EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MRS C GHYSELEN		MARRIOTT DAVIES YAPP LLP

Heard at: London Central

On: 29 September – 5 October, 2020

Before: Employment Judge O Segal QC
Members: Ms J Kilgannon; Mr S Pearlman

Representations
For the Claimant: Ms S Crawshay-Williams, Counsel
For the Respondent: Mr S Crawford, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The Claimant's claim under ss. 20-21 Equality Act 2010 succeeds.

(2) The Respondent is to pay the sum of £13,500 to the Claimant by way of an award for injury to feelings.

REASONS

1. The Claimant brings a claim of failure to make certain reasonable adjustments to avoid or mitigate substantial disadvantages arising by reason of a hearing deficit amounting to a disability. All other claims, including by reference to other disabilities (diabetes and fibromyalgia), have been withdrawn during the proceedings and are to be treated as dismissed on withdrawal.

2. Both parties were represented by counsel. We express our gratitude for the way in which both conducted the proceedings.

Evidence

3. We had an agreed bundle of 681 pages. We had witness statements and heard live oral evidence from:

   3.1. the Claimant (by video-link);

   3.2. for the Respondent: Liam Davies ("LD") (Designated Member of the Respondent, Solicitor, and the partner of the Respondent responsible for HR); Timothy Yapp ("TY") (Designated Member of the Respondent, Solicitor, and the partner of the Respondent responsible for the Private Infrastructure Development Group ("PIDG") Programme); and Diane Harris ("DH") (Member of the Respondent, and General Counsel for PIDG).

4. We comment at the outset that we consider that all the witnesses were, all or nearly all of the time, doing their best to assist the Tribunal; although, as we set out below, there were areas where we determined certain material evidence given by one or more witnesses to be more reliable than evidence given by another.

Facts

5. The Respondent works for clients in the international development sector, including PIDG and the Emerging Africa Infrastructure Fund ("EAIF").

6. The Claimant was employed by the Respondent from 8 August 2016 as a Personal Assistant, reporting to Amina Rasool ("AR"), a Consultant Solicitor of the

Respondent who acted as General Counsel of EAIF, working closely with Emilio Cattaneo ("EC"), Executive Director of EAIF. The Claimant had been engaged in the same capacity through an agency for some weeks prior to 8 August 2016.

7. The Claimant has suffered during the whole of the material period from sensory neural hearing loss, diabetes and fibromyalgia (the last being only formally diagnosed in 2017). Although the Respondent accepted that each of these conditions amounted to a disability within the meaning of the Equality Act 2010 ("the Act"), it was, by the end of the evidence, only the hearing deficit on which the Claimant relied as regards her reasonable adjustment claims.

8. The first disputed fact of significance is whether the Claimant, in early August 2016, informed William Mackenzie ("WM"), at the time a solicitor of the Respondent who worked as its HR Manager, about her hearing deficit. The Claimant says she gave WM a copy of a letter from 2010 from Hidden Hearing, explaining her condition, including that she would be at a disadvantage working in an open-plan office environment; and that she discussed that condition (and her diabetes) with him. WM apparently recently told LD that he could not remember one way or the other. LD told us that WM did not report any such issues regarding the Claimant to him (as he would have expected him to) and that searches of the relevant files did not turn up a copy of the Hidden Hearing letter. We find, on the balance of probabilities, that the Claimant did provide information about her hearing deficit to WM and probably at least showed him a copy of the Hidden Hearing letter. It seems it had been her practice to do so when beginning other employments between 2010 and 2016 and her clear recollection is to be preferred to any negative inferences from LD not being told and a copy of the letter not being found in late 2018.

9. In the latter context, we say in passing that we did not consider as particularly illuminating the fact that the Claimant apparently did not, when completing an annual anonymous diversity questionnaire distributed at the Respondent, tick the box stating she had a disability (nor, it seems, did Mr Yapp, whom all at the Respondent knew had a hearing disability).

