directly under an air conditioning unit which exacerbated her asthma. At around this time she was told that a staff member had complained that she was getting special treatment. Ms Sharon Mitchell, her then manager, came to her desk in March/April 2015 and took down the sign that indicated that the work station was reserved for a disabled person. The claimant was upset by this. From that short period onwards, the claimant had no dedicated work station.

19. Between 18 March 2015 and 16 November 2015, the claimant had a number of absences from work. She had five bouts of sickness and had to spend time on sick leave.

20. In April 2015 the claimant wrote to her managers to indicate that she felt that her disability and her need for assistance were being ignored. She repeatedly complained that management did not understand or care about her disability and were doing nothing to assist her. There was some turnover of managers which contributed to some of the difficulties in this case, with information perhaps not being passed on as fully as it should have been from one manager to the next.

21. In any event, in May 2015 a letter was given to the respondent from the claimant's GP, asking if work adjustments could be made. The GP, it appears had misunderstood the nature of the work because he thought that the claimant had to stand for seven hours at a time.

22. On 17 December 2015, Mr Michal Jankowski, who gave evidence to the tribunal and who was the Corporate Health and Safety Advisor for the respondent, wrote to Mr Murray Oates who was by then the claimant's line manager saying:

> "please see assessment carried out previously for Debbie. It states the chair should be adjusted for her, labelled and moved away if not in use so that nobody else uses it [that was clearly referring to the 21 November 2013 assessment]. There is no mention that a specialist chair would be required so in my opinion this isn't necessary especially as having a specialist chair would not stop people from using it…we should work on the basis that Debbie is excluded from hot desk policy and has allocated desk and chair and that the chair should not be used by other members of staff."

23. At that stage Mr Jankowski recognised that the claimant required a dedicated work station (sometimes referred to as "a fixed desk").

24. The claimant returned to work after a period of absence on 9 March 2016 and had a return to work interview. She explained to Mr Oates at that interview how her fibromyalgia affected her on a daily basis. They discussed the options for mitigating the effects of her disability and Mr Oates indicated that he would be willing to look at allowing her the option to work an additional day at home on occasion under certain circumstances relating to her disability and on a case by case basis.

25. On 10 March 2016, the claimant wrote to Mr Oates. The email was essentially about the chair. The claimant indicated that she had previously had a specialist chair due to a back problem caused by a whiplash injury. She said: "*It is unreasonable to expect me to have to walk around the office every time I am in looking for a chair and having to try to adjust different chairs. This is difficult for me to do with my disability*". Her trade union representative, Mr West, asked Mr Oates to sort this out. He pointed out that the claimant would not be the only person in the council who had a dedicated chair for her own use due to disability.

26. The claimant then filled in a questionnaire which she and others had been provided with on 14 March 2016. She said, among other things: "*I do not have a chair I can fully adjust. I have a disability that causes pain in my arms and legs*." She then said: "*I had an assessment in 2013 but my employer has not implemented the report*".

27. Thereafter, on 17 March 2016 she wrote to the Head of Policy and Business Partners. She referred to an agreement back in November 2013 which led to Sharon Mitchell being given the task of ensuring that she had a suitable workstation including a suitable chair. This was never completed, she said, following the challenge from a member of the team: that is a reference to the March/April 2015 matter. She said that the recommendations had not been met. She felt they were being ignored and again she said she did not

feel management cared about her disability.

28. A report was then obtained from an ergonomist, Mr Richard Patricio. His report was dated 4 April 2016. It was a detailed report in which Mr Patricio said that the claimant's workstation was "not the sole cause of her discomfort" but that it definitely was "a contributing factor". He then referred to the claimant's office hours and said that she worked "from the same office and the same desk". That referred to what happened in practice: the claimant's role was desk-based and she tended to sit at the same desk each day. There was reference to the surrounding environment and to the claimant's work chair. Advice was given that the claimant should be issued with a chair with arm rests that were sufficiently adjustable to support her upper limbs but allow her to get close to the edge of the desk. The chair that was advised was the RH extend chair designed, it was said, to help her sit with a dynamic posture.

