EMPLOYMENT TRIBUNALS

Claimant: **Mr D Loftus**

Respondent: **Her Majesty's Revenue and Customs**

Heard: **via CVP** **On: 1, 2, 3, 4 and 5 March 2021**

Before: **Employment Judge S Jenkins**
Members: **Mrs A Burge**
Mr B Roberts

Representation:
Claimant: In person
Respondent: Ms J Williams (Counsel)

JUDGMENT having been sent to the parties on 8 March 2021, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The hearing was to deal with the Claimant's claims of direct discrimination on the ground of disability (Section 13 Equality Act 2010 ("EqA")), discrimination arising from disability (Section 15 EqA) and failure to make reasonable adjustments (Sections 20/21 EqA).

2. We heard evidence from the Claimant on his own behalf and from eight employees or former employees of the Respondent. These were: Thomas Gough, Senior Delivery Manager; Stephen Richards, Customer Complaints Adviser; Samuel Rees, Taxes Technician; Daniel Morgan, Administrative Officer; Karl Olsen, Deputy Service Delivery Manager; Ashley Galliers, Operations Customer Service Manager; Stephanie Bonnar, formerly

Personal Assistant to the Senior Delivery Manager; and Brendan Murphy, Planning Team Lead.

3. We considered the documents in the bundle spanning 1,148 pages, together with some supplemental documents produced during the hearing, to which our attention was drawn.

Issues and Law

4. The issues had been identified by Employment Judge Harfield, and were included in a preliminary hearing summary, sent to the parties on 11 November 2020, and were as follows:

The issues (liability)

1. Time limit / limitation issues

1.1 Were the claimant's complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")?

1.2 Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period; whether time should be extended on a "just and equitable" basis; and when the treatment complained about occurred.

1.3 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 25 June 2019 is potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.

2. EQA, section 13: direct discrimination because of disability

2.1 Has the respondent treated the claimant as follows:

On 02.07.19 Mr Gough sent the claimant an email which, in effect, proposed that the claimant return to work undertaking some sitting without the claimant's specialist chair having arrived;

2.2 Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

The claimant relies on hypothetical comparators.

2.3 If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

3. EQA, section 15: discrimination arising from disability

3.1 Did the respondent treat the claimant unfavourably as follows (no comparator is needed):

3.1.1 On 01.07.19 ended the claimant's disability adaptation leave (requiring him to either get signed off sick or return to work) before the furniture modifications (chair and desk) specified in an occupational physiotherapist report were installed;

3.1.2 On 02.07.19 Mr Gough proposed that the claimant return to work on amended duties without the claimant's specialist chair being in place;

3.1.3 On 08.07.19 Mr Gough requested that the claimant return to work and said that the claimant's workplace was all set up for him when it was not;

3.1.4 On 19.07.19 (contrary to prior indications) required the claimant to return to work where was no DSE assessor was available on the claimant's return to work to undertake an assessment of the electric sit/stand desk or the RH Logic 400 Chair or a DSE assessor available that was familiar with the equipment and able to correctly demonstrate it;

3.1.5 Required the claimant to return to work but provided the claimant with a specialist chair that did not have the recommended gas cylinder B modification;

3.1.6 Pressured/required the claimant to be in work without the correct equipment/set up such that he suffered increasing pain and had to leave work early on 19.07.19 and 26.07.19 and later on 30.07.19 the claimant was signed off work by his GP until recommendation workplace adaptations were implemented;

3.1.7 On 20.08.2019 Mr Olsen asked the claimant to return to work for 2 hours a day increasing to full time without furniture modification adaptations in place following a further occupational health report in August 2019;

3.1.8 On 29.08.19 dismissed the claimant (when there were recommendations made after a further occupational health physiotherapist assessment of 06.08.19 unfulfilled that would have allowed the claimant to be in work and where the claimant's GP had signed him off work until the recommended adaptations had been made);

3.2 Did the following thing(s) arise in consequence of the claimant's disability:

3.2.1 Being unable to attend work or work without pain and risk of deteriorating the claimant's condition without suitable equipment being provided and set up;

3.2.2 Because of his disability the claimant required assessments and assistance from occupational health to get the equipment in place to allow him to safely be in work;

3.2.3 The claimant had to take periods of work of sick leave and disability adjustment leave;

3.2.4 The claimant received fit notes specifying workplace adaptations had to be in place before the claimant was fit to return to work.

3.3 Did the respondent treat the claimant unfavourably because of any of those things?

3.4 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent relies upon the alleged legitimate aims of organisational efficiency, the need to meet customer demand and a requirement for its workforce to provide satisfactory attendance.

3.5 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability? (The respondent concedes knowledge from the 5 April 2019 onwards)

4. EQA, sections 20 & 21: reasonable adjustments (for disability)

4.1 Did the respondent know or could it reasonably have been expected to know the claimant was a person with a disability? (see above)

4.2 A "PCP" is a "provision, criterion or practice". Did the respondent have / or apply the following PCP(s):

4.2.1 A requirement to attend work to required attendance levels;

4.2.2 A practice of HR in recruitment not passing on information about the claimant's disability and adjustments/adaptations needed prior to commencement of employment;

4.2.3 A requirement to attend work without correct equipment/adaptations;

4.2.4 (At the time of the claimant's return to work in July 2019) a practice of not providing on site appropriately trained/knowledgeable DSE assessor or physiotherapist to check and set up specialist equipment;

4.2.5 A requirement for users to use/set up/ adapt specialist equipment without training;

4.2.6 A requirement to set desks to a monitor height to take account of other colleagues

4.3 Did any PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: A person who is disabled is less able to attend work to a required attendance level;

4.3.1 No assessment or equipment were in place at the start of the claimant's employment or shortly thereafter;

4.3.2 The claimant was caused pain, had to take sick leave, had to take disability adjustment leave, faced criticism at work, was pressured to use equipment or set up equipment without appropriate professional assistance, was threatened with misconduct, placed on attendance management procedures and ultimately dismissed;

4.3.3 Opportunities were missed to earlier identify that the correct equipment had not been ordered /additional modifications were needed.