10. It is also disputed whether the Claimant made TY aware of her hearing disability. She is sure she did so; he is sure she did not. The Claimant's written and oral

evidence about the conversation(s) she had with TY where she recalls that being discussed was not precise or consistent. We find, on the balance of probabilities, that she did not – or at least, not so as to make it clear to TY – speak to him about her own hearing disability at any time during her employment with the Respondent.

11. It is common ground that shortly after beginning her employment at the Respondent, the Claimant (perhaps with others) asked for and achieved the rearrangement of their desks, with the Claimant's desk moving from nearer the middle of the room to a position where she had her back against the wall. It is the Claimant's evidence, accepted by the Respondent, that this was materially advantageous to her because it meant that sound would "bounce off" the wall assisting the Claimant to hear her colleagues speak (as well, the Claimant said, because the new desk position and better light assisted her to lip-read where necessary).

12. The Respondent disputes that its office manager, Patricia Doyle ("PD"), who authorised the move of the desks, did so for that reason; based on what PD told LD during the investigation of the Claimant's grievances in June 2018, unfortunately not documented by LD as part of that investigation. However, based on the recorded evidence given to the grievance investigation of Cheryll Gardiner ("CGa") – at the time a colleague of the Claimant, but shortly afterwards the Respondent's HR Administrator as well; and of the recorded evidence of EC in the same context; and based on the tribunal's inference on the balance of probabilities that AR would have known what CGa and EC knew, since AR worked most closely with the Claimant; the tribunal finds that it is probable that PD also knew that was one of the reasons for the desk-moves (although, as we explain below, that finding is not necessary to our conclusions in this case).

13. The Claimant was also provided with a hands-free telephone headset, so that she could make or receive calls away from her desk and which helped block out background noise whilst on the phone. The Claimant does not state in terms that she asked for this headset or was provided it by reference to her hearing deficit. Others, including DH, had similar headsets. We find that the Respondent probably did not know expressly that the telephone headset provided the Claimant with material advantages by reference to her hearing deficit, though those at the Respondent who knew of that disability might well have deduced or assumed as much.

14. Until April 2018, the Respondent's office premises were at Kings Buildings, Smith Square SW1.

15. With effect from April 2018, PIDG Ltd was established and took up new office accommodation at 6 Bevis Marks EC3 ("Bevis"). PIDG Ltd provided EAIF with accommodation at Bevis from that time. This meant that:-

    15.1. The majority of the Respondent's employees transferred their employment to PIDG Ltd and their place of work to Bevis.

    15.2. EC and AR moved from Kings Buildings to Bevis, as did DH for part of each week.

    15.3. The remainder of the Respondent's staff moved to smaller premises in Temple Chambers EC4.

16. The Respondent remained contracted to provide services to EAIF (on which the Claimant continued almost exclusively to work). Thus, the Claimant's employment did not transfer to PIDG. However, it was determined (lawfully pursuant to her contract and in any event in accordance with her wishes) that the Claimant would join the EAIF team (EC and AR) at Bevis, rather than move to Temple Chambers, from 9 April. The Claimant knew of that decision from at the latest 1 April 2018. In fact, the Claimant worked from home in the first week of April 2018 whilst the Bevis office fit-out was completed and her first day of work at Bevis was 9 April 2018.

17. The Claimant was, and remained (at least until about a year after presentation of her tribunal claim in this case on 4 August 2018) aggrieved that her employment had not transferred to PIDG Ltd, along with those several colleagues of hers. She considered that she had been singled out for different treatment and that this was unfair to her. She blames the Respondent for not making the position clear to her. For the purposes of this claim, it is not necessary for us to determine whether the Claimant is justified in blaming the Respondent in this regard; but it is relevant that this is how she felt from April 2018 until about September 2019.

