Case Numbers: 3201544/2019
3202160/2019

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EMPLOYMENT TRIBUNALS

Claimant: **Mr G Grayling**

Respondents: **(1) Wolseley UK Limited**
(2) Mr A Goodchild
(3) Mr K Johnson
(4) Ms A Watson

Heard at: **East London Hearing Centre** (by Cloud Video Platform, apart from 28 and 29 January 2021, which were held in person)

On: **26, 27, 28, 29 January 2021; 2, 3, 4, 5 February 2021 (with the parties) and 3 March 2021 (in chambers)**

Before: **Employment Judge Gardiner**

Members: **Mr T Burrows**
Mr P Lush

Representation

Claimant: Ms L Mankau, counsel

Respondent: Mr S Nicholls, counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's claim against the Third Respondent is dismissed upon withdrawal.**

2. **None of the Claimant's complaints against the First, Second and Fourth Respondents are well founded. Accordingly, the claims against each of these Respondents are dismissed.**

REASONS

Introduction

1. Until his dismissal on notice at a capability meeting on 13 August 2019, Gary Grayling ("the Claimant") was employed by Wolseley UK Limited ("the First Respondent") as a Branch Manager, latterly of the Walthamstow Branch. He had worked for the First Respondent since January 1989, and been a Branch Manager since about 1997.

2. In these two consolidated cases, the Claimant alleges his dismissal was unfair; that the First Respondent has committed acts of disability discrimination in failing to make reasonable adjustments and in other respects; and is also liable for discriminatory comments made by employees about his hearing. The Second and Fourth Respondents were employees of the First Respondent, and are alleged to be personally liable for acts of disability discrimination. The Second Respondent was named as an individual respondent in the first claim, and the Fourth Respondent was named as an individual respondent in the second claim, which was issued following the Claimant's dismissal.

3. The First Respondent accepts that the Claimant was a disabled person, but denies all the Claimant's complaints. Its position is that the Claimant was dismissed because he was unable to perform his role as Branch Manager of the Walthamstow branch; that there was no other role to which he could be redeployed given the extent of his impairments; and the alleged comments from colleagues were not made or do not amount to discrimination. The individual Respondents deny personal liability. If there is liability arising from the conduct of the individual Respondents, then the First Respondent accepts it is also liable for that conduct.

4. The case was heard over eight days, although the Tribunal panel spent much of the first day reading witness statements and documents. At the start of the first day, Ms Mankau, counsel for the Claimant, indicated that her client was withdrawing his claim against the Third Respondent. This was on the basis that the First Respondent accepted it was liable for such conduct as might be proved against the Third Respondent's. Due to his difficulties hearing the questions directed to him over Cloud Video Platform, the Claimant attended the Tribunal Building to give evidence in person. During his evidence, both representatives were also present to ask their questions. The remainder of the evidence and submissions were given remotely, over Cloud Video Platform. Both the Claimant, and his counsel confirmed that the Claimant was able to follow sufficiently to proceed over this platform.

5. In addition to his own evidence, the Claimant called evidence from four other witnesses. These were Amanda Grayling; Martina Foreman; Costas Constantinou and Martin Hayes. There were six witnesses called on behalf of the First Respondent. These were Wayne Lowther; Tony Goodchild (the Second Respondent); John Soilleux; Shaun Kelly; Graeme Fotheringham and Andrea Waldron (the Fourth Respondent). A witness statement had been prepared on behalf of Tahira Azam, but Ms Azam was not called to give evidence. Reference was made to documents in an agreed bundle.

6. The issues for determination were discussed at the start of the second day and again at the conclusion of the evidence. Ms Mankau submitted an amended List of Issues. These issues were as follows:

(1) <u>Direct discrimination: Section 13 Equality Act 2010</u>

1. Did the Respondent subject the Claimant to the following treatment:

(1) On a regular and ongoing basis, the Third Respondent made inappropriate comments about the Claimant's hearing condition, often in front of the First Respondent's customers, and also in front of Wayne Lowther (Area Manager);

(2) On or about February 2019, the Third Respondent made inappropriate comments about the Claimant by pretending to pick up the telephone and saying "Is this Harry? Barry? Steve? Who is it?"

(3) On the 4th April 2019, the Claimant was supposed to attend a welfare meeting with Wayne Lowther, however when he turned up, Wayne Lowther was unaware that such a meeting had been scheduled. The Claimant arrived at the Barking Office in error (as a result of his dyslexia) and asked a colleague to call Wayne. The Claimant contends that he had sufficient time to get to the Waltham Cross Office, however Wayne Lowther said "Can you come to my house", the Claimant agreed, however Wayne Lowther called back on the landline and spoke to the Second Respondent, and requested to reschedule. The Second Respondent ended the conversation with Wayne by saying "Sorry I can't hear you", thinking that was funny and started to laugh;

(4) On the 29th May 2019, the Claimant visited his place of work in order to pick up some papers. During his short visit, the Third Respondent stated "What are you doing here, you won't be able to hear on the phone" and then proceeded to laugh.

2. Who are the Claimant's comparators?

The Claimant relies on a hypothetical comparator.

3. Was any or all of the treatment set out in paragraph 2 (above) less favourable treatment than that which would have been accorded to a hypothetical comparator?

4. Was the less favourable treatment done because of the Claimant's disability/disabilities?

5. Are there facts from which the tribunal could decide, in the absence of any other explanation that the Respondent(s) discriminated against the Claimant?

6. If so, has the Respondent(s) proved that it did not discriminate against the Claimant?

(2) Discrimination Arising from Disability - Section 15 Equality Act 2010

7. Was the Claimant subjected to unfavourable treatment?

The alleged unfavourable treatment relied upon the Claimant's dismissal on 13 August 2019.

8. Was any unfavourable treatment, if found, done because of something arising in consequence of the Claimant's disability?

The "something arising" relied upon is:

(1) The Claimant's inability to hear customers and colleagues either over the telephone or when speaking to them in person (for all allegations of unfavourable treatment); and

(2) The Claimant's inability to lift and carry easily, his inability to go up and down stairs on a regular basis, and his inability to stand for prolonged periods of time (in respect of the Claimant's dismissal only).

9. Was there a legitimate aim to the unfavourable treatment?

10. What is the legitimate aim that the Respondents rely upon?

11. Can the Respondents show that its treatment of the Claimant was a proportionate means of achieving that legitimate aim?

(3) Failure to make reasonable adjustments

12. Did a provision, criterion or practice (PCP) applied by the First Respondent put the Claimant at particular disadvantage in comparison with persons who are not disabled?

13. The PCPs relied on by the Claimant are:

(i) The Hearing Condition

(1) The requirement that the Claimant use the telephone whilst at work;

(2) The requirement that the Claimant deal with the First Respondent's customers face to face;

(3) The policy of paying sick pay for a limited period only;

(ii) The Knee Condition

(4) The requirement that the Claimant walk up and down stairs several times a day in order to fulfil his role;

(5) The requirement of having to stand for a significant period during the working day;

(6) The requirement of having to carry heavy objects in order to service customer requirements;

(7) The policy of paying sick pay for a limited period only.

14. Did the Respondents apply those PCPs?

15. Was the Claimant put to a substantial disadvantage when compared with persons who do not share his disability/disabilities?

16. At all material times, did the First Respondent have knowledge of the disadvantage(s) or, alternatively, ought the Respondent reasonably to have known about the substantial disadvantage(s)?

17. Did the First Respondent make adjustments as it is reasonable to have to take to avoid the disadvantage?

The Claimant avers that steps which could and should have been taken by the Respondent include:

(i) The Hearing Condition

(1) Removing, as much as possible, the requirement that the Claimant speak with customers over the telephone;

(2) Removing, as much as possible, the requirement that the Claimant speak with customers face to face;

(3) Redeploying the Claimant to an alternative role;

(4) Giving the Claimant the Barking role on a trial basis;

(5) Continuing to pay the Claimant sick pay when his entitlement to sick pay was exhausted;

(6) Not dismissing the Claimant.

(ii) The Knee Condition

(7) Removing the requirement that the Claimant walk up and down stairs several times a day in order to fulfil his role;

(8) Removing the requirement of the Claimant having to stand for a significant period during the working day;

(9) Removing the requirement of the Claimant having to carry heavy objects in order to service customer requirements;

(10) Redeploying the Claimant to an alternative role;

(11) Continuing to pay the Claimant sick pay when his entitlement to sick pay was exhausted;

(12) Not dismissing the Claimant.

(4) <u>Harassment (s. 26 EqA)</u>

18. Was the Claimant subjected to unwanted conduct related to his disability/disabilities?

The unwanted conduct relied upon is as set out at paragraph 1 above.

19. Did the unwanted conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating and offensive environment for him, taking into account the perception of the Claimant, the other circumstances of the case and whether it is reasonable for conduct to have had that effect?

(5) <u>Unfair dismissal</u>

20. Was the Claimant dismissed for a potentially fair reason pursuant to s.98(1) and (2) of the Employment Rights Act 1996, namely capability?

21. Did the First Respondent carry out a fair and proper investigation into the Claimant's health and capability?

22. Did the First Respondent comply with its duty to make reasonable adjustments before making the decision to dismiss?

23. Did the First Respondent act reasonably in treating the Claimant's capability as a sufficient reason for dismissing the Claimant?

24. Did the Respondent carry out a fair procedure?

25. Was the dismissal of the Claimant fair in all the circumstances in accordance with s98(4) Employment Rights Act 1998? In particular, was the dismissal within the band of reasonable responses available to the First Respondent?

(6) <u>Jurisdiction</u>

26. Do the acts/failures relied upon by the Claimant constitute a continuing course of discriminatory conduct pursuant to section 123(3) EqA?

27. Have the acts/failures been brought within a period of 3 months (as adjusted taking into account ACAS Early Conciliation) beginning with

the date of the act/failure, or the end of the period alleged as a continuing course of discriminatory conduct, as appropriate?

28. If not, is it just and equitable to extend time, pursuant to section 123(1)(b) EqA?

7. At the conclusion of the evidence, and before oral closing submissions, the Tribunal read written submissions prepared by both representatives.

Findings of fact

8. The First Respondent is a wholesaler providing materials to the building trade. One division supplies the whole spectrum of plumbing equipment and spares through its network of branches, which traded as "Plumb Centers".

9. The Claimant has worked for the First Respondent within the Plumb Center division for much of his working life.

10. He had been the Branch Manager at the Tottenham Branch in the early 2000s, one of the First Respondent's smaller branches. For two years, from about May 2007 until May 2009, the Claimant was the Branch Manager of the Barking Branch, one of the First Respondent's larger branches in that part of London. In June 2009, the Claimant was transferred to become Branch Manager of the Walthamstow Branch. He remained in this role until the end of his employment. Walthamstow was one of the First Respondent's smaller branches. Latterly, it was designated as a Local Branch. This was to distinguish it from the large branches, known as Contract Branches. There were two other permanent members of staff working at Walthamstow. From mid-2018 onwards these were Ken Johnson and Costas Constantinou. In addition, extra assistance was provided by agency staff from May 2018 onwards. In his role as Branch Manager, the Claimant line managed these two members of staff. Between them, the three members of staff had to carry out all the functions of the Walthamstow Branch, although only one member of staff would work on Saturday mornings on a rota basis.