4.4 If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

4.5 If so, were there steps that were not taken that could have been taken by the respondent to avoid the disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

4.5.1 Extended the disability adjustment leave until the correct workplace adaptations and equipment were in place to enable the claimant to attend work;

4.5.2 Provided the appropriate workplace adaptations and equipment in time for the commencement of the claimant's employment or promptly thereafter;

4.5.3 Ordered promptly the correct equipment in line with the recommendations of the occupational health assessments (the recommended chair together with the gas cylinder modification, the desk, and the additional elevated monitor mounts;

4.5.5 Ensured that the equipment and adaptations were set up promptly and by an appropriately qualified workplace assessor rather than compelling the claimant to set up his chair under threat of misconduct if he did not do so;

4.5.6 Provide elevated monitor stands;

4.5.7 Adjusted the sick leave/ attendance level requirements;

4.5.8 Postpone or not commence the attendance management proceedings until the equipment and adaptations were properly in place and set up;

4.5.9 Provide a properly trained and knowledgeable DSE assessor to set up, check and demonstrate the equipment;

4.5.10 Not dismiss the claimant.

4.6 If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

4.7 Alternatively, did the respondent, through not providing an auxiliary aid (chair with gas cylinder modification, desk, elevated monitor mounts and an appropriately trained and knowledgeable DSE assessor to check, set up and demonstrate equipment), put the claimant at a substantial disadvantage compared to persons not disabled?

4.8 Was it reasonable to take steps to provide the auxiliary aid?

5. The relevant law, as set out in Sections 13, 15 and 20/21 EqA, was largely encapsulated within the List of Issues. We were also conscious of the provisions of Section 136 EqA regarding the burden of proof, and, in relation to the reasonable adjustments claim, the need for us to apply an objective test of the reasonableness of the steps that might need to be taken to avoid any relevant disadvantage.

Findings

6. The factual elements as to what happened during the relevant period were not particularly in dispute. Our findings, on the balance of probabilities where there was any dispute, were as follows:

7. The Claimant was recruited by the Respondent, as a Customer Services Consultant to handle telephone enquiries, towards the end of 2018. This was part of a large recruitment exercise undertaken by the Respondent nationally.

8. The Claimant was engaged to work at the Respondent's Brunel House, Cardiff office, and commenced on 1 March 2019, the initial period spent on training.

9. In his recruitment health declaration as part of the recruitment process, the Claimant had recorded that he suffered from a herniated lumbar spinal disc with occasional radiated sciatic pain. As a result of this, the Claimant underwent a telephone consultation with an Occupational Health Adviser which recorded, in a certificate dated 9 January 2019, that the Claimant was fit for his new role, but that a work station assessment was required. The certificate stated that the terms of disability within the Equality Act were likely to apply, and that two adjustments were advised; these were: a work station assessment on commencement of employment; and, in addition to DSE breaks, posture breaks.

10. That certificate was sent to the Respondent's central HR Department, and information on the advice was meant to be provided to the Respondent's local management in the form of a "Take Up Duty" spreadsheet. Unfortunately, an error arose, and no indication of the occupational health advice was received locally, which meant that local management were unaware of the Claimant's health issue at the point of his arrival on 1 March 2019.

11. The Claimant was recruited to work on a four-day week basis, working Friday, Saturday, Sunday and Monday, and he attended on Friday 1 March 2019 for training. He attended with a wedge cushion of his own and made use of an available chair.

12. It was only on Sunday 10 March 2019 that the Claimant raised with one of the local managers that he had had an occupational health referral and that a work station assessment would need to take place. The matter was then dealt with internally.

13. The Claimant was asked to complete a display screen equipment self-user assessment, which he did on 17 March 2019, and a DSE assessment was then undertaken by one of the Respondent's locally trained assessors, Rachel Gilchrist, on 22 March 2019. She completed a report on that day, recommending an occupational health referral regarding a chair and a raised desk.

14. That referral led to a conversation on 5 April 2019 between the Claimant and the same Occupational Health Adviser who had produced the pre-employment certificate in January. This explored the Claimant's condition in more detail, and provided recommendations, including; additional breaks, the sourcing of a suitable chair, and the establishment of a time frame for an on-site work station assessment.

15. Also on 5 April 2019, the Claimant had a conversation with his then Manager, Mr Richards, and he informed him that Occupational Health would get back to him with a date for the work station assessment in the near future. Mr Richards informed the Claimant of options available for when the Claimant went live with his work on Monday 8 April 2019 until any occupational health recommendations had been actioned. These were: (1) Look into the possibility of moving to a height-adjustable desk so that he could work standing up when necessary, (2) Instead of going live (i.e. take calls from customers), he could call listen (i.e. listen in on other advisers taking calls from customers), giving him the option to get up and walk away whenever he felt he needed it; (3) The Claimant could take disability adjustment leave.