18. The Claimant found working at Bevis considerably less congenial than at Kings Buildings. There were various reasons for this:-

18.1. First, as we have said, she resented not having been transferred to the employment of PIDG. Apparently, the remuneration and other benefits for the transferred staff were much improved by reason of the transfers.

18.2. Secondly, the rather different commute to work (the Claimant lives in Dover) was more troublesome. It took longer and it involved climbing several steps, which quickly caused her fibromyalgia to become more symptomatic (she described to us having to be assisted up those steps by kind fellow-travellers).

18.3. Thirdly, the office was a much larger open-plan office, with higher levels of ambient noise (including noisier air conditioning units).

18.4. Fourthly, there was initially no easy supply of drinking water in the office, which, by reason of the Claimant's diabetes, was a real concern to her. Even when a water dispenser was soon made available, it would, the Claimant says, regularly run out of water.

18.5. Fifthly, the Claimant was very concerned at PIDG Ltd taking on a PA with responsibility inter alia for Board Minutes, Deirdre D'Arcy; the Claimant felt she should have been asked to apply for that role.

19. Finally, more intangibly, but perhaps in the end as important as any of the above factors, the Claimant experienced what she described as an unkind and intolerant attitude from some of her colleagues, in particular CGa – whom she accused, it would seem justifiably, of making an offensive comment to her referencing her hearing disability, which was initially also the basis of a claim in these proceedings; but also Carolyn Kennedy and an employee of PIDG Ltd, Bhaven Pandit. That unkindness and intolerance was exhibited in particular and over a period, the Claimant found, in an unwillingness of those colleagues to assist her with photocopying and scanning by allowing her to use their 'cards' (enabling use of the relevant machine(s)), pending the Claimant receiving her own 'card'.

20. Compounding, and doubtless exacerbating these concerns, the Claimant was led to believe, by early May 2018, that the Respondent's contract with EAIF was to end and thus the vast majority of the work she was doing would no longer be required by the

Respondent. By her last actual day of work at the Respondent, 4 May 2018, the Claimant was making plans to seek employment elsewhere if that proved necessary.

21. As regards the levels of noise and the effect on the Claimant by reason in particular of her hearing disability, the Claimant found that her assigned desk was (although sensibly positioned next to AR) nowhere near a wall or partition; and that there was no telephone headset provided to her. There is no dispute as to those facts. These are the two matters in respect of which she claims the Respondent did not make the legally required reasonable adjustments ("the Adjustments").

22. As to the significance of the Adjustments for the Claimant, there is not much dispute:-

    22.1. It is accepted that the Claimant's desk being in the middle of the room would have failed to mitigate the problem of hearing colleagues, by reason of sound not being able to bounce of a wall behind the Claimant.

    22.2. It is not formally accepted, but it seems clear as a matter of the Claimant's evidence and of common sense, that a telephone headset would have significantly mitigated the effect of the hearing deficit whilst the Claimant was on the phone. However, the Respondent pointed out, and the Claimant accepted, that once she had moved to Bevis she was taking very few phone calls – the Claimant estimated one or two a week – on what the Claimant referred to as the EAIF 'hotline'.

23. The Claimant also told the tribunal that the failure to consult with her before or when she moved to Bevis about how the office environment could be made better for her given her disabilities, had caused her considerable hurt and contributed much to a feeling of isolation and that her disabilities were being ignored.

24. There is no dispute that it would have been very easy for the Respondent to have ensured provision of a telephone headset for the Claimant; and fairly easy to have moved the Claimant to a workstation next to a wall, perhaps with an additional mobile screen behind her if (as the room configuration made likely) she had her side to that wall.

25. Perhaps the most factually contentious area of the evidence is the extent to which the Claimant made others at the Respondent (or at PIDG/EAIF) aware of the lack of the Adjustments in the period, principally 9-16 April 2018. The Claimant says she told CK, CGa, BP, PD, TY and LD. The Respondent, either by the direct oral evidence of TY and LD, or by the statements given to the grievance investigation, denies that she did so. The highest the Respondent's evidence goes by way of acceptance, is that LD accepts that in a casual conversation during a lunch break on 13 April, the Claimant mentioned to him in the presence of PD that the "acoustics" were bad at Bevis.

26. Other than BP (about whom we make no finding, and in respect of whom, as a PIDG Ltd employee, no finding is particularly relevant), we find on the balance of probabilities that the Claimant did not make any express representation to CK, CGa, PD, TY or LD about the absence of the Adjustments at Bevis. We so find for the following reasons:-

    26.1. In more or less formal written communications with some of those colleagues at the time, the Claimant did not mention the Adjustments, although she did mention other concerns (e.g. the lack of water). She also raised concerns about the printing/scanning with PH.

    26.2. There is more or less clear evidence from at least TY, LD and CGa that the Claimant did not raise the Adjustments with them.

    26.3. The Claimant herself, in answer to a question from the tribunal in this context, said she did not "like to impose" on her colleagues.

    26.4. It is inherently unlikely, given the Claimant was a valued colleague and given the ease with which the Respondent could have arranged the Adjustments, that the Claimant raised the Adjustments with those people and yet nothing was done to remedy the situation.

27. The Claimant's last day at work was Friday 4 May 2018. The following Monday was a Bank Holiday and the Tuesday the Claimant had booked as annual leave. By Wednesday 9 May 2018, the Claimant was signed off sick from work with because of "anxiety states". The Claimant had in fact had a significant and continuous flare up of her fibromyalgia, was in constant pain, her blood sugars were erratic and she was

suffering panic attacks – all, she says unsurprisingly, connected with and to a large extent caused by stress. Without going into the detail of the Claimant's medical history since then, she has not recovered her health and remains unfit to work.

28. On 10 May 2018 the Claimant presented a written grievance, complaining primarily of:

    28.1. The failure to include her amongst the employees transferred to PIDG and not being asked to apply for the new PIDG PA role;

    28.2. The failure to make the Adjustments;

    28.3. The behaviour towards her of CGa.

29. The tribunal read and heard a good deal of evidence and submissions in relation to the progress and outcomes of the investigation into that grievance. For present purposes, we can state our relevant findings shortly:-

    29.1. LD, who took on the investigation and resolution of the grievance, did so relatively expeditiously and in good faith. However, his gathering and recording of the relevant evidence left much to be desired. In particular, some of the key evidence collected by him, in particular PD's evidence, was not recorded or the records not retained; and much of the evidence gathering, from now-PIDG staff, was (not unreasonably) delegated to Sandra Rochfort, head of HR at PIDG, but Ms Rochfort did not ask some of those staff, in particular AR, some of the most pertinent questions.

    29.2. On the question of the Adjustments, LD made absolutely clear to the Claimant throughout the grievance process, including unambiguously and formally in the first Grievance Report dated 13 June 2018, that the Respondent would be happy to make the Adjustments to enable the Claimant to return to work, and looked forward to her doing so.

    29.3. The harassment complaint against CGa was upheld. However, the Claimant's other complaints were rejected, including that the Respondent knew from the Claimant that she required the Adjustments to be made.

The Law

Discrimination arising from disability

30. Section 20 of the Act provides that

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice [PCP] of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> …
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

31. Section 21 of the Act provides:

> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

32. *"Substantial"* is defined as *"more than minor or trivial"* at s. 212(1).

33. Para 20 of Sch 8 of the Act provides:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

…

(*b*) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

34. The Equality Act 2010 Code of Practice: Employment provides:

5.17 If an employer's agent or employee (such as an occupational health adviser or a HR officer) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability.

5.18 Therefore, where information about disabled people may come through different channels, employers need to ensure that there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act.

