EMPLOYMENT TRIBUNALS

Claimant: **Mrs E. Falade**

Respondent: **Department for Work and Pensions**

Heard at: **East London Hearing Centre**

On: **1 and 3-4 October 2019**
2,4 and 5 December 2019
3 January 2020 (in Chambers)

Before: **Employment Judge Massarella**
Members: **Mr D. Ross**
Mr K. Rose

Representation

Claimant: Ms E. Godwin (Solicitor)

Respondent: Mr A. Ratan (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is as follows.

1. **The Claimant's susceptibility to headaches amounted to a disability within the meaning of s.6 Equality Act 2010.**

2. **With the exception of the Claimant's reasonable adjustments claims covered by Issues 5.2 and 5.3, the Tribunal lacks jurisdiction to hear her claims in relation to acts or omissions which occurred before 1 March 2018: they were presented out of time and it is not just and equitable to extend time. Those claims are dismissed.**

3. Although the matters covered by Issues 5.2 and 5.3 were presented out of time, it is just and equitable to extend time in relation to them.

4. The Respondent failed to make reasonable adjustments in relation to the lighting above the Claimant's desk (Issue 5.2) and to the Claimant's chair, keyboard and mouse (Issues 5.3) and those claims succeed.

5. The Claimant's remaining claims of indirect disability discrimination (Issue 3.1), discrimination arising from disability (Issues 4.2.1(f) and 4.2.6) and failure to make reasonable adjustments (Issue 5.1), although presented in time, are not well-founded and are dismissed.

REASONS

1. This is a claim concerning allegations of disability discrimination over a period between February 2016 and August 2018. ACAS early conciliation began on 31 May 2018 and ended on 9 July 2018. The ET1 was presented on 8 August 2018. The Claimant remains in the Respondent's employment.

Procedural background

2. The case was originally listed for four days between 1 and 4 October 2019. Unfortunately, no lay member from the employer panel was available for the first two days of the hearing. At a case management discussion on what was to have been the first day of the final hearing, I explained to the parties that there were three options: with the consent of the parties the Tribunal could sit as a panel of two, pursuant to s.4 Employment Tribunals Act 1996; if the Tribunal could find a member who was available to attend on the second day, the hearing could begin then; or a full panel was definitely available for the third and fourth days, although starting then would inevitably mean that the case would go part-heard.

3. The Claimant, through her solicitor Ms Godwin (who is also her daughter), objected to proceeding with a panel of two. She preferred that the case be adjourned in its entirety. The Respondent, through its Counsel Mr Ratan, wished to make the best use of the time available and invited the Tribunal to hear as much of the evidence as possible.

4. I considered the position and concluded that it was not in the interests of justice to postpone the case. I took into account the fact that it is never ideal to begin the case in the knowledge that it will go part-heard. On the other hand, the Tribunal would not be able to offer a multi-day hearing before mid-2020 and a further delay of that length might have an impact on the cogency of the evidence. Another factor was that the Claimant was still employed by the Respondent and it was important for all the affected individuals that these matters be resolved as soon as possible. I considered it likely that, at the very least, the Claimant would be able to complete her evidence in the two days

available and it might also be possible to make a start with the Respondent's witnesses.

5. The Tribunal was able to offer three further days in December 2019 to complete the evidence and submissions and a day for deliberation in early January 2020. The hearing duly began on 3 October 2019 with a panel of three.

6. There was an agreed list of issues, which required some amendment to identify some additional dates, as well as to specify the legitimate aims relied on by the Respondent in the discrimination arising from disability claims. It was then further refined in the course of the hearing and it is included in the appendix to this judgment.

7. The Respondent had provided a chronology. As Ms Godwin said that it was not agreed, she was invited to amend it to show any significant points of disagreement and to send it to the Tribunal before the start of evidence. The parties also provided a short reading list.

8. At the beginning of the hearing I discussed with Ms Godwin any adjustments the Claimant might need for the hearing. An appropriate chair was provided and Tribunal staff helped the Claimant to adjust it. The Claimant also said that she found cold rooms uncomfortable. We explained that, in East London Tribunal, we have little control over the temperature of the hearing rooms. She agreed that the current temperature was comfortable for her. When we resumed in December, a portable heater was provided and she brought her own hot water bottle, which Tribunal staff filled for her. She also confirmed that the light level was comfortable (although she asked to wear sunglasses on one day) and that the position of the witness table was suitable, having regard to her hearing impairment.

9. We had an agreed bundle of documents, running to some 900 pages. We also had a supplementary bundle, containing documents on which the Claimant wished to rely, consisting of some 80 pages.

10. We heard evidence from the Claimant and from her trade union representative, Ms Marlene Fernandes. For the Respondent we heard evidence from Ms Debbie Patrick, who was the Claimant's line manager between June 2015 and September 2017, and from Ms Jasbir Bhamra, who was the Claimant's line manager from October 2017 onwards. We also heard from Ms Paula Bamford, who was the Job Seekers Allowance Manager up to October 2017 and who managed Ms Patrick and Ms Bhamra. We heard from Ms Clodagh Hardagon, who dealt with the Claimant's grievance of April 2017; and from Mr Mike King, who conducted the investigation into the Claimant's grievance of November 2017.

11. We also had a statement from Ms Sally Whetherly, who dealt with the Claimant's appeal against the grievance decision of Ms Hardagon. In correspondence before the hearing the Respondent said that Ms Whetherly would not be attending the hearing. The explanation given was that she is retired and now lives in the South West of England; she was unable to attend the hearing, partly because of the cost of travel and partly because she has caring responsibilities. The Respondent did not seek a witness order but invited the Tribunal to have regard to her witness statement. We explained at the

outset of the hearing that the fact that Ms Whetherly had not attended the hearing might affect the weight given to her evidence.

12. At the beginning of the last day of evidence (i.e. in the middle of the Respondent's evidence) Ms Godwin asked the Tribunal for permission to recall the Claimant to give further evidence on the issue of time limits, as her statement had not addressed this issue. Mr Ratan observed that the time limits issue had been known about all along and was clearly identified in the list of issues; he did not accept that there was any justification for recalling the Claimant.

13. The Tribunal rose briefly to consider the issue and concluded that it would not be right to conclude the case when such a significant gap had been identified in the Claimant's evidence. We gave Ms Godwin permission to recall the Claimant, provided she gave Mr Ratan in advance a summary of the evidence which the Claimant proposed to give, so that he could prepare his questions.

Findings of fact

14. The Claimant commenced employment as a civil servant in the Department of Work and Pensions ('DWP') on 29 January 1990. She started work as an administrative assistant, but in around 2003 she became an administrative officer ('AO'). She has worked in various locations, but in around 2007 she moved to her current office in Stratford, East London. Initially she worked on the telephones but after 2007 she was moved to processing claims for job seekers allowance ('JSA').

Conceded disabilities

15. The Claimant has had lower back pain since the 1990s. Her back is sensitive to cold and pain when sitting down; she uses thermal clothes and a hot water bottle, both at home and at work, to ease the symptoms. She has had arthritis in her hands for a similar period. She experiences strong pain and is affected by cold. The Claimant's contract of 15 December 2003 recorded that she had 'limited mobility status'. An occupational health ('OH') assessment in 2008 revealed that the Claimant had hearing loss in her right ear.

16. The Claimant then began to suffer from chronic chest pain in 2015; she was struggling to breathe. This was initially diagnosed as a chest infection but in January 2016 she was admitted to hospital; she was diagnosed with pericarditis and fluid was drained from her heart and lungs. The Claimant was on sick leave for a period of six and a half months between 30 December 2015 and 3 July 2016. She suffered with severe chest pain for two years after this incident. She still has chest pain, although not as badly as before, and still experiences breathlessness and panic attacks.

17. The Respondent accepts that the Claimant was disabled by reference to these conditions; it also accepts that it had actual knowledge of these disabilities at all material times, as well as knowledge of the substantial disadvantage to which the disabilities put the Claimant by comparison with non-disabled people.

Disputed disability

18. The only aspect of disability in dispute is the Claimant's reliance on headaches. The Claimant explained in her witness statement that she has been suffering from headaches since the early 1990s, especially when she is experiencing stress or is in pain because of her other health conditions. Bright lighting also brings on headaches. She uses a strong balm and painkillers to manage these headaches while at work, but sometimes the headaches are so bad that the only recourse is for the Claimant to lie down and rest. We accept that evidence and go on to consider whether this amounted to a disability in our conclusions below.

Previous adjustments made by the Respondent

19. Because of her back pain and arthritis, the Claimant had a workstation assessment in 2006, which recommended that she be provided with a special chair, desk and footrest, keyboard and mouse. When she moved to Stratford in 2007 she discussed her requirements with her new manager at the time, who immediately referred her to OH. The Claimant filled in a display screen equipment checklist ('DSE'). She encountered difficulties in 2009 when she was moved to a cold seating area. She raised the issue with her manager at the time and was moved. A new desk was ordered for her. In 2010 her chair was replaced. She encountered further difficulties in 2011 and 2013, when a further review of her workstation took place and further adjustments were made.