16. On 7 April 2019 the Claimant informed Mr Richards that his preferred outcome would be to meet the Occupational Health Assessor, and then attend full time once any required equipment was in place. At that point, disability adaptation leave was put in place. Disability adaptation leave ("DAL") is something operated by the Respondent in the form of paid special leave, and only granted to those who are considered to qualify as being disabled and who are not on any form of sickness absence. Time spent on DAL does not count towards trigger points or lead to any reduction in pay. Eligibility is limited to those who are fit to attend work on the days on which they have applied for DAL, but where absence arises directly due to the requirement to manage the effects of disability. DAL does not apply where the individual is not fit for work, i.e. is on sickness absence. It is usually awarded for short periods of up to five working days, and will not normally exceed three months in a twelve-month period, and applies pro rata for part-time staff.

17. The occupational health assessment took place on 14 April 2019, and a report was produced. It is not clear when it was received by the Respondent, but reference is made to it in an internal email forwarding it on 26 April 2019, so it must have been received just before that.

18. The Assessor verbally indicated that he would recommend an electric height-adjustable desk and a specialist chair, and Mr Richards reported that to Mr Gough, the overall manager of the Brunel House operation, by email on 14 April 2019.

19. The written report made three specific recommendations regarding the desk and chair, which it is appropriate to record.

"*I also believe that due to his discomfort sitting for extended periods Mr Loftus would benefit from using an electric sit/stand desk of standard height range.*"; and,

"*I believe that to help Mr Loftus sit more comfortably the initial option would be for him to use a Senator Free Flex Mesh Task Chair if this can be provided with brake loaded or lockable castors to prevent it sliding. This chair should be available through your usual suppliers, the chair could be used together with a posture right 11 degree wedge cushion*"; and then,

"*If it is not possible to source the Senator chair with the alternative castors then I believe that Mr Loftus may well benefit from a chair not currently on the HMRC equipment list such as an RH Logic 400 specialist chair available from suppliers. Due to his high sitting position and need for a forward tilt this chair would need to be sourced with a high gassed MB brake-loaded castors and height adjustable arm rests. He may also need to use the above wedge cushion on this chair.*"

20. The Claimant, in his evidence, indicated that he felt that the RH Logic chair had been confirmed by the physiotherapist as the preferred option rather than the Senator chair, and that that had been communicated to him by the assessor on the day. However, we considered that the content of the written report was clear, and indicated that the preferred option, what was recorded as the "initial option" in the report, was the Senator chair. The Claimant indicated that he did not receive a copy of the report at the time but did confirm in his oral evidence that he must have seen it fairly shortly afterwards as he obtained the telephone number of the assessing company from it.

21. Other relevant matters relating to the report that we noted are that it made no reference to a physiotherapist, or indeed anyone, attending to assess the Claimant once the equipment was in place, and also that it directed that a chair seat height of up to 56cm was required in relation to the Claimant's sitting position.

22. On 2 May 2019 Mr Gough asked Mr Richards and two of the other local managers to put together a particular needs form. The equipment was then ordered on 3 May, and the Claimant was informed of that by email by Mr Richards on the same day with an indication that Mr Richards would let the Claimant know the timescale for delivery once it was known.

23. The order to "The Hub", an internal procurement department, was initially rejected and was re-submitted on 9 May 2019. It was then indicated that the

chair could be delivered in the week commencing 3 June and the desk would be delivered within four to six weeks of 22 May 2019. An issue initially arose regarding the Senator chair being delivered without lockable castors, as lockable castors did not apparently fit with the Respondent's health and safety requirements. However, once local management made clear that that was a specific occupational health recommendation, the purchase was authorised.

24. Due to that initially understood problem, an order was also placed for the RH Logic chair on 13 June 2019. That was initially rejected due to the wrong form having been used, and was re-ordered on 19 June.

25. In the meantime, the Claimant submitted a Fitness Note, dated 6 June 2019 for one week, stating that he was unfit for work. It seemed that this should have led to the DAL being withdrawn at that time, but no action was taken. It is not clear when the Fit Note was received, as an email from the Claimant to Mr Gough on 27 June referred to him having presented two GP notes stating that he was unfit for work until the reasonable adjustments had been put in place, although there were no Fit Notes from this period, other than the one dated 6 June 2019, brought to our attention during the hearing.

26. On 28 June 2019, Mr Olsen telephoned the Claimant to update him on various workplace changes, and in particular that Mr Rees would be taking over as his Line Manager. There had, in fact, been a steady exchange of emails between the Claimant and Mr Gough during June in which the Claimant at times expressed himself intemperately and, in our view, inappropriately, but they are not directly relevant to the Claimant's claims so we do no more than observe that there had been an increase in tension, certainly on the Claimant's side at this time.

27. Due to that increased tension, a meeting was arranged for 1 July 2019, the initial intention being that it would be with Mr Gough. In the event, due to direction provided by the Respondent's HR Department, it was considered that Mr Richards, as the Claimant's Line Manager, should deal with that meeting. During the meeting Mr Richards confirmed that Human Resources had advised that DAL had come to an end. Mr Richards also confirmed that the Claimant could return with a number of possible adjustments, such as a staggered return, working two hours a day, half a day, or ultimately whatever was agreed.