Example: An occupational health (OH) adviser is engaged by a large employer to provide them with information about their workers' health. The OH adviser becomes aware of a worker's disability that is relevant to his work, and the worker consents to this information being disclosed to the employer. However, the OH adviser does not pass that information on to Human Resources or to the worker's line manager. As the OH adviser is acting as the employer's agent, it is not a defence for the employer to claim that they did not know about the worker's disability. This is because the information gained by the adviser on the employer's behalf is attributed to the employer.

…

6.10 The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions

…

> 6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

35. As regards past loss, as well as future loss, a tribunal may be in the position where it is not sure whether, but for any act(s) of discrimination found, the Claimant would have suffered (or would in the future suffer) the pecuniary losses claimed. In such a case, a tribunal should make a reasoned assessment of the chance(s) of such losses having occurred/occurring in any event: see e.g. ***Ministry of Defence v Cannock* [1994] ICR 918**, EAT, at [130-136].

36. We were referred by Ms Crawshay-Williams to ***BAE Systems (Operations) Ltd v Konczak* [2018] ICR 1**, CA, where Underhill LJ made the following comments in a case concerning psychiatric injury which had been arguably caused to a large extent by factors not constituting unlawful discrimination but in one respect by an incident of discrimination (emphasis added), which the tribunal had found had in effect 'tipped' the Claimant from a state of reasonable health (albeit vulnerable) to a state of ill health:

> 71 What is therefore required **in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused**. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm. …

72 That distinction is easy enough to apply in the case of a straightforward physical injury. A broken leg is 'indivisible': if it was suffered as a result of two torts, each tortfeasor is liable for the whole, and any question of the relative degree of 'causative potency' (or culpability) is relevant only to contribution under the 1978 Act. **It is less easy in the case of psychiatric harm. The message of *Hatton* is that such harm may well be divisible**. In *Rahman* the exercise was made easier by the fact (see paragraph 57 above) that the medical evidence distinguished between different elements in the claimant's overall condition, and their causes, though even there it must be recognised that the attributions were both partial and approximate. In many, I suspect most, cases the tribunal will not have that degree of assistance. But it does not follow that no apportionment will be possible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of the aggravation. The most difficult type of case is that posited by Smith LJ in her article, and which she indeed treats, rightly or wrongly, as the most typical: that is where 'the claimant will have cracked up quite suddenly, tipped over from being under stress into being ill'. On my understanding of *Rahman* and *Hatton*, **even in that case the tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence**. If there is no such basis, then the injury will indeed be, in Hale LJ's words, 'truly indivisible', and principle requires that the claimant is compensated for the whole of the injury …

The parties' submissions

40. Both parties provided written submissions and supplemented those orally.

41. We have taken those fully into account and summarise here only certain key points.

42. On the issue of the Respondent's knowledge of the Claimant's hearing disability and of the substantial disadvantage to her caused by each of the Adjustments:-

43. The Respondent all but accepted knowledge of the disability, by reason of CGa's knowledge of it and accepted that if we were to find (as we have) that WM had knowledge, that meant the Respondent did.

44. As to substantial disadvantage,

44.1. On the issue of the desk position, the Claimant relied on the knowledge of CGa, EC and the presumed knowledge of AR as being sufficient, even if PD had not known (as we have found she likely did). The Respondent accepted that if all of those people knew, the Respondent had the requisite knowledge.

44.2. On the issue of the headset, the Claimant accepted there was no direct evidence of that knowledge, but submitted that it should be inferred from common sense once the Respondent knew of the disability. The Claimant also relied on the Respondent's duty (Code 6.19) to *"do all they can reasonably be expected to do to find out whether this is the case"* as being applicable when the Claimant moved to Bevis, given everyone knew she had previously worked with such a headset and her complaint about the "acoustics" at Bevis. The Respondent's position was simply that if it did not know it had provided the headset at Kings Buildings as a reasonable adjustment, it could not be aware of any substantial disadvantage arising from not providing one at Bevis.

44.3. The Claimant in this context noted and relied on the observation of Ms Rochfort, who had been delegated in effect to conduct part of the grievance investigation as regards the evidence of PIDG staff and who also attended LD's interview with CGa, that *"In Cheryll's role as Office Manager and HR Co-ordinator, it is surprising that Cheryll did not realise that we should have had a conversation with Caroline about any reasonable adjustments she may have required."*

45. Actual substantial disadvantage by reason of the non-provision of the Adjustments was, in each case, denied by the Respondent. It pointed to the (on its case, and as we have found) lack of complaint by the Claimant after 9 April 2018 about not having the Adjustments and asked the tribunal to consider carefully the Claimant's own evidence about the actual disadvantages she says she experienced. The Claimant relied on her own evidence that having her desk against the wall did assist materially with being able to hear colleagues speak, and that having the headset "helped enormously" when on the phone; as well, as regards the desk position, on the understanding of several of the Claimant's colleagues that being against the wall helped mitigate problems caused by the hearing disability.

46. On the issue of assessing the chance the Claimant would have gone off sick and/or stayed off sick regardless of any failure to make the Adjustments, or apportioning the harm between a part caused by any unlawful act and other part(s) caused by other factors:-

46.1. Mr Crawford argued that the other matters we have set out at paragraphs 18 to 20 above were more relevantly causative of the Claimant's ill health – as might be judged in part by the Claimant not asking for the Adjustments before she went off sick; and that it was significant that even when it was made clear to the Claimant by the Respondent that the Adjustments could and would be made, that did not improve her health or lead to a return to work. At its highest, he suggested, the Claimant should be awarded only 30-40% of her claimed loss from the date of the first Grievance Report (13/6/18) and nothing after the second Grievance Report (18/7/18) when the grievance investigation was concluded and the allegation of harassment also upheld. Mr Crawford also noted the medical evidence that after going off sick the Claimant's diabetes and new medication to control its effects had had seriously adverse consequences for the Claimant's health and the likelihood of her returning to work.

46.2. Ms Crawshay-Williams relied on the Claimant's oral evidence to the tribunal, which she said demonstrated how important the failure to provide the Adjustments and to consult about them had been in precipitating the Claimant's ill health; and on her evidence (which we did not accept) that she had complained at the time to various people about those matters. Ms Crawshay-Williams also relied on a report from a Consultant in Pain Medicine, Dr Lieberman, dated 6 June 2020, supplemented on 12 September 2020 by answers to further questions from the Claimant's solicitors, which concluded that 50% of the Claimant's pain increase was due to work-related stress including the failure to provide the Adjustments and that she would in time have been able to deal with the more difficult commute; noting on 12/9/20 that in interview in January 2020 he had been struck *"at quite how much distress the lack of adaptation had caused the claimant"*. Ms Crawshay-Williams argued that once the fibromyalgia had flared up as badly as it did in May 2018, there was no likelihood of a quick restoration of sufficient health to enable a return to work. The Claimant's primary case is

that she ought to receive her claimed past loss of earnings to date because she remains signed off sick and has not been able to return to work since 9 May 2018. At its lowest, Ms Crawshay-Williams contended orally for full loss until the Claimant had been able to complete a course of counselling which only ended in November 2018; but having taken further instructions, she put the Claimant's alternative case as being that she should be awarded her past loss of earnings up until the date when Dr Lieberman examined the Claimant on 16 January 2020, as that was when he indicated that she could return to work, noting that she "could return to similar roles as long as the office conditions allow" – although we note that Dr Lieberman does not there state that this is a new state of affairs as at January 2020.

Discussion

The Respondent's knowledge

24. We agree with the Claimant's case on the Respondent's knowledge of both the disability and the substantial disadvantages caused in relation to that disability by the failure to make the Adjustments.