29. There were also recommendations for a foot rest and the positioning of her display screen. Mr Patricio advised on a handset, keyboard and mouse. It was suggested that the claimant might benefit from an alternative mouse. In relation to hot desking, Mr Patricio said this: "*Debbie noted she hot desked and this is an issue for her. Solution: I advised Debbie that hot desking can in fact be an advantage for someone with musculoskeletal issues. It will allow Debbie to reconfigure her workstation daily. Provided she's cognisant of the advice given this should make her more mindful of her posture and the impacts of her workstation on how she is seated. This should encourage better practices and, hopefully, comfort*". There was then reference to job variation and breaks, the adjusting of her monitor and the need for a chair set up to suit her with user training and instruction on how to adjust the chair. It was recommended that she should have guidance on how to raise a facilities issue and on spending time adjusting her workstation as per the guidance daily. The RH extend with armrest and evoluent vertical mouse were recommended.

30. On 20 April 2016, the claimant told Ms Hall-Brunton that a fixed desk had been agreed at a meeting in November 2013. Although the precise terms of the agreement were not evidenced in writing, and it is difficult to pinpoint the time exactly when a fixed desk was provided, it is plain that a fixed desk was provided. Mr Oates was not aware that there had been an agreement for a fixed desk. Mr Oates did not exempt the claimant from hot desking because he took into account Mr Patricio's opinion on the benefits of hot desking, which conflicted with the earlier indication from Mr Jankowski. The RH extend chair was purchased for the claimant on about 20 April 2016, as well as the recommended vertical mouse. A footrest was also purchased.

31. In April 2016, having met with her new manager Mr Oates, the claimant was content to confirm that she did not want any action taken specifically at that time as she wanted to give Mr Oates the opportunity to put the recommendations in place. There were nevertheless, subsequent discussions in relation to getting a new chair and the possibility of a fixed desk.

32. There was then some discussion in August 2016 about the purchase of a foot stool after the claimant was asked on 8 July 2016 whether the recommendations in the Assessment Report had been implemented and if they had proved beneficial. The date of the Assessment Report was not there

referred to so but it would appear to be the April 2016 report.

33. On 24 August 2016, the claimant wrote again to Ms Hall-Brunton. She said that she would still like to have a fixed workstation, especially as she constantly had to make adjustments to the workstation which was difficult for her because of her disability. She referred to the previous agreement in relation to a fixed workstation. Ms Hall-Brunton attempted to get in touch with the claimant but found that she was unable to leave a message.

34. Mr Oates referred the claimant for occupational health advice on 14 October 2016. On 3 November 2016 an occupational health nurse provided a report. In the section of her report headed "Opinion", the nurse said that the claimant had been off work but was assessed as fit to return to work. In order to aid the claimant's stamina and resilience, she recommended that the claimant return on a phased basis. A DSE assessment was also recommended. She advised that the claimant should not hot desk. If possible, an area in the office where she did not sit directly under an air conditioning unit should be found.

35. Although a DSE Assessment was recommended, this was not obtained.

36. The claimant was invited to a first formal managing for attendance meeting which she attended on 13 December 2016. Mr Oates, at that meeting, referred to the seating arrangements. He said that the claimant was at an advantage because she got in to work really early which meant that there were a lot of desks available when she got in. He said:

> "We do mobile working so there is not an issue with where you sit, I am quite happy for you to take an area or to take a chair anywhere on the floor that you believe is best for you. You will have a good idea of what's irritating you or what's affecting you and if you can find a chair within that area or around the corner if need be where you feel you are least under the impact of those air conditioners I am quite happy to make arrangements for you to sit there so I need to leave that in your court."

37. The claimant referred to a problem with her chair and the desk. She said that she could not move up and down because her chair did not go under the desk. Mr West said:

> "What I would suggest is talking to Health and Safety. As well as the chair and foot rest is whether it will be appropriate for the claimant to have one of those desks that go up and down and then to set it up, put in a position you are happy with and then get them to adjust it to the right height for you."

38. There was reference to the air conditioning and the claimant made a request to work an extra day from home. She referred to the symptoms of her fibromyalgia.