28. On 2 July 2019, the ordered desk arrived, and Mr Gough emailed the Claimant to confirm that. In the email Mr Gough noted that, whilst the desk had arrived and was being set up, the chair would unfortunately take another four to six weeks. He referred to Mr Richards having mentioned that the Respondent was happy to put in place amended duties without

telephony work to give the Claimant more control over when he stood or sat, unlimited breaks, reduced hours, and/or a change of shift pattern to help aid his return to work. Mr Gough also referred to refresher and post training being provided on a one to one basis. He also in this email clarified the rationale for the withdrawal of DAL, and he concluded by saying that if the Claimant was unable to attend work on the following Friday he should contact his new Line Manager, Mr Rees.

29. In the event, the Claimant obtained a further Fit Note dated 3 July 2019 saying that he was unfit until 18 August. It stated, in fact, that he was unfit for work until reasonable adjustments as per the formal Occupational Health Reports were in place, noting further that HMRC had advised that delivery of the required kit was not expected for four to six weeks, and that the GP note would apply until the chair arrived.

30. Due to steps taken by Mr Gough to expedite the delivery process, the complete Senator chair with the appropriate castors was in place on Monday 8 July 2019. Mr Gough then emailed the Claimant on that day confirming that the original chair with the fitted castors, the wedge cushion and the desk had all arrived, and therefore that his workplace was all set up for him. Mr Gough confirmed that he would therefore like to discuss a return to work on the following Friday i.e. 12 July. He concluded his email by saying that Mr Rees was finalising a refresher training package and would be in contact later that day with a timetable and to agree final details for the Claimant's return.

31. The Claimant replied to Mr Gough that evening. In this, he noted that he wanted any further communication to be in the form of a letter sent to his home address, and also that he would not respond to contact made to his mobile phone. With regard to his work station, the Claimant mentioned that it had been mentioned by Mr Rees and Mr Olsen, when he had met them in the Brunel House foyer, that a physiotherapist would attend for a fitting once, what he described as, "THE" chair, with an integral tilting base, which we presumed to mean the RH Logic chair, was in place, and that the delivery date of that was expected to be within four to six weeks. He asked to receive a letter 48 hours before an appointment time to meet with the physio for a fitting of "THE" chair, again we presume referring to the RH Logic chair.

32. Reference to the comments made by Mr Rees and Mr Olsen related to a brief visit the Claimant had made to Brunel House to hand over a Fit Note on 5 July 2019. The evidence of both Mr Rees and Mr Olsen was clear, and we accepted it, and was that, whilst the Claimant had referred to the need for a physiotherapist to be in attendance, they had only agreed that if that was what had been requested it would be arranged, and it was only after the meeting, when they saw the work station assessment report and noted

that it did not make reference to a further physiotherapist appointment, that they appreciated that it had not been stipulated as a requirement.

33. The Claimant did not turn up for work on 12 July 2019, and a letter from Mr Rees was then hand-delivered to him on that day. In this letter Mr Rees noted that the Claimant had provided a Fit Note stating that he was not fit for work until the Respondent provided the RH Logic chair, although Mr Rees noted that the April work station assessment had stated that this was an alternative option, the recommended option being the Senator chair with the brake-loaded castors. Mr Rees confirmed that all the DSE equipment required, as outlined in the Occupational Health Report, had been provided in order to facilitate the Claimant's return, and he confirmed that, if the Claimant was unfit for work, then he required a new Fit Note which stated the reason for his current absence. Mr Rees also confirmed that a 'keep in touch' discussion would need to take place, and that if the Claimant was fit he looked forward to his return on Saturday 13 July, but, if not, then a meeting would need to take place on Monday 15 July.

34. It appears that the Claimant attended Brunel House on several occasions on 12 and 13 July 2019, following receipt of Mr Rees' letter, setting out his view that he needed the RH Logic chair and disagreeing that his absence should be classified as sickness. By this stage the Claimant had also submitted an email or letter of complaint about his treatment to the Respondent's Head Office in London.

35. The Claimant and Mr Rees did then meet on 15 July 2019, and during this meeting the Claimant repeated his assertion that the RH Logic chair had been the one recommended by the physiotherapist and that his GP had confirmed that he was not fit until that chair was in place. However, as we have noted, the chair recommended by the physiotherapist had clearly been the Senator chair, with the RH Logic only being a fall back option in the event of the Senator chair being unavailable. We were also of the view that the very specific references in the Fit Note to timescales and a specific chair, and indeed subsequently the need for a second physiotherapist assessment once the equipment was in place, all sprang from what the Claimant was telling his GP about what was required. We observed that the Claimant confirmed in his evidence that he did not provide a copy of the April work station assessment to his GP.

36. Following the meeting, Mr Rees took advice from the Respondent's HR Department, who advised that the Occupational Health Report had been interpreted correctly and that all the reasonable adjustments had been provided such that the Respondent had done everything to facilitate a return to work. The advice also was that, once a formal meeting had taken place, a case could be put forward for a Decision Maker to consider terminating the Claimant's employment. Mr Rees then sent the Claimant a further letter,

on 18 July 2019, repeating that all adjustments in the work place assessment had been put in place, but also informing the Claimant that the RH Logic chair had arrived and concluded by saying that he looked forward to seeing the Claimant in work on 19 July 2019.

