EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs K Kalia	**- V -**	Crowe UK LLP

Heard at: London Central **On**: 13-20 & 23-24 May 2019

Before: Employment Judge Baty
Ms CI Ihnatowicz
Mr I McLaughlin

Representation:

For the Claimant: In person
For the Respondents: Ms A Carse (counsel)

RESERVED JUDGMENT

1. The claimant's complaints of direct disability discrimination and for a failure to make reasonable adjustments were all presented out of time. It is not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear any of the claimant's complaints and the claim is struck out in its entirety.

2. If the tribunal had had jurisdiction to hear the claimant's complaints of direct disability discrimination and for a failure to make reasonable adjustments, those complaints would all have failed.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 3 April 2018, the claimant brought complaints of direct disability discrimination and for a failure to make reasonable adjustments. The respondent defended the complaints.

2. One of the issues was as to whether the claimant was a disabled person. The claimant initially sought to rely on nine different alleged disabilities. A preliminary hearing was held on 20 November and 13 December 2018 before EJ Clark to determine whether the claimant was indeed a disabled person at the relevant times and by reason of which alleged disabilities. EJ Clark's decision, which was sent to the parties on 9 January 2019 accompanied by full written reasons for that decision, was that the claimant was prior to 18 October 2017 a disabled person by reason of the following disabilities:

1. Fibromyalgia with effect from March 2015;

2. Vitamin B12 deficiency/pernicious anaemia with effect from the start of her employment in September 2014;

3. Temporomandibular disorder ("TMD") with effect from April 2016; and

4. Sciatica with effect from December 2015.

3. EJ Clark found that the claimant had not proved that she was a disabled person by reason of the other alleged disabilities, namely: dry eyes leading to defective vision from the start of her employment; sicca symptoms from March 2015; PVD in the left eye from the start of her employment; carpal tunnel syndrome/tendonitis in hands from April 2017; or depression from April 2017.

4. The issue of the extent of the respondent's knowledge of these various disabilities was not decided and was left to be determined at the full merits hearing.

The Issues

5. The issues for the full merits hearing had long since been agreed between the parties, having been discussed at an earlier case management hearing on 21 September 2018 before EJ Segal. A copy of that agreed list of issues was set out at pages 84-87 of the claimant's bundle of documents for this hearing. At the start of the hearing, the claimant and Ms Carse confirmed that that list was agreed as between them.

6. The agreed list of issues was as follows:

Jurisdiction – Equality Act 2010 ('EqA')

1. Whether any part or all of C's claim was presented in time within the meaning of s. 123(1) EqA.

2. Whether any or all of the conduct complained of constituted a continuing act of less favourable treatment (s. 123(3) EqA).

3. To the extent that any part or all of C's claim was not presented in time, whether it is just and equitable for the ET to extend time to allow C to present the claim pursuant to s. 123(1)(b) EqA.

Direct disability discrimination – s. 13 EqA

4. Whether, at the material time, C had a disability within the meaning of s. 6 EqA.

5. Whether, at the material time, R had knowledge of C's disability.

6. Whether R committed the following alleged acts which amounted to less favourable treatment of C because of her disability contrary to s. 13 EqA:

    a. From August 2015 C she was required to regularly work more than her contractual hours or anyone else in the EAG team in order to cope with her workload;

    b. R failed to keep its promise of providing C with suitably qualified and experienced staff to assist her;

    c. In April 2016 Susan Ball falsely accused C of not responding to a client;

    d. In May 2016 Ms Ball falsely accused C of taking unauthorised annual leave;

    e. C was required to work from home whilst on sick or annual leave on 27 May 2016 and during the period 18 November 2016 to 9 December 2016. *(Email from C to Susan Ball dated 18 March 2016 which is provided in the bundle setting out knowledge of disability (page 36);*

    f. On 9 February 2017 Ms Ball falsely accused C of ignoring her emails;

    g. In March 2017, R relocated C's desk into direct vicinity of an air-conditioning vent and open plan office and this exacerbated the symptoms relating to her disabilities by reason of noise and/or cold air flow;

    h. In December 2016 & April 2017, Ms Ball told C to clear her desk of client files in front of the other staff;

    i. In July 2016 authorised C to work from home on less favourable terms than other staff

j. On 15 August 2017, Caroline Harwood and Katrina Pennington told C:

i. To clear her desk of client files and maintain a clear desk policy. By doing as she had been instructed, this exacerbated or caused further injury to C;

ii. Made allegations of work not being completed for a client that C was not responsible for;

iii. Accused delays arising for a client that C worked on which were not C's fault;

iv. Made incomplete, incorrect and/or misleading notes of the meeting held on 15 August 2017 and did not allow C the opportunity to correct or agree the notes;

k. Susan Ball instructed C to work from home on Thursday 21 September 2017 and Friday 22 September 2017 when C had declared herself to be unfit for work due to a disability related illness

l. In September 2017, Susan Ball made 2 unsubstantiated allegations of dishonesty against C;

m. At or around 7.00 pm on 3 October 2017, Susan Ball told C to respond to a client when C did not want to work anymore because she was tired and in pain;

7. Whether this treatment was less favourable treatment than how R would have treated a hypothetical comparator (s. 23(1) EqA).

Failure to make reasonable adjustments

8. Whether R was under a duty to make reasonable adjustments for C and whether it failed to make reasonable adjustments by:

a. Requiring her to attend the office for long hours from July 2015 to October 2017.

b. Failing to provide her with a suitable workstation / equipment for example:

i. Suitable ergonomic mouse (vertical not horizontal).

ii. Elevated/angled stand for the keyboard or 'under the desk' mounted tray for keyboard.

iii. Chair to prevent sciatica from developing.

iv. Headset so that C did not have to hold the phone in neck using the left side of her chin and left shoulder.

v. Access to filing near her workstation.

vi. Humidifier.

c. Failing to relocate C from out of the flow of air released from the air-conditioning or place her in a quieter part of the office from June 2016.

d. Failing to provide C with adequate assistance from other members of staff from August 2015.

e. Refusing C's requests to be allowed to park her car at the office in September 2016 and December 2016.

f. On 16 October 2017, R refused to allow C the use of electronic equipment to records the conversations of a disciplinary hearing whilst knowing that C would not be able to make notes of the meeting herself.

Remedy - EqA

9. If C succeeds in all or any part of her claim, the ET must decide what remedy C is entitled to (s. 124 EqA).

Personal injury

10. C wishes to pursue remedy for personal injury in the ET**.**

7. The judge went through the list with the claimant and Ms Carse, explaining in summary, for the benefit of the claimant who was a litigant in person, the law and what was required for the claimant to establish her case in relation to the various elements in the list of issues.

8. It was agreed that there were some typographical errors in the list of issues (which are corrected in the list as set out above). Furthermore, the

claimant said that, in relation to issue 6(c), she wanted to check whether the month referred to was correct and it was agreed that she would revert to the tribunal about this when the hearing resumed after the tribunal had done its pre-reading. The claimant duly confirmed that the month was correct and there was therefore no change to the list of issues in this respect.

9. In addition, it was agreed that issue 4 (relating to whether the claimant was disabled) had already been determined at EJ Clark's preliminary hearing and therefore did not require determining at this hearing. However, issue 5 (relating to knowledge of disability) remained to be determined.

10. The judge observed that the issues relating to the reasonable adjustments complaints were not set out as he would expect, identifying the provision criterion or practice ("PCP") relied on by the claimant; the substantial disadvantage which it was said this put her at; and then the adjustments which it is said should have been made to alleviate that disadvantage. He noted that, for example, issue 8(a) appeared to contain just the PCP relied on, without setting out the substantial disadvantage or the adjustments; whereas most of the remainder of issue 8 appeared to be alleged reasonable adjustments, without setting out the PCP or the substantial disadvantage in relation to each of them. The judge stated that he could spend time going through them, identifying these three elements in relation to each allegation of a failure to make reasonable adjustments; alternatively, particularly as in many cases it may be possible to infer the other two elements from the element that was set out in the list of issues, the list of issues could be left as it was. He sought the parties' views on this. Both parties stated that they wanted to leave the list of issues as it was and the tribunal therefore agreed to this. However, the judge made a point of going through in some detail with the claimant the various elements of a complaint of a failure to make reasonable adjustments (as identified above) and what she had to demonstrate and ensuring that she understood this; which the claimant confirmed that she did.

11. It was also accepted that, given the time constraints (see below) and the fact that some further medical evidence in relation to the claimant's alleged personal injuries would be required, it would not be possible to determine the issues of remedy (issues 9 and 10 in the list) at this hearing. The hearing would therefore determine only the issues of liability (issues 1-8 (excluding, as noted, issue 4)).

12. The list of issues was therefore agreed between the parties and the tribunal as set out above.

13. In discussing the jurisdiction/time points in the list of issues, the judge noted that, as set out in the list of issues, it appeared that all of the allegations were out of time (subject to the tribunal's discretion to extend time on the basis that it was just and equitable to do so). This was because it was not in dispute that: the claimant (who remains employed by the respondent) has been off work sick from 18 October 2017; she had contacted ACAS on 18 January 2018; ACAS early conciliation had concluded on 4 March 2018; and the claim was presented on 3 April 2018. By the judge's calculation, this meant that any alleged event

which took place prior to 19 October 2017 would be out of time. The latest allegation in the list of allegations of direct discrimination was dated 3 October 2017; as regards reasonable adjustments, at the very latest, time ran from 18 October 2017 (and the complaints were therefore out of time) and, given that the test is as to when the reasonable adjustments should have been put in place (see our summary of the law below), it was likely that time started running at a date even earlier than that. Both parties acknowledged this.

The Evidence

14. Witness evidence was heard from the following:

For the claimant:

the claimant herself.

For the respondent:

Ms Susan Ball, a Senior Equity Partner at the respondent and Head of the Employers' Advisory Group ("EAG") (having joined the respondent in February 2011) and, during most of the time material to this claim, the claimant's line manager;

Ms Nicola May, a Senior Equity Partner at the respondent (but not in the EAG), who chaired a disciplinary hearing in relation to the claimant on 16 October 2017.

Ms Xian Lockwood, an employee of the respondent in the EAG, who is currently employed as an Associate but was at most times relevant to this claim employed as a Tax Assistant (having originally joined the respondent on 1 December 2015);

Ms Caroline Harwood, a Partner and Head of Share Plans and Reward at the respondent within the EAG (having joined on 2 May 2017); and

Ms Katrina Pennington (formerly Katrina Hoffman), a Senior Human Resources Adviser at the respondent (having joined on 9 January 2017);

15. The witness statements were extensive. The claimant's statement alone ran to some 144 pages; the respondent's statements, in total, to around 200 pages.

16. Various bundles of documents were provided to the tribunal. There was a "respondent's bundle" in 2 volumes numbered pages 1-849; there was a "claimant's bundle" in 7 volumes numbered pages 1-2,622; and there was, at the claimant's request, a medical bundle in one volume numbered pages 1-577.

17. The judge expressed some surprise that there was not a consolidated bundle. Ms Carse suggested that the contents of the claimant's bundle, to the extent that they did not overlap with the respondent's bundle, were not relevant

and indicated that, in her cross-examination of the claimant, she would, barring making a handful of references to the claimant's bundle, be referring the claimant to the respondent's bundle only (which duly happened). However, notwithstanding the vast extent of the documentation, it was accepted by the parties that all of this documentation could be before the tribunal.

18. The tribunal read in advance the witness statements and the documents in the bundles which they cross-referred to. Given the extent of the documentation, the tribunal needed the remainder of the first day of the hearing and the second day to do this.

19. At the start of the fourth day of the hearing, the claimant produced a document which she had referred to in her evidence the previous day. By agreement, this document was added to the respondent's bundle at pages 214 A-F. On the fifth day, further documents were added by consent to the respondent's bundle at pages 850-851.

20. On the afternoon of the sixth day of the hearing, during the evidence of Ms Harwood (the penultimate witness of the respondent), the claimant stated that she had found a recording of a conversation which she had had with Ms Harwood on 10 October 2017 (and which she had covertly recorded). Initially, she said that she just wanted to notify the tribunal and the respondent that she had it and did not want to introduce it as evidence. However, towards the end of her cross-examination of Ms Harwood, she said that she wanted to introduce it because it would shed light on some of the details which Ms Harwood was not able to remember from that conversation. The claimant confirmed that the tape was over an hour in length. There was no transcript. The claimant said that she was aware she had recorded the conversation but thought she could not access the recording until the night before she made this application (when she managed to "repair" the USB stick on which it was contained). Ms Carse opposed the application. Both parties made submissions. The tribunal took a break and deliberated on the application. When the parties returned, the tribunal gave its decision.

21. The tribunal decided not to allow the introduction of the tape and refused the claimant's application. It did so for the reasons given by Ms Carse in her submissions which, in summary, were as follows. First, the various questions which the claimant had asked Ms Harwood in relation to this meeting of 10 October 2017 were not part of the list of issues; at best they were background. It was not therefore of relevance that the tribunal should hear this evidence. Secondly, the application was made very late and without good reason being given for this. As Ms Carse submitted, given the length of the tape, it would take a considerable amount of time, probably the rest of that day, for her to obtain a copy of the tape and review it and to be able to take instructions from Ms Harwood (who was on oath at that point anyway). Furthermore, there would then be more time needed for the tribunal to listen to the tape (on another day). The tribunal did not, therefore, feel that the claimant would be prejudiced by not having the tape played (as it was not germane to the issues) whereas there would be considerable prejudice in terms of time lost in the context of what was a tight timetable anyway (see below). Therefore, the application was refused.

22. In fact, although the claimant did generally use the claimant's bundle when she was cross-examining the respondent's witnesses, she referred to a relatively small number of pages; of these, many were contained in the respondent's bundle anyway and others were of limited or no relevance to the agreed issues.

23. In her cross-examination of the respondent's witnesses, the claimant was often unclear in the questions which she asked the respondent's witnesses and had to be asked to rephrase the questions. She did not put some of the issues to the relevant witnesses of the respondent; rather, she tended to focus on certain aspects which were of interest to her regardless of whether they assisted in helping her establish her case.

24. Both parties provided written submissions and supplemented these with brief oral submissions. The tribunal's decision was reserved.

Adjustments

25. At the start of the hearing, the judge discussed with the parties what adjustments might need to be made in order for the claimant and others to participate properly in the hearing.

26. In advance of the hearing, there had been correspondence between the claimant and the tribunal in relation to the provision by the tribunal of a notetaker during the hearing to take notes which the claimant could then refer to. The claimant had originally requested permission to record the hearing herself but this had been refused by the tribunal in favour of providing the notetakers; the claimant had indicated that she was happy with that. Notetakers were duly present throughout the hearing.

27. The judge asked what other adjustments might need to be made in relation to the claimant. He explained how a normal tribunal day would operate, from roughly 10 AM to 4:30 PM with lunch for an hour in the middle, and a short comfort break mid-morning and mid-afternoon. The claimant stated that she would need a break at least every 1½ hours, although it was noted that that was catered for within the normal tribunal day. However, the judge emphasised that, if the claimant required further breaks, she should simply ask and this could be accommodated. The claimant confirmed that, if the main breaks were 10-15 minutes, that would be more than long enough.

28. In addition, when the hearing reconvened at the start of the third day, after the tribunal had read all of the documentation and had a greater understanding of the alleged impact on the claimant of her disabilities, the judge explained to the parties that he had decided to turn the air conditioning units in the tribunal off, given the amount of noise they created and the cold air which they emitted, particularly as the temperature in the room appeared to be fine without them (sensitivity to noise in particular was one issue of which the claimant complained in her claim form). The claimant indicated that she was grateful for this and nobody else objected.

29. (In the second week of the hearing, the outside temperatures had warmed up a bit and both parties asked for the windows in the tribunal to be opened. However, when there was any noise outside (for example from building work), the windows were shut again at the claimant's request.)

30. Furthermore, the claimant's evidence suggested that she had difficulty in managing heavy files. The tribunal had sought to arrange the large number of bundles at the witness desk in such a way that it would make life easier for the claimant. However, the claimant stated that she hoped that, even when giving evidence, she would be able to use her laptop computer, which had the bundles on it. Ms Carse noted that the respondent could not be sure what else was on her laptop beyond the bundle. The tribunal agreed that to allow the claimant to use a laptop when giving evidence would, for this reason, be inappropriate. However, as there were always two notetakers present (taking notes alternately), the notetakers kindly agreed that the notetaker who was not taking notes could sit next to the claimant while she was giving her evidence and turn the pages of the bundles for her. This was done.

31. At the start of the hearing, Ms Carse indicated that Ms Lockwood, who is dyslexic, would need to bring a ruler with her to assist her with reading documents and may need more time to read documents if she was taken to them; the tribunal indicated that this could certainly be accommodated and it duly was.

32. Ms Carse also indicated that Ms Ball may need someone to assist her in turning the pages of the bundle when she was giving her evidence; again, the tribunal indicated that this was something which could certainly be accommodated. When Ms Ball came to give evidence, the judge asked her if she needed assistance in this respect; however, Ms Ball stated that she was fine to deal with the bundles herself and duly did so.

Timetabling

33. The hearing was originally listed for 10 consecutive days, starting Monday, 13 May 2019. However, the judge explained at the start of the hearing that he would not be available for two of those 10 days (Tuesday 21 and Wednesday, 22 May 2019), so this hearing could in fact only be an 8 day hearing; the judge explained that it was likely that the alternative was that the hearing would have to be postponed. The parties accepted this. The claimant noted that she was due to have her vitamin B12 injection on 21 May 2019 in any case and the break would therefore suit her.

34. The judge noted that, at the preliminary hearing before EJ Segal, it was anticipated that evidence and submissions on liability would be completed within the first 7/8 days, leaving 2/3 days for the tribunal to deliberate and deliver a decision. There had also been discussion about whether remedy should be dealt with and it was envisaged that, where the claimant was seeking personal injury by way of a remedy, those aspects of remedy could not be considered at this hearing because of the need for further medical evidence, although other aspects

of remedy, for example loss of earnings and injury to feelings, might be adjudicated upon without additional medical evidence.

35. The judge noted that, as the hearing was now limited to 8 days, it would not be practicable to deal with issues of remedy; furthermore, even if a suitable timetable was agreed, there was likely to be little time for the tribunal to deliberate and deliver a decision on liability within the time allocated for the hearing. The claimant was disappointed that remedy could not be dealt with at this hearing but accepted that, in the circumstances, it would not be possible to do so.

36. A timetable for cross-examination and submissions was agreed with the parties at the start of the hearing, with the tribunal able to accommodate the time sought for cross-examination by each of the parties, including allowances made for the adjustments referred to above. The timetable included: two days' reading; two days' cross-examination of the claimant; 2½ days' cross-examination of the respondent's witnesses; and up to half a day for written and oral submissions; leaving only a day for the tribunal to deliberate on its decision, which would inevitably lead to a reserved decision being given.

37. This timetable was agreed between the parties and the tribunal and the tribunal indicated to the parties that it would hold them to that timetable. Subject to the points in the paragraphs below regarding submissions, this timetable was in fact comfortably adhered to.

38. There was discussion at the start of the hearing about the various elements of the hearing, including the provision of submissions. The judge explained not only what submissions were but that the parties could produce written submissions or oral submissions or a combination of the two. Both parties said that they would produce written submissions; Ms Carse said that she would not add much in her oral submissions, requiring maybe 20 minutes; the claimant said that she would prefer to do submissions in writing and not address us orally.

39. By the end of Monday, 20 May 2019 (the day before the two-day break), the claimant's evidence and the evidence of four out of the five witnesses of the respondent had been completed. It was agreed that, in accordance with the timetable which had been agreed at the start of the hearing, the claimant would complete cross-examination of Ms Pennington, the final witness of the respondent, on the morning of Thursday, 23 May 2019, with submissions being dealt with on the afternoon of that day, leaving Friday, 24 May 2019 for the tribunal to deliberate on its decision.

40. On Tuesday 21 May 2019, the claimant emailed the tribunal, copying in the respondent. She stated that she was due to have her submissions ready for Thursday afternoon; that she had on 21 May 2019 received her vitamin B12 injection and it would take a couple of days for this to take effect; that she had a long commute to and from London and was tired and unable to prepare written submissions when she got home; that she had to wait until the notetakers provided her with their notes; that she was struggling to keep track of everything

and that it was unlikely that she would be able to finalise her written submissions by Thursday. She asked the tribunal to allow her an extension of two weeks for providing her written submissions to the tribunal.

41. The judge, who had been away for two days, did not pick this email up until the morning of Thursday, 23 May 2019. At the start of the hearing that day, the judge sought the views of the parties further.

42. Ms Carse said that she was in the tribunal's hands as to whether it felt it needed to make this adjustment; however, she said that, if it was granted, the respondent would want to reserve the right to respond to the claimant's submissions, either orally or in writing, if it disagreed with certain points in them and that this would therefore lead to further delay and to the respondent incurring further costs; she also stated that she would not be available for most of the next two weeks because of other commitments should the hearing run into those weeks.

43. The claimant said that she had been receiving the notes from the notetakers, either on the evening of the day they were taken or first thing the following morning. The judge asked her whether, even if two weeks could not be granted, some extension of time would help, for example allowing her the rest of Thursday to complete her submissions and hearing submissions the following day (Friday, the last scheduled day of the hearing). The claimant said that this would not be of assistance and that she had only made some notes in relation to her submissions at that point, which were in a form which would not assist the tribunal.

44. The tribunal adjourned to consider its decision. It decided not to grant the two-week extension which the claimant had requested for the following reasons:

1. The claimant had known what the timetable was right from the start of the hearing.

2. The claimant had had the weekend after the first week of the hearing to start to put together her submissions. By that stage, the majority of the witness evidence had been heard and it was before the claimant was due to have her vitamin B12 injection, which she maintained took a little while to take effect. The claimant did not appear to have done a great deal of work on her submissions at that point.

3. The claimant had actually had an extra two days to prepare her submissions beyond what parties in a normal hearing would have as there had been a two-day break on the Tuesday and the Wednesday. Whilst the tribunal acknowledged that the claimant stated that she needed time for her injection to take effect, that break did still represent extra time for her to work on her submissions.

4. Very significantly, if the claimant's request was allowed, there was every chance that the tribunal would not be able to deliver a decision on the case until near the end of the year. This was because the members of the tribunal had compared their dates of availability and there was no chance (with the exception of a day early the following week) of their being able to meet again for many months. This would delay the decision enormously and cause great prejudice to both parties.

5. In addition, fitting in extra time on this case would be prejudicial to other tribunal users, as the judge and/or members would not be available for other cases that were listed if extra days were added to this case; the tribunal's caseload was extremely busy.

6. Acceding to the claimant's request would incur extra costs for the respondent. This may entail the respondent attending for another day for oral submissions; alternatively, it could involve extra work in responding to the claimant's written submissions (which, judging by her other documentation, might be lengthy).