11. Duties included serving customers at the trade counter and over the telephone, moving equipment from the warehouse to customers, and dealing with suppliers and customers by email. The Walthamstow Branch was often busy, with several customers standing near the trade counter waiting to be served. If a member of staff was on holiday or off sick, then between them the two remaining employees would need to perform all the tasks necessary to operate the Branch.

12. Each branch had sales targets based on previous sales levels. The Claimant was part of a bonus scheme in which his bonus was linked to performance in a range of different respects. This included the time taken to respond to telephone calls, which was logged, and the total volume of branch sales.

13. Since summer 2017, the Claimant's line manager was Wayne Lowther, who was the Area Manager for the area in which the Walthamstow Branch was located. Initially he was also responsible for around 20 branches in the same geographical

area. He too had sales targets based on the aggregate sales in his area. He reported to Graeme Fotheringham, who since December 2017 had the role of Regional Director, covering the South Region.

14. On 1 September 2015, the Claimant suffered an accident at work, in which he injured his left knee. Despite a subsequent operation, the Claimant developed arthritis in his knee, which caused him ongoing symptoms and restricted his ability to carry out certain activities. The Claimant found it difficult to engage in heavy lifting and to stand for prolonged periods, as well as finding it difficult to use stairs on a regular basis.

15. In addition, from about 2004 onwards, the Claimant had experienced difficulty with his hearing. It was investigated and specialists concluded it amounted to a difficulty with processing certain conversations. This may have been caused by psychological trauma in the Claimant's past, although the Claimant could not recall such an event. The hearing problem had worsened since about 2013. His processing difficulties caused particular problems in hearing those telephoning the branch, and to a lesser extent customers and staff at the branch. This was a particular problem at the trade counter, especially if several customers were chatting to each other as they were waiting to be served.

16. The Claimant also had difficulty in writing and checking emails for accuracy, caused by his dyslexia. He had been diagnosed with dyslexia at the age of 11. His writing difficulties are evident in the few emails in the bundle written by the Claimant, including emails on 11 May 2017 [236], 18 July 2017 [235] and 9 January 2019 [299]. These particular examples were not corrected with the spellcheck software that the Claimant generally used when writing emails. The Claimant also had some difficulties with reading, which are dealt with in more detail below.

17. On 9 June 2017, the Claimant was referred to Occupational Health to consider the impact of his various conditions on his employment [227]. The Claimant met with Dr Mirza on 27 June 2017 to discuss his health. Dr Mirza reported on 28 June 2017 [229], noting that the hearing problems were a particular concern during the first 45 seconds or so of face to face conversations and were exacerbated by stress and anxiety. Dr Mirza described them as progressive, indicating that they had become more pronounced over the past three to four years. Dr Mirza also recorded that the Claimant's knee problems were more marked with heavy lifting, and restricted his ability to stand, walk, climb stairs and lift items, as well as with bending and kneeling. Dr Mirza's advice was as follows:

> "Keeping in view his limitations, it would be helpful for Mr Grayling to not be involved in a client facing role or a client dealing role if operationally feasible. Mr Grayling reports that he has good organisational skills and is able to work more effectively when it comes to organising and managing other members of staff or other branches of the company. I have advised him to liaise with management to discuss this further, if there was the possibility of a change in his role to match his capabilities. Additionally, in view of his ongoing left knee symptoms, it would be helpful for him to avoid any heavy lifting."

18. On receipt of this report, Amy Smith, HR Advisor, spoke to Dr Mirza about the implications of the initial occupational report. That led to a further report dated 17 July 2017. Dr Mirza's letter recorded it was "impossible for him to use the phone", and that "his symptoms have also become obvious during face to face consultations" with customers. Dr Mirza recommended that another member of staff should help deal with customer queries over the phone. If so, and if the Claimant repeated back to customers what they were seeking, Dr Mirza considered he would be able to work in his current role as Branch Manager. Dr Mirza raised the possibility that the Claimant could be considered for a management role as an alternative.

19. On 15 December 2017, Wayne Lowther held an informal meeting with the Claimant, to discuss the Claimant's health. There are handwritten notes in the bundle, which were written during the course of the meeting and were signed by the Claimant at the end of the meeting. We think it unlikely that the Claimant read the notes before he signed them. However, given that they were written during the course of the meeting, and given the contents of the notes, we accept that they are a broadly accurate account of what was said during this meeting. As recorded in the notes, the Claimant told Mr Lowther that his knee was not giving him many issues as there was support available apart from on Saturdays, "which can be a struggle". It was agreed that the Claimant would remove himself from the Saturday rota. The result was his total weekly working hours reduced. The Claimant said that his hearing was still bad and may have worsened since the last review. He managed to cope to a degree with the support of staff in the Branch, "which was not ideal". The Claimant agreed to arrange a further referral to an ENT Consultant to review his hearing.

20. The Claimant attended an appointment with Dr Azhar Shaida, Consultant ENT Surgeon, on 15 January 2018. On the same day, Dr Shaida wrote to the Claimant's GP with a summary of his conclusions [242]. He noted that the Claimant's hearing appeared to be getting worse; that he had difficulty talking to people on the telephone; had difficulty focusing on conversations if he had to start listening suddenly; but he did not seem to have problems in the presence of background noise. His diagnosis was of "possible central auditory processing disorder". He said he would arrange for the Claimant have some hearing tests and would review him with the results.

21. Prompted by Dr Shaida's recommendation, auditory tests were carried out by Dr Palaniappan, Consultant Neuro-otological Physician in Audiovestibular Medicine, on 16 February 2018, and a report was prepared on 2 March 2018. Dr Palaniappan noted as follows [243-244]:

> "He continues to have hearing difficulty, which is mainly to do with understanding speech and it is worse in background noise. He also has significant problem hearing people on the telephone, which has a detrimental effect on his ability to work as a plumber's merchant. He has to be on the telephone regularly, which he finds very difficult to handle and this causes significant stress … Mr Grayling is significantly stressed about the issues that he has to deal with on a day to day basis, in terms of being able to manage his business. I have discussed management strategies, including hearing therapy for auditory training and cognitive behavioural therapy/mindfulness."

22. Following this assessment, the Claimant attended a Welfare Meeting with Mr Lowther on 22 March 2018 [247]. As with the December 2017 meeting, Mr Lowther took notes during the course of the meeting and they were signed by the Claimant. We again accept that they are a reasonably accurate record of what was discussed during the course of the welfare meeting. The Claimant told Mr Lowther that he could not take phone calls and that conversations were difficult, causing him regular stress. He said that his hearing had got worse over the last four years. He said it was very difficult for him to cope "due to the fact a lot of everyday life is conversations and interaction with people which I struggle with, but try my best". In answer to the question "How can the business support you with these difficulties?" he replied that he felt an additional 1 ½ members of staff in his branch would take the pressure of any phone work as currently this was constantly putting him under stress. He said that he was okay with face to face conversations as he saw it coming and this allowed him "to deal with the situation much better not causing any issues or stress". Mr Lowther agreed to look into the help that the First Respondent could potentially provide him in managing stress.

23. By this point, the First Respondent had agreed to provide additional agency support. This started in May 2018, and broadly equated to 20 hours a week, although the precise amount of support fluctuated from week to week.

24. On 5 June 2018, there was a further meeting between the Claimant and Mr Lowther. Again, we accept that the notes taken by Mr Lowther are a reasonably accurate record of what was discussed in the course of this meeting [252]. By way of update, the Claimant said he struggled daily to cope with his circumstances and the pressures that answering the phone put on him and on his staff. He noted that comments had been made about his hearing by both staff and customers, which had hurt his confidence and self-esteem and was getting him down. Mr Lowther asked him if there was anything he could do to support him in order to stop such comments. The Claimant's response was as follows:

    "A lot of the people I have known for years and confronting customers may not be good for business".

25. Mr Lowther asked him if he would like him to speak to any staff members in particular. The Claimant's reply was:

    "No not to the extent to upset them"

26. He told Mr Lowther that he would be okay with him talking to his team but "not overdo it. Do not want too much fuss". In the meeting, the Claimant noted that the branch was receiving around 20 hours of additional support from agency workers. He did not request additional resources in this meeting, and the Respondent's evidence, which we accept, was that this was something that the Claimant could have booked had it been thought to be helpful. Although in his witness statement the Claimant says that the staff who were provided were either unreliable or inexperienced, he did not raise this with Mr Lowther in his meeting or subsequently.

27. Mr Lowther made the Claimant aware of the Access to Work Scheme to help the Claimant to continue with his duties. Mr Lowther told him that the Scheme had to be initiated by the Claimant.

28. At some point after this meeting, the Claimant mentioned to Mr Lowther that one member of staff who had been making comments about his hearing was Jeff Morris. It was agreed that Mr Lowther would speak to Mr Morris on an informal basis about this issue.

29. On 22 June 2018, the Claimant received a response to his enquiry about ill health early retirement. Laura Harris told him that because his condition did not appear to be life threatening, he could not be offered early retirement on the grounds of serious ill health [260].

30. On 31 July 2018, an Access to Work assessment was undertaken [261]. Of note, the resulting report recorded:

    a. He did not want to take part in Cognitive Behavioural Therapy, because he believed it would not help him with his difficulties;

    b. He had difficulties with reading text in order to absorb and assimilate, and often missed words and skipped lines. He also had difficulties in identifying errors when sending emails;

    c. Whilst the possibility of text to speech and voice recognition software was discussed, the report recorded he did not feel that this would be useful due to his auditory processing difficulties. He did not consider a digital recorder, to enable him to record conversations, would be helpful;

    d. He did not feel that tools to assist with reading and writing were required as there were fewer aspects to his role that involved working from his computer;

    e. He reported strengths in time management and organisation.

31. In his witness statement, the Claimant suggested (at paragraph 37) that his hesitancy to endorse speech to text software during the Access to Work assessment was because of the number of telephones and computers at the branch. We do not find that he explained his reluctance in any detail to the person carrying out the Access to Work assessment.

32. Access to Work recommended workplace coaching sessions, which might help him to develop techniques to work to his strengths. It would aim to help him develop new strategies for areas that were of particular difficulty. It noted that the sessions might not assist with the Claimant's difficulties with auditory processing. The Claimant was required to complete and return a grant claim form in order for this coaching to be booked.

33. On 26 September 2018, the Claimant emailed Alison Pickersgill (HR Advisor) alleging that customers had been swearing at him and throwing the phone down. When asked about this entry in cross examination, the Claimant said it happened a lot. He said she could feel the heat down the phone.

34. On 11 October 2018, the Claimant signed the relevant Access to Work form claiming assistance from a support worker [270]. He had delayed filling in the form. So that the form could be processed, Mr Lowther had helped him complete it.

35. In November 2018, the position of Branch Manager at the Barking Branch became vacant as a result of Martin Hayes's departure. Mr Hayes felt unsupported in his role at Barking and requested a lesser role on a reduced salary. The Barking Branch had not been performing well and the Respondent had lost several key contracts. Mr Hayes was transferred to become the Branch Manager of the Brentwood Branch without a competitive interview. Brentwood Branch was a Local Branch with fewer customers and staff.