39. In December 2016, Mr Oates contacted Ms Ramos-Gill and referred to the conversation about the seating arrangements. He asked Ms Ramos-Gill to arrange for a new assessment to be carried out early in the new year. Ideally, this needed to focus on her seating and possible options for access to an

adjustable desk to be situated in a specific area. That request was passed on to Mr Jankowski.

40. The claimant wrote again on 16 December 2016 to Mr Oates repeating her concern that she had not been provided with a fixed desk and that management were not caring about her disability.

41. A split keyboard and a rocking foot machine were ordered and provided in about January 2017.

42. On 18 January 2017, Mr Jankowski provided a report to Mr Oates, having carried out a review of the claimant's case. He recommended reasonable adjustments which included: choosing a seat on the floor away from the air-conditioning units; having a chair specifically assigned to the claimant which other staff were prevented from using and which would be clearly labeled; providing the claimant with a suitable footrest, ergonomic keyboard, higher laptop stand and extra cushion; and using a headset for all phone calls.

43. Mr Jankowski did not take into account the occupational health recommendation that the claimant should not be hot desking. He took the view that the claimant being able to choose a desk was the same as having a dedicated workstation. He did not consider that setting up a workstation each day might be problematic for the claimant because of her condition. Although there were conflicting recommendations into whether the claimant should or should not hot desk with Mr Patricio considering that hot desking was helpful, and the occupational health nurse considering that the claimant should not hot desk, neither Mr Oates nor Mr Jankowski took any further medical or occupational health advice on this matter.

44. Although the question of a fixed desk had been raised at the meeting on 13 December 2016, the respondent did not at any stage consider or take into account its own policy on fixed desk working for disabled employees.

45. On 24 January 2017, the claimant's trade union representative, Mr West, wrote to HR saying: "*I understand a member of your team has just undertaken a workplace assessment for Debbie. I also understand Debbie has been told she cannot have a dedicated desk as a reasonable adjustment for her disability. Is this the case?"* There was apparently no response to this letter. On 26 January 2017, Donna Lewis, who worked in HR, wrote to Mr Jankowski saying: "*I have had the below email from Mr West. Looked at the file. Can only find an assessment carried out in April 2016 for the claimant by Well Working which actually states that the hot desking could be an advantage given her condition. Have you undertaken a further assessment?"* Ms Lewis did not refer to the conflicting November 2016 occupational health advice.

46. There was a second formal meeting on 27 January 2017, when there was specific discussion about the fixed desk. The claimant said "*Fixed desk, what are we doing about that? Mr West said that he had raised this as well*".

47. On 27 January the question of a fixed desk was raised by the claimant with Mr Jankowski but she and Mr Jankowski were unable to find a time to talk about this.

48. On 3 February 2017, the claimant said to Mr Jankowski in an email *"I just want to ensure that the Occupational Health report recommendations advice for a fixed desk is included in your report*". The claimant received a copy of Mr Jankowski's report on 26 May 2017. She immediately questioned why Mr Jankowski had not included fixed desk in his report even though she had raised the matter.

49. Mr Jankowski replied to the claimant on 30 May 2017. He said: *"having spoken with Mr Oates in regard to the desk at the time of the meeting, the agreement was that he would ensure everyone in the other teams are aware that you require a desk space that is suitable and that you will get preference of the desk chosen, effectively meaning you can sit at the same desk every day. If for any reason you find that desk is occupied you can gain support from your manager to ask the person to vacate the desk.*" The claimant considered that it was humiliating to have to ask somebody to move.

50. There were people employed by the respondent who, for medical reasons, required a fixed desk. If these people were not at their desks, their desks, but not their chairs, could be used by others.

51. In around May 2017, Mr Oates told the claimant that if somebody was sitting in a desk where she wished to sit he would intercede in order to support her. On the one occasion that he did seek to intercede, he was unsuccessful because Children's Services insisted on using the relevant desk.

52. The seating in the office was on a 7:10 ratio; seven workstations for every ten employees. In practice, subject to allocated fixed desks, the practice was first-come-first-served. Generally, people sought to go to the same place every day. In practice it could be difficult to police fixed desks, in particular if the relevant manager was out of the office but there was a clear policy of fixed desks for disabled employees where appropriate and the respondent must therefore have thought that fixed desks were a reasonable adjustment that could be made for people with disabilities where appropriate.

53. From May 2017, Ms Sornsuparp became the claimant's manager. There appears to have been a period of overlap with Mr Oates. On 8 June 2017, Mr Jankowski was still writing to Mr Oates in relation to the claimant and to the chair that had been provided not being comfortable.

54. In June 2017, a further chair, which had been ordered, was delivered and kept for the claimant until she was in the office. It was recognised that that chair would need to be set up for the claimant.

55. It was stated on 16 June 2017 by Mr Jankowski that a replacement chair for the claimant had been purchased as she did not like the other one. There were no costs attached but she needed to let the respondent know within a maximum of a week if that chair was suitable or not. The claimant indicated on 19 June that she would need someone to set the chair up and show her how to adjust it. That had not been done by 17 July when she again requested for the chair to be set up.

56. On 30 July, the claimant noted that there was an arrangement for her

chair to be set up that day between 10 and 11. By 3.15 pm she had not heard from anyone and did not know what was happening.

57. On 17 August 2017, the claimant wrote to the Chief Executive saying that she had not received support from her managers or current HR Business Partner and had been advised that she was not entitled to a fixed desk despite a previous HR Business Manager agreeing to a fixed desk.

58. Ms Labor, who gave evidence to the tribunal, wrote to the claimant's then manager on 18 August 2017 saying: *"Can you please allocate to the claimant a designated work station. Ask her where she would prefer to sit and let her know that it is her designated work area."*

59. Ms Sornsuparp agreed to speak to the claimant with a view to her sitting at a desk that she had chosen.

60. On 23 October 2017, she spoke to the claimant regarding a designated desk and informed her she was happy for the claimant to continue to sit where she chose and this would be her designated desk. She did not do anything further to ensure that all the adjustments recommended were put in place.

61. Ms Sornsuparp asked the claimant to try out a hydraulic desk, which can be moved up and down by pressing a button. The claimant was unwilling to try out the desk suggested because it was located in the path of an air conditioning unit.

62. On 6 October 2017, the claim form was presented. There followed some further discussions between the claimant and management in relation to the adjustments that the claimant sought. The claimant was then absent from work for a long period. At the time of the tribunal hearing, the claimant was working two days a week from home. The issue of the fixed desk had still not been resolved.

The law

63. The legal principles were mainly undisputed.

64. The first claim was the claim for reasonable adjustments. Section 20 of the EQA defines the duy, which comprises three requirements. Although the claimant's counsel made reference to the failure to provide auxiliary aids (the third requirement) in his skeleton argument, there was no issue in relation to auxiliary aids identified at the case management hearing and the focus during the hearing was on the first requirement. 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".* The first issue was whether there was a provision, criterion or practice (PCP) which put the claimant at a substantial disadvantage. If so, did the respondent take reasonable steps to avoid that disadvantage?

65. Substantial disadvantage means disadvantage which is more than

minor or trivial. Where the conditions in section 20 are satisfied, the duty to make reasonable adjustments is triggered and the burden is then on the employer to show that it made reasonable adjustments. This may involve looking at adjustments as a whole not item by item: **Burke v College of Law** [2012] EWCA Civ 37, referred to in paragraph 9 of **Home Office (UK Visas and Immigration) v Kuranchie** [2017] 1 WLUK 277.

66. Section 21 of the EQA provides that a failure to comply with any of the requirements in section 20 is a failure to comply with a duty to make reasonable adjustments.

67. Pursuant to section15 of the EQA:

"(1) A person (A) discriminates against a disabled person (B) –
(a) if A treats B unfavourably because of something arising in consequence of B's disability…".

The respondent did not seek to rely on the defence of justification in section 15(1)(b) of the EQA.

68. The only issue in relation to section 15 related to the question of causation. The respondent accepted that there was unfavourable treatment. However, it contended that the proper test of causation was a "reason why" test. Therefore, if, as the respondent contended, the respondent's reason for not progressing a fixed desk adjustment was that management thought it was better for the claimant to hot desk, then that test is not satisfied. He could provide no authority in support of this proposition.

69. The claimant submitted that the proper test was to look at the unfavourable treatment and to ask whether that was something arising in consequence of disability. This was an objective test. If the claimant experienced pain and discomfort when required to hot desk, which she plainly did and which amounted to unfavourable treatment, the difficulty in hot desking was *"something arising in consequence"* of her disability and the necessary causal connection was made out. The tribunal accepted the claimant's submission.

70. In relation to time limits, the issue between the parties was whether any acts or omissions relied on by the claimant which fell outside the primary three month time limit formed part of *"conduct extending over a period"* within the meaning of section 123(3) of the EQA which did not conclude until a date falling within the primary three month time limit period.

71. The tribunal was referred to the case of **Sougrin v Haringey Health Authority** [1992] ICR 650 in which the Court of Appeal relied on the earlier appellate decisions in **Amies v Inner London Education Authority** [1977] ICR 308 and **Kapur v Barclays Bank plc** [1991] ICR 208, where the distinction was made between acts extending over a period and one-off acts with continuing consequences.

Analysis and Conclusions

Time Limits

72. The tribunal considered the substance of the claimant's complaint which was that from 2013 the respondent continued to apply its ordinary hot desking policy to the claimant and failed to provide her with a fixed desk. From time to time, the question of providing the claimant with a fixed desk was reviewed and from time to time decisions were taken as to adjustments which would or would not be made. The facts demonstrated an ongoing review process. This is not unusual in a case involving a disabled employee whose symptoms and consequent difficulties may vary from time to time. It was artificial to characterise this ongoing review process as consisting of single decisions with continuing consequences.

73. There was an ongoing application of the respondent's ordinary hot desking policy to the claimant which was still continuing at the time that the claimant presented her claim form. The application of the policy was conduct extending over a period which continued up to the time of the presentation of the ET1 and thereafter.

74. The tribunal concluded that this was, therefore, a claim which was made in time.

75. Had the claim been out of time, the tribunal would have extended time on just and equitable grounds. The provisions of the EQA of course provide for short, three-month, time limits so that claims can normally be dealt with expeditiously. It is the exception rather than the rule to extend time.

76. However, the facts of this case involved an ongoing process of reviewing the claimant's requirements over a number of years. There were periods of delay during the process: some of which were attributable to the respondent and some to the claimant. The matter was very well documented and the respondent was able to meet all of the allegations without any difficulty. The tribunal heard from six witnesses who all gave clear evidence.

77. Looking at the balance of prejudice, which was a relevant but not the sole factor, there would be considerable prejudice to the claimant if the tribunal did not allow her case to proceed because she would lose the benefit of a potentially valuable claim. Perhaps even more importantly, the claim raised issues which impacted on her continuing employment. If the respondent had a valid limitation defence, it would lose that defence if the claim was permitted to proceed on just and equitable grounds but the respondent did not complain that it was prejudiced in its ability to meet the allegations made.

78. The tribunal considered, in its discretion, that even if it had found the primary claim to be out of time, it would have extended the time limit on just and equitable grounds so that her claims could all be brought.

Reasonable adjustments claim

79. The respondent submitted that the PCP could not properly be defined as the ordinary hot desking policy: it was the hot desking policy read together with Mr Oates' agreement to intercede if the claimant needed support in relation to her sitting. In the tribunal's view, that contention conflated the

policy and the adjustment.

80. The policy was that identified by the claimant, namely the ordinary hot desking policy. The agreement to intercede was an adjustment. The policy placed the claimant at a disadvantage compared to non-disabled co-workers and that disadvantage was more than minor or trivial. The claimant could, in practice, pick her own workstation on a day-by-day basis, if she came in early but without a fixed desk there was no guarantee that her workstation would be properly set up for her when she came to work. She might be required to move equipment, for example, a chair and footrest. Given her physical condition and the symptoms of her fibromyalgia such activity could be painful or, on occasions, impossible given the severity of her symptoms. Non-disabled workers would not have this difficulty.

81. The respondent submitted that the claimant was not disadvantaged. The claimant could choose her own desk and Mr Oates would police the matter. It was suggested that a desk for sole use was not possible in practice.