37. On the morning of 19 July, the Claimant provided Mr Rees with a letter noting that he had a GP appointment at 10.20am but would attend as soon as possible after that. He went on to ask for the presence of an Occupational Health Physiotherapist or a representative of the chair supplier for a fitting, stating that this had been stipulated by the firm carrying out the work station assessment as essential. The Claimant also on that day obtained a further Fit Note, specifying that he may be fit for work in the period up to 18 August 2019, noting, "*Adaptations are in place but physio have advised needs proper assessment by a physio and fitting for the new chair and table. Should not work until this has been done.*" This, in terms, it seemed to us, recorded what the Claimant had told the GP, but what he had told the GP was not correct; the work station assessment carried out in April 2019 had made no mention of any further physiotherapy assessment.

38. The Claimant did then attend work on 19 July for around 4 hours. He then went to see Mr Rees to say that he was in pain and needed to go home. On that day it appeared that the Claimant was initially unwilling to try the RH Logic chair without a physiotherapist assessing him, but he subsequently did. It ultimately transpired, following a subsequent work place assessment in August, that the chair had been provided without the required gas cylinder due to an error of the supplier, and therefore could not be raised to the required height.

39. The Claimant also complained to Mr Rees that he had not been afforded breaks, to which Mr Rees responded that it was up to the Claimant to take breaks whenever he needed. The Claimant also stated that no DSE assessment had been undertaken, to which Mr Rees responded that it was up to the Claimant to request one. Mr Rees concluded by saying that if the Claimant did not feel well enough to stay in work he should go home. That appears to be what the Claimant then did, and that then led to a further letter being sent to the Claimant on 19 July 2019 requiring him to attend a meeting to discuss his sickness absence on 22 July.

40. The Claimant attended work on Saturday 20 July, but went home at around 11.00am. During his time in work, Mr Rees carried out a return to work interview with the Claimant, and the Claimant handed the Fit Note dated 19 July to Mr Rees. During the meeting the Claimant reiterated that he wanted a physiotherapy assessment of his desk and chair, and Mr Rees confirmed that he would check that with Occupational Health on the following Monday. Mr Rees confirmed the Claimant did not need to ask for breaks but could

take them whenever he required, and he also indicated that the Respondent could look at a phased return with either shorter days or skipped days.

41. The Claimant did not attend work on Sunday and Monday 21 and 22 July 2019, one of those days being a day's leave, and Mr Rees then sent him a further letter on 22 July 2019, indicating that he wanted to meet the Claimant on 26 July in respect of his absence.

42. On 22 July Mr Rees emailed the Respondent's Occupational Health Adviser, asking for clarification as to whether the physiotherapist undertaking the work station assessment in April had advised that the chair should be fitted to the Claimant's specification by a physiotherapist or a representative from the chair company. He also pointed out that the Claimant had stated that he felt that he needed another Occupational Health Assessment as he felt that the keyboard was too narrow when using the desk standing up, also that he had difficulty using the mouse, and that the monitors were not high enough. The Occupational Health Advisor replied the following day, saying that an internal DSE Adviser should be able to set up the chair, and that, with regard to the other points, a referral for another work station assessment was suggested.

43. The Claimant was then in work on Friday 26 July, and Rachel Gilchrist undertook a DSE assessment with him. She noted that the chair was not high enough and she also recommended another work station assessment. We observed that throughout this period the only chair being assessed was the RH Logic which, as we have noted, could not work correctly due to the absence of the required gas cylinder. At no time was any attempt made to use the Senator chair.

44. Mr Rees had intended to meet the Claimant on 26 July 2019, but, due to an allegation that the Claimant had made about the impropriety of Mr Rees' hand delivery of the letter of 22 July, felt unable to do so. Mr Morgan therefore stepped in to deal with the meeting instead.

45. Mr Morgan explained that the purpose of the meeting was to discuss the Claimant's absence, summarising that, since the cessation of DAL on 1 July 2019, the Claimant had been absent on 5 to 8 July, 12 to 15 July, and for part of the day on each of the 19 and 20 July, and on 22 July. This amounted to ten days which was above the trigger point for action to be taken. We observed in passing that, in the Claimant's circumstances, the trigger point was, in fact, nine days, the initial figure of seven days being increased by 25% to take account of his disability.

46. Mr Morgan also summarised the occupational health recommendations from April, and the steps taken to fulfill them, and also confirmed that Mr Rees had contacted Occupational Health who had confirmed that a further

physiotherapist appointment was not needed. Mr Morgan also indicated that the Claimant's behaviours were not meeting the standards expected. He referred to the Claimant's reluctance to try out equipment, lack of contact when absent, and unwillingness to meet his responsibilities as a jobholder. He concluded by saying that he would inform the Claimant of the next steps within five working days.

47. Following the meeting Mr Morgan produced a timeline document and noted his deliberations. He concluded that the Respondent had done as much as it could to meet the Occupational Health requirements, and was still giving the appropriate level of support to the Claimant, but that the required level of attendance had not been met. He was therefore recommending that the Claimant be put forward for dismissal on the basis of a lack of cooperation to work towards a reasonable return to work. He then completed the internal referral, and wrote to the Claimant on 5 August 2019 indicating that his case was being referred to a Decision Manager. He wrote further to the Claimant on 10 August confirming that the Decision Manager would be Ms Bonnar.

48. In the meantime, Mr Rees had, on 27 July 2019, arranged for the second work station assessment, and that took place on 8 August. The Claimant was in work at the end of July, but then did not attend on Friday 2 August. He provided a further Fit Note dated 1 August stating that he was not fit for work, and awaiting the outcome of the occupational health assessment and implementation of recommended workplace adaptations. Again we observed that this simply recorded what we understood the Claimant to be telling his GP.