7. Finally, judging by the sort of documentation which the claimant had submitted so far and the fact that she had not stuck to the list of issues in her cross-examination of the respondent's witnesses, the tribunal thought that there was a reasonable chance that any written submissions which she produced may perhaps not assist the tribunal to an enormous degree. The judge explained again that submissions were not about adducing more evidence (the claimant had spoken about using her submissions to "tell the story"). The tribunal thought that not being able to produce written submissions was unlikely to prejudice the claimant's case greatly.

8. Therefore, taking into account the balance of prejudice, the tribunal decided that it was not proportionate to allow the claimant two extra weeks to submit written submissions.

45. As indicated, the tribunal had noted that it may be able to meet for one day early the following week. The judge asked the claimant whether, if the production of submissions was delayed until Friday morning (the following day), that would be of assistance to her; that way, the tribunal would be able to hear submissions on the Friday and would have a day to deliberate the following week if necessary. The judge stated that, in the light of what the claimant had previously said, such a short extension may be of no assistance to her at all in producing written submissions. However, the claimant said that it would help and it was, therefore, agreed that, once the evidence had been completed (which was duly done by lunchtime that day (Thursday)), the parties could have the rest of the day free and the tribunal would hear submissions the following morning. It was agreed that: the parties should have any written submissions they wished to produce ready for 10 AM on Friday morning; the tribunal would first read whatever written submissions were produced; and that the parties could each have up to 20 minutes to make any oral submissions they chose to make.

46. The parties duly produced their submissions to the tribunal at the start of the final day of the hearing. Both sets were around 15 pages long and structured in relation to the issues. We did not feel that the claimant had been unduly prejudiced by not having a further two weeks to produce her written submissions. Neither party chose to speak for more than five minutes by way of oral submissions.

47. In her submissions, the claimant sought to introduce new evidence which was not before the tribunal at the evidence stage. The judge explained that the tribunal would not be able to take this new evidence into account when making its decision.

Claimant's Application to Amend

48. At the end of the third day of the hearing, halfway through her evidence, the claimant stated that she wanted to apply to amend the claim. She stated that she had sent an amendment application to the tribunal in July 2018 and this had not been dealt with. She said that the amendment covered things that had subsequently happened in her employment after she had gone on long-term sick leave on 18 October 2017.

49. The judge was somewhat surprised to hear this, particularly as the issues for the claim had been agreed at the start of the hearing, there had been no mention of this by the claimant, and we were now three days into the hearing and halfway through the claimant's evidence.

50. The judge explained that the claimant was free to make an amendment application at any time and that the tribunal would determine it. However, he explained that, in determining the application, the tribunal had to apply the principles in Selkent Bus Co v Moore [1996] ICR 836, including consideration of the balance of prejudice to the parties and the timing and manner of the application. He noted that it was now a very late stage in the proceedings and that the case had been prepared on the basis of the list of issues and the original claim and that, if there were new allegations in the proposed amendment which the respondent had not come prepared to address, granting the amendment would be likely to result in the hearing being postponed and that would be a factor which the tribunal would need to take into account in deciding whether or not to allow such an amendment.

51. As it was right at the end of the day, the judge suggested to the claimant that she consider overnight whether or not she wanted to make such an application and let the tribunal know the following morning. He reiterated that it was entirely her decision as to whether she chose to pursue such an application. He also told her that, if she were to do so, she would need to produce to the tribunal the text of the proposed amendment.

52. At the beginning of the next day of the hearing, the judge asked the claimant whether or not she had decided to pursue her application to amend. The claimant stated that she had decided not to pursue it. Whilst she did not produce anything to the tribunal setting out what her proposed amendments had

been, she said that she noted that one of the elements of her proposed application was already in the existing list of issues before this tribunal in any case. Therefore, she did not wish to pursue the application.

The Law

Direct disability discrimination

53. Under section 13(1) of the Equality Act 2010 ("EqA"), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination.

54. Disability is a protected characteristic in relation to direct discrimination.

55. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

Reasonable adjustments

56. The law relating to the duty to make reasonable adjustments is set out principally in the EqA at s.20-22 and Schedule 8. The EqA imposes a duty on employers to make reasonable adjustments in certain circumstances in connection with any of three requirements. The requirement relevant in this case is the requirement, where a provision criterion or practice ("PCP") of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. There are therefore three elements to such a complaint: the PCP; the substantial disadvantage; and the reasonable adjustment or adjustments.

57. A failure to comply with such a requirement is a failure to comply with the duty to make reasonable adjustments. If the employer fails to comply with that duty in relation to a disabled person, the employer discriminates against that person. However, the employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to.

58. The burden of proof rests initially on the employee to prove on the balance of probabilities facts from which we could decide, in the absence of any other explanation, that the employer discriminated against the employee. It is not enough merely for the employee to show a difference in treatment and the existence of the protected characteristic; there must be something more. If the employee does so, the burden of proof shifts to the employer to show that on the balance of probabilities it did not so discriminate against the employee. If the employer is unable to do so, we must hold that the discrimination did occur.

However, it is not necessary to apply the burden of proof referred to if the tribunal is able to make clear findings either way.

Time extensions and continuing acts

59. The EqA provides that a complaint under it may not be brought after the end of the period of three 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. That time limit is extended in relation to periods of time spent in ACAS early conciliation.

60. The EqA further provides that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

61. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of "an act extending over a period". The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

62. As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA.

63. In relation to time limits and reasonable adjustments, the case of Humphreys v Chevler Packaging Limited EAT 0224/06 confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make the reasonable adjustment in question.

64. In the subsequent case of Kingston-upon-Hull City Council v Matuszowicz [2009] ICR 1170, CA, the Court of Appeal decided, in analysing Section 123(4) of the EqA, that the legislation provides two alternatives for defining the point when the person is to be taken as having decided upon the omission for the purposes of reasonable adjustments complaints. The first of these, which is when the person acts inconsistently with the omitted act, is fairly self-explanatory. The second option, however, requires an enquiry that is by no means straightforward. It pre-supposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which he might reasonably have been

expected to do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an enquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustment. That is not at all the same as enquiring whether the employer did in fact decide upon doing it at that time.

Assessment of Evidence

65. Before turning to our main findings of fact, we make the following findings about the reliability and credibility of the evidence of the witnesses from whom we heard.

The Claimant

66. In her evidence, the claimant frequently went off on a tangent, seeking to include in answers to questions information which she clearly wanted to give rather than concentrating on answering the question directly. In addition, she had to be reminded on a number of occasions to answer the question that was put to her.

67. A considerable number of the assertions which the claimant made, both in her witness statement and in oral evidence, and which formed the basis of her suggesting that employees of the respondent had discriminated against her or had knowledge of her disabilities, were not reflected in the contemporaneous documentation. That is surprising, given how extensive and thorough that documentation is (emails from managers and between managers and the claimant, notes of meetings etc). The claimant repeatedly referred to alleged conversations which she said took place but of which there is no record.

68. The explanations she gave were frequently complex and hard to follow, in contrast to how clear the situation appeared to be from what was set out in the extensive contemporaneous documentation. This was particularly so when she sought to address points put to her which were, because of what the contemporaneous documentation set out, difficult for her reasonably to contradict.

69. Furthermore, on a number of occasions she gave explanations which appeared not to reflect what actually happened. For example, in one passage of her oral evidence, the judge sought to get clarity on what the claimant's position was in relation to the events behind issues 6(d & e); her answer was (typically) unnecessarily laboured and complex but, eventually, the judge was through further questions able to get a clear answer from her of what her position was; Mr McLaughlin then took her to a contemporaneous email which she had written which contradicted what she had just said to the judge.

70. Another example is one of the two disciplinary charges against her which formed the basis of issue 6(l). The claimant was accused of being dishonest in an email written to a client about the status of an HMRC application. We will come to the relevant emails in our findings of fact but, for these purposes, when one reads them it is clear that she is seeking to mislead the client. Most of the

subsequent lengthy disciplinary hearing before Ms May involved the claimant obfuscating, going off the point and failing to give any clarity when this was put to her (just as she did in her evidence before us when faced with difficult points to answer) rather than admitting what is obvious from the documents.

71. Some of the most obvious occasions when the claimant was being untruthful to us came from the questioning of her in relation to the jurisdictional issues about why she did not put her claim in earlier. Her explanation was that, from the period of time when she went long-term sick on 18 October 2017 until at least when she contacted ACAS on 18 January 2018, she was mentally not in a good place, so much so that she could not and did not leave the house for 3-4 months; had all her doctor's appointments over the phone; did not even go into her garden; and put the bins out at night because she didn't want to go out. However, her GP report of 12 December 2017, right in the middle of that period, states *"As stated to me by Mrs Kalia, if she maintained working hours at 30 hrs/week with appropriate workload appropriate to her role, she sees no reason why she should not be able to perform the duties"*. What she told her doctor at that time is therefore completely in contrast to the picture she sought to paint in her oral evidence before the tribunal.

72. In addition, Ms Ihnatowicz took the claimant to her medical records and pointed out that these seemed to indicate that, in contrast to her doctor's appointments being held over the phone, she did attend her doctor's. The claimant had been caught out. She then simply changed her evidence. She admitted that she did attend the doctor's. She said that her Mum picked her up and took her to the GP; and to the pharmacist to pick up medication; and to do the shopping.

73. The claimant told us in her evidence that she did not get any legal advice over this period; she stated merely that she had in early November 2017 sought legal insurance cover from her insurer and that she was told that she was ineligible. Mr McLaughlin then took the claimant to page 182 of the claimant's own medical bundle where, in her medical records, it states *"issues at work with her partner. involved solicitors now. almost feels like a load taken off since dealing with solicitors"*. The claimant had been caught out again. She then went on to suggest that she thought this was a reference to the insurers' solicitors and that she had a telephone conversation with her insurer's legal team helpline, that this was the first time she had been able to talk to someone about matters and that it was a weight off her shoulders and felt like offloading. When asked how she knew the person on the helpline was a solicitor, she said that it was just the "language I used" and it was their legal team. When asked whether they gave her advice, she said that they just listened and that she sent them the papers and that was all; but that they did not give any legal advice. This is against the background of her insurer, in a letter of 17 November 2017 to the claimant, reminding her that, even though it could not provide legal insurance cover for her, she was *"still entitled to advice from our legal helpline"*. Again, the claimant's evidence shifted once she had been caught out and an explanation lacking in credibility was given. In addition, the same letter from the insurer referred to the insurer being *"unable to consider your preferred solicitors at that time as court*

proceedings had not been issued"; leaving the insurer's legal advice line aside, the claimant had clearly identified solicitors of her own.

74. The claimant also sought to suggest that she had only sought to get advice via the insurer on the disciplinary proceedings so as to resolve matters internally and not on the substance of the claim which she has now brought. However, the documentation from the insurer makes reference to issues which form part of the claim she is now bringing; furthermore, that documentation is clearly about the prospect of her bringing an employment tribunal claim, for example the letter of 17 November 2017 from the insurer already referred to, which states *"we note from the information provided to date that you are seeking cover under your Admiral legal expenses insurance policy, in order to pursue a claim arising from an employment dispute"*. That documentation also contains other references to claims and to the employment tribunal. The claimant was clearly contemplating an employment tribunal claim at that point; what she told us (that she did not contemplate making a claim until 18 January 2018) was therefore simply not true.

75. The claimant has sought to suggest that any defects in her evidence are because of the "memory fog" which is one of the potential effects of her fibromyalgia and vitamin B12 deficiency. However, we noted throughout her evidence that the claimant was perfectly capable of speaking clearly and without any memory issues when she wanted to; it was only when it came to issues which were of great difficulty for her in her case that the sort of untruths which we have referred to above came out. Furthermore, this was also the experience of Ms May in terms of the claimant's approach at the disciplinary hearing; she too felt that, when the claimant wanted to, she could be absolutely clear. We do not, therefore, consider that any "memory fog" impacted upon the sort of examples set out above; the claimant was simply not telling the truth and seeking to mislead the tribunal.