36. On 13 December 2018, the First Respondent formally advertised the position of Barking Branch Manager, with a closing date of 11 January 2019. The role description noted that the Branch Manager would be managing up to 30 staff members, six vehicles and a £1.1 million turnover. Barking was described as one of the First Respondent's "flagship branches". It noted that the successful candidate would have proven experience managing large branches; proven experience managing a transport team; an ability to deliver exceptional customer service, and industry experience. The advert noted that the First Respondent was undergoing a significant re-organisation, in the following sentences:

    "Today we operate Plumb, Parts, Drain, Pipe and Climate Center as separate businesses. We are working towards bringing every part of our businesses together to form one specialist trade merchant called Wolseley.

    We are the UK's largest plumbing, heating and cooling trade specialist merchant. Soon, our entire product range will be accessible under one roof. That means customers can easily reach all our products and specialisms, delivering on our promise of helping them achieve more."

37. As a result, a proven track record of managing a large Branch in the past would not necessarily demonstrate sufficient skill and experience for the anticipated new role following the re-organisation.

38. The Claimant did not submit an application for this role. He had not even noticed that a job advert had been prepared and that a formal application was required. In his experience, based on his previous job moves with the First Respondent, jobs were allocated on a more informal basis. His evidence was that he had registered his interest in the Barking role with Mr Lowther at a further meeting in December 2018.

39. The Claimant's oral evidence was that this discussion took place during a budget setting meeting on 5 December 2018 at Waltham Cross. This differed from his witness statement, where he had said that the discussion took place when Mr Lowther "popped into the [Walthamstow] branch around December 2018" (w/s para 38). In his oral evidence in cross-examination, the Claimant said he was wrong about the location of the meeting in his witness statement. However, he remained confident about the gist of the conversation given there, namely that "Wayne Lowther gave the impression that I would be considered for this role and that he

was looking into it. I was certain that I would be moved across to enable me to continue my employment with the Respondent in a way that would be making adjustments for my knee injury and my hearing."

40. Mr Lowther's consistent evidence was that the Claimant never expressed an interest to him in the Barking Branch Manager role. There is no contemporaneous record of such a conversation. The first reference to such a conversation is in the Claimant's own witness statement. In the Tribunal's view, it is likely that the Claimant did make a passing reference to the vacancy at Barking in a meeting with Mr Lowther. Whilst the Claimant's recollection of what was discussed was that he was thereby registering an interest in filling the vacancy himself, this was not how it was understood by Mr Lowther, nor was it reasonable for him to do so, given the oblique way in which the topic had been raised. As a result, Mr Lowther did not relay the Claimant's interest in the role to the relevant Area Manager, Michael Collett. Thereafter, the Claimant did not seek any further update on the availability of the Barking role until much later, The first reference in the bundle to a request for more management responsibilities his solicitors asked for a "purely managerial role" in their letter dated 13 March 2019.

41. Around the end of 2018, the Tottenham Branch closed. This caused the Walthamstow Branch to receive more telephone calls and more trade at the counter, and this in turn caused the Claimant more stress.

42. On 8 January 2019 the Claimant emailed Alison Pickersgill, HR Advisor, about arrangements for stress counselling. In the course of the email, he stated his hearing was getting worse every day. This had been going on for two years. He said that people were taking "the mick" out of him every day and his stress levels were getting higher.

43. On 22 January 2019, Mr Lowther met with the Claimant in the Walthamstow Branch. The Claimant's case is that there were two events of significance whilst Mr Lowther attended. He says that in the presence of Mr Lowther, a customer from a particular client referred to him as a "deaf fucker". He says that Mr Lowther chose to ignore this comment and did not take any action to reprimand the customer. We do not accept that this was said in Mr Lowther's presence as the Claimant alleges. There is a handwritten note written by the Claimant in what has been referred to as his "journal" which he apparently kept in his desk at the Branch. This records that the same comment was made at 4pm on that date, but does not indicate that it was made in front of Mr Lowther. Mr Lowther, when questioned about such an incident, denied being present whilst such a comment was made. If he had heard such a comment being made, it is likely he would have taken it up with the customer, as he had offered to do in the welfare meeting held with the Claimant in June 2018. The reason he had not taken any action at that point in respect of customers was that the Claimant said confronting customers may not be good for business.

44. The Claimant alleges he had a second conversation with Wayne Lowther at the Walthamstow Branch on 22 January 2019. He said Mr Lowther told him that the First Respondent would acquire the unit next door, knock through the partition wall, and recruit a new manager to manage the bigger branch. As a result, the Claimant would be made redundant. Mr Lowther disputes having such a conversation. He says it would have been very unprofessional to have talked about staffing

managers in front of other members of staff. We consider it is inherently unlikely Mr Lowther made such a remark. There was no formal confirmation that the occupant of the adjacent premises was leaving; it was not down to Mr Lowther whether the Walthamstow Branch should be expanded to encompass both units; and there was no reason why, given the good performance of the Walthamstow Branch, the Claimant would be at risk of redundancy if the size of branch expanded. Such an expansion would have been likely to lead to an increase in staffing levels. This in turn may well have made it easier for the Claimant to fulfil the demands of the role of branch manager. There was no obvious internal candidate to replace the Claimant. Further, if such a comment had been made, it ought to have been noted by the Claimant in his journal. There is no entry recording such a conversation. Finally, there is no reference to such a conversation in the detailed letter from the Claimant's solicitors sent on 14 February 2019, just over three weeks later.

45. The Claimant alleges that, on an ongoing basis, Mr Johnson made inappropriate comments about the Claimant's hearing, often in front of the First Respondent's customers and also in front of Wayne Lowther. Whilst the Tribunal accepts that some references are likely to have been made to the Claimant's hearing by Mr Johnson, we are unable to find, on the balance of probabilities, that these comments were intended to be hurtful or were regarded as such by the Claimant. Mr Johnson and the Claimant were good friends who had known each other for many years through employment with the First Respondent. They had both been branch managers at the same time in the same geographical area, and it was the Claimant who had suggested that Mr Johnson should be recruited to join the staff at the Walthamstow Branch, initially on an agency basis, when another member of staff had left. Any comments made by Mr Johnson are likely to have been intended as no more than light hearted banter, and received as such by the Claimant. We accept that the Claimant would himself engage in banter with his colleagues, and had not set down a clear line that any comments about his hearing were inappropriate and unacceptable.

46. It is, in the Tribunal's view, significant that Costas Constantinou, despite his witness evidence, accepted in cross examination that the only comments he heard about the Claimant's hearing difficulties were from customers rather than from other members of staff. If Mr Johnson had spoken to the Claimant by "taking the piss out of him" on a regular basis, as the Claimant now alleges, this is very likely to have been noticed by Mr Constantinou. Furthermore, as the Branch Manager, it was the Claimant's role to set the tone for the branch and, if necessary, take disciplinary action where staff members made inappropriate comments. The fact that he did not do so is a further indication that comments made by Mr Johnson were not regarded as unacceptable.

47. There are references to Mr Johnson making comments about the Claimant in the handwritten journal which the Claimant was writing at this time to keep a record of the difficulties caused by his hearing. However, the contents of this journal are not consistent with the letter from the Claimant's solicitors dated 14 February 2019 and the Claimant's witness statement relied upon in support of his case in these proceedings. In particular, there are no entries in the journal that Mr Johnson made inappropriate comments about the Claimant by pretending to pick up the telephone and saying "Is this Harry? Barry? Steve? Who is it?". The Claimant cannot be more precise about the date of this alleged comment than that it was made in the period

"on or around February 2019". This is an example of a comment that Mr Johnson is likely to have made, which was intended as no more than light hearted banter and received as such by the Claimant, as already stated. Our view is reinforced in relation to this comment by the Claimant's failure to document it in his journal, his failure to note the specific date on which the comment was made, his lack of detail as to the context in which it was made, and his failure to complain about this comment internally; other than in his solicitor's letter as part of a more general complaint about his ability to cope in his current role.

48. At some point in February 2019, John Soilleux was appointed to the position of Branch Manager at Barking. Mr Collett was the Area Manager with responsibility for Contract Branches including Barking Branch. Two internal candidates had expressed an interest in taking over the role at Barking, including Mr Soilleux. Mr Soilleux was the manager of the Sidcup Contract Branch. Mr Soilleux did not fill in an application form, nor did he attend an interview. He had a discussion with Mr Collett in early February at which he told Mr Collett of his plans, if he was appointed to the role. Mr Collett decided that Mr Soilleux was the best fit for the role, given his strong performance in the Sidcup Branch Manager position. Therefore, he decided to appoint him. There was a short delay in Mr Soilleux starting this role given his personal circumstances at the time. He started the role on 1 March 2019.

49. On 24 January 2019, the Claimant had the first of four conversations with Martina Foreman. Ms Foreman was the workplace coach who had been engaged as recommended by Access to Work to assist the Claimant with his responsibilities at work. The notes of the session record that strategy coaching had been recommended to work on the Claimant's strengths and to learn stress management and coping strategies.

50. On 4 February 2019, the Claimant visited a solicitor to seek advice in relation to his situation at work [311].

51. On 7 February 2019, the Claimant attended the second coaching session with Ms Foreman. The notes record him telling her that Costas will be off for two days in February and Ken will also be off for two days. He was already feeling stressed about having to cover the telephones and the counter and not being able to hear the customers. [310/311]. He told her that when the phone rang, he got "hot around the head and the neck, it's like being on a high". Ms Foreman advised him to start making notes of what was happening. This could help to build a case for discrimination at work and when trying to hear people. He was asked to bring the notes to the next counselling session.

52. On 14 February 2019, the First Respondent received the first of several letters from solicitors writing on the Claimant's instructions. The letter alleged that the First Respondent had failed to carry out reasonable adjustments, contrary to Section 20 Equality Act 2010, and was responsible for harassment relating to disability from both staff and customers, contrary to Section 26 Equality Act 2010. By way of alleged reasonable adjustment, the letter dated that the Claimant should be removed from having to answer the telephone and "avoid a client facing role in order that the Claimant does not have to suffer the embarrassment of not being able to hear customers speaking to him". It said that the First Respondent should "place him on managerial duties only". It asked the First Respondent to speak to

customers if they make comments that could constitute harassment on the ground of the Claimant's disability; for all staff to be spoken to about the Claimant's disability; and for "any other appropriate action to be taken in order to prevent any further discrimination for the Claimant". It did not specifically ask for the Claimant to be transferred to fill any vacancy as manager of the Barking Branch. The letter attached a supportive email from Mr Constantinou.

53. On 26 February 2019, the Claimant attended the third coaching session with Ms Foreman [318]. The notes record him telling her that "he feels the hearing issue is more psychological than physiological and that his brain feels heavy". He told her he had considered what costs were involved if he were able to get redundancy or a pay-out to fund a comfortable life. The action points from the meeting included keeping a note of anything useful for a discrimination case.