25. On the findings of fact we have made, there is no dispute as regards the desk position. As to the headset, we are persuaded that in the circumstances, the Respondent had a duty to make reasonable inquiries which it did not fulfil. The Respondent did not *"do all they can reasonably be expected to do to find out whether"* there might be substantial disadvantage, particularly once the Claimant had complained about the "acoustics" at Bevis.

Actual substantial disadvantage

26. We accept the Claimant's evidence on this issue. The disadvantages were more than minor or trivial in each case; although given the infrequency of the Claimant needing to take phone calls at Bevis, as regards the non-provision of a phone headset the disadvantage was not considerable.

Causation, loss of a chance, apportionment of harm

27. We have set out the law as we understand it above. However, we consider that whether one looks at loss in this case from the perspective of

    27.1. 'What would have happened but for the unlawful acts? What are the chances the Claimant would have remained at work, or been able to return to work?', or

    27.2. 'Can the Claimant's ill health and thus her loss of earnings be apportioned, on a rational basis, between a part caused by the unlawful acts and a part caused by other factors?

    the result is much the same in this particular case.

28. We accept that there being a rational basis for such an assessment does not equate to a scientific calculation; our conclusion is inevitably to some extent impressionistic and holistic. With that caveat, we find that the Claimant is entitled to 20% of her loss of earnings until 30 November 2018 and not to any loss of earnings thereafter. More particularly, we find that 20% of the harm in the shape of ill health suffered by the Claimant was caused by the failure to make the Adjustments in the period until 30 November 2018 with 80% caused by other factors; and that after 30 November 2018 the Claimant's continued ill health was caused entirely by other factors.

29. We so find for the following reasons in summary:-

    29.1. We consider that the other factors set out at paragraphs 18 to 20 above were, collectively, by far the main reasons why the Claimant's health deteriorated so significantly in such a short time. In that regard our finding that the Claimant did not complain in terms about the Adjustments before 4 May 2018 is germane.

    29.2. Although we have found that substantial disadvantages (as a matter of fact and law) were experienced by the Claimant by reason of the Respondent not making the Adjustments, those disadvantages were not so considerable, particularly as regards the lack of the headset, relative to some of those other factors. We do take into account, however, the psychological impact on the

Claimant of the Adjustments not being made and her not being consulted about them, as well as the more direct hearing-related disadvantages.

29.3. We were struck by the complete absence of any improvement in condition or prognosis once the Claimant knew, at the latest by mid-June 2018, that the Respondent was more than happy to make the Adjustments; and by the Claimant's continuing sense of grievance (as evidenced inter alia by her pursuing claims in this regard to the tribunal long after that date) about the Respondent not transferring her employment to PIDG and CGa's treatment of her at Bevis.

29.4. We accept that the failure to make the Adjustments (and the failure to consult with the Claimant) was an exacerbating factor in precipitating the Claimant's ill health – particularly taking account, as we have said we do, of the psychological impact on the Claimant of the Adjustments not being made and her not being consulted about them. As to how much so, we were not particularly assisted by Dr Lieberman's views, since they were based entirely on what the Claimant had told him in interview in 2020, and we had obtained a much fuller picture from the Claimant's evidence to us and from the other documentary and oral evidence we considered; we also noted that Dr Lieberman's answers to the supplementary questions relied on by the Claimant were answers to questions phrased in an artificially narrow way.

29.5. We consider that the period between 13 June 2018 (when in the first Grievance Report the Respondent made it clear that it was happy to make the Adjustments) and 30 November 2018 (which includes the period during which the Claimant had 10 counselling sessions, the last on 8/10/18), was sufficient to resolve any health issue caused by the Respondent's failure to make the Adjustments.

Remedy

30. The parties were able to agree remedy in the sum of £13,500 by way of an award for injury to feelings (no other sum being payable).

31. The tribunal therefore makes an award for injury to feelings in that sum.

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Employment Judge - Segal

Date: 5th Oct 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

05/10/2020.

…….....

FOR THE TRIBUNAL OFFICE