76. We should also note that the examples given above are indeed only examples and that they are typical of the manner of the claimant's evidence throughout.

77. For these reasons, we hesitate to accept anything that the claimant has told us except where it is backed up by contemporaneous documentary evidence.

<u>The Respondents' Witnesses</u>

78. The respondents' witnesses were all clear in their responses, despite facing the difficulty of being asked questions by the claimant which were often vague or poorly structured. They did not deviate from their position when questioned. They were consistent throughout. Contrary to what the claimant seemed to suggest during her cross-examination of them, confirming in response to questions that they did not have a recollection of the minutiae of details of, for example, alleged conversations from a long time ago is not suspicious; it is entirely understandable. Importantly, the evidence which they gave, both in their witness statements and orally, was consistent, both internally, with the evidence

of the other respondents' witnesses, and, importantly, with the extensive contemporaneous documentation. Without exception, we found them to be credible witnesses.

79. In addition, we note that the respondent's witnesses were able to admit when they got things wrong and to take decisions which were favourable to the claimant even when they didn't need to. Examples include the fact that, when Ms Ball discovered that the claimant had indeed booked holiday on 27 May 2016, she acknowledged this and immediately apologised to the claimant for her mistake; Ms Ball pushing for and obtaining the award to the claimant of a bonus for 2016 even though many other partners outside the department did not think that the claimant deserved one; and Ms May's decision at the disciplinary hearing to drop one of the two allegations of dishonesty against the claimant when she could have quite easily preferred Ms Ball's evidence over that of the claimant and found that the claimant had indeed been dishonest; in short, she gave the claimant the benefit of the doubt.

80. Therefore, where there is a conflict of evidence between the respondents' witnesses and the claimant with no contemporaneous documentation to evidence what happened, we prefer the evidence of the respondents' witnesses to that of the claimant.

Findings of Fact

81. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

82. The respondent is a leading audit, tax, advisory and risk firm with a national presence. It is an independent member of Crowe Global, the eighth largest accounting network in the world. It advises businesses of all sizes, professional practices, non-profit organisations, pension funds and private clients. It is highly regulated and owes fiduciary duties to its clients.

83. The respondent has offices in London. One of the departments within the respondent's tax practice which is based there is the Employers Advisory Group ("EAG"); its focus is advice on employment related taxes.

84. The Head of the EAG is, and was at all times material to this claim, Ms Susan Ball. Although there have been some changes in personnel over the last few years, there were, as at 1 April 2019, 15 fee earners in the EAG in addition to Ms Ball. In order of seniority these were: 3 Partners (including Ms Ball), 1 Director, 1 Senior Manager (the claimant); 3 Assistant Managers; 1 Senior Executive; 1 Executive; 2 Associates; 3 Assistants; as well as a dedicated administrative assistant and full-time secretarial support.

85. The claimant commenced employment with the respondent on 1 September 2014. Prior to her position being confirmed, she had been interviewed by Ms Ball and others. With effect from 1 October 2015, the claimant

was promoted to Senior Manager. She therefore held a senior position within the EAG.

86. At the start of her employment, the claimant completed a "New Starter Form", on which she noted that she had a disability, namely "Vitamin B12 deficiency". She told Ms Ball that she had to go for an injection every 13 weeks and Ms Ball duly notified the respondent's HR Department of this by email. Other than the need to have an injection, the claimant did not raise anything else about the impact of her condition. Ms Ball agreed with the claimant that, as the claimant lived in Langley, Slough, on the day she had an injection she could work from home or travel to the respondent's Reading office rather than come into London.

87. The claimant's employment contract, which she signed on 11 July 2014, contains the following clause:

"Hours of Work

14. Your normal hours of work will be 9:30 am to 5:30 pm, Monday to Friday, with a break of one hour for lunch i.e. a 35 hour working week. The firm reserves the right to vary the hours worked and your starting and finishing times. You may also be required to work such additional hours as may be necessary for the full and effective performance of your duties. You will not be entitled to additional payments for, or time-off-in-lieu of, overtime."

The contract also contained a standard "opt out" from the 48 hour average working week under the Working Time Regulations 1998.

88. The evidence of the respondent's witnesses, which we accept, is that there was not a culture of working long hours at the respondent, particularly in comparison with the big four accountancy firms, of which many of the respondent's witnesses had direct experience. However, as Ms Harwood said in evidence, it was not unusual for an employer at a senior level to do one or more additional hours per day beyond the core hours set out in that employee's contract.

89. The claimant has complained about being required regularly to work more than her contractual hours. However, we have not seen any evidence of anyone at the respondent instructing the claimant to do this. By contrast, we have seen numerous examples of the respondent seeking to ensure that the claimant did not work long hours. These include: in her July 2015 appraisal, the appraisal records that the claimant should take care to manage her work life balance and not let it get out of control; in August 2015, in the claimant's business case for promotion, the claimant acknowledged that she need to improve her time management skills; in March 2016, Ms Ball asked the claimant to spread work around and delegate; in May 2016, Ms Ball said that she was concerned about the claimant's work levels and asked the claimant to highlight work that could be passed to others; in August/September 2017, Ms Harwood asked the claimant to delegate and to say when she needed support and assistance; and on 4 October 2017, Ms Ball and Ms Harwood met the claimant and discussed getting on top of her workload (although the claimant said that there was not much to catch up with).

90. As to whether the claimant actually worked greatly in excess of her core contractual hours, her timesheets do not demonstrate this. We accept that the timesheets may not be the full picture, as we have seen evidence that the claimant was not good at completing them efficiently or in a timely manner and indeed actively told managers that she did not see the point of recording non-chargeable time. However, the timesheets are one indication.

91. The claimant's main evidence behind her assertion that she was working considerably in excess of her core contractual hours was emails which she sent very early in the day and very late in the evening. We have seen a number of these. We accept that these do not prove that she was working long hours on a regular basis (for example, there are often gaps in her sending emails earlier on those days where there are late emails, so it is possible that she was not working or not working efficiently earlier). However, we do accept that the emails are an indicator that, at times, the claimant was working very early and very late and that, at times, she was working greatly in excess of her core contractual hours. Why she was doing so is a different matter.

92. We have seen a lot of evidence, both in the documentation and from the respondent's witnesses, that the claimant simply worked in a very inefficient manner and was unable/unwilling to delegate. The claimant kept control of clients she was working for and did not delegate work which it was appropriate for someone of her seniority to delegate. Ms Lockwood, who was in a position to compare working first for the claimant and, subsequently, for Ms Lorraine Owens (a director in the EAG), gave compelling evidence in this respect. For example, the claimant would repeatedly seek redraft after redraft of a particular letter when working with Ms Lockwood, wasting time unnecessarily as a result, and this resulted in them working late. Ms Lockwood's experience working for Ms Owens was quite the contrary.

93. The claimant has asserted that she was not provided with suitable staff to assist her during her employment. However, beyond her assertions (at the time and before this tribunal), we have not seen any evidence of this. There were changes in personnel over the years when the claimant was employed, as is the case in most organisations. However, the claimant could use, variously at various times in her employment, Ms Lockwood, two other assistant staff members in the EAG, corporate tax trainees and juniors, and could have passed certain types of work to others on a sideways basis. That support was available to her. The reality, however, was that the claimant was not good at delegating or passing out work and did not do so. In short, the support was there; however, the claimant did not avail herself of it.

94. Ms Lockwood had joined the respondent as a tax assistant on 1 December 2015 and at first worked predominantly with the claimant. However, her experience of working for the claimant was not a happy one; it is not necessary to go into all of the details, which are set out in her statement, save to say that she found working with the claimant difficult and unpleasant and "utterly demoralising and demotivating", with the claimant's attitude to her being patronising. She complained that the claimant would not pronounce her first

name correctly and would not allow her to take notes (even though Ms Lockwood was dyslexic and the notes assisted her in this respect). Therefore, because of the claimant, Ms Lockwood submitted her resignation on 26 February 2016. The respondent managed to persuade Ms Lockwood to change her mind (on the basis that she would in future work predominantly with Ms Owens). Ms Lockwood remains employed in the EAG today.

95. Serious concerns about the claimant had therefore been raised. Ms Ball and Ms Owens met the claimant on 7 March 2016. Ms Ball explained that Ms Lockwood had resigned and the reason she had given. She explained to the claimant that Ms Lockwood was dyslexic and therefore had a different way of learning and retaining information, which was to take contemporaneous notes. She also explained that they would be moving Ms Lockwood to Ms Owens.

96. When they discussed Ms Lockwood's dyslexia, the claimant mentioned that she took notes herself as she had some memory issues too, connected to her health. She then said that she had health issues and noise on the floor could be a problem. She mentioned tinnitus, chronic fatigue, fibromyalgia and sciatica. Ms Ball did not know what this meant in practical terms and said that they needed to get her an occupational health referral so that Ms Ball could understand what effect the claimant's health issues were having. Ms Ball immediately requested this from HR.

97. The claimant has asserted throughout her evidence that she told Ms Ball and others at the respondent about her various conditions and their symptoms in a variety of conversations throughout her employment. The respondent's witnesses do not accept this. There are no contemporaneous documents backing up the claimant's assertions. We do not, therefore, accept that the claimant did mention these things to Ms Ball or others at the respondent, save where we specifically make a finding, as in the paragraph above. Therefore, up until the meeting of 7 March 2016, all that the respondent knew in relation to the claimant's disabilities was that she had vitamin B12 deficiency which required an injection every three months (but without knowing any details of how the claimant's vitamin B12 deficiency might impact upon her otherwise).

98. The claimant was duly referred to occupational health. Occupational health produced a report, dated 6 June 2016. It included the following:

"In 2009, she was diagnosed with pernicious anaemia and has been on medication by injection every three months since then. As a result of a failure to address the signs and symptoms related to pernicious anaemia, Ms Kalia has undergone a range of investigations and been assessed by a number of consultants. The most recent medical evidence available confirms that she has fibromyalgia, Vitamin B deficiency, Vitamin D deficiency, and a history of cataract surgery with left vitreous detachment, which is now stable.… Following a series of investigations in relationship to pain in her neck area, she has recently been assessed by an ENT surgeon, who confirmed that she had temporal mandibular joint disease and requires pain management. Surgical intervention is not advised. In addition to her recent diagnosis of an ENT complaint, she has mechanical back pain that has been assessed by MRI scan on at least three occasions, the most recent being in early 2016, where she was advised that she was a non-surgical candidate and required regular exercise. I understand that her back pain is significantly improved with enhanced mobility.…

On a day-to-day basis, Ms Kalia has discomfort in her neck and lower back, her sleep pattern is disrupted, and she finds it difficult to work in an open plan office as increased levels of noise are associated with significant headaches.…

Ms Kalia would be regarded as fit to attend work. Within the work environment, as she finds it difficult to work in a noisy area, it would be helpful if consideration could be given to offer her a less busy part of your office or alternatively, the opportunity to use headphones to block out noise might be helpful.…

There are no specific restrictions on her workplace capability. ….”

99. Two adjustments were therefore suggested by occupational health namely noise cancelling headphones and change of office location.

100. The claimant was offered noise cancelling headphones; however, the claimant did not want to use these. She said she was worried that she would not hear the phone.

101. The respondent’s office was an open plan office on one floor. There were some private offices to the side of the open plan section. At that time, the claimant was in a private office with another manager and not in the open plan part of the office. However, this was only ever intended to be a temporary situation and the respondent became ever more squeezed for space when it closed another local London office and the staff moved to the main office.

102. Ms Ball also agreed with the claimant that she could work from home one day a week, which was normally Wednesday. This pattern commenced on a trial basis on 4 July 2016; it duly became a permanent arrangement.

103. As time went on, the number of concerns about the claimant’s work gradually increased. We have seen a plethora of evidence in the bundle of examples of the claimant in particular failing to respond to clients and keep them informed. There are huge numbers of emails from clients chasing the claimant for her to do something or at least for an update on where things stood. The claimant frequently and repeatedly did not reply to these emails. As the claimant’s employment went on, concerns were raised by clients and by other partners at the respondent about the claimant’s quality of work in this respect. The claimant’s ability in this respect was in some cases so serious that clients threatened to stop instructing the respondent. One partner even questioned whether the claimant was being honest in her dealings with client/colleagues.

104. The claimant was off sick over a period from 18 November 2016 to 9 December 2016. The respondent and HR decided that they should ask for a medical report from the claimant’s GP which, with the claimant’s permission, they did. The letter from the claimant’s GP is dated 16 February 2017 and includes the following:

“In addition to this, she suffers with temporomandibular joint pain (jaw pain) as well as a condition called fibromyalgia (which causes generalised muscular aches and pains), both of which are long-term conditions which we anticipate to remain stable. The symptoms she attributed to her fibromyalgia include swelling of the hands, headaches, anxiety, muscular and joint pain, fatigue and occasionally lack of concentration.

She suffers regularly from headaches which affect her concentration, especially in a noisy environment. Her muscular and joint pain slow her down, cause fatigue and contribute toward her headaches.

Her temporomandibular joint pains also contribute to headaches and difficulty/pain when twisting the neck and head.

According to our records she currently has regular vitamin B12 injections, which otherwise do not usually cause any side effects.…

On further discussion with Mrs Kalia, she explained that the noisy environment at work causes difficulties for her, and would prefer to have the option of working from home instead."

105. In March 2017, there was a change to the seating arrangements in the office. The claimant was placed in the open plan part of the office with the rest of the EAG team. The private offices were required for partners or other functions where privacy was essential. It was not, therefore, possible to give the claimant a private office. However, we accept the evidence of Ms Ball that the noise on the open floor is not rowdy or particularly loud and that, in fact, the EAG was located off to the side of the floor and this was quite a quiet area. We also accept her evidence that, in terms of noise levels, there can be even more noise in a confined private office when it is shared between two or three individuals, as was the case with the respondent's offices, than on the open floor.

106. The respondent sought a further occupational health report. That further report (from a different occupational health provider) was provided and is dated 15 June 2017. It contains the following:

"…she is suffering from fibromyalgia. She also has low vitamin B12 levels and requires an injection of B12 every 13 weeks.…

Ms Kalia last saw her rheumatologist in 2015 and over the last three months has developed increasing joint pain in her hands, feet, ankles and neck. She experiences fatigue on a daily basis and this may be related not only to her fibromyalgia, but also to the low vitamin B12 levels. Her sleep has been disturbed for some time. She develops headaches and a reduction in concentration and an increase in fatigue when she is exposed to high levels of ambient noise. This is the case in the open plan office. Until July last year Ms Kalia was working in quieter offices with perhaps a maximum of three employees. She is now working in a relatively noisy open plan office with perhaps 35 employees.

Since working from home one day a week she states her productivity has increased. ...

Ms Kalia states her workload has increased recently because of a reduction in number of managers. I suggest this issue be discussed with her. She would like to have more support to help with administrative matters, for example help from another staff, consideration be given to technical support such as voice-activated software or other IT solutions. I recommend someone from the in-house IT department assesses whether voice-activated software and other IT strategies could help increase efficiency.

If operationally feasible, I suggest consideration be given to her working from home a second day each week. If this is not possible then she would like to work longer days. She would then like to work her usual one day at home and also the half day. Ultimately this is a management decision, but it is likely to assist her in terms of her fatigue and productivity. …

In my opinion she would benefit from consideration of additional administrative support which can be in the form of an employee helping her and/or technical assistance, perhaps voice-activated

software. If operationally feasible I suggest consideration be given to more time working from home. I also recommend discussion be held about her current workload.

The main difficulty she has is concentrating in a noisy environment. …

The most useful support would be to provide help with administrative tasks. This may take the form of an administrative assistant. I recommend consideration be given to voice-activated software as this is often faster than typing. She may also benefit from other information technology solutions.…

All recommendations contained in this report are recommendations only and it is the responsibility and decision of the employer to decide what is and is not a reasonable adjustment. …"

107. During the months running up to the publication of this report, a number of staff had left the EAG. Whilst it was difficult to find replacement staff of the requisite quality in the prevailing economic climate, the respondent made efforts to do so and further staff were duly employed.

108. Following the report, the respondent checked whether it would be possible for the claimant to move back into a two-person office. However, it was not practicable as these needed to be reserved for partners or staff who worked on confidential matters.

109. The respondent also carried out a workstation assessment with the claimant on 30 June 2017; in other words, this assessment was done with the claimant's input. This flagged that the claimant required a new chair and a headset to block out ambient noise from the air conditioning and photocopier. The claimant was duly provided with a higher level keyboard, wrist support and backrest. A suitable chair was ordered and obtained.

110. The claimant initially confirmed that she would like to take up the respondent's offer of digital dictation software and noise reduction headphones. She was provided with the headphones. However, despite the respondent's efforts, she did not engage with it in relation to agreeing the precise requirements for the sort of digital dictation software which would best assist her and ultimately, this was never finalised before she went off long-term sick on 18 October 2017.

111. The respondent has a clear desk policy. The respondent operates a paper-based filing system and members of the EAG are expected to return client files to a central filing range and not to leave them on their desks (other than having, for example, three or four files on their desk when they are working on those files). This is because of the risks associated with the confidential information in relation to the clients and so that other employees can find the files easily. This policy applied to everybody in the EAG. However, lots of employees failed to comply with it from time to time. Ms Ball has had words with many employees in the EAG reminding them to comply with the policy. She cannot specifically remember speaking to the claimant about it but it is likely that she did so, given that she spoke to a lot of members of the EAG about it.

112. Although the most recent occupational health report had suggested that the claimant might spend an extra day working at home, this was not practicable because of the issue of client files. Whilst the respondent felt that it could allow the claimant one day working at home, any more would have made operations impractical for the claimant and the rest of the team because of the issue of access to the paper files. The respondent did not therefore allow the claimant a second day per week to work at home.

113. In the meantime, further issues about the claimant's not responding to clients had been raised. In addition, in July 2017, another partner suggested to Ms Ball that the claimant was not being honest in relation to a work matter. Ms Ball decided that these matters needed to be raised with the claimant.

114. Ms Harwood, who had joined EAG as a partner on 2 May 2017, put together a list of the various performance issues in relation to the claimant. She and Ms Pennington met the claimant on 15 August 2017. Ms Pennington took bullet point notes which she typed up shortly after the meeting. They are not verbatim. However, we accept the evidence of Ms Harwood and Ms Pennington that they are a fair reflection of what was said. The claimant was sent a copy of the notes after the meeting. She did not suggest any changes to them.

115. Ms Harwood went through a number of the issues on her list. The claimant responded by talking about how she felt that there had been a lack of support and resource until that point. Ms Harwood went through all the resources that were available and told the claimant that she should be delegating, passing work sideways, communicating and trying to manage client expectations. She told the claimant to speak up when she didn't have capacity to take something on; and pointed out that the team had additional resource to delegate to. The claimant spoke about working long hours and Ms Harwood told her to record all the time as this would then indicate if there was a need for additional resource, otherwise it would not be flagged up as a problem. The claimant said that Ms Ball had already told her to record all the time but that she, the claimant, thought that time spent recording overtime was a waste. Ms Harwood asked the claimant to write down a list of what she was working on so that she could help her delegate her work or get her some assistance for tasks she was working on. Ms Harwood also said that if the claimant was going on leave, she should write down what needed to be done, allocate work to colleagues to cover, tell the clients that she would be away and copy in the relevant person (this was a particular concern because, when the claimant was away, either on leave or off sick, it was difficult for her colleagues to know what needed to be done because she did not leave adequate notes). Ms Harwood and the claimant agreed that the claimant would put together her "to-do" list by the end of the month. The claimant missed this deadline and, even when she did send a list to Ms Harwood on 11 September 2017, it was incomplete.

116. The claimant maintains that Ms Harwood raised the issue of her clearing her desk of client files and maintaining a clear desk policy at that meeting. However, this is not recorded in the notes of the meeting and the evidence of Ms Harwood and Ms Pennington is that it was not raised. For reasons of respective

credibility, we prefer their evidence to that of the claimant and find that the matter was not raised.

117. In September 2017, two issues arose which went on to form the basis of disciplinary charges brought against the claimant.

118. The first involved communications between the claimant and a client ("client B"). It involved an application to HMRC which the respondent had been asked to do in respect of one of client B's employees. The matter had become urgent and Client B had, on 15 September 2017, chased the claimant for an update on how the application to HMRC was progressing. The claimant replied to client B:

"… There can often be a backlog of work with HMRC. I will chase up this matter and request urgent attention from HMRC."

Three minutes later, in an email to one of her colleagues, copied to Ms Ball, the claimant wrote:

"FYI - I will take forward this application myself. I have asked Martyn to prepare the application and engagement letter several times over the last couple of weeks and still not received a reply from him.

Unless the application has come to you without involving me, then the application has not be drafted and I will prepare this today."

The claimant had indicated to the client that the application had already been submitted to HMRC and the delay was HMRC's fault when she knew that, in all probability, the respondent had not yet even submitted the application. In other words, the claimant appeared to be knowingly misleading the client.

119. The second issue arose on 19 September 2017. The claimant was off sick on the week of 18-22 September 2017. On 19 September 2017, she called Ms Ball to tell her that that day was the deadline when CIS returns were due for two clients; she said that she would liaise with the respondent's Reading office and get the return done for one; and that the other one, for client "BS", had already been filed earlier in the month by her and the receipt was on the file. Ms Ball asked her if she was sure and she said she was. At this point, given the earlier concerns about the claimant's honesty, Ms Ball was not taking anything the claimant told her at face value and so she decided to double check that the respondent did have the receipt, but she could not find the file for client BS. She therefore checked the HMRC system and it appeared that no return for client BS had actually been filed. Ms Ball then called the claimant back. The claimant changed her story and agreed that she had not actually actioned this. Ms Ball then arranged for Ms Owens to file the return for client BS so that the deadline would not be missed. The matter was serious because, if she had not checked on the status of the return, it could have meant penalties from HMRC for late filing and another unhappy client. The claimant's conduct appeared to be serious because she appeared to have told Ms Ball something that wasn't true.

120. HR were informed of these issues and it was decided that the matters should be put to the claimant in a disciplinary hearing.

121. The allegations were set out in a letter to the claimant dated 6 October 2017 inviting her to a disciplinary meeting on 16 October 2017 to be held by Ms Nicola May. Evidence in relation to both allegations was attached to the letter. The allegations against her were described as being that "you were dishonest with a partner (Susan Ball) and a client". The claimant was notified of her right to be accompanied at the meeting by a colleague or a trade union representative.

122. On 3 October 2017, Ms Ball asked the claimant to send a holding email to a client. The client in question, "client S", had been chasing the claimant for an answer on a matter but had not heard anything from her. The client had chased previously for feedback on 6 September 2017 and 12 September 2017 and then again on 28 September 2017. In the early evening of 3 October 2017, Ms Ball asked the claimant whether she had responded to client S's request. The claimant said that she had not yet done so. Ms Ball asked the claimant to send an email acknowledgement to the client just to say that they had the matter in hand and then to prioritise the matter the next morning. The claimant got angry and upset. Matters became quite heated. However, all Ms Ball had asked her to do was to send a holding email; she did not expect her to stay and do the work that evening.

123. In her allegation about this incident, the claimant maintains that at the time she was asked she did not want to work any more because she was tired and in pain. However, Ms Ball cannot recall the claimant having raised issues about her health issues. Therefore, on the balance of probabilities, and taking into account our findings on the respective credibility of the witnesses, we find that she did not raise them.

124. The disciplinary hearing took place on 16 October 2017. Ms May, who is a partner from a separate division at the respondent and not part of the EAG, chaired the meeting. Ms Pennington attended as HR representative and she also arranged for an HR colleague, who was an experienced notetaker, to take a full note of the meeting. The claimant did not bring a trade union representative or a colleague.

125. At the start of the meeting, the claimant asked to record the meeting, noting that Ms Pennington's note of the informal meeting which they had previously had on 15 August 2017 had only been a summary. Ms Pennington explained her that it was only a summary because that meeting had been informal. It is not the respondent's policy to record meetings; however the HR colleague was there specifically to take a full note of this meeting because it was a formal meeting.

126. When the issue regarding client B was discussed, the claimant repeatedly went off on a tangent and did not address the issue of what was set out in the email exchange. Ms Pennington felt that the claimant was being deliberately obtuse in this respect. Furthermore the claimant changed the subject completely and start complaining about Ms Ball.

127. They moved on to discuss the issue regarding client BS. The claimant stated that symptoms of her fibromyalgia and vitamin B deficiency included memory fog, headaches, chronic fatigue and muscular pain. She said that she had called in sick at the time and called Ms Ball to tell her that there were two returns that needed doing and that she thought one had been done but the other needed doing and that the long and the short of it was that she couldn't remember what she had done or if neither had been done. Ms May took a break at this point and decided that she would give the claimant the benefit of the doubt with regard to her memory about the client BS issue, particularly as she was off sick at the time. However, she felt they needed to drill down further regarding the other (client B) issue.

128. There was therefore further discussion about that issue but again Ms May could not get a straight response from the claimant, so the meeting was adjourned. When it reconvened, Ms May told the claimant that she needed some more information to reach a conclusion. The claimant agreed that she would check that all of her notes were on the file and would let Ms Pennington have any additional relevant documents. Taking into account various leave dates, they agreed to try and reconvene around the end of October 2017 to conclude their discussions.

129. On 18 October 2017, the claimant went off sick with work-related stress and has not returned to work since. The disciplinary issue is, therefore, not yet concluded.

130. We have not made findings of fact in the section above on all of the individual issues in the list of issues as, for ease of reference, findings in relation to some of the self-contained specific allegations in that list of issues sit better next to the conclusions we reach. Therefore, in relation to some of the issues, our conclusions below contain further findings of fact specific to the issue in question.

Conclusions on the issues

131. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Knowledge

132. The respondent had knowledge of the four disabilities respectively from the following points:

1. Vitamin B12 deficiency: the respondent knew about this from the beginning of the claimant's employment. The extent of that knowledge was, however, that the claimant needed an injection every three months and not knowledge of how that disability might impact upon the claimant. The respondent knew of this disability being described as "pernicious anaemia" when it received the occupational health report of 6 June 2016.

2. Fibromyalgia and sciatica: the respondent first had knowledge of these when they were mentioned by the claimant at her meeting of 7 March 2016 with Ms Ball. This was also the first occasion that the respondent was aware that the claimant had any memory issues connected to her health.

3. TMD: the respondent first had knowledge of this when it was mentioned in the occupational health report dated 6 June 2016.

133. As to knowledge of the individual symptoms, we deal with this (where necessary) in the sections below dealing with the various adjustments which the claimant maintains should have been made to alleviate those symptoms.

Direct disability discrimination

134. We deal with the various allegations of direct disability discrimination in the order they are set out in the list of issues.

6(a) From August 2015 C was required to regularly work more than her contractual hours or anyone else in the EAG team in order to cope with her workload

135. As we have found in our findings of fact, there was no requirement imposed by the respondent on the claimant to work long hours. Quite the reverse; on numerous occasions the respondent indicated its concern that the claimant should not be working long hours. The reason that the claimant was working long hours was her own inefficiency, work method and inability/unwillingness to delegate. This allegation is not therefore made out and therefore fails.

6(b) R failed to keep its promise of providing C with suitably qualified and experienced staff to assist her

136. First of all, the claimant has not specified the "promise" that the respondent allegedly made about providing staff to assist her. As she has not proven this, this allegation fails. Furthermore she has not specified the level of qualification and experience which she required; the allegation fails for this reason too.

137. In addition, as regards the provision of staff to assist in general, we have found that there were staff there to assist her; however, it was the claimant's choice not to use them.

138. The allegation is not therefore made out and therefore fails.

6(c) In April 2016 Susan Ball falsely accused C of not responding to a client

139. It was not clear at the start of the hearing what the claimant was alleging was the basis of this allegation. In her cross-examination, she confirmed that it

related to paragraphs 3.26 and 3.27 of her 144 page witness statement. Those paragraphs, albeit they are very vaguely worded, appear to refer to an exchange between the claimant and Ms Ball where the claimant was told to go and check her email inbox and that she should have checked her emails before she went into any discussions with the client in question. It was put to the claimant that when the claimant said that she could not locate the emails, Ms Ball forwarded them to her; the claimant said that she couldn't see the emails and did not have them so Ms Ball sent them to her and shouted at her. Ms Ball was not cross-examined on this particular allegation and so has not had the chance to explain her account of the alleged incident.

140. In the light of our concerns regarding the reliability of the claimant's evidence, given that there are no contemporary documents to back this up, we do not find that Ms Ball shouted at the claimant. We find that it is likely, given other evidence that we have seen of the claimant making assertions without checking things first, that she said she didn't have the emails in question and Ms Ball simply forwarded them to her.

141. There is, however, nothing whatsoever to suggest that Ms Ball would do this for any reason other than operational reasons and certainly not because of any disability of the claimant. The allegation therefore fails.

6(d) In May 2016 Ms Ball falsely accused C of taking unauthorised annual leave

6(e) C was required to work from home whilst on sick or annual leave on 27 May 2016 and during the period 18 November 2016 to 9 December 2016

142. Allegation 6(d) and the first part of allegation 6(e) relate to the same incident. The claimant had booked a day's holiday for 27 May 2016. However, her holiday was not booked through Ms Ball but through another manager and, although it went into a separate chart in relation to holiday, the fact that the claimant was on holiday that day was not entered into her work diary by her. Furthermore, the only entry in her work diary that day was that she had a call booked with client AS. On 27 May 2016, Ms Owens emailed the claimant, copying in Ms Ball, to say that she had taken a call from client AS who was "quite irate" as she had a call booked with the claimant at 10 AM that morning, it had been rearranged three times, and she had rearranged her own schedule to speak to the claimant that day. The claimant then duly called client AS from home.

143. Ms Ball checked the claimant's work diary (although she did not check the holiday diary) and emailed the claimant to ask for an explanation, as she did not believe the holiday had been approved. The claimant responded that she had given notification of her leave and had updated the holiday diary. Ms Ball checked and noted that another manager had approved the leave. She quickly responded to the claimant and apologised for her mistake.

144. There was therefore a mistake about whether the claimant had booked holiday or not. However, the more serious issue was that the claimant's failure to realise that she had a client call in her diary that day had caused a client to

become irate. This was clearly another client care issue at which the claimant was at fault.

145. In any event, Ms Ball's email asking the claimant to explain herself regarding unauthorised leave was clearly because Ms Ball did not realise that the claimant had indeed booked leave that day; it was nothing whatsoever to do with any of the claimant's disabilities. This element of the allegation therefore fails.

146. Furthermore, the claimant was not required to work from home whilst on annual leave on 27 May 2016. It was she who had diarised a call to client AS that day and caused the problem. The fact that she then spoke to client AS on her day's holiday was her remedying the problem which she herself had created. It was clearly nothing whatsoever to do with a disability. This element of the allegation therefore also fails.

147. The other part of allegation 6(e) relates to the period when the claimant was off sick from 18 November - 9 December 2016. The claimant had told another partner that she would be doing some work from home. Where an employee is on sick leave, it is usual for them to brief a colleague who can then pick up any work they have left over. Occasionally, more senior members of staff may have to deal with anything critical which cannot be handed over, particularly if they have the file. The partner in question had a meeting with HR at this time and the respondent then arranged for the claimant to return four files to the office on 29 November 2016 when it became clear she would be out of the office for some time.

148. Therefore, to the extent that this involved the claimant doing very much at all, this handover was part of normal operational practice. It was nothing whatsoever to do with any of her disabilities. This allegation therefore also fails.

6(f) On 9 February 2017 Ms Ball falsely accused C of ignoring her emails

149. This allegation relates to a conversation between Ms Ball and the claimant on 7 February 2017 about "off payroll" and a particular client. Their discussion was about whether the "20% test" which had previously been in HMRC documents was in fact contained in draft legislation. Ms Ball took the view that it had been dropped because it was not contained in the draft legislation which she had circulated on 4 February 2017. The claimant disagreed and with Ms Ball's agreement an email was sent to HMRC for confirmation (which duly confirmed that Ms Ball's view was correct).

150. In cross-examination, the claimant accepted that she had seen the previous information circulated to the team on 20 December 2016 and the revised guidance and legislation on 4 February 2017. The 7 February 2017 discussion appears to have been just a discussion between colleagues who disagreed over the content of the draft legislation. We accept Ms Carse's submission that, given that the information was circulated on 4 February 2017, it is reasonable to infer that there was discussion about whether the claimant had read the email. However, the evidence does not substantiate an allegation that Ms Ball behaved in an accusatory manner or said that the claimant had "ignored"

the email. Such conduct by Ms Ball would be out of character when one takes into account the other communications from her to the claimant which we have seen. Furthermore, given our concerns about the reliability of the claimant's evidence, we do not accept that Ms Ball addressed the claimant in this manner. This allegation is not therefore made out and therefore fails.

151. In any event, there is nothing to suggest that this conversation was anything whatsoever to do with the claimant's disability and the allegation fails for that reason too.

6(g) In March 2017, R relocated C's desk into direct vicinity of an air conditioning vent and open plan office and this exacerbated the symptoms relating to her disabilities by reason of noise and/or cold air flow

152. As we have found, there was a move in March 2017 such that the claimant sat in an open plan office. The move was done for operational reasons. There were air-conditioning vents all over the open plan office, not just where the claimant was stationed.

153. There is nothing whatsoever to suggest that the reason for the move was anything to do with the claimant's disabilities rather than for purely operational reasons. This allegation therefore fails.

6(h) In December 2016 & April 2017, Ms Ball told C to clear her desk of client files in front of the other staff

154. As noted, the respondent maintains a clear desk policy, for good client confidential information and operational reasons. It was often not adhered to by various employees, including the claimant. Whilst Ms Ball did not remember the two specific occasions set out in the allegation, she accepts that it is likely that she reminded the claimant of the policy. However, she did this to other employees as well. There is nothing, therefore, to suggest that she did this because of the claimant's disabilities; rather, she was simply enforcing the respondent's clear desk policy. This allegation therefore fails.

6(i) In July 2016 authorised C to work from home on less favourable terms than other staff

155. The respondent did allow the claimant to work from home for one day a week from July 2016 onwards. This was done for the claimant's benefit. When the June 2017 occupational health report suggested an extra day working at home if possible, the respondent considered it but did not implement it because of the operational impracticalities due to the paper filing system. That was the reason why these working at home arrangements were not extended further; it was nothing whatsoever to do with the fact that the claimant had certain disabilities; this allegation therefore fails.

156. The claimant has named two comparators in this respect. One of these is CH (for the avoidance of doubt, not Ms Harwood). CH is a director in corporate tax. It was put to the claimant in cross-examination that the files in corporate tax

can be accessed remotely via Alpha Tax and the claimant said that she did not know whether this was the case. CH is not therefore a valid comparator because the issues about paper filing do not apply to her in the same way that they do to the claimant.

157. The other comparator named by the claimant is AC. AC is part of the EAG. However, it was put to the claimant that AC is a part-time member of staff who works four days per week in the office and two hours at home on a Friday morning. The claimant disagreed with this. However, given our concerns regarding the reliability of her evidence, we do not accept this and find that on the balance of probabilities it is more likely that AC is indeed a part-time member of staff who works four days per week in the office and two hours at home on a Friday morning. AC's working at home arrangements are not, therefore, more favourable than those of the claimant.

6(j) On 15 August 2017, Caroline Harwood and Katrina Pennington told C:

(i) To clear her desk of client files and maintain a clear desk policy. By doing as she had been instructed, this exacerbated or caused further injury to C

158. As we have found, Ms Harwood and Ms Pennington did not discuss the clear desk policy at this meeting. This allegation therefore fails.

(ii) Made allegations of work not being completed for a client that C was not responsible for

159. The claimant confirmed that her allegation relates to a client whom we will refer to as "client A". Client A was one of the clients on Ms Harwood's list of points which she wanted to raise with the claimant. This matter had been raised with Ms Harwood by another partner so it was reasonable and proper for her to ask the claimant for an explanation. The claimant said that she was not responsible for this work. Ms Harwood and Ms Pennington accepted the claimant's explanation and moved on.

160. There is no evidence whatsoever to suggest that the claimant was asked for an explanation because of her disabilities; rather, she was asked because the matter had been raised by another partner. This allegation therefore fails.

(iii) Accused delays arising for a client that C worked on which were not C's fault

161. This allegation related to client AS. Ms Harwood raised the fact that client AS had sent a query in December 2016 but had not had a response from the claimant. Ms Harwood did not blame the claimant for delays but made the point that the claimant had failed to keep the client informed. (Again, this was one of a myriad of examples of the claimant failing to keep clients informed which we have seen in the bundle). There is no evidence to suggest that Ms Harwood raised this issue because of the claimant's disabilities; rather, she did so because the claimant had failed to keep the client informed and this was a matter which was therefore appropriate for her to raise with a senior manager. This allegation therefore fails.

(iv) Made incomplete, incorrect and/or misleading notes of the meeting held on 15 August 2017 and did not allow C the opportunity to correct or agree the notes

162. As we have found, the notes of the meeting were not verbatim; in that sense, therefore, they were incomplete. However, they were accurate; they were neither incorrect nor misleading. Furthermore, the respondent did not prevent the claimant from correcting or agreeing the notes; they were sent to her and she could have done this if she had wanted to. The only part of this allegation, therefore, that is established factually is the allegation that the notes were, in one sense, "incomplete". However, as Ms Pennington stated in evidence, this was an informal meeting and it was not the respondent's practice to take full notes at such meetings. There is nothing to suggest that adopting this practice was anything to do with the claimant's disabilities. This allegation therefore fails.

6(k) Susan Ball instructed C to work from home on Thursday 21 September 2017 and Friday 22 September 2017 when C had declared herself to be unfit for work due to a disability related illness

163. As we have found, the claimant was off sick this week. She did not record any chargeable time during that week. Ms Ball did not require the claimant to work that week; any work she may have done would have been at her own initiative. The claimant emailed Ms Ball and asked for her laptop to be couriered to her; however, that was the claimant's decision and was not forced on her by the respondent. The allegation is not therefore made out and fails.

6(l) In September 2017, Susan Ball made two unsubstantiated allegations of dishonesty against C

164. The two allegations were in fact set out in the letter of 6 October 2017 to the claimant (not in September 2017 and not by Ms Ball). We have set out the details of them in our findings of fact above. Both of them, as set out, give good grounds to believe that the claimant had been dishonest, in the one case with a client and in the other with Ms Ball. Honesty is clearly of great importance in any employment relationship, even more so in the context of highly regulated industry and one where the respondent owes fiduciary duties to its clients. It was entirely appropriate to put those allegations to the claimant in a disciplinary meeting.

165. The allegations were quite clearly made because of what the evidence appeared to show and the seriousness of that; the decision to do so was nothing whatsoever to do with the claimant's disabilities.

6(m) At around 7.00 pm on 3 October 2017, Susan Ball told C to respond to a client when C did not want to work any more because she was tired and in pain

166. As set out in our findings of fact, this allegation relates to a client which had chased the claimant three times for a response. Ms Ball had asked the claimant if she had responded and the claimant said that she had not. Asking the claimant to send a holding response to the client would not have involved much time on the claimant's part and was an entirely reasonable and proper

course of action for Ms Ball to take in the circumstances. Her decision to ask her to do this was nothing whatsoever to do with the claimant's disabilities; it was to do with the operations of the business and client care. This allegation therefore fails.

167. In summary, therefore, the allegations of direct disability discrimination all fail.

Reasonable adjustments

168. We turn now to the allegations of a failure to make reasonable adjustments.

8(a) Requiring her to attend the office for long hours from July 2015 to October 2017

169. As noted, this allegation appears to be of a PCP that was applied, without setting out what the substantial disadvantage was and what reasonable adjustments should have been made.

170. However, it is not necessary to try and formulate what those might be. As we have found, the respondent did not require the claimant to attend the office for long hours; to the extent that the claimant did so, this was because of her own inefficient work practices and inability/unwillingness to delegate. The PCP is not therefore established and this allegation therefore fails at the first stage.

8(b) Failing to provide her with a suitable workstation/equipment for example:

(i) Suitable ergonomic mouse (vertical not horizontal)

171. The claimant admitted in cross-examination that this is an adjustment which she says would be reasonable in relation to her carpal tunnel syndrome. This is not a disability for the purposes of this claim. This allegation therefore fails.

(ii) Elevated/angled stand for the keyboard or "under the desk" mounted tray for keyboard

172. The claimant has failed to establish what the PCP and the substantial disadvantage are in relation to this alleged reasonable adjustment. The allegation fails for that reason.

173. In any case, this adjustment was not something which was recommended in any of the medical reports. Notwithstanding that, following the 15 June 2017 occupational health report, the respondent carried out a workstation assessment with the claimant and did indeed arrange for a higher level keyboard to be provided. To the extent that any duty arose in this respect, therefore, the respondent complied with it. This allegation therefore fails.

(iii) Chair to prevent sciatica from developing

174. Again, no PCP or substantial disadvantage has been established by the claimant, so the complaint fails for these reasons.

175. However, as to the adjustment relied on, the claimant admitted that she was provided with a suitable chair. The respondent therefore did make the adjustment in question. This allegation therefore fails.

(iv) Headset so that C did not have to hold the phone in neck using the left side of her chin and left shoulder

176. Again, no PCP or substantial disadvantage has been established by the claimant, so the complaint fails for these reasons.

177. However, headsets were provided to all employees of the respondent when Skype was introduced from May 2016. Therefore, to the extent that this duty even arose, the respondent made this adjustment. The complaint therefore fails.

(v) Access to filing near her workstation

178. The claimant's evidence was that she had a filing cabinet where she put her files near her desk but that this was removed in late 2016. The claimant was required to use the filing cabinets in the central range to store client files; this was so that the other employs in the EAG would know where to find the relevant files. Furthermore, the filing range was no more than 30 to 40 seconds walk from the claimant's desk and the claimant has not suggested that walking there was a problem for her. She has suggested that the filing range got full as files increased in size and it was harder to pull files out and put files into the range; however, in this respect, the assistance of a dedicated filing clerk was available at all material times.

179. It is, therefore, unclear what the PCP is which the claimant seeks to rely on in relation to this alleged reasonable adjustment or indeed what the substantial disadvantage which she relies on is. All we can assume is that the PCP is having to use the central filing range. As to the substantial disadvantage, all we can assume based on the evidence is that it is not the distance of the range from the claimant's desk but the difficulty of putting files in and taking them out of the range which is what the claimant relies on. However, because of the assistance of a filing clerk, the claimant was not put at any disadvantage, let alone a substantial one, in this respect. This reasonable adjustment complaint therefore fails.

180. As to what is specifically set out in the list of issues, the allegation focuses on the filing being near her workstation; however, as we have noted, the claimant has not shown that a lack of proximity was an issue which disadvantaged her because of the disabilities or that she was placed at a substantial disadvantage by having to walk for 30 to 40 seconds to get to the range, so such an allegation would fail; furthermore, it would not be a reasonable adjustment to allow her to

use her own filing system next to her desk when the rest of the EAG, for good commercial reasons about everyone knowing where the files were, had to use the central range, particularly given that there was a dedicated filing clerk to access the files; such an allegation would therefore fail for this reason. In any case, as set out above, the claimant's concern appears to have been about the difficulty of taking the files out of and putting them into the range when the range was full rather than the distance of the range from her desk.

(vi) Humidifier

181. The claimant accepted that this alleged reasonable adjustment would be in relation to her dry eyes; that is not a disability for the purposes of this claim and therefore this allegation fails.

8(c) Failing to relocate C from out of the flow of air released from the air conditioning or place her in a quieter part of the office from June 2016

182. This allegation falls into two parts.

183. Dealing first with the air conditioning, the claimant does not appear to have had an issue about this from June 2016 as stated in the allegation; rather, it appears allegedly to have become an issue from March 2017 when she moved to the open plan part of the office. There was air conditioning in every part of the open plan office. We therefore presume and accept that the PCP applied was to place the claimant in the open plan part of the office where there was air conditioning.

184. However, the claimant has not established that this placed her at a substantial disadvantage. Cold air in the air conditioning is not mentioned anywhere in any of the medical reports nor was it raised by the claimant with the respondent (reference to air-conditioning was only in relation to noise, not in relation to the cold air that the claimant now maintains the air conditioning system produced). There is no evidence beyond the claimant's assertion (which we do not rely on given our concerns about the reliability of her evidence) that cold air put her at a substantial disadvantage. This allegation therefore fails for this reason.

185. It also fails because of the issue of knowledge. The respondent was never told, either by the claimant or through the medical reports, that cold air might cause the claimant any problem; it could not therefore reasonably have been expected to know that the claimant was placed at any substantial disadvantage (even if there was one) because of any cold air from the air conditioning system. Therefore, the respondent was not subject to a duty to make a reasonable adjustment in this instance.

186. Furthermore, even if it had been under such a duty, the respondent could not shut off the air conditioning system. Assuming that the adjustment sought by the claimant would be to turn off the vents near her, it was not possible to do so and therefore such an adjustment could not be reasonable. As to relocating her, the air conditioning system was all over the office so no relocation could have

assisted in this respect. The complaint would therefore have failed for this reason too.

187. In respect of noise, the occupational health report of 6 June 2016 did refer to noise, so the claimant was offered noise cancelling headphones, but rejected them. By the time of the occupational health report of 15 June 2017, the claimant was in the open plan part of the office, and we assume that the PCP, which we accept is established, is the placing of the claimant in the open plan part of the office. However, notwithstanding the medical evidence, we do not accept that this placed the claimant at a substantial disadvantage. The medical evidence is based on what the claimant told the relevant doctors, namely that ambient noise was a problem for her. However, we have accepted the respondent's evidence that the open plan office was not particularly loud and that the EAG was located in a particularly quiet part of it; and that furthermore, being in a small private office with other individuals can actually be louder than being placed where the claimant was in the open plan office. We do not, therefore, accept that the claimant has established that she was placed at a substantial disadvantage. This complaint therefore fails for this reason.

188. In any case, the respondent investigated placing the claimant in a private office but was told that it was not possible. The offices were needed for partners and others where privacy was required. Furthermore, given the evidence about the level of noise in a private office anyway, such a move would not have been effective. For these reasons, therefore, we do not consider that placing the claimant in a private office was a reasonable adjustment. The allegation fails for this reason too.

189. Noise cancelling headphones would have been a reasonable adjustment which would have been effective and these were offered; however the claimant did not take them up when they were first offered.

8(d) Failing to provide C with adequate assistance from other members of staff from August 2015

190. As we have found, the respondent did not fail to provide the claimant with adequate assistance from other members of staff at any time; rather, the claimant did not take advantage of that assistance and was unable/unwilling to delegate. The PCP has not therefore been established and this complaint therefore fails.

8(e) Refusing C's requests to be allowed to park her car at the office in September 2016 and December 2016

191. During the evidence, it was established that the second reference under this allegation is in fact to October 2016 rather than December 2016.

192. The respondent's office has only four parking spaces, and only two of these are accessible without cars moving. They are used by staff, clients and contractors of all those in the building. Staff are able to book spaces in advance with the respondent's office manager. We have seen email evidence in the

bundle that, subsequent to the claimant being allowed to work Wednesdays at home (in other words at some point in the period after July 2016), the claimant would park in the office parking on Tuesdays and Thursdays; she explained in her evidence that this was because she took files home to work on on the Wednesday and she wanted to park at the office so that it would be easier for her to take them away on a Tuesday and bring them back on the Thursday. There was not a problem with doing this. However, what she failed to do was to comply with the respondent's rules that she should notify the office manager in advance when she wanted to use the parking spaces and the office manager had to remind her of this. The claimant, in rather impertinent email correspondence with the office manager, then told her that she had decided that she would make her own parking arrangements instead. The claimant continued to drive to the office, but simply used public parking for which she paid.

193. The PCP relied on by the claimant is not therefore made out; the respondent did not refuse to allow the claimant to park her car at the office, either in September/October 2016 or otherwise. The claimant was permitted to park her car there; however, what she had to do was to comply with the respondent's rules to book spaces in advance. The decision then to discontinue using the respondent's parking was the claimant's own decision. This complaint therefore fails.

194. Furthermore, even if there had been such a refusal, the claimant has not established that it placed her at a substantial disadvantage. We assume that the substantial disadvantage which she relies on related to carrying her files; however, she has not established whether carrying the files is merely inconvenient or that it is something that, because of her disabilities, places her at a substantial disadvantage. Furthermore, she has not established that it would be any better for her to use the office parking spaces rather than the public parking spaces in terms of alleviating any disadvantage (if any) in relation to her disabilities (there would be a cost benefit to her in not having to pay for the public parking, but that is a separate issue). The complaint fails for this reason too.

8(f) On 16 October 2017, R refused to allow C the use of electronic equipment to record the conversations of a disciplinary hearing whilst knowing that C would not be able to make notes of the meeting herself

195. The respondent did refuse to allow the claimant to record the disciplinary meeting on 16 October 2017. The PCP is therefore established.

196. However, we do not find that the claimant was placed at a substantial disadvantage. First, the claimant had been told of her right to bring a companion, who could have taken notes of the meeting; however, she did not do so and that was her choice. Second, there was an experienced notetaker there who took a full note of the meeting; the claimant was therefore placed at no disadvantage. This allegation therefore fails.

197. In summary, therefore, the complaints of a failure to make reasonable adjustments all fail.

Time Limits

198. As noted, the claimant has been off work sick from 18 October 2017; she had contacted ACAS on 18 January 2018; ACAS early conciliation had concluded on 4 March 2018; and the claim was presented on 3 April 2018. Therefore, any alleged event which took place prior to 19 October 2017 was presented out of time.

199. We turn first to what is the latest allegation of direct discrimination. The last of these in date terms is issue 6(l), which took place on 6 October 2017; although the list of issues refers to this as being in September 2017, the two allegations were in fact set out in a letter of 6 October 2017 to the claimant from Ms Pennington. Even if it could be said that some of the undated issues (for example 6(a)&(b), in relation respectively to the claimant being required to work more than her contractual hours and the respondent not providing her with suitably qualified and experienced staff) were continuing acts of discrimination, they clearly could not have gone on beyond 18 October 2017 as the claimant was not at work from then on; they too were therefore presented out of time. All of the allegations of direct discrimination were therefore presented out of time.

200. In terms of the allegations of a failure to make reasonable adjustments, the latest that these allegations could apply is 18 October 2017 and therefore they too are all out of time. (In fact, it is likely that time started running in relation to many of them at an earlier stage than that, in accordance with the principles in Matuszowicz set out in our summary of the law; however it is not necessary to carry out that enquiry in relation to each of the individual allegations of a failure to make reasonable adjustments as, regardless of that, the very latest date is 18 October 2017 and these allegations were therefore all presented out of time.)

201. There are no successful in time allegations (nor indeed any in time allegations at all) to which earlier out of time allegations could be connected so as to amount to conduct extending over a period so as to mean that those earlier allegations are deemed to be in time. This does not therefore assist the claimant.

202. In her written submissions, the claimant sought to link allegations in the list of issues to events which she maintained happened after she went off long-term sick on 18 October 2017. However, these later matters were not part of the claim or allegations in the list of issues. It is not, therefore, possible as a matter of law to link matters which are part of the proceedings with other matters which are not part of the proceedings so as to amount to conduct extending over a period. This does not therefore assist the claimant either.

203. There remains therefore only the question of whether or not it is just and equitable for the tribunal to extend time. We remind ourselves that the burden of proof to show that it is just and equitable to do so rests with the claimant.

204. The reason put forward by the claimant as to why she did not put her claim in any earlier was that she was not in a fit state to do so. We have referred to this in the sections assessing the credibility of the claimant's evidence. We do

not accept her reason. She stated that for 3-4 months following 18 October 2017, she was not in a mentally fit state, so much so that she could not and did not leave the house for 3-4 months; had all her doctor's appointments over the phone; did not even go into her garden; and put the bins out at night because she didn't want to go out. However, her GP report of 12 December 2017, right in the middle of that period, states *"As stated to me by Mrs Kalia, if she maintained working hours at 30 hrs/week with appropriate workload appropriate to her role, she sees no reason why she should not be able to perform the duties"*. What she told her doctor at that time is therefore completely in contrast to the picture she sought to paint in her oral evidence before the tribunal. We have also noted that, in fact, she did get out of the house to visit her doctor, contrary to what she originally told us. The claimant's dishonesty in her evidence aside, we find that it is far more likely that what she told her doctor at the time in December 2017, and which is reflected in his note of what she said, is the true version of events. If the claimant thought she was capable of working a 30 hour week in the job that she was doing, she was certainly capable of putting in an employment tribunal claim.

205. Right at the end of the hearing, after submissions had been completed, the claimant asked to add a further point. Clearly concerned about the impact that the evidence above had on the jurisdictional issues, she stated that, when she was giving her evidence, she had said she had admitted that she had gone to the doctor's in person and that she did not have merely telephone appointments; she then told us that, in fact, all the appointments in person were from January 2018 (in other words from after the time she was putting in her claim) and that she did not go to the doctors in person when she was unwell; she added that the medical records showed this. The judge explained that it would be very difficult for the tribunal to take this evidence into account given that that was not the evidence she gave earlier. However, after the hearing, the tribunal did look at the doctor's records in question. In fact, these clearly showed that the claimant did attend the doctor's surgery in person on several occasions between October 2017 and January 2018, albeit there were some telephone appointments as well. Therefore, all that the claimant's comment at the end of the hearing did was to underline even further the lack of credibility in her evidence.

206. Furthermore, the claimant was very alive to the possibility of putting in a claim.

207. First, she has considerable experience of employment tribunals. As she admitted in cross-examination, she had brought employment tribunal proceedings against her previous employer for whistleblowing and disability discrimination; these had been determined at a multi-day hearing; not only had the claimant lost on all of the allegations in her claim but she subsequently had costs awarded against her at a subsequent costs hearing. Furthermore, the claimant had been represented at that hearing by a barrister and had instructed solicitors in relation to the case. Although she sought in her evidence, as was typical of her attitude to attributing responsibility generally, to blame her solicitors and barrister for what happened, she clearly had considerable legal advice and assistance in relation to those employment tribunal proceedings. Whilst she suggested that there had been no discussion of time limits in relation to those proceedings, we do not (particularly given that she has been dishonest in so

many aspects before this tribunal) believe her and find it far more likely that there was at least some discussion of time limits at the time and that the claimant was aware of their importance.

208. In relation to these proceedings, the claimant was in touch with her legal insurers and had given details of the proposed claim. She was certainly contemplating bringing a claim as early as early November 2017 when she was in touch with those insurers. In addition, the documentation with the insurers made clear that, notwithstanding that her application for legal insurance for the claim was rejected, she had access to their legal advice helpline. In addition, the documentation references the fact that the claimant had other "preferred solicitors" lined up. The claimant admits that she spoke to "solicitors" but maintains that this was just her insurer's helpline and that she only spoke to them and sent them some documents but received no advice; we do not, however, believe her when she suggests that she received no advice from them (if they were solicitors, we find it inherently unlikely that they did not give some advice to her and, given our concerns about the claimant's honesty, do not accept that she did not receive any advice from them). Furthermore, the documentation from the insurers indicates that a barrister had assessed the likely chances of her claim succeeding and had found that they were less than 50%, which was a further reason given by the insurer for refusing her application for insurance for an employment tribunal claim.

209. The claimant's evidence to this tribunal was that she was aware of time limits but didn't know there was a three month time limit in the employment tribunal. Again, in the light of her previous employment tribunal litigation experience and the fact that she was speaking with lawyers as early as early November 2017, we do not believe her and find that, on the balance of probabilities, she did know about tribunal time limits and what they were. It is far more likely that she simply got the application of the time limit wrong: we note in this respect that she contacted ACAS exactly 3 months after the day she went off sick (albeit that was one day too late to keep any allegations dating from 18 October 2017 in time) and then (on an assumption that she had contacted ACAS early enough initially) presented her claim on the last possible day for presentation after the close of ACAS early conciliation.

210. Finally, the claimant suggested in her evidence that she hadn't been contemplating an employment tribunal claim until 18 January 2018 (which was the date she contacted ACAS) and that, rather, she was prompted to do so because of a call made by Ms Pennington to her on 18 January 2018. The claimant covertly recorded this call without Ms Pennington's knowledge. The claimant describes this call as one which amounted to bullying her; however, having heard Ms Pennington's evidence and seen the transcript, it is clearly a welfare call from an employer which is concerned about an employee who has been off sick for a long time.

211. First, we can see nothing in the transcript of this call which indicates that it would be something which prompted the claimant to bring an employment tribunal claim if she had not been contemplating a claim prior to that call. Secondly, the claimant's assertion in this respect is completely at odds with the

evidence which we have set out above which clearly shows she is contemplating an employment tribunal claim as early as early November 2017. We do not, therefore, believe the claimant's assertion in this respect.

212. We can, therefore, see no reason why the claimant could not have submitted her claim on time.

213. Furthermore, applying the test which we have to apply, the claimant has not proved that it would be just and equitable to extend time and we do not therefore extend time. The tribunal does not therefore have jurisdiction to hear any of the claimant's complaints under her claim and the claim is therefore struck out in its entirety.

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Employment Judge Baty

Dated: 29 May 2019

Judgment and Reasons sent to the parties on:

31 May 2019

For the Tribunal Office