54. On 1 March 2019, a meeting took place at the Walthamstow Branch between the Claimant and Andrea Waldron. Ms Waldron is the First Respondent's HR Business Partner for the South Region. Although this was not a formal meeting, Ms Waldron is likely to have checked in advance to make sure he would be present in the Branch on that day. Ms Waldron emailed her colleagues after the meeting to note what had been discussed [321]. Whilst the Claimant disputes several features of this note, we conclude that this is likely to be an accurate record of what was said. The notes were made on the same day as the conversation, whilst events were still fresh in Ms Waldron's memory.

55. The notes record that the discussion covered three main areas. The first related to comments from the First Respondent's customers. Ms Waldron told the Claimant that this would not be tolerated and if this occurred again then the Claimant should formalise his concerns either with Ms Waldron or by lodging a grievance. Again, the Claimant responded he was not prepared to do this as it would affect the customer base at the branch.

56. The second area related to comments from staff members. Ms Waldron told the Claimant to formalise his concerns about comments made by other staff members by raising a grievance. She added that, if he did so, she would take his concerns very seriously. The third area focused on the impact of his medical conditions on his ability to perform the role of a Branch Manager. The Claimant told Ms Waldon that he could not pick stock very well due to his knee condition; and that he was unable to speak to customers on the telephone or sometimes over the counter due to his hearing condition. There was a discussion about how the role of Branch Manager had changed so that the Manager was now integrally involved in sales discussions and "sitting in an office is no longer a feasible option". Ms Waldron asked him directly if he considered that there were other roles within the business he could perform, and he was unable to suggest any other roles. When asked what resolution he was looking for, he said he was looking for the First Respondent to pay him to leave the business and was looking for £250,000, which he regarded as a reasonable figure. The Claimant added that he felt he was heading towards a period of sickness absence as he could not answer the phone or pick stock. His difficulties were coming to a head because of the increased stress he was under at that time.

57. In the light of the discussion at the meeting on 1 March 2019, the First Respondent wrote back to the Claimant's solicitors on 5 March 2019 [323]. The letter rejected the allegations of disability discrimination made in the 14 February 2019 letter. It stated that the First Respondent was looking into whether any further reasonable adjustments could be made, but emphasised that adjustments had to be reasonable.

58. On 11 March 2019, the Claimant was signed off work on sick leave for seven days. The reason given on the Fit Note was "audiovestibular problems, stress at work, knee pain" [325].

59. On 13 March 2019, the Claimant's solicitors wrote a further letter focusing on the Claimant's physical restrictions, and enclosing a letter from Mr John Ireland, a consultant orthopaedic surgeon, dated 19 June 2017. It added that the Claimant had reported to the solicitors that "lifting, walking up and down stairs and prolonged periods of standing cause him pain". The letter concluded by requesting that the Claimant be transferred into a "purely management role" as a reasonable adjustment.

60. On the 18 March 2019, the Claimant was signed off work for a month for the same reasons as previously given. The Claimant attended a fourth and final coaching strategy session with Ms Foreman on 25 March 2019. It noted that the log book – which we take to be a reference to the journal - prepared by the Claimant was with his solicitor. It recorded that stress had a massive impact on performance for neurodiverse individuals such as the Claimant, as it weakened memory and concentration.

61. The First Respondent arranged to hold a further welfare meeting with the Claimant. It was due to take place on 4 April 2019 at the Waltham Cross Branch. In error, the Claimant travelled to the Barking Branch. As a result, the meeting was rescheduled for 12 April 2019.

62. The Claimant alleges that in the course of conversations on 4 April 2019 at the Barking Branch, prompted by the Claimant's mistake about the location of the meeting, Tony Goodchild made fun of him, by saying to Wayne Lowther "Sorry I can't hear you". As with Mr Johnson, the Claimant had known Mr Goodchild for many years. They had been colleagues together at the Tottenham Branch when the Claimant was Branch Manager, but known each other since Mr Goodchild started working for the First Respondent in May 1995. We accept the evidence we have heard from Mr Goodchild that they had a positive working relationship. They would laugh and joke together, including making jokes at their own and one another's expense.

63. In that context, we find that the likeliest version of events on 4 April 2019 is as follows. The Claimant arrived in the Barking Branch expecting to see Mr Lowther. He was told by Mr Goodchild that Mr Lowther was not present. The Claimant then realised that he had made a mistake about the correct venue for the meeting, and make a joke about mishearing the correct location. We think it likely that he had been told about the meeting, rather than received an email or other electronic reminder confirming it had been scheduled. No such record was included in the bundle of documents. In these circumstances, given our assessment of the

Claimant's approach to his hearing difficulties, particularly with good friends, we consider it likely that the Claimant would have made a light-hearted reference to his hearing in order to explain his mistake. We do not consider that his decision to travel to Barking rather than Waltham Cross had anything to do with his dyslexia, as is suggested in the List of Issues.

64. Telephone contact was made with Mr Lowther to tell him that, in error, the Claimant was in the Barking Branch. Given his hearing difficulties the Claimant was unable to speak to Mr Lowther directly on the telephone, and so it was Mr Goodchild that spoke to Mr Lowther in order to reschedule the meeting. At the end of the conversation, continuing the light-hearted reference to the Claimant's hearing that the Claimant himself had started, Mr Goodchild probably did make a joke about the Claimant's hearing and this was heard by Mr Lowther. Although Mr Lowther says that such a comment was never made, we consider on balance Mr Goodchild is likely to have made a joke about the Claimant's hearing at the end of the telephone call as alleged by the Claimant. This is consistent with an email from Amanda Grayling, the Claimant's wife sent three days later, on 7 April 2019.

65. The rescheduled welfare meeting took place on 12 April 2019 [343] and was conducted by Mr Lowther. Again, it was noted by Mr Lowther as the meeting progressed and the notes were signed by the Claimant at the conclusion of the meeting. Again, we accept the notes of the meeting as broadly accurate. During the meeting, the Claimant told Mr Lowther that his hearing continued to get worse. This, he added, was consistent with what his GP had told him, due to cell breakdown as he got older. He alleged that the doctor had been willing to sign him off work for a year. He said he was not currently expecting to return to work on 18 April 2019 when his sick note expired. In relation to the workplace coaching sessions he said that they were not helpful for the workplace but they were of assistance in enabling him to understand his current disability. When asked about his current stress levels he said he could not perform at levels that he was used to performing over the last 30 plus years. This was a combination of the remarks from customers and colleagues and his inability to communicate correctly. The Claimant accepted that in a small branch such as Walthamstow, it was not possible as branch manager to avoid contact with customers. However, he thought this would not be a particular problem if he was a General Manager in a larger branch and reasonable adjustments were made.

66. During the meeting, the Claimant showed Mr Lowther the letter from his solicitors dated 14 February 2019. This was the first time Mr Lowther had seen this letter. Because the letter criticised him personally, Mr Lowther subsequently told Ms Waldron he did not feel comfortable managing the welfare process. As a result, Ms Waldron took over responsibility for subsequent welfare meetings, although Mr Lowther still attended.

67. On 18 April 2019, the Claimant initiated Early Conciliation with ACAS. The Early Conciliation Certificate is dated 17 May 2019.

68. The Claimant was signed off work for a further two months on 18 April 2019. His Fit Note expired on 17 June 2019. Under his employment contract, the Claimant was entitled to receive 12 weeks sick pay. This was due to expire around the end of May 2019, before the end of the two-month period of sick leave covered by the

latest Fit Note. As a result, on 30 April 2019 [355] the Claimant's solicitors wrote requesting that, as a reasonable adjustment, the First Respondent should continue to pay sick pay to the Claimant whilst he was off sick. It alleged that failure to continue to pay sick pay may amount to a failure to make reasonable adjustments and also a repudiatory breach of contract. It noted it would not be unrealistic, should the evidence support it, that any financial loss could incorporate loss of earnings to retirement age.

69. Following the welfare meeting on 12 April 2019, the First Respondent referred the Claimant to occupational health for a further appointment. The Claimant was seen on 17 May 2019 by Jon Bastock, Consultant Orthopaedic Health Physician. In his report of the same date [360] he recorded that the Claimant's hearing had progressively become worse, and there were no definitive treatments or future options to explore. So far as his knee symptoms were concerned, he could no longer cope with the knee pain and therefore would not want a role that increased the chance of his knee injury becoming further aggravated. Mr Bastock recommended redeployment to a role similar to "the role of general manager that the Claimant had managed well in the past", although added that this "would be a decision for the employer". He recommended the following adjustments:

"because of his dyslexia and hearing difficulties he may benefit from speech to text software such as read and write software. He may also benefit from voice recognition software such as Dragon Naturally Speaking. He should also make good use of spell and grammar checkers on his computer. He may also wish to use the task lists and also make good use of checklists. He should have ongoing regular contact with his manager. He may also require regular additional breaks. He would benefit from a role where there is minimal use of telephones."

70. We do not find, on the balance of probabilities, that Mr Johnson challenged the Claimant during a visit by the Claimant to the Walthamstow Branch on 29 May 2019 to pick up some papers, as the Claimant alleges in paragraph 28 of his witness statement. The Claimant said in cross-examination that he made a record of this exchange with Mr Johnson in a second journal which he had provided to his solicitors, but which for some reason was not included in the Final Hearing Bundle. In his witness statement, the Claimant does not provide any date for this allegation beyond "in or around May 2019" and we consider, given the confused way in which the Claimant gave his evidence, that his evidence on this point is unlikely to be accurate.

71. By around the end of May 2019, the Claimant's contractual sick pay had ended. The First Respondent had not agreed to extend contractual sick pay on a discretionary basis.

72. On 4 June 2019, Alison Pickersgill wrote to the Claimant to invite him to a Welfare Meeting with Andrea Waldron and Wayne Lowther to be held on 13 June 2019.

73. That Welfare Meeting took place as scheduled on 13 June 2019, the same day that the Claimant was signed off work for a further three months, until 12 September 2019 [371]. Again, the Fit Note gave the same three reasons for the Claimant's absence.

74. The meeting on 13 June 2019 was chaired by Andrea Waldron [366]. Mr Lowther also attended. At the very start of the meeting, Ms Waldron asked the Claimant how he was feeling. At that point, his hearing went, and he was given a couple of minutes for it to recover. He said he thought his hearing was getting worse. He agreed he needed a role in which he was not talking to customers. Ms Waldron asked him if the Walthamstow Branch Manager role could be released as a vacancy if the Claimant was saying he was unable to go back to that role. The Claimant said he would need to discuss the point with his solicitor. There was a discussion about whether a General Manager role would be suitable, by reference to the Job Description for the role which Ms Waldron provided to the Claimant during the course of the meeting. The Claimant stated that the Barking General Manager role was updated and did not involve working with customers. This was his understanding based on what the staff there had told him. He said that if customers "book my visits, I can then jump in the car and go and see them". On reviewing the Job Description, he said that there was not anything with which he would struggle, although he would not be able to talk to suppliers or customers on the telephone. He would be fine working on the counter so long as he was able to take his customers back to the office to discuss matters further.

75. Ms Waldron mentioned the possibility of a role in the Sidcup Debt Team. The Claimant replied that this would not be suitable as he would need to be on the telephone. Ms Waldron asked if he would consider it further if it did not involve the phone, to which the Claimant replied "No, as it will involve the phone". In oral evidence, Mr Fotheringham, who had ultimate responsibility for appointing the senior roles within the region, said that this role was likely to attract a salary in the region of £30,000. This would be a significant reduction in the Claimant's pay. However, salary was never discussed, because the Claimant rejected the role as soon as it was suggested.

76. After the meeting, Ms Waldron telephoned Mr Fotheringham to discuss the Claimant's request to be offered the Barking General Manager role. Mr Fotheringham told her that there was no vacancy, because the role was now being performed by Mr Soilleux. Whilst he agreed there were some aspects of the role of managing a larger branch that the Claimant would be able to perform, he explained his concerns about the Claimant's abilities to perform fundamental aspects of the role, given the occupational health advice, and the Claimant's own comments about his current difficulties. His concerns centred on the Claimant's difficulties in speaking to customers over the telephone or face to face, which he regarded as an essential aspect of the role. In his view, in a larger branch he would need to speak to more customers and more staff. There was a discussion about other potential roles within the First Respondent's business. The only potential position which was thought to be potentially suitable was the Sidcup debt role. This was the position the Claimant had already rejected.

77. Following the meeting, the Claimant's solicitors emailed to say that they had been instructed to contact the First Respondent directly. The email recorded that the Claimant was shocked by some of Ms Waldron's suggestions made during the meeting. It added:

"We would confirm for the purposes of clarity and ease of reference, our client remains in employment and his place of work is the Walthamstow branch, we note the request for reasonable adjustments is an ongoing concern to our client."

78. On 14 June 2019, the Claimant lodged his first Employment Tribunal Claim against the First, Second, and Third Respondents. Ms Waldron was not a named Respondent in those proceedings. It was served on the Respondents by the Tribunal on 25 June 2019.

79. Ms Waldron sent the Claimant a letter on 27 June 2019 [381]. This summarised what had been discussed at the meeting on 13 June 2019 and set out the following, under the heading "Next Steps":

"When considering whether a General Manager role would be suitable for you as an alternative to your current role of Branch Manager, I took into account all of the responsibilities that the General Manager role encompasses. Whilst it is clear that there are aspects of this role that you could carry out with no difficulty, I have significant concerns that some of the fundamental aspects of the role are tasks that you and OH have said you would not be able to perform. Dealing with customers, both face to face and on the telephone, is an essential part of both a Branch Manager and a General Manager role, as is dealing with staff and any issues that may arise.

As the overall manager of the site, customers will expect that you would be available to speak to them and be able to deal with any issues that arise effectively, whether that be over the telephone or face to face. In a General Manager role, similar to that of a Branch Manager, there is regular use of the phone system to support customer queries and general customer service. Whilst it is accepted the team could handle more of these queries to support your disability, it would be unrealistic to expect customers/suppliers not to ask to speak to the General Manager for more significant issues that may occur. Similarly, it would be unrealistic to ask customers to visit the branch as opposed to using the telephone in order to raise their queries. You have confirmed on more than one occasion that you are unable to speak to customer or suppliers over the telephone and would not be able to carry out this task in any role that you were doing.

Given that the main aspects of a General Manager role do not differ greatly from that of your current role, the difficulties that you currently face in your role would remain in the event you moved into a General Manager position. I also note that the OH report confirms that you find it difficult to cope with the demands of your current role, a General Manager has responsibility for a larger site, with more staff and customers to manage on a daily basis. This in turn means greater engagement would be necessary with the branch team.

Having considered this carefully, our view is that the General Manager role would not be suitable for you, and in any event, there is no General Manager role available at this time."

80. The letter ended by inviting the Claimant to a further meeting to discuss whether there were any other suitable roles in circumstances where, as the letter noted, the Claimant had rejected a role in the debt team in Sidcup.

81. On 10 July 2019, the Walthamstow Branch failed a periodic audit [385]. This was because the risk assessments were out of date. This was the Claimant's responsibility as Branch Manager. In an email on 18 July 2019, Andrea Waldron noted as follows:

"Had this manager still been in branch, we would have taken this further so just adding for the record that this is evidence of his inability to manage a bigger branch"

82. There was further correspondence between the Claimant's solicitors and the First Respondent about reasonable adjustments on 11 July and 22 July 2019 respectively. The Claimant's solicitors confirmed that the offer of employment at Sidcup was not suitable [390]. Two reasons were given – firstly that he was unable to deal with customers on the telephone due to his disabilities, and secondly that the commute to Sidcup would be too time-consuming and too expensive, given the additional fuel required and the toll charges at the Dartford Crossing. The solicitors argued that the Barking General Manager role was suitable and that having a separate office to carry out that role would be a reasonable adjustment. No other reasonable adjustments were proposed. In the First Respondent's response, Ms Pickersgill said that it had already explained in its letter dated 27 June 2019 why the role of General Manager was not considered suitable for the Claimant.

83. In the welfare meeting conducted by Ms Waldron on 23 July 2019 [398], there was a further discussion with the Claimant about the way forward. The Claimant stated that he could not do the Walthamstow role as he could not hear customers on the counter or phone. The General Manager role at Barking was discussed. Ms Waldron stated that "having an office is not an issue – we can build one. It's the customer base and staff interaction that we believe still occurs". She had said that the role was just a bigger version of what the Claimant currently did, with a bigger customer base and more staff. Ms Waldon asked him if there were any other ideas that the First Respondent should consider. The Claimant replied: "No just Barking which I've mentioned regularly". The meeting ended with Ms Waldon saying "we may be in a place where we have to consider your future employment by the business". Ms Waldon provided the Claimant with a summary of the meeting in her letter to him dated 30 July 2019.

84. On 6 August 2019, Ms Pickersgill wrote to the Claimant inviting him to a capability meeting on 13 August 2019. She warned him that if he was unable to put forward any other suitable alternative roles at this meeting, the company may have no other alternative but to terminate his employment on grounds of ill-health capability.

85. On 8 August 2019, the Claimant's solicitors suggested, for the first time, that the Claimant be permitted to carry out the Sidcup debt team role remotely. The letter suggested that it could be done out of an office in Barking [417]. The letter reiterated the suitability of the role as General Manager of the Barking Branch. It added that an alternative reasonable adjustment would be to create a suitable job for the Claimant "where he can focus on using the skills he has".

86. At the capability meeting on 13 August 2019 [421], the First Respondent discussed several issues as listed by way of agenda at the start of the meeting. In relation to the Sidcup debt role, Ms Waldron told the Claimant that this had now been filled, because the Claimant had previously told the First Respondent it would not be suitable. In the course of this Final Hearing, the First Respondent confirmed that in August 2019 the person carrying out the role was a temporary appointment. A permanent appointment to the role was not made until November 2019.

87. The Claimant was told that managers were now heavily involved with customers and colleagues, which would make Barking unsuitable for the Claimant, given his communication difficulties. Ms Waldron added that, if it had been suitable, then the First Respondent would have built a separate office in the right location, but this could not be done at Walthamstow due to its small size. At the conclusion of the meeting, the Claimant was told that because the First Respondent was in the process of making redundancies, it was not in the position of being able to create a new role for him. As there was no role within the London Region that was suitable, Ms Waldron told him she had no choice but to dismiss him on grounds of capability. He would be paid 12 weeks' pay in lieu of notice.

88. The dismissal decision was confirmed in a dismissal letter dated 16 August 2019. The Claimant's solicitors lodged an appeal against dismissal. The grounds of appeal were that the Claimant's dismissal was unfair in that insufficient consideration was given to his requests for reasonable adjustments and that no real or genuine reasonable adjustments were considered. Reference was made, for the first time, to training him to undertake alternative duties, to consider a work trial in alternative employment.

89. An appeal hearing was fixed for 16 September 2019. This took place on the scheduled date and was chaired by Shaun Kelly, Regional Operations Manager. The Claimant was accompanied by his wife.

90. The day after the appeal hearing, Mr Kelly interviewed Wayne Lowther and Andrea Waldron. On 25 September 2019, Mr Kelly wrote to the Claimant to inform him of the outcome of his appeal. Mr Kelly's decision was that his appeal was not upheld.

91. On 11 October 2020, the Claimant initiated Early Conciliation for the second time, receiving the Certificate on the same date. On 12 November 2020, the Claimant lodged a second Claim Form for unfair dismissal, disability discrimination and victimisation against the First, Second, Third and Fourth Respondents. This made Ms Waldron a respondent to a claim brought by the claimant for the first time.

92. The Basildon Branch was the largest branch in the UK network with a turnover of £18 – £20 million, and a team of more than 30 people. We accept the evidence from Mr Soilleux as to the particular demands and requirements of the role of General Manager at Barking. Specifically, we accept that the bullet points contained in his email to Mr Fotheringham on 11 January 2011 [410-411] broadly reflect the nature of the role. In short, the role involved frequent meetings with others based at Barking and in other branches in the same area, as well as regularly speaking to customers about promotions, orders and complaints both face to face and on the telephone. No doubt there were times when the Branch was quiet and calm, but Barking would regularly be busy and the work would be demanding and potentially

stressful. Before the changes necessitated by the pandemic, Mr Soilleux was not generally based in his office, but regularly visiting different parts of the branch to discuss issues with staff and customers.

93. The evidence from Shaun Kelly, which we accept, was that there was greater status attached to managing larger branches. Managing a larger branch was an opportunity to prove oneself as a manager and potentially secure further career progression. A manager of a large branch would generally not be interested in moving to manage a smaller branch.

Legal principles

Direct disability discrimination

94. Section 13 of the Equality Act 2010 is worded as follows:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

95. The Claimant seeks to compare himself against how a hypothetical non-disabled employee would have been treated, who was in all other respects in a comparable position to the Claimant.

96. The focus is on the mental processes of the person that took the decisions said to amount to direct disability discrimination. The Tribunal should consider whether that person was consciously or unconsciously influenced to a significant (ie a non-trivial) extent by the Claimant's disability, rather than by its consequences. The motive is irrelevant.

97. Section 136(2) and (3) of the Equality Act 2010 is worded as follows:

> "(2) If there are facts from which the Court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred;
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

98. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

99. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that her treatment was in part the result of his disabilities.

100. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). To shift the

burden of proof a Claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between his disability and his treatment, in the absence of a non-discriminatory explanation.

101. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the Claimant's treatment.

Harassment

102. Section 26 of the Equality Act 2010 is worded as follows:

(1) A person (A) harasses another (B) if-

a. A engages in unwanted conduct related to a relevant protected characteristic,

And

b. The conduct has the purpose or effect of –

i. Violating B's dignity, or
ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B

…

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

a. The perception of B;
b. The other circumstances of the case
c. Whether it is reasonable for the conduct to have that effect

103. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (*Munchkins Restaurant Ltd v Karmazyn and others* EAT 0359/09). The Equality and Human Rights Commission : Code of Practice on Employment (2011) states as follows :

"7.7. Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not meant that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment."

104. When considering whether a comment was related to a protected characteristic under Section 26 Equality Act 2010, this covers a wider category of conduct than conduct "because of a protected characteristic" under Section 13 Equality Act 2010.

A broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (*Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester* [2018] UKEAT/0176/17).

105. In assessing whether the conduct met the proscribed threshold, Tribunals should not place too much weight on the timing of any objection (*Weeks v Newham College of Further Education* UKEAT/0630/11). Whether it was reasonable for the Claimant to regard treatment as amounting to treatment that violates her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). In that case the EAT said :

"Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended."

106. In *Land Registry v Grant* [2011] EWCA Civ 769, Elias LJ considered the words "intimidating, hostile, degrading, humiliating or offensive" and observed that "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".

Failure to make reasonable adjustments

107. The Tribunal must assess whether the Respondent applied a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison to those employees not sharing his disability. If so, the duty to make reasonable adjustments is engaged. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

108. In order for the disadvantage suffered by the employee to be "substantial" it must be more than minor or trivial: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 21.

109. Paragraph 20 of Schedule 8 to the Equality Act 2010 is worded as follows:

"An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know … that the employee has a disability and is likely to be placed at a disadvantage."

110. The burden of proof is on the Claimant to establish the existence of the provision, criterion or practice and to show that it placed her at a substantial disadvantage - see *Project Management Institute v Latif* [2007] IRLR 579 at paragraph 45. In other words, to establish that the duty to make reasonable adjustments has been engaged.

111. Thereafter the onus remains on the Claimant to identify the potential reasonable adjustments with a sufficient degree of specificity to enable the Respondent to address them evidentially and the Tribunal to consider the reasonableness of providing them. The burden of proof is reversed at the point where the duty to make reasonable adjustments has been engaged, and the Claimant has identified one or

more potentially reasonable adjustments, namely facts from which it could be inferred, absent an explanation, that the duty has been breached. The Respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved – *Latif* at paragraphs 53-54. It is not necessary, at the time, for the Claimant to have brought the proposed adjustment to the Respondent's attention.

112. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 73. In order for an adjustment to be "reasonable", it does not have to be shown that the success of the proposed step was guaranteed or certain. It is sufficient that there was a chance that it would be effective.

113. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice. The Tribunal is required to have regard to this Code when considering disability discrimination claims.

114. Caselaw is not wholly clear on whether the offer of a role on a trial period is capable of being a reasonable adjustment. In *Environment Agency v Rowan* [2008] IRLR 20, at paragraph 61, the EAT treated a trial period as being akin to a consultation and therefore not capable of amounting to a reasonable adjustment. In the earlier case of *Smith v Churchill Stairlifts* [2006] IRLR 41 at paragraph 58, the Court of Appeal proceeded on the assumption that a trial period could be a reasonable adjustment. *Smith* was referred to in argument in *Rowan***,** but it is unclear whether the reference to *Smith* was on this point. *Smith* is not referred to in the EAT's judgment.

115. In *Rowan* the EAT had already stated (at paragraph 59) that the appeal needed to be allowed because of the ET's failure to make findings on "a number of major factual issues" and failed to identify clearly the nature and extent of the substantial disadvantage suffered by the Claimant (paragraphs 55-57). In that context, it said it was unnecessary to decide the other issues (paragraph 59), and specifically whether the trial of a period of home working was capable of constituting a reasonable adjustment, because the matter was not fully argued. We are prepared to proceed on the same assumption as the Court of Appeal did in *Smith*, and accept that in an appropriate case a trial period can be a reasonable adjustment.

116. In *O'Hanlon v Commissioner for Revenue and Customs* [2007] IRLR 404, the Court of Appeal considered whether it would be a reasonable adjustment to extend the period over which sick pay was paid where absence was disability related. Endorsing the approach taken by the EAT, this would only be a reasonable adjustment in highly exceptional circumstances. The purpose of the legislation was to assist disabled workers to obtain employment and to integrate them into the workforce, rather than simply put more money in their wage packets. The earlier Court of Appeal case of *Meikle v Nottinghamshire County Council* [2005] ICR 1, was viewed as a case where extending entitlement to sick pay might be a reasonable adjustment if the sickness absence was the result of a failure to make

reasonable adjustments. This approach is reflected in the EHRC Employment Code at paragraphs 17.21 and 17.22:

"17.21 Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so.

17.22 However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make."

Discrimination arising from disability

117. Section 15 Equality Act 2010 is worded as follows:

(1) A person (A) discriminates against a disabled person (B) if-
   a. A treats B unfavourably because of something arising in consequence of B's disability; and
   b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

118. This complaint relates only to the Claimant's dismissal. The first issue for the Tribunal to assess is whether the Claimant's treatment was influenced to any significant extent by any consequences of the disability. This requires a focus on the reasoning in the mind of the person responsible for the Claimant's dismissal, namely Ms Waldron. The Tribunal needs to consider the conscious or unconscious thought processes of the alleged discriminator, keeping in mind that her actual motive in acting as she did is irrelevant.

119. In *York City Council v Grosset* [2018] ICR 1492, the Court of Appeal considered the extent of knowledge that was required under Section 15(1). In short, there is none. If there is a causal link between the consequences of the disability and the dismissal, it is not necessary that Ms Waldron knew of that connection (see paragraph 39).

120. Section 15(2) provides a limited statutory defence. That is that there is no discrimination arising from disability if the Respondent shows that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability. That does not apply in the present case.

121. If the dismissal decision was influenced by any consequences of the disability, then under Section 15(1)(b) it is for the Respondent to show, on the balance of probabilities that the decision was justified. That requires that the Tribunal form its own assessment of whether the dismissal was a proportionate means of achieving

a legitimate aim. This is a different analysis from the range of reasonable responses approach required when considering the unfair dismissal claim.

122. In assessing proportionality, the Tribunal must assess whether on a fair and detailed analysis of the working practices and business considerations involved, the decision was reasonably necessary in order to achieve the legitimate aim (*Hardys & Hansons Plc v Lax* [2005] ICR 1565), even if the legitimate aim was not identified at the time (*Air Products Plc v Cockram* [2018] EWCA Civ 346 at paragraph 60)

123. In *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160, Lord Justice Elias said (at paragraph 26):

> "An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment — say allowing him to work part-time — will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified."

124. The EHRC Employment Code of Practice states as follows (at para 5.21):

> "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."

Unfair dismissal

125. The Tribunal must determine the reason for the Claimant's dismissal. The Respondent contends that the reason for the Claimant's dismissal was that the Claimant lacked the capability to perform the role in which he was employed. This is a potentially fair reason for dismissal, under Section 98 Employment Rights Act 1996. Section 98(3)(a) defines "capability" as his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

126. If the Tribunal accepts that the reason for the Claimant's dismissal was capability, then the Tribunal needs to decide whether the Respondent acted reasonably in treating it as a sufficient reason for dismissing the employee. This requires an assessment of whether a decision that the Claimant was no longer capable of performing the role was a decision that a reasonable employer could have come to. The Tribunal must ask whether this decision fell within the band of reasonable responses given the Claimant's difficulties in performing his role. The Tribunal is not to substitute its own decision for that of the Respondent.

127. The Tribunal must also ask whether the Respondent carried out a reasonable investigation into the Claimant's health before deciding that the Claimant was not capable of performing the role; and consult with the Claimant as to his ability to perform the role before concluding the decision-making process.

Conclusions

Direct discrimination: Section 13 Equality Act 2010

Did the Respondent subject the Claimant to the following treatment:

(1) On a regular and ongoing basis, the Third Respondent (Mr Johnson) made inappropriate comments about the Claimant's hearing condition, often in front of the First Respondent's customers, and also in front of Wayne Lowther (Area Manager)

128. On occasions, Mr Johnson made comments about the Claimant's hearing. The Claimant did not object to these comments. As Mr Johnson's line manager, the Claimant could have told Mr Johnson not to make any comments about his hearing. If he failed to comply with such an instruction, he could have instigated disciplinary action. The reason why the Claimant did not object to these comments is because they were made in the context of a longstanding friendship where one aspect of their friendship was a willingness to make jokes at each other's expense. It was in that context that Mr Johnson made the remarks that he did. We do not find that there were any specific occasions in which Mr Johnson made such comments in front of customers or in front of Mr Lowther.

(2) On or about February 2019, the Third Respondent (Mr Johnson) made inappropriate comments about the Claimant by pretending to pick up the telephone and saying "Is this Harry? Barry? Steve? Who is it?"

129. We have found that it is likely that this comment was made, but in the context of the Claimant's longstanding friendship with Mr Johnson, in which there was a willingness and an acceptance of making jokes at each other's expense.

(3) On the 4th April 2019, the Claimant was supposed to attend a welfare meeting with Wayne Lowther, however when he turned up, Wayne Lowther was unaware that such a meeting had been scheduled. The Claimant arrived at the Barking Office, in error (as a result of his dyslexia) and asked a colleague to call Wayne. The Claimant contends that he had sufficient time to get to the Waltham Cross Office, however Wayne Lowther said "Can you come to my house", the Claimant agreed, however Wayne Lowther called back on the landline and spoke to the Second Respondent (Tony Goodchild), and requested to reschedule. The Second Respondent ended the conversation with Wayne by saying "Sorry I can't hear you", thinking that was funny and started to laugh.

130. As stated in our findings of fact, we have found that this comment was made by Mr Goodchild. Again, it was made in the context of a longstanding friendship between the two, which had started soon after Mr Goodchild joined the Respondent and deepened when both were colleagues at the Tottenham Branch. It was a friendship in which both the Claimant and Mr Goodchild engaged in jokey comments and remarks. This particular comment had been prompted by the Claimant referring to his hearing as the reason why he had attended the wrong location for his scheduled meeting with Mr Lowther.

(4) On the 29th May 2019, the Claimant visited his place of work in order to pick up some papers. During his short visit, the Third Respondent stated "What are you doing here, you won't be able to hear on the phone" and then proceeded to laugh.

131. We have rejected this factual allegation.

Was any or all of the alleged detrimental treatment less favourable treatment than that which would have been accorded to a hypothetical comparator?

132. A hypothetical comparator would also have hearing difficulties although these would not amount to a disability. The comparator would also have a similarly strong friendship with the person alleged to have made the comment. We consider that a hypothetical comparator would have received the same comments as were made to the Claimant, as part of the way in which the friendship was conducted.

Was the less favourable treatment done because of the Claimant's disability/disabilities?

133. We do not consider that the treatment was less favourable treatment than would have been received by a hypothetical comparator. It was not prompted by the Claimant's disabilities but rather was prompted by the nature of the friendship that the Claimant had with Mr Johnson and Mr Goodchild.

Are there facts from which the tribunal could decide, in the absence of any other explanation that the Respondents discriminated against the Claimant?

134. Given the nature of the comments which related to the Claimant's hearing impairment, and given that the hearing impairment is accepted to be a disability, there are facts from which the Tribunal could decide in the absence of a non-discriminatory explanation that the comments which were made were influenced by hearing difficulties prompted by the Claimant's disability.

If so, has the Respondents proved that it did not discriminate against the Claimant?

135. The Tribunal accepts the Respondents' non-discriminatory explanation both in relation to the conduct of Mr Johnson and in relation to the conduct of Mr Goodchild. Both made their comments in the context of their friendship with the Claimant as part of the way in which the friendship was conducted. In so finding, we bear in mind that Mr Johnson has not attended the Final Hearing and therefore has not given evidence. However, based on the Claimant's evidence as to his longstanding friendship with Mr Johnson, and our findings as to the nature of their friendship, we find that the Respondents have discharged the burden of showing that the Claimant was not treated less favourably than a non-disabled hypothetical comparator would have been treated.