49. The work station assessment report was received after the assessment on 8 August. We observed that this only assessed the RH Logic chair and not the Senator chair. The report noted that the seat needed a gas stem and also made recommendations regarding adjustable monitor arms. A replacement RH Logic chair was then ordered, with again an anticipated delivery date of some four to six weeks.

50. Ms Bonnar wrote to the Claimant on 12 August 2019 inviting him to a meeting on 20 August, which took place as scheduled. The notes of the meeting indicate that Ms Bonnar and the Claimant discussed his absences and the work station assessment recommendations from April and the equipment that had been provided. Ms Bonnar confirmed that she had received Mr Morgan's referral documents and had also seen a letter from the Claimant's GP dated 12 August 2019 (which we noted referred to the RH Logic chair as having been felt to be the most appropriate chair), the latest work station assessment from 8 August, and also a 17-page letter that the Claimant had hand delivered to the Respondent's Head Office on 12 August.

51. One specific point of the discussion recorded in the notes was that Ms Bonnar asked the Claimant why he had not made an effort to work even for an hour a day, to which the Claimant had replied that he had not thought that was an option. Shortly after the meeting however, on the same day, the Claimant emailed Mr Olsen asking if he could attend daily from 23 August 2019, for two hours, working from a standing position. Mr Olsen replied, within an hour, noting that he was happy for the Claimant to return to work on 23 August for two hours as part of a phased return which would look to get the Claimant back to full working hours over a period of four weeks. The Claimant then replied, saying he was concerned at the reference to a phased return to full time hours as the RH Logic chair could take up to six weeks to arrive (again, we observed that no reference was made to the available Senator chair), and therefore he would not return on the suggested two hours a day basis.

52. Following the meeting on 20 August 2019, Ms Bonnar prepared a note of her deliberations. In these she noted the Claimant's absences, the equipment provided, and the assistance offered in the form of not undertaking telephony work until all the equipment was installed, breaks as and when needed, reduced hours and a phased return. She noted that, in her view, there was evidence of a lack of personal responsibility by the Claimant from the first day he started work, which had contributed to his absence. She went on to say that there was also evidence of the Claimant's unwillingness to take on board any suggestions made about measures available to support him in achieving a successful return to work. She ultimately concluded that she had decided to end the Claimant's employment on the grounds of his continued absence with no evidence of a commitment or want to return to work.

53. Ms Bonnar then wrote to the Claimant on 29 August 2019, confirming her decision that he should be dismissed on the expiry of four weeks' notice i.e. on 27 September 2019. She informed him of his right to appeal and that the Appeal Officer would be Mr Murphy.

54. Ms Bonnar confirmed in her evidence that she had been aware that a further RH Logic chair had been ordered, but that she did not think it would be appropriate to wait for that chair to arrive, as she felt that the Claimant was constantly "changing the goalposts", and that she was of the opinion that even when a new RH Logic chair was obtained there would be another reason for the Claimant not to attend, an opinion with which we found it difficult to disagree.

55. The Claimant submitted an appeal to Mr Murphy on 14 September 2019, and on 26 September Mr Murphy sent the Claimant a letter inviting him to an appeal meeting on 15 October. In advance of the meeting the Claimant

sent Mr Murphy an email on 7 October, with background to his appeal and attaching documents for Mr Murphy to consider.

56. At the appeal meeting Mr Murphy confirmed that his role was to examine the evidence and be satisfied that the overall decision made by Ms Bonnar was appropriate, and that he would not be reconsidering the case in detail, although the notes of the meeting suggest that a large part of the matters the Claimant had covered with Ms Bonnar were also covered with Mr Murphy.

57. Following the appeal meeting Mr Murphy contacted Occupational Health to check whether they had indeed recommended that a physiotherapist be present to set the chair up, to which they confirmed that that had not been included in the recommendation, and then Mr Murphy prepared deliberation notes.

58. He concluded that Ms Bonnar had given proper consideration to all the evidence and that the only additional evidence produced was the exchange of emails the Claimant had had with Mr Olsen about working for two hours each day. With regard to that, Mr Murphy concluded that, had the Claimant returned for those hours, a discussion about continuation of the reduced hours could have taken place, but the Claimant had not allowed the opportunity for that discussion to take place. He felt that that only added weight to Ms Bonnar's view that the Claimant had rejected all offers of reasonable adjustments to enable a reduced return to work. He therefore concluded that Ms Bonnar had given proper consideration to the evidence, had not made any procedural errors, and that her decision should be upheld. He confirmed that to the Claimant by letter dated 29 October 2019.

Conclusions

59. Applying our findings to the issues identified at the outset, our conclusions were as follows.

Direct discrimination

60. First looking at the direct discrimination claim, we noted that the assertion was that Mr Gough, in his email to the Claimant of 2 July 2019, had, in effect, proposed that the Claimant return to work undertaking some sitting before the specialist chair had arrived, and that that amounted to less favourable treatment on the ground of his disability. However, we did not consider that the email amounted even to unfavourable treatment, let alone less favourable treatment compared to a non-disabled person.

61. In the email Mr Gough had noted that Mr Rees had mentioned that the Respondent was happy to put in place amended duties, unlimited breaks,

reduced hours, and/or a change of shift pattern, to help aid the Claimant's return. He also concluded the email by saying that if the Claimant was unable to return he should contact Mr Rees. We did not consider that to be any form of direction to the Claimant to return, and it seemed to us that Mr Gough was only exploring the possibility of a return if the Claimant felt able. In our view this would have been the stance taken with any employee, whether disabled or not, where there was an issue impacting on their attendance, and, as we have noted, we did not think that it amounted to any form of unfavourable, let alone less favourable, treatment.