82. We accepted that on occasions another employee might sit at the desk reserved for a disabled person when a manager was not there. But the respondent's own policy specifically provided that there should be fixed desks for some disabled employees. The respondent's submission that the provision of a fixed desk was impossible in practice was contrary to its own express policy.

83. The respondent did make some reasonable adjustments for the claimant. Some equipment was provided for the claimant and efforts were made on a one-by-one basis to comply with specific recommendations made. Further, the claimant was offered an additional day working at home when needed and was offered the adjustment of Mr Oates interceding on her behalf if there was no suitable workstation available for her.

84. What the respondent failed to do was to look at this matter broadly and holistically in the light of all the expert evidence, including the medical and occupational health evidence. It chose to take into account the advice of the ergonomist, Mr Patricio, that hot desking was good for the claimant but it largely disregarded and failed to take into account or make further enquiry into the contrary medical and Occupational Health nursing advice and the suggestion from the DSE advice of 20 September 2013 from the health and Safety Consultant that the claimant should have, or might benefit from, a dedicated workstation.

85. Providing a dedicated workstation would have been a reasonable adjustment. The respondent said that this was impractical but the tribunal did not accept this, not least because arranging a fixed desk for a disabled employee is specifically provided for in the respondent's own policy. The fact that other people might use the claimant's desk from time-to-time did not abrogate the need to make reasonable adjustments by providing the claimant with a fixed desk solution.

86. The onus is on the respondent once a PCP is established and disadvantage made out to show that it has made reasonable adjustments. It failed to do so. It is not for the claimant to establish what reasonable

adjustments should have been made, although she should co-operate with any attempts to make reasonable adjustments. The claimant's claim under section 21 of the EQA is upheld.

Discrimination arising from disability

87. The claimant's claim under section 15 of the EQA turned on identical facts. The tribunal accepted the claimant's analysis of the law on causation. Unfavourable treatment was conceded. The unfavourable treatment was in consequence of the difficulty in hot desking which arose from the claimant's disability. This claim is also made out.

Remedy

88. The claimant withdrew her claim for injury to health. Her claim was for injury to feelings and financial losses.

Financial losses

89. Financial losses are only recoverable if caused by the established discrimination. The claimant's claims were set out in her Schedule of Loss. The claimant claimed for a loss of annual leave entitlement. Her contention was that she could not take sick leave without placing her job in jeopardy and therefore she took annual leave rather than taking additional sick leave. She relied on what was said at a sickness review meeting on 4 August 2016. At that meeting, she said that Mr Oates told her that if she took any more sick leave she could be dismissed. She was so worried about this that she decided to take this time as annual leave instead of sick leave. That matter was never put to Mr Oates when he gave evidence and the tribunal did not consider that it was fair to make a factual finding as to whether this was said without Mr Oates having had an opportunity to respond.

90. In any event, on the claimant's own evidence, at least on 1 December 2017, she was having problems with her chest and her fibromyalgia. Without the benefit of medical evidence, the tribunal could not conclude that the relevant absences were caused by the established unlawful discrimination.

91. Finally, the tribunal noted that in January 2017, at the claimant's Managing Attendance Meeting, it was said that the Managing for Attendance Policy would be suspended for the next 18 months. The tribunal therefore rejected the contention that the claimant had to take annual leave rather than sick leave.

92. For all those reasons, the claim for financial losses was not upheld.

Injury to feelings

93. This was a serious case in which the appropriate award fell within the middle Vento band. Matters continued over a number of years during which it was plain from the correspondence that the claimant suffered some considerable distress because her request for a fixed desk, supported by expert advice, was not being treated with due expedition or, indeed, at all. Some of the delay was attributable to the claimant who was not always prompt

in responding to requests to deal with matters.

94. The incident involving Sharon Mitchell was an aggravation but it was a single incident of upset and did not have any significant bearing on the overall injury to feelings award. Most of the distress was caused by the ongoing failure to accommodate a fixed desk solution.

95. The tribunal concluded, in all the circumstances, that the appropriate award for injury to feelings was £10,000.

96. The tribunal further went on to make recommendations which were largely agreed between the parties.

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Employment Judge McNeill QC

Date:28 February 2019

Judgment sent to the parties on

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For the Tribunal office