136. Therefore, the Claimant's complaint of direct disability discrimination fails.

Harassment (Section 26 Equality Act 2010)

Was the Claimant subjected to unwanted conduct related to his disability/disabilities? The unwanted conduct relied upon is the same as the alleged acts of direct disability discrimination set out above.

137. Remarks made by Mr Johnson and by Mr Goodchild about the Claimant's hearing difficulties were not unwanted for much of the Claimant's employment. They were friends and in the course of their friendship they made remarks about themselves and each other in a light-hearted manner, as part of the general good-humoured nature of their friendship. This is to be contrasted with similar remarks that may have been made by customers or by other members of staff, who were not friends, such as Mr Morris. Such remarks, were unwanted and prompted the Claimant to raise them with Mr Lowther. However, towards the end of 2018, the Claimant was becoming increasingly stressed about the combined impact of all his difficulties on his ability to perform his role of Branch Manager at Walthamstow. As a result, comments made by Mr Johnson and Mr Goodchild from then onwards about his hearing were no longer regarded as acceptable, and were unwanted. However, the Claimant never explained to Mr Johnson and Mr Goodchild that these comments should no longer be made.

Did the unwanted conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating and offensive environment for him, taking into account the perception of the Claimant, the other circumstances of the case and whether it is reasonable for conduct to have had that effect?

138. We accept the Claimant's evidence that he found comments made by Mr Goodchild and by Mr Johnson to be offensive and degrading, when they were made during the last period before he went on sick leave or thereafter. At this point, he was significantly stressed and not coping with his duties as Branch Manager. He had visited a solicitor for help with his job situation generally. Remarks made by Mr Johnson were recorded in his journal, and the Claimant chose to name Mr Johnson as a party to his employment tribunal proceedings.

139. However, we also have to consider whether it was reasonable for the remarks to have had that effect. We do not consider that the conduct, even if unwanted, had the purpose or the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The Claimant was willing to make comments about his colleagues and was willing for those colleagues who were friends to make comments about him, including about his hearing. Apart from a record of one comment on 22 January 2019 said to have been made by Ken Johnson and another also by Mr Johnson on 24 January 2019, there is no contemporaneous evidence that particular comments by Mr Johnson or by Mr Goodchild were upsetting the Claimant. It is telling that no specific reference was made to particular comments by the Claimant's solicitors in their lengthy letters sent to the Respondent.

Failure to make reasonable adjustments (Section 20/21 Equality Act 2010)

Did a provision, criterion or practice (PCP) applied by the First Respondent put the Claimant at particular disadvantage in comparison with persons who are not disabled?

The PCPs relied on by the Claimant are:

The Hearing Condition

(1) The requirement that the Claimant use the telephone whilst at work

(2) The requirement that the Claimant deal with the First Respondent's customers face to face

(3) The policy of paying sick pay for a limited period only.

140. These three PCPs are accepted by the Respondent.

The Knee Condition

(4) The requirement that the Claimant walk up and down stairs several times a day in order to fulfil his role

141. This is also accepted by the Respondent.

(5) The requirement of having to stand for a significant period during the working day

142. The Tribunal finds that this was not a PCP. The Respondent provided its Branches, when requested, with chairs for those staff working at the trade counter. This could and should have been requested by the Claimant. Had such a request been made, then sufficient numbers of chairs would have been made available to enable the Claimant to sit whilst working at the counter.

(6) The requirement of having to carry heavy objects in order to service customer requirements

143. The Tribunal finds that it was necessary for the Claimant, on occasions, to handle heavy objects in order to take them from the shelf of the warehouse onto whatever equipment would carry them to the customer. Whilst this was not a regular requirement for the Claimant himself, given that there were often at least two other members of staff or agency staff at the Walthamstow Branch, it was not possible for the Claimant to wholly avoid such work if items needed to be removed when other staff were absent or otherwise engaged.

(7) The policy of paying sick pay for a limited period only

144. This was a PCP. It was the result of the sick pay provisions in the First Respondent's contracts with its employees. Employees were entitled to 12 weeks sick pay. If an employee was absent for more than 12 weeks they had no contractual entitlement to receive further sick pay.

Was the Claimant put to a substantial disadvantage when compared with persons who do not share his disability/disabilities?

145. The Tribunal accepts that the PCPs relied upon by the Claimant which we have found were applicable to the Claimant's work did place the Claimant at a substantial disadvantage.

At all material times, did the First Respondent have knowledge of the disadvantages or, alternatively, ought the Respondent reasonably to have known about the substantial disadvantages?

146. The Tribunal accepts that the substantial disadvantages would have been known about by the First Respondent. The First Respondent had substantial information about the Claimant's health given the occupational health reports and the reports provided from the Claimant's treating doctors.

Did the First Respondent make adjustments as it is reasonable to have to take to avoid the disadvantage?

The Claimant avers that steps which could and should have been taken by the Respondent include:

The Hearing Condition

(1) Removing, as much as possible, the requirement that the Claimant speak with customers over the telephone;

(2) Removing, as much as possible, the requirement that the Claimant speak with customers face to face;

(3) Redeploying the Claimant to an alternative role;

(4) Giving the Claimant the Barking role on a trial basis;

(5) Continuing to pay the Claimant sick pay when his entitlement to sick pay was exhausted;

(6) Not dismissing the Claimant;

The Knee Condition

(7) Removing the requirement that the Claimant walk up and down stairs several times a day in order to fulfil his role;

(8) Removing the requirement of the Claimant having to stand for a significant period during the working day;

(9) Removing the requirement of the Claimant having to carry heavy objects in order to service customer requirements;

(10) Redeploying the Claimant to an alternative role;

(11) Continuing to pay the Claimant sick pay when his entitlement to sick pay was exhausted;

(12) Not dismissing the Claimant.

147. We address each of these points, albeit not in the precise order in which they were listed in the List of Issues when that document was finalised at the start of closing submissions.

Adjusted Walthamstow role

148. Since the start of his sickness absence in March 2019, the Claimant maintained he was not able to perform the role of Branch Manager at Walthamstow. This was for a variety of reasons, but primarily because of the need to speak to customers on the telephone or face-to-face, and because the small size of the team at the Branch meant he needed at times to be involved in the heavier aspects of the role. As a result, it was not practicable for the Claimant to continue in the role with a significantly reduced or negligible requirement to speak with customers over the phone or face-to-face. The Claimant accepts in paragraph 18 of his counsel's written closing submissions, that there were no adjustments that could have been made to enable him to continue in the Walthamstow role.

Barking role

149. We do not consider it would have been a reasonable adjustment to offer the Claimant the role of Branch Manager at the Barking role when it became vacant in December 2018 or at any point until 1 March 2019, when Mr Soilleux started the role.

150. During this period, the Claimant was still physically able to perform the role of Branch Manager in the Walthamstow Branch, albeit with adjustments. At the meeting on 5 December 2018, the Claimant had indicated an interest in the Barking role in passing. He had not registered his interest in writing, still less had he submitted an application. He had not specifically asked that this step be taken as a reasonable adjustment because of the extent of his disability. By the time it was requested more formally, the vacancy had already been filled. During this period, the Claimant's focus was on further assistance in managing the Walthamstow role, which he was exploring in the coaching sessions with Martina Foreman, arranged through Access to Work.

151. We agree with Ms Mankau that a claimant can argue can later argue that there has been a failure to make a reasonable adjustment, even if the proposed adjustment has not been requested at the time, whether in substance or specifically as a reasonable adjustment required by discrimination law. However, the fact that the Claimant only made a passing reference to this proposed role and thereafter did not pursue the matter for several weeks, is relevant context in which to evaluate the reasonableness of the First Respondent's consideration of the Claimant for the Barking role.

152. We accept there would have been some advantages for the Claimant in the Barking role in comparison to the Walthamstow role. There would have been less need to use stairs on a regular basis, to lift heavy items, or to spend time on the trade counter. The Claimant, if appointed as manager, could have been provided with his own office and could have been given some equipment to enable him to understand what was being said over the telephone. Even then, there would have potentially been a delay in seeing the text of what had been said by a customer;

and potentially a difficulty in reading what had been typed, especially if the wording did not fully capture the words that the customer had used.

153. However, we find that the Barking role was a significantly more demanding role than the Walthamstow role in terms of the branch performance that would have been expected. There was an urgent need to address the series problems that had developed in the Barking Branch, and restore the expected revenue for a branch of this size. This required a manager who was able to lead from the front in involving himself in every area of the Branch's operations, in order to understand how it was being operated and how it could be improved. There would have still been a significant need to speak to customers, albeit that customer conversations may have initially been with less senior Branch staff. This could not have been realistically achieved by the Claimant travelling to customers' premises, as the Claimant envisaged in his evidence. Rather, it would have required the Claimant to speak to customers at short notice within the Branch – either at the trade counter, or on the telephone. On occasions, the Claimant may have been able to persuade a customer, with a more involved issue, to have a meeting with him in his office, but this would have been the exception rather than the norm.

154. We bear in mind that the Claimant had previously been the Manager at Barking. However, we do not regard this as cogent evidence that the Claimant would have been able to carry out the role in December 2018. He had been the manager of the Walthamstow branch since 2009, a much smaller branch. The role of Branch Manager would inevitably have evolved into a role with different demands over that decade.

155. Even if there was a vacancy, to move the Claimant to a larger branch would effectively be a promotion. He would be managing a larger turnover and expecting to be paid a larger salary in order to take on more extensive responsibilities. Whilst the duty to make reasonable adjustments can require employers in some circumstances to provide a degree of positive discrimination in favour of a disabled employee, the fact that this would amount to a promotion is a further factor tending against the reasonableness of the adjustment.

Barking role on a trial period

156. If, as we find, it was wholly unrealistic for the Claimant to be moved into such a role, then a trial period in the role would be futile. In any event, once Mr Soilleux had been appointed to the role of Barking Branch Manager in February 2019, there was no vacant Branch Manager role for the Claimant to do on a trial basis. Since the passing reference in December 2018, the Claimant had not expressed an interest in managing one of the larger contract branches until the welfare meeting on 12 April 2019.

Redeployment to another Contract Branch

157. If the Barking Branch Manager role was unsuitable, then so would other Branch Manager roles in branches of similar size. In any event, since Mr Soilleux took over from Mr Hayes at Barking, there is no evidence that there was any Branch Manager vacancy within the Claimant's area. The Contract Branches within commuting distance for the Claimant were Brimsdown and Basildon. It is unrealistic and

therefore unreasonable to expect the Respondent even to ask either of the existing managers at those branches if they would consider swapping from their current role in order to move to Walthamstow, in order to free up a potential role for the Claimant at a larger branch. Our conclusion that this would not have been a reasonable adjustment is not based on whether such a request is likely to have been accepted. We remind ourselves that it is sufficient that there is a chance that a proposed step will be effective. Rather it derives from our view of the demands of the branch manager role in such a branch, and from the extent of the Claimant's difficulties. We regard another Contract Branch General Manager role as unsuitable for the same reasons that the Barking General Manager role was unsuitable.