Discrimination arising from disability

62. We noted that eight specific matters were raised as amounting to unfavourable treatment because of something arising in consequence of the Claimant's disability, and which the Respondent could not show as being a proportionate means of achieving a legitimate aim. The first of these was the ending of the disability adaptation leave.

63. The Respondent submitted that this could not constitute unfavourable treatment, as DAL was an advantage to the Claimant and, as suggested in the case of Williams -v- The Trustees of Swansea University Pension and Insurance Scheme [2018] UKSC 65, could not give rise to a claim simply because it was insufficiently advantageous. However, we noted that the focus of the assertion of the Claimant was that the ending of the DAL, and not the provision of it, was the source of his claim, and we therefore did not agree with that submission.

64. Nevertheless, we noted that the ending of DAL was an automatic consequence of the Respondent's policy, once an employee was certified as unfit for work, and therefore arose from the certification of the Claimant as unfit, and not from his underlying disability.

65. Even if that could still be considered to be something arising from the Claimant's disability, we nevertheless considered that the cessation of DAL was a proportionate means of achieving the legitimate aim of encouraging satisfactory attendance. In that regard, we noted that, on 2 July 2019, the desk had arrived, which would have enabled the Claimant to undertake some work, albeit by no means a full day, and that, by 8 July 2019, the Senator chair had arrived with appropriate castors, enabling the Claimant to work fully as anticipated by the April work station assessment.

66. With regard to the second Section 15 claim, the 2 July 2019 email of Mr Gough, we have already dealt with that in the context of the Section 13 claim, and noted that we did not consider that Mr Gough's email in any way amounted to unfavourable treatment.

67. With regard to the third assertion, that on 8 July 2019, Mr Gough requested the Claimant return to work and said that the Claimant's work place was all set up for him when it was not, we had to fundamentally disagree factually that that was the case.

68. As we have noted, the work station, as recommended by the April work station assessment, was in place on 8 July 2019, in the form of a desk, the Senator chair and the cushion. This assertion seemed to us to reflect the Claimant's unwillingness to recognise that the primary recommendation of the April work station assessment was an electric sit/stand desk, a Senator chair with brake-loaded castors and a wedge cushion. All of these were indeed in place on 8 July 2019, and in our view there was no reason why the Claimant could not have attended from that point on. Again therefore, we did not consider that there was any unfavourable treatment in that regard.

69. Similarly with regard to the fourth assertion, that on 19 July 2019 the Claimant was required to return to work when no Assessor or Physio was available to assess the chair and desk, this again reflected the Claimant's unwillingness to recognise that the April work station assessment did not require a DSE Assessor to be available to assess the chair or desk, or a Physiotherapist to be in attendance. The work station assessment was silent on the point, and whilst it may have been advantageous for an Assessor to be present, we did not consider that it was unfavourable treatment for that not to have happened.

70. With regard to the fifth point, requiring the Claimant to return to work but where the specialist chair did not have the recommended gas cylinder modification, again this in our view reflected the Claimant's misguided approach of insisting that the RH Logic chair was the preferred option and indeed it seems ultimately, in his view, was the only option.

71. Whilst the RH Logic chair was indeed provided without the required gas cylinder, that was due to supplier error, and we noted that the appropriate Senator chair was present and functioning to the work station assessment specifications at the same time. In our view, the Claimant could always have used the Senator chair at that point, and therefore we did not consider that provision of the RH Logic chair without the gas cylinder could be said to be unfavourable treatment. In any event even if we had viewed it as being unfavourable treatment, we did not consider that it could be said to have arisen in consequence of the Claimant's disability as, as we have noted, it arose from a mistake by the supplier and the lack of understanding on the Respondent's part that the chair was not as recommended.

72. With regard to the sixth point, pressuring the Claimant to be in work without the correct equipment, we again, as we have noted, felt that we did not

consider that the Claimant had in fact been pressurised or required to be in work without the correct equipment. In our view, the correct equipment, again the Senator chair with brake-loaded castors, the sit/stand desk and the wedge cushion, was in place from 8 July 2019 onwards. In addition, the Respondent in any event proceeded with the RH Logic order, and when, due to the lack of gas cylinder, it transpired that that caused the Claimant difficulty, was prepared to look at a range of other options, such as reduced hours, phased return and unlimited breaks. We did not therefore consider that the Respondent's actions amounted to unfavourable treatment.

73. With regard to the seventh point, the assertion that Mr Olsen had asked the Claimant to return for two hours a day without the adaptations being in place, we noted that the suggestion of a return to work on a two hours per day basis, to work on a standing only basis, came from the Claimant himself, and seemed only to have been a reaction to his meeting with Ms Bonnar. We noted that the Claimant then withdrew his proposal when Mr Olsen accepted the proposal but as part of a phased return, but, as Mr Murphy noted, that could have been discussed further once it had become clear as to how the Claimant was coping, and the Claimant's withdrawal of the option prevented any such discussion. Again, we did not consider that this amounted to unfavourable treatment.

74. Finally, from the Section 15 perspective, we noted that the eighth point related to the dismissal of the Claimant, and we noted that Ms Williams accepted in her submissions that it was clearly a detriment and that it had arisen following the Claimant's absence. Her focus was therefore on the justification of the decision to dismiss as a proportionate means of achieving a legitimate aim.