The Respondent's policy in relation to ill-health retirement

20. The issue of ill-health retirement recurs in this case and it is convenient to set out the applicable policies at the outset. The Respondent's policy 'Retiring on Ill-Health Grounds Procedures' provides (as relevant):

> '1.2 In general, members of Classic [the applicable scheme for the Claimant] … must have at least two years' qualifying service and have suffered a permanent breakdown in health involving incapacity for employment. In this context 'permanent' normally means until the employee reaches scheme pension age …
>
> …
>
> **2.2 Ill-Health Retirement Criteria in Classic**
>
> The criteria for Ill-Health Retirement in Classic is that an individual is prevented by ill-health from discharging his/her duties and that the ill-health is likely to be permanent.
>
> …
>
> 3.1 An employee can make an application for retirement on the grounds of ill-health. The manager and employee will need to discuss, and document, whether Ill-Health Retirement will be pursued. The manager cannot make a compulsory application but should discuss the likelihood of an award of Ill-Health Retirement with the employee at attendance review meetings and these discussions should be documented.
>
> …

> 3.12 The Scheme Medical Adviser will provide medical advice on the basis of the information provided in the referral or by gathering more information through a face-to-face personal consultation with the employee, a third-party report (e.g. from a GP or specialist) or a combination of the two.
>
> …
>
> 3.13 Once the case has been considered by the Scheme Medical Adviser, they will send the employee and manager the report and a medical (ill-health) retirement certificate either supporting or rejecting the application. The Scheme Medical Adviser will notify the outcome of the HMRC severe ill-health assessment at the same time as the scheme ill-health retirement assessment, and include the outcome on the certificate that they issue …
>
> The Scheme Medical Adviser will issue a report detailing whether the application is approved or rejected. Where an application is rejected, the report will provide reasons for this.

21. The Claimant's retirement age for the purposes of the Respondent's policies was 60; she reached that age on 9 September 2017.

22. The Respondent's 'Attendance Management Procedures' refers to a number of actions which the manager must take at absence review meetings, for example they must review previous sickness absences and explore what the employee is, or might be, capable of doing (with help) to return to work. These mandatory requirements also include the following:

> '4.18 The manager must:
>
> …
>
> - Consider whether Ill-Health Retirement is appropriate and that this is documented. More information on Ill-Health Retirement can be found in the Ill-Health Retirement Procedures.'

23. The Respondent also uses, as part of its absence procedures, an Attendance Management Compliance Check Form [379] which, in the section entitled 'additional checks for long-term absences, dismissals and ill-health retirement' includes the question:

> 'Has IHR [Ill-Health Retirement] been considered?
>
> If not, why not?'

24. Partial retirement occurs where an individual feels they cannot work full-time. The employee takes salary *pro rata* in respect of the time worked and receives partial pension in respect of the balance of the time.

<u>The meeting of 8 February 2016</u>

25. While she was off sick after the diagnosis of her heart condition, the Claimant's line manager at the time, Ms Patrick, conducted an absence review meeting with her on 8 February 2016. Ms Patrick kept a log of her contact with the

Claimant during this period, which (among other things) contains the following entry under this date:

> 'We also discussed in the event that Elizabeth does not get better would she consider ill-health retirement? She made it quite clear that she would not consider that option.'

26. The Claimant was not asked to take ill-health retirement; the issue was merely raised against the background of the Claimant having experienced very serious ill-health and in the context of what might happen if she did not get better. The Claimant now states that she found this question 'insulting'. The Tribunal found this surprising given that the Claimant's own evidence in her statement was that she told Ms Patrick at the meeting that she had almost died and that, although she was looking forward to coming back to work, the recovery process had been slow and she was still under hospital investigation. Further, Ms Patrick's understanding of the policies set out above was that she was required to raise the issue with the Claimant. The rest of the meeting consisted of discussing a plan, the clear purpose of which was to get the Claimant back to work.

The meeting of 8 April 2016

27. A second review meeting took place on 8 April 2016. The Claimant said in her statement that she told Ms Patrick that she was feeling much better, but still had chest pain and had been told by her doctors that there was scarring on her lung and heart. Nonetheless, she was looking forward to returning to work. The Claimant asserted that Ms Patrick 'recommended that I should consider ill-health retirement, which I found intimidating and disturbing, because she was bringing it up again'.

28. Ms Patrick's log for this meeting refers only to the fact that the Claimant was 'feeling much better [and] is looking forward to returning back to work'. There is no reference in the log to ill-health retirement. However, we consider it likely that Ms Patrick did mention ill-health retirement again because she considered that she was required to do so. Its absence from the log suggests that it was by by no means the focus of the meeting.

The meeting of 6 June 2016

29. The Claimant had an Occupational Health assessment on 17 May 2016. The OH adviser stated that the Claimant continued to suffer with shortness of breath on exertion and felt very tired. She was unfit for work due to the severity of her symptoms, but hoped to be able to resume work on 6 June 2016, once she had been reviewed by her specialists. The prognosis would depend on the full diagnosis and the adviser noted that the Claimant 'may suffer future related ailments. I am unable to advise on frequency or duration of any future episodes.' She advised that there should be a phased return to work.

30. The Claimant attended the office on 6 June 2016 and spoke to Ms Patrick. On the one hand she had a medical certificate which said she was not fit for work between 21 May and 3 July 2016; on the other she told Ms Patrick that she was ready to begin her phased return to work. The Claimant asserted that, in the course of this conversation, Ms Patrick again tried to 'push me to take ill-health retirement'.

31. Ms Patrick's log recorded the following:

> 'I have not done a welcome back discussion template as I feel Elizabeth is not going to come back to work. Therefore, I have discussed with her PTMG and given her an update on the changes in work.
>
> … Elizabeth has had a CT scan and the results are that she has a leak in one of the valves and she has scarring around her heart and she has to take it easy. Elizabeth said she is ready to work and she would like to return to work on PTMG on the 20/6/16. We discussed the return and that it would go as follows:
>
> [*dates for the phased return then set out*]
>
> We discussed that she has exceeded her sick days and that a warning will be issued her case will be sent to a decision-maker due to length of sickness …
>
> We discussed Ill-Health Retirement but again Elizabeth has declined this. I explained to Elizabeth that if the doctors are saying that she is unfit for work then she really needs to think about her health first and not work.'

32. Ms Patrick was in a difficult position at this meeting: OH had advised that the prognosis was uncertain and the Claimant was telling her about a diagnosis which must have sounded very concerning to her, yet the Claimant wished to return to work. Ms Patrick was receiving mixed signals and did her best to respond appropriately.

33. We find it unsurprising that Ms Patrick responded as she did again and raised the question of ill-health retirement. Indeed, we find that she might have been criticised for not doing so. She did not 'push' the Claimant to accept ill-health retirement: when it was rejected, she moved on to discuss the details of a phased return to work. She exerted no pressure at any stage.

<u>The document 'Referral for dismissal'</u>

34. The Claimant attended work on 13 June 2016 to set herself up on the computer. She told Ms Patrick that she might not be coming back to work on 20 June after all, depending on the outcome of a doctor's appointment. On 21 June 2016 the Claimant texted Ms Patrick to say that she had had a relapse and her children had advised her to stay at home until her medical certificate expired on 3 July 2016.

35. On 24 June 2016 Ms Patrick wrote to Mr Paul Stevenson, the 'decision-maker' referred to in the previous meeting, providing a report into the Claimant's attendance. She wrote that the Claimant had been on long-term sickness absence since 30 December 2015 and said that she had had a meeting with the Claimant on 4 June 2016 'when I informed them that their absence could no longer be supported and I was referring the case to you'. The letter concludes:

> 'I recommend that Elizabeth is dismissed. They have been given adequate guidance, support and time to improve their attendance, but have not shown that there is any reasonable prospects of achieving the

required level of attendance within a reasonable timescale. They have been informed that their case is being referred to you for a decision about their future.'

36. Attached to that letter was a report entitled 'Considering Referral for Dismissal or Demotion'.

37. Ms Patrick was taken by Ms Godwin in cross-examination to the relevant policies and accepted that moving towards dismissal or demotion in these circumstances was outside the Respondent's policy. Ms Patrick believed that there was no intention to consider dismissal at that juncture, but that this was a template document which was used across a range of different circumstances and that she could not change the wording of it. We think it likely that this was a template rather than a bespoke document: we note the use of 'they' and 'their', rather than 'she' and 'her'.

38. It is right that, although the covering letter expressly refers to dismissal, the substance of the report attached to the form does not - and is not necessarily consistent with a case being made for dismissal. At one point it says: 'there is no current impact on fellow colleagues and the work has been distributed within the team'. The email correspondence between managers at the time is ambiguous and Ms Patrick wrote to the Claimant on 14 July 2016, inviting her to a meeting, 'following [which] I will decide whether or not you should be given a First Written Warning', i.e. a sanction far short of dismissal.

39. The Claimant returned to work on 4 July 2016. There was no return to work meeting, no referral to occupational health, no discussion about adjustments and no consideration of whether her targets needed to be adjusted. A meeting about a warning did take place in August, but there are no notes of it in the bundle. We accept the Claimant's account the Claimant's TU rep told Ms Patrick that she could not issue a warning without first holding a return to work meeting and making an OH referral. No action appears to have been taken as a result, not even a warning. No steps were subsequently taken to move towards dismissal.

40. Ms Patrick's evidence about these matters was in some respects unsatisfactory. However, we concluded that this was because she was genuinely unable to remember the rationale for her actions because of the passing of time.

<u>The Claimant's grievance against Ms Bamford</u>

41. The Claimant took leave in August 2016 because she wished to attend her son's wedding. That request had initially been refused by Ms Patrick, as leave requests from other colleagues had already been approved and no other leave could be authorised. Ms Patrick advised the Claimant to raise the matter with Ms Bamford, who also refused the request. The Claimant raised a grievance against Ms Bamford in respect of that decision. In the event, she did attend the wedding and returned to work in September 2016.

<u>The meeting of 5 October 2016</u>

42. The Claimant alleges that Ms Patrick also raised the subject of ill-health retirement with her on 5 October 2016. Ms Patrick did not recall doing so. There

is no documentary evidence to confirm that this occurred. The Claimant does not mention this when dealing with this meeting in a witness statement. Absent any evidence that it occurred, we find that it did not.

The performance improvement plan

43. At the meeting in October 2016 Ms Patrick told the Claimant that she had not been reaching her targets, but she took no action at that point.

44. Ms Patrick did prepare a PAL plan with a start date of 18 January 2017. She accepted in cross-examination that the decision to initiate this plan came from senior management and had been taken in late 2016. There was nothing unusual in that; the Tribunal would expect senior management to encourage the use of performance management in appropriate circumstances.

45. The plan itself was not shown to the Claimant, nor discussed with her when it was first drawn up, but Ms Patrick told her about it at the meeting on 18 January 2017 and discussed and agreed certain aspects of it with her. For example, in relation to the fact that she had been arriving late to work, a plan was put in place that she should arrive at 10:30 a.m. The Claimant had also asked that she be given only certain types of claims, not including what is referred to as 'rapids' or ESA/JSA claims. Ms Patrick did not consider that a reasonable request. That these matters were discussed is evident from Ms Patrick's manuscript note of that date, as well as from references made by the Claimant in her later grievance.

46. The figures relied on by the Respondent in the PAL started from 2 January 2017, even though the Claimant knew nothing about it at that point. Insofar as the Respondent sought to rely on those figures, there was an issue as to whether it was right to do so. On one view, had it confined its analysis of the Claimant's performance to the period from 18 January 2017, her performance was above the required standard, at least for that period. Moreover, it appeared that no consideration had been given to whether the targets needed to be adjusted, having regard to her disabilities. On the other hand, Ms Hargadon, who considered the Claimant's grievance about the PIL concluded that 'having examined your performance for the three months prior to the PAL being issued there was not a single week that you achieved a reasonable contribution'. Unfortunately, the underlying performance data to which she was referring was no longer available.

47. On 1 February 2017 the Claimant lodged a grievance against Ms Patrick in respect of the PAL. She also complained about being asked to consider ill-health retirement and being issued with a written warning for her sickness absence. She alleged that the PAL was being used to 'victimise' her (the term being used in its colloquial, rather than its legal, sense).

The Claimant's sickness absence from February 2017

48. On 8 February 2017 the Claimant began a period of sickness absence, which she stated was triggered by the stress caused by the issuing of the PAL. On 14 February 2017 the Claimant's colleague, Fatima (surname unknown), contacted her by phone for a review of her attendance. The Claimant replied that she did not want to participate as her daughter had just arrived and she put the phone down. Fatima phoned again and it went through to voicemail. She phoned again

after five minutes; the Claimant said that she did not want to speak and hung up again. She remained off work until 9 April 2017.

49. On 1 March 2017 Ms Bamford wrote to the Claimant stating that she wished to meet with her to discuss her attendance.

The meeting of 8 March 2017

50. Ms Bamford went to the Claimant's home for a meeting on 8 March 2017, accompanied by Ms Kelly Russell. Ms Godwin was present at the meeting.

51. At the meeting Ms Bamford again raised the subject of ill-health retirement. The Claimant in her witness statement acknowledged that she did so 'in a tactful way'. The notes of the meeting record the Claimant saying the following [*original format retained*]:

> 'Elizabeth answered she is not considering taking early retirement and explained when asked before felt intimidated by the question as it can be taken differently when asked by another person and that's why it should always be explained in the appropriate way from the guidance and because Paula had read the question from the guidance she understood why.'

52. However, in her statement the Claimant explained that when she later saw the guidance she considered Ms Bamford had not needed to ask her the question. In her oral evidence she maintained that she felt 'intimidated' by Ms Bamford's asking the question. We find that evidence to be exaggerated; it is inconsistent with the contemporaneous evidence.

The Claimant's return to work in April 2017

53. On 4 April 2017, OH produced a further report. In response to a specific question as to whether Ill-Health Retirement would be appropriate at that point, the OHS adviser responded: 'I would not expect Ill-Health Retirement to apply until there is some indication that she is unable to cope with any available duty in the long term.'

54. A further attendance management meeting took place on 6 April 2017, which was conducted by Mr Desmond Osiecki. Towards the end of that meeting he asked the Claimant if she felt comfortable returning to work the following week. She confirmed that she did and explained that when she was at work before she had felt agitated and stressed but now 'feels she is coming back at herself… Elizabeth confirmed she… felt more relaxed'.

55. On 11 April 2017 she returned on a phased basis. Ms Patrick conducted a return to work meeting with her, at which the Claimant said she was feeling better. She accepted in cross-examination that she did not feel pressured to return to work.

The warning for sickness absence

56. Ms Patrick conducted an attendance review meeting on 26 April 2017 with the Claimant, in the presence of her union representative. Ms Patrick informed the Claimant that she would have to consider issuing her with a warning and on 2

May 2017 the Claimant was given a written warning about levels of sickness absence.

The grievance outcome and appeal

57. The Claimant's grievance was considered by Ms Hargadon at a meeting on 15 May 2017. The notes of that meeting record that the Claimant's trade union representative said that there was no evidence to support the Claimant's allegation of 'victimisation' against Ms Patrick, although the Claimant disputes that this was said. The outcome of the grievance was given on 9 June 2017. The finding was that there was not a single week when the Claimant had achieved a reasonable contribution and that six other PALs had been issued to other people. Ms Hardagon found no evidence that Ms Patrick had acted inappropriately or had singled the Claimant out. The Claimant appealed the outcome by way of an email on 14 June 2017. On 18 July 2017 Ms Whetherly conducted an appeal hearing into the grievance decision. After the hearing she made further enquiries as she had said she would at the meeting, but on 31 July 2017 the Claimant was informed that her appeal had not been upheld.

The 2017 box mark

58. The Respondent's year for the purposes of performance review ends in April, which is when employees are given what is referred to as a 'box mark'. On 2 August 2017 the Claimant sent Ms Patrick an email about her end of year review and specifically referred to wishing to know her box mark. Ms Patrick responded on 3 August 2017: 'apologies thought I had sent it to you will send it to.' The Claimant replied the same day saying that she had checked the system and discovered that she had been given a box mark of three (a low mark), asking for an explanation and requesting a meeting.

59. The documents indicate that the box marking had been assigned on 16 May 2017, albeit without any input from the Claimant. It had been signed off by Ms Patrick and Ms Bamford.

60. On 11 August 2017 the Claimant lodged a grievance about her box mark. On 23 August 2017 Ms Bamford replied that her grievance was out of time by reference to the date on which the box mark had been assigned. The Claimant's trade union adviser pointed out that this was because the Claimant had not known that the mark had been assigned to her then; the grievance was allowed to proceed. On 20 September a meeting took place, conducted by Ms Layla Ashton, who upheld the appeal against the mark, in a letter dated 18 October 2017, because no end of year meeting had taken place.

61. The Claimant did eventually have an end of year review meeting with Ms Bhamra on 1 May 2018 and her box mark was changed to 2, a higher mark. The Claimant accepted in her oral evidence that Ms Patrick had simply made a mistake, which was corrected by the Respondent as a result of her grievance.

Adjustments to the Claimant's workstation

62. In this section we group together our findings in relation to steps taken by the Respondent to provide reasonable adjustments to the Claimant's workstation.

63. In September 2016 the Claimant completed a DSE, requesting adjustments to her workstation (computer, mouse and keyboard) and in relation to the lighting at the desk which she found too bright and which was giving her headaches.

64. The Claimant attended an OH appointment on 2 March 2017. In the resulting report, OH recommended [*original format retained*]:

> 'to have a workstation assessment to be done with the main focus on an adjustable lumbar support chair, email keyboard, mouse and she has light directly above her is affecting her vision'.

65. The Claimant was absent through ill-health between 6 February and 10 April 2017. When she returned on 11 April 2017 she had a back to work discussion with Ms Patrick, who told her that she would need to complete another DSE 'due to the nature of her illness (stress) and as per OHS report'.

66. The Claimant completed a DSE on 13 April 2017 and copied Ms Patrick in. She sent her a reminder email on 11 May 2017, but Ms Patrick did not respond. The Claimant sent a further reminder to Ms Patrick, copying in Ms Bamford on 30 May 2017. No progress was made at this stage.

67. On 2 October 2017 Ms Bhamra replaced Ms Patrick as the Claimant's line manager. The Claimant was asked to complete another DSE, which she did on 2 October 2017. However, there was an IT problem which meant that Ms Bhamra could not open the form. On 20 November 2017 the Claimant again chased the DSE assessment. On 13 December 2017 Ms Bhamra asked the Claimant to complete another DSE 'as the original done in October did not allow me to take any action on any issues you may have with your workstation'.

68. On 22 January 2018 the Claimant was allowed to sit at the desk of an absent colleague, where the lighting was not so bright. However, when the colleague returned on 31 January 2018, the Claimant was moved back to her original desk.

69. The Claimant raised the issue of adjustments again in an email of 15 January 2018, pointing out that a year had now passed since OH had made its recommendations regarding adjustments. She completed another DSE on 2 February 2018, but again Ms Bhamra could not access it.

70. On 5 February 2018 the Claimant began a period of sickness absence which lasted three and a half months. She blamed this on the stress caused to her by the Respondent's failure to make the reasonable adjustments.

71. At a meeting on 22 March 2018, Ms Bhamra noted:

> 'that she was aware that Elizabeth was having problems with her chair, mouse and the lighting over her desk. Jas confirmed that once her access is restored Elizabeth will need to complete a further DSE and then Anwar (LST FM) will action any required adjustments as a matter of urgency.'

72. She explained that a further OH report would now have to be commissioned as the previous one dated back to March 2017. It was not until 2 May 2018 that Ms Bhamra completed a DWP Workplace Adjustments Team ('CSWAT') Enquiry Form.

73. At a meeting on 9 May 2018 [623], Ms Bhamra noted the following [*original format retained*]:

> 'Oliur [the Claimant's TU representative] asked me what the current update was regarding Elizabeth's workstation adjustments. I explained that I have referred Elizabeth to CSWAT as they will need to assess her and the work station and will advise of the new equipment she needs […] I went on to tell Elizabeth that one of the recommendations from her previous OHS report was to focus on the light above her desk and with previous conversations with Elizabeth the light above her desk had been issue. I advised Elizabeth that she has now been given a desk where there is no direct light above her head and once she returns to work she will need to complete a new DSE for her new desk.'

74. From the evidence we heard, it appears that the issue with the lighting above the Claimant's desk had indeed been resolved: someone had removed the bulb. Why it had taken over a year to accomplish this was entirely unclear. However, when the Claimant returned to work on 25 May 2018 she discovered that a well-meaning person had replaced the bulb.

75. The Claimant sent an email to Ms Paulette Thompson on 30 May 2018, complaining that four very dusty boxes had been left on her desk, of which only two related to her. She complained again about the lighting.

76. On 4 June 2018, the Claimant attended a DSE Assessment in her place of work. An OH report was produced on the same day, which stated (as relevant):

> 'Lighting: the office has good natural light sources. However artificial light sources are causing glare on the screen.
>
> …
>
> Chair – Unfortunately I was unable to make the required adjustments to Elizabeth's chair, and her current chair lacks a headrest and does not allow her to adopt correct ergonomic postures…
>
> Keyboard and mouse – The current keyboard and mouse don't promote correct ergonomic working positions.
>
> …
>
> Artificial lighting – Unfortunately I was unable to make the adjustments to Elizabeth's lighting. It's recommended that the light bulbs are removed from the lighting above her work station.'

77. The CSWAT team sent an email to Ms Bhamra, copying in the Claimant, on 14 June 2018, advising exactly what equipment was required and how to order it.

78. The mouse, keyboard and wireless headset had been provided by 21 June 2018. The lighting issue must also have been resolved by then, since the Claimant confirmed in a DSE risk assessment document, prepared on 17 July 2018, that she was satisfied with the lighting, as well as with her keyboard, mouse and desk. The only outstanding issue was her chair. Ms Bhamra submitted an equipment request form on 11 July 2018. In response to the *pro forma* question whether this was 'a high priority work order', she replied No.

79. The chair was finally delivered in August 2018. The whole process had taken nearly two years.

Partial ill-health retirement

80. Turning back in the chronology to 2017, on 22 September 2017 the Claimant requested partial ill-health retirement; she stated in her email that she felt she had taken the decision 'due to continuous JSA management team pressure'. The Claimant gave a different reason in her witness statement, in which she alleged that she took the decision because had not been provided with the adjustments which she required.

81. On 24 October 2017, the Claimant lodged a grievance alleging bullying and intimidation against Ms Bamford concerning a conversation she had had with her on that day. The grievance was heard by Mr Mike King at a meeting on 10 January 2018, and on 13 February 2018 the outcome was provided. He did not uphold the grievance.

82. Far from putting pressure on the Claimant to commit to partial retirement, in an email of 25 October 2017, Ms Lorna Pettifer made the point to the Claimant that Ms Patrick had already moved on and Ms Bamford was about to do so (with both of whom the Claimant had had difficult relationships): 'you are under no obligation to retire at this stage and I hope that you will feel differently moving forward.' Nonetheless, on 22 December 2017 the Claimant lodged an updated request to reduce her working hours.

83. At a meeting on 28 January 2018, the Claimant met with Ms Bhamra to discuss her application for partial retirement. The minutes of the meeting were sent to the Claimant. At the beginning of the meeting Ms Fernandes, the Claimant's TU representative, suggested that the Claimant was not accepting partial retirement by choice. Ms Bhamra replied that it was entirely up to the Claimant whether she wished to proceed. The Claimant confirmed that she did and that she wished to commence partial retirement from 1 August 2018, which was later than the date she had originally requested. The decision to grant partial retirement was finally communicated to the Claimant on 8 March 2018.

84. The Claimant said in cross-examination that she thought that, if she did not take partial retirement, she would be sacked. We have no hesitation in rejecting that allegation. We find that this was a choice which the Claimant made after careful reflection, and without pressure from the Respondent, against the background of her various health challenges.

The reference to ill-health retirement at the meeting on 22 March 2018

85. In the meeting on 22 March 2018, which we have referred to above, the notes record Ms Bhamra again raising the subject of ill-health retirement:

> 'Jas explained to Elizabeth that, in line with the attendance management procedures, she needed to ask if Elizabeth wanted to be considered for early retirement on medical grounds. Elizabeth said no and she was hoping to return to work once the reasonable adjustments had been made.'

86. The Tribunal finds that Ms Bhamra did not put pressure on the Claimant to take ill-health retirement; she did not even ask her to take it, she merely drew the option to her attention, as the Respondent's policies required her to do. It was even more reasonable for her to do so, given the fact that the Claimant had recently had a further, substantial period of sickness absence and had elected to take partial retirement.

The sick pay decision in May 2018

87. A letter dated 25 April 2018 was sent to the Claimant, informing her that her sickness absence from 25 May 2018 would be unpaid because she had exceeded the maximum period of sick leave allowed under her contract. The content of that letter was consistent with the relevant contractual term, which was as follows.

> '**Sick leave**
>
> You may be allowed sick absence on full pay, less any Social Security National Insurance Benefits such as Incapacity Benefit or Maternity Allowance received, for up to 6 months in any period of 12 months. After that you may receive half pay, which is subject to an overriding maximum of 12 months sick absence in a period of four years or less. Any Statutory Sick Pay (SSP) will be paid with sick pay up to the maximum of full pay.
>
> If your attendance is unsatisfactory because you have frequent or continuous sick absences we will review your suitability for continued employment. Full information is contained on the Department and You Intranet site.'

88. The Claimant accepted in cross-examination that the letter of 25 April 2018 was an automated letter, which simply applied the terms of the contract.

89. At a meeting on 9 May 2018, Ms Bhamra asked the Claimant if a phased return would help her resume work and the Claimant said that it would. As we have already explained, she returned to work on 25 May 2018. Accordingly, there was never a time when she was without sick pay. However, on the same day she raised a complaint, alleging that the Respondent was attempting to:

> 'force me back to work while still on medical certify sick due to work stress over my workstation adjustment … I felt it unfair to come back to work despite the fact the workstation adjustment issues has not been resolved yet' [*original format retained*].

90. Even when the Claimant subsequently left work because she was dissatisfied with the state of her desk (and the lighting), the Respondent continued to pay her in full.

The requirement to perform phone duties after July 2018

91. Because of her health difficulties the Claimant had in the past been exempted from the requirement to speak to benefit claimants on the phone. She alleges that in July 2018 she was told that, because of a restructure, she had to go on telephone duties 'full-time and permanently'.

92. It is right that the Claimant was moved from the JSA New Claims team to ESA around that time. However, we reject her account as to what she was told about telephone duties. Apart from anything else, on 1 August 2018 the Claimant moved to part-time hours in accordance with the partial retirement arrangement.

93. Quite properly, when the move took place, the Claimant was referred to OH report so that an assessment could be made as to what, if any, telephone work she was capable of doing. Pending the report, the Claimant was assigned to clearing JSA post. The report was prepared on 14 August 2018 and stated (as relevant):

> 'Following assessment, she is likely to benefit from:
>
> …
>
> - Having reduced time on telephone duties as prolonged talking causes her to get short of breath and brings on a dry cough – she should manage half a day on telephone duties but on days when her symptoms are particularly bad, this may have to be reassessed.
>
> - Having short regular breaks when on telephone duties as her shortness of breath and cough would come on after about 45 min – 1 hour of talking.'

94. We find on the balance of probabilities that this is what the Claimant told OH she could manage. The Claimant started doing half days on the phone from August 2018 until December 2018.

95. On 8 August 2018, the Claimant lodged her ET1. Strictly speaking, matters which postdate the ET1 form no part of the Claimant's claim: there was no application to amend the pleadings to add matters which post-dated it. However, for completeness we will consider how this matter was eventually resolved.

96. There was a further OH report on 12 December 2018 which confirmed the same advice given about telephone duties in the August report.

97. The Claimant confirmed in her witness statement that she was removed from phone duties altogether around January 2019. In her statement, she asserted that in September 2019 the Respondent had told her that she had no choice but to be trained on full-time phone duties. However, she accepted in oral evidence that she only ever did the training and was informed on 11 October 2019 that she was being moved to a non-telephone role. We find that the Respondent never required the Claimant to do more work on the telephone than she told them she could manage; and it did not require her to do any phone work at all after January 2019.

The law

Time limits

98. S.123(1)(a) EqA provides that a claim for disability discrimination must be brought within three months, starting with the date of the act to which the complaint relates.

99. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner. A relevant factor in whether or not a series of acts is to be regarded as an act extending over a period is whether the same person is responsible for each of the acts: *Aziz v FDA* [2010] EWCA Civ 304 at para 33.

100. The Tribunal may also extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so. That is a very broad discretion.

101. In exercising that discretion, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

102. Failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused (*Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278 at para 16). There is no requirement for exceptional circumstances to justify an extension (*Pathan v South London Islamic Centre,* UKEAT/0312/13/DM at para 17).

103. The limitation period in a claim for a failure to make reasonable adjustments was considered by the Court of Appeal in *Kingston upon Hull City Council v Matuszowicz* [2009] ICR 1170. For the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence, it is to be treated as having decided upon the omission when, if it had been acting reasonably, it would have made the reasonable adjustments. The Court acknowledged that imposing an artificial date from which time starts to run is not entirely satisfactory, but pointed out that the uncertainty, and even injustice, that may be caused could, in appropriate cases be alleviated by the Tribunal's discretion to extend the time limit where it is just and equitable to do so. Sedley LJ held (at paras 37 and 38) as follows:

> **'36. For obvious reasons this can create very real difficulties for Claimants and their advisers. But there are at least two ways in which the problem may be eased.**
>
> **37. One is that Claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission.**

> **38. The other is that, when deciding whether to enlarge time under paragraph 3(2), Tribunals can be expected to have sympathetic regard to the difficulty paragraph 3(4)(b) will create for some Claimants. As Lloyd LJ points out, its forensic effect is to give the employer an interest in asserting that it could reasonably have been expected to act sooner, perhaps much sooner, than it did, and the employee in asserting the contrary. Both contentions will demand a measure of poker-faced insincerity which only a lawyer could understand or a casuist forgive.'**

The definition of disability

104. S.6(1) EqA provides:

> **A person (P) has a disability if –**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and adverse long-term effect on P's ability to carry out normal day to day activities.**

105. 'Substantial' is defined in s.212(1) EqA as meaning 'more than minor or trivial' and is a low threshold.

106. The 'long-term' requirement is developed in para 2, Sch.1 to the EqA which provides, so far as relevant:

> **(1) The effect of an impairment is long-term if –**
>
> **(a) it has lasted for at least 12 months,**
>
> **(b) it is likely to last for at least 12 months, or**
>
> **(c) it is likely to last for the rest of the life of the person affected.**
>
> **(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.**

107. The statutory *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011), in the section 'Meaning of Impairment' at paragraph [A3] states:

> **The definition requires that the effects which a person may experience must arise from a physical or mental impairment the term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to forward the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.**

108. In the section 'Cumulative Effects of an Impairment' at [B6], the *Guidance* states:

> **A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities. For example, a minor impairment which affects physical coordination and an irreversible but minor injury to a leg which affects mobility, when taken together, might have a substantial effect on the person's ability to carry out certain normal day-to-day activities the cumulative effect of more than one impairment should also be taken into account when determining whether the effect is long-term…**

109. In the section 'Effects of Environment' at [B11] the *Guidance* states:

> **Environmental conditions may exacerbate or lessen the effect of an impairment. Factors such as temperature, humidity, lighting, the time of day or night how tired the person is, or how much stress he or she is under, may have an impact on the effects. When assessing whether adverse effects of an impairment is substantial, the extent to which such environmental factors, individually or cumulatively, are likely to have an impact on the effects should, therefore, also be considered. The fact that an impairment may have a less substantial effect in certain environments does not necessarily prevent it having an overall substantial adverse effect on day-to-day activities.**

Failure to make reasonable adjustments: s.20-21 EqA

110. S.20 EqA provides as relevant:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**

111. S.21 EqA provides as relevant:

> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**

> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
>
> **…**

112. The Equality and Human Rights Commission *Code of Practice on Employment (2011)* ('the Code of Practice') at para 6.16 emphasises that the purpose of the comparison with persons who are not disabled is to determine whether the disadvantage arises because of the disability and that, unlike direct or indirect discrimination, there is 'no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's'.

113. In relation to the employer's actual or constructive knowledge of the employee's disability, and of the disadvantage, sch.8, Part 3, para 20(1)(b) EqA provides that:

> **(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
>
> **…**
>
> **(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.**

114. If the employer knew, or could reasonably be expected to have known, that the Claimant had an impairment, it does not matter that it had no precise diagnosis. It is, however, a requirement that the employer should know (actually or constructively) that the Claimant had an impairment the adverse effects of which were both substantial and long-term (*Wilcox v Birmingham CAB Services Ltd* [2011] EqLR 810.

115. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal (*Morse v Wiltshire County Council* [1998] IRLR 352).

Discrimination arising from disability: s.15 EqA)

116. S.15 EqA provides 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.**

117. The correct approach to a claim of this sort was considered by the Court of Appeal in *City of York Council v Grosset* [2018] IRLR 746 *per* Sales LJ (at para 36 onwards):

> **'36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of**

> **an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.**
>
> **37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...**
>
> **38. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" ….'**

118. The Code of Practice offers the following explanation of what is meant by 'something arising in consequence of disability' for the purposes of s.15 EqA:

> **[5.9] The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.**

119. The meaning of 'unfavourable treatment' was considered by the Supreme Court in *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2019] ICR 230 (at para 27):

> **'… in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.'**

The passages in the Code of Practice to which the Court had been referred were as follows:

> **'5.7 For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.**
>
> **…**
>
> **4.9 'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about—so an unjustified sense of grievance would not qualify…'**

120. It is then necessary to look to the employer's defences of justification (s.15(1)(b)). The issues for determination are: whether the treatment in question had a legitimate aim, unrelated to any discrimination based on any prohibited

ground; whether the treatment was capable of achieving that aim; and whether in the light of all the relevant factors, the measure was proportionate.

Indirect disability discrimination

121. The concept of indirect discrimination is set out at s.19 EA 2010:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

122. As identified in *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160, there is a substantial overlap between indirect discrimination and discrimination arising from disability, and between indirect discrimination and a failure to make reasonable adjustments. However, a key distinction between indirect discrimination, and claims under s.15 and s.20 EA 2010 is the need to show group disadvantage. It is therefore necessary to show that the PCP causes a disadvantage to persons with the Claimant's particular disability, see s.6(3) EA 2010:

> **(3) In relation to the protected characteristic of disability—**
>
> > **(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;**
> >
> > **(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.**

Submissions

123. Both representatives provided helpful written closing arguments, which the Tribunal has taken into consideration. They then supplemented them with brief oral submissions. Both focused in particular on the question of time limits.

124. For the Claimant, Ms Godwin argued that the discrimination amounted to conduct extending over a period; alternatively, that the effects of the discrimination continued up to the point at which the Claimant issued proceedings and so the claims were presented in time; alternatively, it was just and equitable to extend time because the Claimant had believed the Respondent when it said it would resolve matters for her. She also made concise submissions in relation to each of the substantive claims.

125. For the Respondent, Mr Ratan argued that most of the alleged acts were long out of time, indeed historic, and that each of them was separate and not part of

a continuum. Moreover, there were clearly identifiable break points when responsibility for the Claimant passed from one manager to another. It was not just and equitable to attend time: the Claimant's explanation that she did not want to add to her stress by bringing proceedings was unsatisfactory, especially as this did not prevent her from conducting a number of internal grievances. His submissions as to the substantive claims focused primarily on those which he accepted were in time.

Conclusions: disability (headaches)

126. There is ample evidence in support of the Claimant's account of the severity and frequency of her headaches, for example at paragraph 50 onwards of her witness statement, and we accept that this is a recurring problem for her.

127. There was extensive documentary evidence before us of the Claimant raising the issue with her managers and with occupational health from as early as 2006. The condition appears to have been particularly bad around 2013/2014.

128. Mr Ratan submitted that the Occupational Health reports prepared at the material time (i.e. 2016 onwards) do not expressly mention headaches. However, the OH report of 4 June 2018 does mention that 'artificial light sources are causing glare on the screen' and refers to the need for adjustment to the light sources above her workstation. It is right that no express mention is made of headaches; however, that is true of the Claimant's other health conditions. Under the section 'Current Issues' the author simply refers to 'an ongoing history of symptoms'. We infer from this that, by this point, the symptoms were so well-known from the extensive earlier documentation that OH considered it was unnecessary to rehearse them again; their focus was on identifying adjustments which would address them.

129. Moreover, the Claimant's headaches are mentioned in many other documents from the period: for example, the Claimant mentioned them in a meeting of 6 March 2017 with Ms Bamford; and she stated that she was experiencing headaches because of the lighting above her desk in an email of 13 May 2018, into which Ms Bhamra was copied. The fact that the Respondent was proposing to adjust the lighting above the Claimant's desk to ensure that it was not too bright is itself indicative of the fact that the issue had been raised, the problem understood and an adjustment proposed and agreed.

130. We accept the Claimant's evidence that the Claimant had a propensity to experience recurring and severe headaches and that this amounted to a physical impairment.

131. Further, we are satisfied that the effects of the impairment had a substantial (more than minor or trivial) and adverse effect on the Claimant's ability to carry out normal day-to-day activities. In reaching this conclusion, we had regard to the fact that environmental conditions exacerbated the effects of the headaches: she was unable to tolerate bright lighting conditions; this interfered with her ability to work for sustained periods; and the pain was sometimes so severe that ordinary painkillers could not deal with it.

132. The impairment was long-term: at the material time it had lasted since at least 2006.

133. We conclude that Claimant was a disabled person by reference to her propensity to experience headaches.

134. If we are wrong about that, we conclude that the Claimant's headaches, taken together with her other impairments (which are conceded by the Respondent), cumulatively had a substantial overall effect on her ability to carry out normal day-to-day activities at the material period and those effects were long-term.

Conclusions: time limits

135. In a case such as this, where so many of the claims advanced by the Claimant are *prima facie* out of time, we consider it appropriate to take the question of time limits first.

136. It was agreed between the parties that any act or omission which took place before 1 March 2018 is out of time, subject to an argument that any or all of those acts amounted to 'conduct extending over a period' or that it would be just and equitable to extend time.

The claims which were presented in time

137. The following claims were presented in time:

    137.1. Issue 4.2.1(f), s.15 EqA: Ms Bhamra asking the Claimant to take ill-health retirement on 22 March 2018.

    137.2. Issue 4.2.6, s.15 EqA: stopping her sickness pay effective from 26 May 2018.

    137.3. Issue 3.1, indirect discrimination, and Issue 5.1, reasonable adjustments: requiring the Claimant to speak to benefit Claimants on the phone. The Claimant contends this was applied to her from 16 July 2018 onwards.

The claims of disability discrimination in relation to the period before 1 March 2018, (other than the reasonable adjustments claims)

Conduct extending over a period

138. Ms Godwin submitted that the unfavourable treatment experienced by the Claimant consisted of 'actions taken by individual managers [which] were not distinct and separate acts but under the advice, influence and instruction of senior management, who continued to have involvement with the Claimant's matter until the time she brought a claim'. We reject that submission: we are not satisfied that there is evidence of concerted action by senior management to disadvantage the Claimant. Apart from anything else, that would suggest a degree of coordination which would run counter to the disorganisation which characterised the Respondent's approach to the Claimant (see in particular our findings in relation to the failure to make reasonable adjustments). In short, we conclude that there was no conspiracy to drive the Claimant out of the business, such that the disparate acts complained of might be viewed as conduct extending over a period.

139. We went on to consider for ourselves whether there were any other factors which might provide the necessary link. We considered that the acts

complained of in Issue 4.2.2 in relation to the performance improvement plan could amount to conduct extending over a period, but that period ended in July 2017. Even if Ms Godwin had sought to link that with the act complained of in issue 4.2.3 (the box mark), that matter was concluded in August 2017.

140. As for the complaints about the handling of the Claimant's sickness absence, although Issues 4.2.4 and 4.2.5 were proximate in time (they relate to the period between April and August 2017), we concluded that there was no connection between those acts and the stopping of the Claimant's sick pay in May 2018, some nine months later, which related to a different period of sickness absence, beginning February 2018. That was a quite separate process.

141. We looked carefully at the complaints alleging that the Claimant was repeatedly asked to take ill-health retirement (Issue 4.2.1(a) to (f)). However, there is a gap of just over five months between the acts done by Ms Patrick, the last of which took place on 5 October 2016, and the only act done by Ms Bamford on 6 March 2017. There is then a gap of over a year (6 March 2017 to 22 March 2018) between Ms Bamford's act (Issue 4.2.1(e), 8 March 2017) and the only act which is in time and which was done by Ms Bhamra (issue 4.2.1(f), 22 March 2018). There were long periods in which no conduct of the kind alleged took place. Moreover, the individual who did the last act had no involvement in the earlier acts. The fact that the acts were done by different people in our view mitigates against this amounting to conduct extending over a period. Weighing these factors in balance, we conclude that these were separate, intermittent acts, rather than conduct extending over a period.

142. In short, we accept Mr Ratan's submission that all the out-of-time allegations concern the conduct of a previous management structure with a different line manager. It was common ground that Ms Bhamra replaced Ms Patrick as the Claimant's line manager on 2 October 2017. Furthermore, Ms Patrick's own line manager (Ms Bamford) also moved to a different role in October 2017.

Just and equitable extension

143. Ms Godwin then argued that the Tribunal should exercise its discretion to extend time. As mentioned above, the Tribunal allowed Ms Godwin to recall the Claimant to lead evidence as to why she issued her claim when she did. We did so because we were concerned that there should not be an important gap in her evidence simply because the matter had been overlooked in the preparation of a complex case.

144. As for the length of the delay, it is very substantial indeed: the earliest acts complained of took place in 2016, over two years before the cut-off date; the latest in August 2017, some seven months before the cut-off date.

145. Turning to the Claimant's explanation for the delay, she said that part of the reason why she did not issue proceedings earlier was because she was reluctant to bring the case against an employer for whom she had worked for 30 years; in other words, it was a conscious choice. Another reason was because of her health: at times she had felt depressed, was having headaches and was experiencing breathlessness; we had no medical evidence to confirm that this prevented her from issuing proceedings. Moreover, we conclude that the fact

that the Claimant was well enough to work between April 2017 and February 2018 strongly suggests that she was well enough to issue proceedings.

146. A further reason was that she hoped that the issues could be resolved by way of internal grievances. It is right that an attempt to resolve matters internally can be a relevant factor in extending time. However, the decision on the Claimant's last grievance was given on 13 February 2018, yet she did not contact ACAS until 31 May 2018, some three and a half months' later.

147. The Claimant did not say that she lacked awareness of her rights. We find that she was well aware of her right to complain to a Tribunal of discrimination and of the applicable time limits. She had access to trade union advice throughout the material period. She had also brought earlier Tribunal proceedings, alleging race discrimination, against the Respondent in the 1990s, albeit this claim was subsequently settled.

148. Turning to the balance of prejudice, we accept Mr Ratan's submission that the Respondent would suffer substantial prejudice if time were extended in respect of the historic allegations dating back to 2016 and 2017. They relate solely to the conduct of employees (Ms Patrick and Ms Bamford) who have not managed the Claimant since October 2017. It was clear to the Tribunal that there were limits on their ability to recall the relevant events, let alone to recall the nuances of their reasons for taking specific decisions. Certain documents, which would have been relevant to the issues we were being asked to decide, were no longer available, for example the underlying data relating to the Claimant's performance in 2016. One of the Respondent's witnesses, Ms Whetherley (who dealt with the Claimant's grievance appeal), had retired and was unable to attend the hearing because of caring responsibilities. By contrast, although the Claimant is prejudiced by not being able to pursue her claims, she is not without remedy altogether as some of her other claims are in time and, as we will go to explain, the Tribunal has decided to extend time in relation to the reasonable adjustments claims.

149. Weighing all these factors in the balance, in particular the unsatisfactory explanation for the delay and our conclusions as to the balance of prejudice, we conclude that it was not just and equitable to extend time in respect of these claims. Accordingly, the Tribunal has no jurisdiction to determine them.

<u>The reasonable adjustments claims: physical features and auxiliary aids</u>

150. It is well-known that time limits in reasonable adjustments cases are somewhat counterintuitive, as Sedley LJ observed in *Matuszowicz* (cited above). Some Claimants, indeed some lawyers, wrongly assume that time does not begin to run for as long as the employer is failing to make a reasonable adjustment. It is clear from *Matuszowicz* that, where the failure was due to lack of diligence, the employer is to be treated as having decided upon the omission when, if it had been acting reasonably, it would have made the reasonable adjustments. The Tribunal made a point of asking Ms Godwin to identify, in respect of each alleged failure to make reasonable adjustments, when the adjustment ought to have been made; time ran from that date.

    150.1. In respect of the lighting at the Claimant's desk, Ms Godwin submitted the adjustment ought to have been made by 2 March

2017, that being the date of an OH report recommending the adjustment.

150.2. As for the auxiliary aids (chair, keyboard and mouse), she submitted that these ought to have been made by 13 May 2017, that being one month after the Claimant submitted a DSE about her workstation.

151. On the basis of Ms Godwin's dates, which we accept are reasonable, these claims were presented long out of time.

152. Although the Claimant was aware in a general sense of her right to complain of discrimination, we conclude that she may not have been aware of the way that time limits work in relation to a reasonable adjustment claim because of their inherent difficulty. On the other hand, she had access to advice from the union (and indeed her daughter) and we give little weight to this factor.

153. We find that the reasons for her delay were essentially those we have set out above and to that extent they are unsatisfactory.

154. We consider that the Respondent's conduct should be weighed in balance. The Claimant was repeatedly led to believe that the adjustments would be made, yet they were not. Although in retrospect, the Claimant perceived this as part of a deliberate campaign to force her out of the job, we conclude that at the time she was prepared to give the Respondent the opportunity to provide the promised adjustments, but it did not do so.

155. We then considered the extent to which the cogency of the evidence had been affected by the delay. We concluded that the position here is different from the claims we have dealt with above. It was not seriously disputed by the Respondent that the adjustments were reasonable and ought to have been made. It was a matter of record when they were made. The Tribunal's ability objectively to assess the extent to which the Respondent complied with its duty was scarcely affected by the delay in issuing proceedings.

156. We then turned to the balance of prejudice. The prejudice to the Claimant if time were not extended in relation to these claims would be very substantial: she would have very limited potential remedy, given that we have declined jurisdiction in relation to most of her other claims. We asked Mr Ratan how he said that the Respondent would be prejudiced by an extension of time. With admirable tenacity, he argued that Ms Patrick had some difficulty recalling what steps she took to follow up on the proposed adjustments. We have already found that the 'memory fade' argument carries less weight when it comes to these claims. Even if he is right, it is difficult to think of an explanation Ms Patrick might have provided, which she has not already provided, which would account for the failure to provide such simple adjustments over such a long period.

157. Weighing all these factors in balance, and having regard in particular to the fact that the balance of prejudice favours the Claimant, we have come to the conclusion that it is just and equitable to extend time in relation to the reasonable adjustments claims.

Conclusions: reasonable adjustments (physical features and auxiliary aids)

Issue 5.2, reasonable adjustments: Did the Respondent's physical feature of lighting above the Claimant's desk put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

Issue 5.3, reasonable adjustments: Did the Claimant's requirement for auxiliary aids: lumbar support chair, appropriate keyboard and mouse put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

158. There was, in the Tribunal's view, a wholesale and collective failure by the Respondent's managers, over a period of nearly two years, to address the relatively straightforward adjustments which the Claimant requested in September 2016, which OH had recommended in March 2017 and which we accept were needed. None of the managers involved took responsibility for the situation. They appeared to be wedded to a bureaucratic approach which meant that no progress could be made unless the correct form was made accessible to them online. We do not doubt that they encountered IT difficulties in accessing the many forms which the Claimant completed, but those difficulties were themselves failures by the Respondent. If the online system was not working, Ms Patrick and Ms Bhamra should simply have made a paper application on the Claimant's behalf and sent it to the CSWAT team – or just picked the phone up to the relevant person and insisted that an alternative route be provided. When a proper CSWAT workstation assessment was eventually arranged in June 2018, all but one of the adjustments were in place within a month, and the last within two months. This brings into stark relief that the delay before that point was wholly unjustifiable.

159. We accept the Claimant's evidence that there was a physical feature of bright light above her desk. There are multiple references to this in the contemporaneous documents. We further accept that this put her at a substantial (more than minor or trivial) disadvantage because it caused her headaches and made it difficult for her to concentrate on her work. The Respondent had actual knowledge of the impairment, and the associated disadvantages, since at least 2013/2014. The fact that it had committed to resolving the issue of bright lighting over her workstation confirms its knowledge.

160. That feature could have been removed simply by removing the bulb in the light fitting. This was done, briefly in May 2018, but then inadvertently reversed. Apart from that brief interlude, the Respondent failed unreasonably to take this simple step.

161. We accept the Claimant's evidence that the absence of an appropriate chair put her at a substantial disadvantage: it aggravated her lower back condition and caused her pain and discomfort. We further accept that the lack of a suitable keyboard and mouse put her at a substantial disadvantage: it aggravated the pain and discomfort which she experienced in her hands because of her arthritis.

162. The Respondent does not suggest that any of these adjustments were unreasonable. They were not made for over a year and, accordingly, these claims succeed.

Conclusion: phone duties (indirect discrimination and failure to make reasonable adjustments)

Issue 3.1, indirect discrimination: requiring the Claimant to speak to benefit Claimants on the phone? The Claimant contends this was applied to her from 16 July 2018 onwards.

Issue 5.1, reasonable adjustments: requiring employees to speak to benefit Claimants on the phone.

163. The Tribunal has found the Claimant's evidence on this issue to be unreliable: on a number of material points, the account she gave in her witness statement was later contradicted by her in oral evidence. This undermined our confidence in the credibility of her account as to the impact on her of telephone duties: we do not believe that performing them had the impact described by her in her witness statement.

164. With regard to the indirect discrimination claim, we conclude that the Respondent did not apply a PCP to the Claimant, which it applied equally to non-disabled employees. We accept Mr Ratan's submission that it adopted an approach which was appropriately tailored to what the Claimant herself told OH she was able to manage. She was treated differently from other employees: she was not required at any point to do full-time telephone duties, when others were. Accordingly, her claim of indirect disability discrimination fails at this first stage.

165. For essentially the same reason, we reject the claim that the Respondent failed to make reasonable adjustments in this area: it made precisely the adjustments which the Claimant herself suggested to OH would be reasonable; it then kept them under review and eventually exempted her from telephone duties altogether. It acted flexibly and made reasonable adjustments to remove the disadvantage described by the Claimant. There was no breach of the duty by the Respondent.

Conclusions: discrimination arising from disability

Issue 4.2.1(f), s.15 EqA: Ms Bhamra asking the Claimant to take ill-health retirement on 22 March 2018.

166. The Tribunal concludes that Ms Bhamra did not 'ask the Claimant to take ill-health retirement', she merely asked the Claimant whether she wished to consider it. For that reason, the alleged treatment did not occur and the claim fails.

167. Alternatively, we do not accept that merely raising the issue of ill-health retirement amounted to unfavourable treatment. It was not a detriment or disadvantage to the Claimant; she simply dealt with the matter by saying that she was not interested. We agree with Mr Ratan that the Claimant's suggestion that ill-health retirement should not be raised unless the criteria are, in fact, met is misconceived. Whether the criteria are met cannot be established until the issue has been raised with the employee; if she expresses interest, the question of whether she meets the criteria would then be separately considered by the relevant authorities in line with the applicable policies. We further conclude that, in the circumstances of the Claimant's ongoing and very serious

health conditions, particularly in relation to her heart condition, the Respondent's managers might have been criticised had they not raised the possibility of ill-health retirement.

168. Nor do we accept the Claimant's evidence that she was seriously distressed by the question. We have found her evidence on this issue to be exaggerated.

169. The Claimant suggested that the issue was raised by her managers in order to intimidate her and drive her out of the organisation. We reject that suggestion. We conclude that the witnesses genuinely considered themselves obliged to raise the issue of ill-health retirement, once a certain trigger point had been reached, because of the terms of the policies set out above. That is not to say the policies are beyond criticism. Ms Godwin cross-examined the witnesses effectively on them and identified anomalies: for example, on a strict reading, ill-health retirement might have to be raised with women returning from maternity leave, which would be absurd. However, we have concluded that the culture within the Respondent was such that managers tended to apply policies, such as these, somewhat unthinkingly. That is consistent with our conclusions about Ms Patrick's and Ms Bhamra's repeated requirement that the Claimant must complete a DSE form, even though she had already done so, before any action on reasonable adjustments could be taken.

170. For all these reasons this claim fails.

Issue 4.2.6, s.15 EqA: Stopping her sickness pay effective from 26 May 2018.

171. The Respondent did not stop the Claimant's sick pay effective from 26 May 2018. The Claimant returned to work on 25 May 2018 in accordance with the phased return plan which she agreed with Ms Bhamra at the meeting on 9 May 2018. Even though she subsequently took a further period of sickness absence, the Respondent never in fact reduced her pay to nil. The unfavourable treatment alleged did not occur and this claim accordingly fails.

172. Even if the claim were to be understood as the Respondent *proposing* to stop the Claimant's sick pay from 26 May 2018, we accept Ms Godwin's submission that this was unfavourable treatment because of something arising in consequence of C's disability, namely her sickness absence. However, we accept Mr Ratan's submission that it was justified. The Respondent's aim was to reduce and manage sickness absence within a clear framework for managers and employees. That was a legitimate aim. The Respondent acted proportionately in pursuit of that aim: its sickness absence policy was a generous one; the Claimant's managers had dealt with her lengthy sickness absences sympathetically and supportively; and the policy was in any event applied flexibly to her, in that pay was not withheld when she went off sick again because of her concerns about the lack of adjustment.

Remedy

173. For the avoidance of doubt, we will address an issue of causation raised by the Claimant in her schedule of loss. She claims loss of earnings flowing from the fact that she took partial retirement in August 2018, on the basis that it was forced on her. We reject that contention, which, in any event, is not one of her pleaded claims; we have already found that the Claimant freely chose to take partial retirement, no pressure was exerted on her to do so and she was given

at least two opportunities (by Ms Bamford and Ms Bhamra) to change her mind, if she wished to do so.

174. Consequently, the Claimant's compensation is likely to be confined to an award for injury to feelings and interest. The Tribunal encourages the parties to use their best endeavours to resolve the issue of compensation by agreement, having regard to the relevant, updated *Vento* guidelines. If they are able to do so, they are asked please to notify the Tribunal as soon as possible. If they are unable to do so, they must provide their dates to avoid for the six months from July 2020 (the earliest possible date on which a hearing could take place in the current circumstances) onwards by no later than 28 days from the date on which this judgment is sent to the parties. The case will then be listed for a three-hour hearing and appropriate directions will be given.

Employment Judge Massarella
Date: 21 April 2020

APPENDIX: FINAL LIST OF ISSUES

1. Disability

    1.1. The Respondent accepts that the Claimant has, and had at the material times, the following disabilities within the meaning of the Equality Act 2010:

        1.1.1. Chronic chest pain;

        1.1.2. Deafness in one ear;

        1.1.3. Arthritis in her hands;

        1.1.4. Lower back pain.

    1.2. Did the Claimant have a further physical impairment consisting of headaches?

    1.3. If so, did that impairment (i.e. headaches) have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities? If not, do the impairments taken together have such an impact?

    1.4. If so, is the effect long term? In particular, when did that impairment (i.e. headaches) start and in respect of that impairment:

        1.4.1. Has the impairment lasted for at least 12 months?

        1.4.2. Was the impairment likely to last at least 12 months or the rest of the Claimant's life, if less than 12 months?

    1.5. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011), paragraph C4.

    1.6. Are any measures being taken to treat or correct that impairment (i.e. headaches)? But for those measures would that impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

    1.7. The relevant time for assessing whether the Claimant had a disability is when the discrimination is alleged to have occurred.

2. [*Blank in parties list of issues*]

3. Section 19: Indirect disability discrimination

    3.1. Did the Respondent apply the following provision, criterion or practice ('PCP') generally, namely a requirement to speak to benefit Claimants on the phone? The Claimant contends it was applied to her from 16 July 2018 onwards. The Claimant accepts that this is the date from which time runs.

3.2. Does the application of the PCP put people who share the Claimant's disability at a particular disadvantage when compared with persons who do not have this protected characteristic? The Claimant alleges the particular disadvantages of stress, strain to her ears, repeating herself to benefit Claimants, asking them to repeat themselves and causing headaches.

3.3. Did the application of the provision put the Claimant at that disadvantage? The Claimant relies upon headaches and deafness in one ear as relevant causes in this regard.

3.4. Has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

4. Section 15: Discrimination arising from disability

4.1. The 'something' alleged to arise in consequence of the Claimant's disability is:

4.1.1. The Claimant's sickness absence on:

(a) 30/12/15 to 03/07/16;

(b) 08/02/17 to 09/04/17;

(c) and 05/02/18 to 24/05/18;

4.1.2. Difficulty in achieving a departmental target. The Claimant says that she was not told what the target was, only that she did not make a reasonable contribution to the targets and that this was why she was issued with a performance improvement plan on her record.

4.2. Has the Claimant proved the following unfavourable treatment by the Respondent?

4.2.1. Repeatedly asking the Claimant to take ill-health retirement between 08/02/16 and 22/03/18, despite her refusing, on the following dates:

(a) 8 February 2016 (Ms Patrick);

(b) 8 April 2016 (Ms Patrick);

(c) 6 June 2016 (Ms Patrick);

(d) 5 October 2016 (Ms Patrick);

(e) 8 March 2017 (Ms Bamford);

(f) 22 March 2018 (Ms Bhamra);

4.2.2. Line manager putting the Claimant on a performance improvement plan on 18/01/2017 and department management upholding the decision for her to be on performance improvement on 09/06/17 and 31/07/17;

4.2.3. Line manager giving the Claimant an adverse end of year mark on 02/06/17 and department manager supporting it on 23/08/17;

4.2.4. Paula Bamford and Debbie Patrick forcing the Claimant to come into work so as not to be dismissed for further sickness absence between April 2017 and August 2017. The Claimant says that she had to come into work even when she had a medical certificate signing her off work;

4.2.5. Putting the Claimant on written warnings for sickness absence on 02/05/17;

4.2.6. Stopping her sickness pay with effect from 26 May 2018.

4.3. Did the Respondent treat the Claimant as aforesaid because of the 'something arising' in consequence of the disability? In particular:

4.3.1. In respect of points 4.2.1, 4.2.4, 4.2.5 and 4.2.6, the Claimant relies upon her sickness absence;

4.3.2. In respect of points 4.1.2 and 4.1.3, the Claimant relies upon her alleged difficulty in achieving the departmental target.

4.4. Has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The Respondent's case is as follows:

4.4.1. The Claimant's treatment was in accordance with the applicable policies on sickness absence and performance management.

4.4.2. The business aims or needs sought to be achieved were:

(a) To help reduce and manage sickness absence within a clear framework for managers and employees; and

(b) To help support and manage employees in their level of performance at work.

4.4.3. Regarding reasonable necessity:

(a) As to the steps taken by the Respondent in connection with the Claimant's extended periods of sickness absence, such monitoring and management is reasonably necessary to ensure that levels of absence are measured so that the Respondent can identify where employees' attendance has fallen below the levels deemed necessary to maintain an effectively run service and act accordingly.

(b) As to the Claimant's performance improvement plan and end-of-year marking, these were reasonably necessary steps in effectively supporting and managing the Claimant in her performance at work.

4.4.4. As to proportionality, the Respondent has applied its policies with due regard for the Claimant's particular circumstances (including, for example, by applying an extended trigger point for the

purposes of the sickness absence policy, to reflect the Claimant's relevant medical conditions.) All the acts complained of by the Claimant amount to steps taken to support the ongoing employment relationship; the Claimant has not been dismissed.

4.5. Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

5. Section 20 and section 21: reasonable adjustments:

5.1. Did the Respondent apply the following PCP generally, namely requiring employees to speak to benefit Claimants on the phone?

5.1.1. Did the application, of any such provision, put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? This was applied to the Claimant around 16 July 2018 onwards.

5.2. Did the Respondent's physical feature of lighting above the Claimant's desk put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? This occurred from 3 July 2016. The Claimant contends adjustment ought reasonably to have been made from date of OHS report 2 March 2017. There was a temporary adjustment when moved to colleague's desk on 22 January 2018. The Claimant was then returned to her original desk on 31 January 2018. The lighting was finally corrected around beginning of June 2018.

5.3. Did the Claimant's requirement for auxiliary aids: lumbar support chair, appropriate keyboard and mouse put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The Claimant contends that these adjustments ought to have been made by a 13 May 2017, a month after the Claimant completed the DSE application around 13 April 2017.

5.4. The Claimant says that she was put at the following disadvantages:

5.4.1. She became stressed and breathless;

5.4.2. Her hearing was strained;

5.4.3. She had headaches;

5.4.4. She had substantial pain in her hands and back;

5.4.5. She had difficulty communicating with benefit Claimants, asking them to repeat themselves and she had to repeat herself;

5.4.6. She was unable to concentrate at work and became unwell.

5.5. Did the Respondent take such steps as were reasonable to avoid the disadvantages? The burden of proof does not lie on the Claimant; however, it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

5.5.1. Providing her with the work station assessment and adjustments recommended in the OHS report dated 02.03.17 and subsequent reports (and which the Claimant says she repeatedly requested);

5.5.2. Lumbar support chair;

5.5.3. Appropriate keyboard and mouse;

5.5.4. Adjustment to light above the Claimant's desk;

5.5.5. Not being on phone duties.

5.6. Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

6. Time/limitation issues

6.1. The Claim Form was presented on 8 August 2018. The Claimant contacted ACAS to commence Early Conciliation on 31 May 2018 and completed on 9 July 2018. Accordingly, and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 1 March 2018 is potentially out of time, so that the Tribunal may not have jurisdiction.

6.2. Has the Claimant shown that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

6.3. Was any complaint presented within such other period as the Employment Tribunal considers just and equitable?

7. Remedies

7.1. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

7.2. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings and/or injury to feelings.