158. Martin Hayes was not in a comparable situation. He had specifically asked to be allocated a smaller branch in circumstances where he was struggling, for whatever reason, to manage the larger Barking Branch. He had not been invited to move roles to a smaller branch. His situation does not provide an evidential basis for establishing that there has been a failure to make a reasonable adjustment in the Claimant's case.

159. The evidence as to the circumstances in which the Claimant moved from Barking to Walthamstow many years earlier were not explored in any detail in the evidence. As a result, they cannot be a basis for inferring that a reverse move would have been a reasonable adjustment.

Sidcup debt role

160. The role was offered to the Claimant as a reasonable adjustment given that he was unable to continue in his contracted role as Branch Manager of the Walthamstow branch. It was initially rejected during a welfare meeting with Ms Waldron, on the basis that the Claimant thought it would require him to spend a substantial proportion of this time using the telephone. The essence of the role was to contact customers who had yet to pay for goods supplied and encourage them to settle their debts.

161. In a subsequent letter written by the Claimant's solicitors dated 11 July 2019, the Claimant's solicitors provided a further reason why this role would be unsuitable, namely the distance from the Claimant's home. At a subsequent meeting on 23 July 2019, the Claimant made it clear he was not willing to consider any alternative role apart from the Barking Branch Manager role. On 8 August 2019, for the first time, the Claimant's solicitors suggested the Claimant might be interested in performing the Sidcup debt role, if it could be performed remotely out of the Barking office. When the issue of a potential alternative role was discussed at the capability meeting on 13 August 2019, the only role suggested by the Claimant was the Respondent making up a role for him checking stock [425]. There was no reference to the Sidcup role in the grounds of appeal challenging his dismissal. It was discussed again during the appeal hearing. The Claimant was asked if the Sidcup role would have been of interest. He replied, "No it wasn't suitable because of the telephone work".

162. In evidence and subsequently in submissions, it was suggested that a role could have been created for the Claimant that would not have required him to use the telephone to speak to customers in relation to unpaid bills. It was suggested that

the Claimant would have been able to carry out analysis of a customer's payment history and potential ability to pay and then shared his analysis with a colleague who would have spoken to the customer to persuade them to pay their bill.

163. The Tribunal concludes that this would not have been a reasonable adjustment. It would require the Claimant to be physically present in Sidcup in order to speak to the other members of the team face-to-face to share his analysis. Alternatively, if he was doing the role remotely, it would require him to communicate with the team over the telephone, which would raise the same problems he had previously experienced, even if it might be somewhat easier telephoning a few colleagues in the same team rather than a larger pool of customers. However, the reality is that all the way through the communications about the Sidcup role, the Claimant was unwilling to contemplate doing the role because of its need for extensive telephone use. This would have still been the case if the Claimant was performing an analysis role remotely and regularly speaking to the Sidcup team on the telephone. In circumstances where the Claimant was refusing to contemplate how software would potentially enable him to overcome this difficulty, it was not reasonable for the Respondent to explore the role in further detail with the Claimant at any point before his dismissal.

Delaying dismissal

164. We take it that the proposed reasonable adjustment is that dismissal should be delayed for a reasonable period, rather than indefinitely.

165. A reasonable adjustment has to be an adjustment which could enable the Claimant to perform his role. Delaying his dismissal in circumstances where he was unable to return to the Walthamstow Branch Manager role and where there was apparently no other role available that he could do, even on a temporary basis, would not have enabled him to perform his role.

166. He had been on sick leave for five months by the time of his dismissal. There was no immediate prospect that the Claimant's health might improve. Indeed, the medical evidence and the Claimant's own explanations made the point that the Claimant's hearing was worsening over time. There was no current vacancy or suggestion that a post was about to become vacant. The fact that there is currently no manager in post in London City Contract Branch does not provide an evidential basis for inferring that a vacancy would have arisen within a reasonable period as at August 2018.

167. In any event, there was no immediate prospect he might be medically capable of performing such a role - given that his ongoing hearing difficulties and his other conditions (his restricted mobility and his ability to cope with administrative tasks (such as reading and writing)) which significantly disadvantaged him from undertaking many of a branch manager's duties.

Payment of sick pay

168. As discussed above, it is only in highly exceptional circumstances that the continued payment of sick pay is capable of being a reasonable adjustment. The Claimant argues that those circumstances apply here. This is because, it is argued, the sickness absence was caused by the failure to appoint the Claimant to a

suitable alternative role. However, no specific medical evidence has been provided to establish such a causal connection.

169. On the available evidence we do not find that it was a failure to provide the Claimant to a suitable alternative role that was the cause of the sick leave. Apart from the passing reference to the Barking Branch Manager vacancy made in the meeting on 5 December 2018, the Claimant had not asked for a different role before he started his period of sick leave. It is more likely that the Claimant's sick leave was caused by the deterioration in the Claimant's hearing such that he was no longer able to speak to customers to the extent required in his role as Branch Manager of the Walthamstow Branch. This is the first condition stated on Fit Note, and led to the stress at work, which was the second condition stated on the Fit Note.

170. In any event, even if the connection had been sufficiently established as a matter of causation to explain the reason for the Claimant's sickness absence, we have not found that there was a failure to make a reasonable adjustment in relation to finding the Claimant another role at any point before his dismissal.

Not dismissing the Claimant

171. We do not consider that this is a separate alleged reasonable adjustment that differs in practice from the suggestion that dismissal should be delayed. We note it does not feature as a separate section in this part of Ms Mankau's closing submissions.

Discrimination Arising from Disability (Section 15 Equality Act 2010)

Was the Claimant subjected to unfavourable treatment?

The alleged unfavourable treatment relied upon the Claimant's dismissal on 13 August 2019.

Was any unfavourable treatment, if found, done because of something arising in consequence of the Claimant's disability?

The "something arising" relied upon is:

(1) The Claimant's inability to hear customers and colleagues either over the telephone or when speaking to them in person; and

(2) The Claimant's inability to lift and carry easily, his inability to go up and down stairs on a regular basis, and his inability to stand for prolonged periods of time.

Was there a legitimate aim to the unfavourable treatment? What is the legitimate aim that the Respondents rely upon? Can the Respondents show that its treatment of the Claimant was a proportionate means of achieving that legitimate aim?

172. The Claimant's dismissal was unfavourable treatment. The decision to dismiss was taken because of the extent of the Claimant's restrictions in his ability to perform his contracted role, that of Branch Manager of the Walthamstow Branch. This was the

result both of his difficulties in hearing customers and staff, and because of his physical restrictions. Both were the consequences of the Claimant's disabilities, namely his audio processing condition, and his knee injury. The medical evidence, accepted by the Claimant, was that both conditions were unlikely to improve and in the case of his audio processing condition this may well continue to worsen.

173. The Claimant has argued that there is no evidence as to the legitimate aim that the Claimant was pursuing in deciding to dismiss the Claimant.

174. We find that the legitimate aim was the need to run the Walthamstow Branch in an efficient manner, which required a permanent employee to be performing the role of manager on a full-time basis. Given that there had been no permanent employee in the role of manager since 11 March 2019 (a period of five months by the date of dismissal) and there was no prospect of the Claimant returning to carry out that role, it was a proportionate means of achieving this legitimate aim to dismiss the Claimant so that a permanent replacement could be sourced.

Unfair dismissal (Section 94 Employment Rights Act 1996)

Was the Claimant dismissed for a potentially fair reason pursuant to s.98(1) and (2) of the Employment Rights Act 1996, namely capability?

175. We find that the reason for the Claimant dismissal was capability. By his own admission at the welfare meeting on 23 July 2019, he was not capable of performing the role of Branch Manager at Walthamstow. By the date of his dismissal, he had been signed off on sick leave for around five months.

Did the First Respondent carry out a fair and proper investigation into the Claimant's health and capability?

176. We find that the First Respondent did carry out a fair and proper investigation into the Claimant's health before it took the decision to dismiss the Claimant. It was within the band of reasonable investigations, given the extent to which the Claimant accepted he was limited in the duties he could perform. In particular, the Respondent had referred the Claimant for a further review by occupational health, which had taken place on 17 May 2019. The Claimant did not suggest that a further occupational health referral should have been made before a decision was taken as to whether the Claimant should be dismissed. Further, the Respondent held a series of meetings with the Claimant to discuss his health, its impact on his ability to carry out the requirements of the role, and any adjustments that could be made to the role. These took place on 1 March 2019, 12 April 2019, 13 June 2019, 23 July 2019 and 13 August 2019.

Did the First Respondent comply with its duty to make reasonable adjustments before making the decision to dismiss?

177. We have already explained why we find that the First Respondent complied with its duty to make reasonable adjustments.

Did the First Respondent act reasonably in treating the Claimant's capability as a sufficient reason for dismissing the Claimant?

178. We consider that the First Respondent did act reasonably in treating the Claimant's capability as a sufficient reason for dismissing the Claimant. The Claimant was unable to perform the role of Branch Manager at the Walthamstow Branch; he had already been off sick for five months; and there was no realistic prospect that his health would improve to the extent he would be able to be return to the role, with any reasonable adjustments; there was no vacancy in any alternative role that the Claimant would be able to perform. Because the Claimant still had the role of Branch Manager at the Walthamstow Branch, no permanent Branch Manager had been running the branch for over five months since the start of the Claimant's sick leave. The potential disruptive impact of this on the Respondent's business is apparent from Ms Waldron's question to the Claimant during the meeting on 13 June 2019, asking if he was willing to allow the Respondent to recruit a replacement if he was unable to return to the role.

Did the Respondent carry out a fair procedure?

179. We consider that the Respondent did carry out a fair procedure. It carefully reviewed the Claimant's health and its impact on his ability to carry out his role; it considered whether there were any alternative roles that the Claimant could perform, and offered him one such role, namely the Sidcup debt collection role; and it discussed the situation with the Claimant over several meetings throughout the five months that the Claimant was on sick leave.

Was the dismissal of the Claimant fair in all the circumstances in accordance with s98(4) Employment Rights Act 1996? In particular, was the dismissal within the band of reasonable responses available to the First Respondent?

180. For the reasons given, we consider that the dismissal of the Claimant was fair in all the circumstances in accordance with Section 98(4) Employment Rights Act 1996. Although the First Respondent is a large organisation which had employed the Claimant for over 30 years, it was within the band of reasonable responses for a reasonable employer to dismiss in these circumstances.

<u>Jurisdiction</u>

Do the acts/failures relied upon by the Claimant constitute a continuing course of discriminatory conduct pursuant to section 123(3) EqA?

Have the acts/failures been brought within a period of 3 months (as adjusted taking into account ACAS Early Conciliation) beginning with the date of the act/failure, or the end of the period alleged as a continuing course of discriminatory conduct, as appropriate?

If not, is it just and equitable to extend time, pursuant to section 123(1)(b) EqA?

181. By the conclusion of the case, this had ceased to be a live issue. The Respondent accepted that there was no jurisdictional hurdle to the Claimant bringing his claim on all issues. The Respondent acknowledged that if any of the claims were issued

outside the statutory time limit, it would be just and equitable for them to be considered on their merits.

Employment Judge Gardiner

31 March 2021