75. In our view however, the dismissal decision did not only arise from the Claimant's absence, but also arose from his behaviour in the form of his unwillingness to engage with the Respondent regarding his return and, as described by Ms Bonnar, his "changing of the goal posts".

76. Whilst we were not considering this claim from the perspective of unfair dismissal, had we been doing so, in terms of the assessment of the reason for dismissal, we would have concluded that the reason was a mixture of capability and conduct. The decision to dismiss was therefore not entirely down to the Claimant's sickness absence and therefore, to a large degree, was not due to something arising in consequence of his disability.

77. Beyond that however, we were in any event satisfied that the Respondent had acted proportionately in achieving the legitimate aim of ensuring satisfactory attendance to meet customer demand. The Respondent had provided the equipment recommended, had indeed gone further in providing the second chair, albeit that it was faulty when delivered, but had

also then been very open about other options to facilitate some sort of return, with references to unlimited breaks, reduced hours, skipped days and a phased return, and yet there was no movement from the Claimant in respect of those matters until, as it seemed to us, he saw the writing on the wall on 20 August 2019 and put forward the possibility of returning for two hours a day, a possibility which he himself shortly thereafter withdrew. In our view these were proportionate means of achieving the Respondent's aim, and, as we indicated in our findings, we did not disagree with Ms Bonnar's view that whatever was put in place the Claimant would have found a different obstacle to his return.

Reasonable adjustments

78. Turning to the reasonable adjustments claim, we first needed to consider whether any of the six matters raised by the Claimant as provisions, criteria or practices ("PCP") had been applied.

79. The Respondent, in its submissions, accepted that the first was a PCP but disagreed that the others could be categorised in that manner. Of those, we agreed that items 2, 3, 4 and 6 could not properly be categorised as PCPs.

80. With regard to items 3 and 6, we considered that they were not requirements, i.e. provisions or criteria, in the form of item 3 - a requirement to attend work without correct equipment, and point 6 – a requirement to set desks to a monitor height to take account of other colleagues, as we did not consider that the evidence supported that either of those requirements had been in place.

81. With regard to items 2 and 4, whilst they had occurred in fact, we did not consider that any provisions, criteria or practices had been applied. In relation to item 2, information was not passed on, and in relation to item point 4, an on-site DSE assessment or physiotherapist assessment was not taken up. However, the former arose due to an internal error and could not in our view be construed as a practice. Similarly, the lack of a DSE Assessor or Physiotherapist on site was also not something which we felt amounted to any form of practice, as there was no evidence of any regular or consistent approach of that sort.

82. We disagreed with the Respondent's submission however, that item 5 was not a PCP, i.e. the requirement for users to use/set up/adapt specialist equipment without training, as it seemed to us that there was a requirement that the users would set up the equipment themselves. With regard to that however, we did not consider that the PCP caused the Claimant any particular disadvantage. We observed that workers generally in workplaces will be left to their own devices to adjust the equipment and we did not see

that the Claimant would be under any material disadvantage in setting up his own, albeit specially procured, equipment.

83. With regard to the first PCP, the one that the Respondent accepted was applied, the requirement to attend work to required attendance levels, the Respondent contended that this requirement did not put the Claimant at a substantial disadvantage due to the increased trigger points applied before absence under the policy, and also to the provision of DAL. However, we noted that the trigger point was only increased from seven days to nine days, and felt that the Claimant, as a disabled person, would have remained at a substantial disadvantage due to the increased likelihood of absence in comparison to a non-disabled person. We also did not see that the provision of DAL meant that no substantial disadvantage arose, as the Claimant was subjected to a review of his absence after DAL had ended.

84. The focus for us was therefore on the reasonableness of the steps taken to avoid the disadvantage, and we were satisfied that reasonable steps had been taken. We noted that Occupational Health advice had been obtained, albeit with a delay of about ten days due to information not being passed on from the recruitment process. In that regard, we did not consider that it would have been a reasonable step to have implemented the work station assessment before, or on the first day of, the Claimant's start, and that if the Occupational Health Assessor had felt that such steps had needed to be taken to enable the Claimant even to attend the training, she would have flagged them up in her pre-employment certificate.

85. We also noted that the Respondent had taken steps to obtain the required equipment, and had placed the Claimant on DAL while waiting for it to arrive. Even then, notwithstanding that, in our view, the appropriate equipment had been provided, the Respondent was willing to discuss a range of alternative options to get some sort of return by the Claimant pending the arrival of his, albeit not the occupational health assessor's, preferred chair, but he was not willing to engage on those. Overall, as we indicated in respect of the Section 15 claim, we did not consider that the Respondent could reasonably have done more.

86. We also considered that the Respondent had taken reasonable steps to provide all appropriate auxiliary aids for the Claimant. Whilst there were delays in them being procured, that was due to errors in the ordering process and on the part of suppliers. However, as we have noted, the recommended equipment was in place on 8 July 2019, with the Claimant receiving the benefit of DAL for most of the period prior to that.

87. In the event we considered that all the Claimant's claims should be dismissed. On that basis it was not necessary for us to deal with the question as to whether the claims had been brought within time, but we

observed that, had that been something upon which we had needed to make a decision, we would have considered that all matters formed part of a course of conduct and therefore had been brought in time, or, alternatively, that it would have been just and equitable to extend time.

Employment Judge S Jenkins
Dated: 26 March 2021

REASONS SENT TO THE PARTIES ON

28 March 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS