EMPLOYMENT TRIBUNALS

Claimant:	**Ms Camille Bhudu**
Respondent:	**University of the Arts London**

Heard by in person and hybrid (in person and CVP)

On	**10 August 2020; 11 August 2020 (half day); 13 August 2020 (full day); 14 August (half day); 26 October to 27 October 2020 - full day and in chambers on 28-29 April 2021**
Before:	**Employment Judge Martin** **Mr D Clay** **Mr M Marenda**
Representation **Claimant:**	**In person (assisted by Mr Byrne her carer)**
Respondent:	**Ms Danvers - Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claims are not well founded and are dismissed.

RESERVED REASONS

1. By a claim form presented on 20 December 2018, following a period of early conciliation that began and ended on the same day, 23 November 2018, the claimant brought complaints of disability discrimination, failure to pay holiday pay and unauthorised deductions from wages. The Claims were defended by the Respondent.

2. We had a bundle comprising documents from both parties numbered to 573. heard from the Claimant and for the Respondent. We heard from Ms Lise Foster (Associate Director or IT Services); Ms Lynn Friskey (Head of IT Service Operations) and Ms Satvinder Matharu (HR Consultant).

The Issues

3. The issues were refined during the hearing and the final issues to be determined are as follows:

Jurisdiction

a. Was the claim form submitted more than 3 months after some of the conduct complained of?

b. If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?

c. If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

Disability

d. The Respondent accepts the Claimant was disabled withing the meaning of s6 Equality Act 2010 at the relevant time due to her asthma.

e. The Respondent accepts it had knowledge of the disability at the relevant time.

Reasonable Adjustments

f. The Claimant relies on the following PCP (provision, criterion, or practice):

    i. Being required to work in a non-air-conditioned environment.

g. Did the Respondent apply that PCP?

h. Did it place the Claimant at a substantial disadvantage in comparison with employees who were not disabled? The Claimant relies on the following disadvantage:

    i. Being uncomfortable and the environment exacerbating her condition.

i. Did the Respondent know, or could they reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage relied upon?

j. Did the Respondent take such steps as it is reasonable to have to take to avoid the disadvantage? In particular:

    i. Providing the Claimant was an air-conditioning unit or moving her to an air-conditioned office. The Claimant says the duty to make this adjustment arose when it was recommended by Occupational Health in February 2017 and it should have been made straight away. She accepts that she was provided with an air-conditioning unit in August 2018.

Harassment

k. Did the Respondent, its employees or agents act as follows:

    i. Tell the Claimant that Lynn Friskey or Lise Foster would be appointed to hear her grievance.

    ii. Thereafter, Lynn Friskey, Lise Foster and Satvinder Matharu involve themselves in identifying who the hearing manager for the Claimant's grievance would be?

l. Did any such treatment amount to unwanted conduct?

m. Was any such unwanted conduct related to disability?

n. Did that conduct have the purpose or effect of:

    i. violating the Claimant's dignity; or

    ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation

o. It is admitted that the following were protected acts on the part of the Claimant:

    i. Making a request for reasonable adjustments in February 2017.

    ii. Raising a grievance in February 2018.

p. Did the Respondent, its employees or agents, act as follows:

    i. Tell the Claimant that Lynn Friskey or Lise Foster would be appointed to hear her grievance.

ii. Thereafter, Lynn Friskey, Lise Foster and Satvinder Matharu involve themselves in identifying who the hearing manager for the Claimant's grievance would be.

iii. Fail to address the Claimant's concerns about lighting raised in September 2018 in circumstances where the lighting was liable to cause her migraines and the terms of her extended probation prevented her from taking further time off sick.

q. If so, in so acting did the Respondent subject the Claimant to a detriment because she had done, or the Respondent believed she had done or may do a protected act?

Holiday Pay

r. Did the Respondent fail to pay the Claimant 58 hrs of holiday pay in respect of the leave year 2017/2018 as set out at p48-49 of the bundle?

The law as relevant to the issues

1. Reasonable adjustments

1.1 An employer is required to make reasonable adjustments under ss.20 and 21 Equality Act 2010 where a provision, criterion, or practice (PCP) applied, placed a disabled person at a substantial disadvantage in comparison with non-disabled persons. Failure to do so amounts to unlawful disability discrimination. Tribunals determining whether it would be reasonable **for** the employer to have to make a particular adjustment to comply with the duty must consider the extent to which taking that step would prevent the disadvantage caused by the PCP (Equality and Human Rights Commission's Code of Practice on Employment).

1.2 The case of Environment Agency v Rowan [2008] ICR 218 set out guidance on how to approach reasonable adjustment cases. It held that the Claimant must show:

a. There was a PCP

b. The PCP put the Claimant at a substantial disadvantage in comparison to persons who did not share his disability

c. The adjustment would avoid that disadvantage

d. The adjustment was reasonable in all the circumstances

e. The failure to make the adjustment caused the losses alleged.

1. 1.3 The duty to make adjustments may require the employer to treat a

disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination (**Archibald v Fife Council** [2004] IRLR 651, HL).

2. The correct approach to assessing reasonable adjustments is addressed in **Smith –v- Churchills Stairlifts plc** [2006] IRLR 41; **Environment Agency –v- Rowan** [2008] IRLR 20; and **Project Management Institute –v- Latif** [2007] IRLR 579.

3. In **Smith**, the comparative exercise required by s.6(1) of the DDA was considered by the Court of Appeal having regard to the speeches contained in the judgment of the House of Lords in **Archibald**. Maurice Kay LJ stated: ". . . Notwithstanding the differences of language, it would be inappropriate to discern a significant difference of approach in these speeches. . . it is apparent from each of the speeches in **Archibald** that the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements".

Victimisation

4. Section 27 of the Equality Act 2010 ("EqA") provides:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act –
>
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

5. In **St Helens Metropolitan Borough Council v Derbyshire** [2007] IRLR 540, HL Baroness Hale endorsed the three-step approach set out in **Chief Constable of West Yorkshire Police –v- Khan** [2001] IRLR 830, HL with

regard to the RRA, which equally applies to the EqA**:**

> "There are three relevant questions under the 1975 Act. First, did the employer discriminate against the woman in any of the ways prohibited by the Act? In this particular case, the alleged discrimination was by 'subjecting her to any other detriment' (contrary to s.6(2)(b) of the 1975 Act). Secondly, in doing so, did the employer treat her 'less favourably than ... he treats or would treat other persons'? Thirdly, did he do so 'by reason that' she had asserted or intended to assert her equal pay or discrimination claims or done any of the other protected acts set out in s.4(1) of the Act?

Harassment

6. Section 26 of the EqA provides:

> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. . .
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are - . . . disability"

7. A Tribunal should consider all the acts together in determining whether they might properly be regarded as harassment (**Driskel –v- Peninsular Business Services Ltd** [2000] IRLR 151, EAT and **Reed and Bull Information Systems Ltd –v- Stedman** [1999] IRLR 299, EAT).

8. The motive or intention on behalf of the alleged harasser is irrelevant (see **Driskel** above).

9. The Court of Appeal confirmed in **Land Registry –v- Grant (Equality and Human Rights Commission intervening)** [2011] ICR 1390 "*when assessing the effect of a remark, the context in which it is given is always highly material*".

10. In **Richmond Pharmacology –v- Dhaliwal** [2009] ICR 724 the EAT held that the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.

11. The word 'victimisation' is specifically defined by the Equality Act 2010 and has a different meaning from the normal use of the word. In

considering a claim of victimisation the Claimant must prove that there has been a protected act as defined. The Claimant must also establish that there has been a detriment, and most importantly the Tribunal must find that the detriment was because of the protected act. A claim of victimisation cannot succeed without that causal link being established.

The Hearing

4. The Tribunal heard evidence from the Claimant on her own behalf and for the Respondent from Ms Lynn Friskey (Head of IT Service Operations); Ms Lise Foster (Associate Director of IT Services) and Ms Satvinder Matharu (HR Consultant). All witnesses provided a written statement.

5. The first day of the hearing took place at the Tribunal with all parties present. However, the lift was not working on day two and although the Claimant made it up the stairs it was clear that she was quite unwell as a result and distressed. She wanted to continue with her evidence, but the Tribunal considered she was not well enough and suggested we should adjourn for the day. After adjournments for the Claimant to consider her position with Mr Byrne the hearing was adjourned for that day and the Claimant was to notify the Tribunal by 3 pm how she was. It was agreed that if she was not well enough to continue then there would be a telephone preliminary hearing to discuss the way forward. It was not known how long it would take to mend the lift. The hearing adjourned at 11.15.

6. The Claimant attended by CVP the next day, and whilst she said she could carry on, she also said that giving evidence had taken its toll. There were problems with the CVP connection which caused communication difficulties. The Respondent wanted to press ahead, however the Tribunal considered that it was in the interests of justice to adjourn to give the Claimant time to recover and time to ensure her computer equipment could handle CVP. The hearing was adjourned and continued on 26 to 27 October 2020. With appropriate breaks she was able to complete her evidence. Mr Byrne assisted her in asking questions of the Respondent witnesses. There were still some technical issues which affected the sound however these were overcome, and the Claimant was able to effectively participate. There was no time for submissions so the case was adjourned until November 2020 with the parties agreeing to provide written submissions.

7. By this time, Employment Judge Martin was absent from work on extended sick leave and due to difficulties imposed by the pandemic, it was not possible to reconvene the Tribunal until 29 April 2021. The Tribunal apologies for the delay in concluding the proceedings which was out of its control.

Background

8. The Tribunal has made the following findings of fact having heard the evidence and considered the documents. These findings are limited to those that are relevant to the issues and necessary to explain the decision

reached. Even if not set out below, all evidence was heard and considered.

9. The Claimant was employed by the Respondent from 1 November 2016 as a telephony assistant. She was one of four in the building and her job was to direct calls from external and internal callers. The office space is open plan, and the Claimant was on the 13th floor. There is a large expanse of glass which means that the office can become very hot in summer and cold in winter. In the area where the Claimant sat were 35 other members of staff, with other staff working on projects and programmes at the other end of the floor. There are about 70 staff on the 13th floor. The Claimant attended her interview at her place of work and viewed her workplace at that time.

10. Ms Foster's witness statement described the premises as follows:

"The IT service team are based on the 12th and 13th floor of the LCC (London College of Communications) building which is at the Elephant and Castle. This is like a big greenhouse and has very little in the way of climate control, these floors to not have air conditioning and it does get uncomfortably warm in summer. There are 70 people based in this open plan space on the 13th floor."

11. The Respondent accepts that the Claimant is disabled by reason of brittle asthma and that it had knowledge of it. Brittle asthma is a very serious form of Asthma.

12. The Claimant was employed subject to a 12-month probationary period. There were formal reviews after three and six months service, and before the twelve month probationary period ends. The Respondent has the right to extend the probationary period if, in its opinion, circumstances so require. The Statement of Terms and Conditions of Employment provide for sick pay entitlement in the first year of continuous service of one month full pay, and after four months' service one month full pay and two months half pay. In the second year of service the entitlement is to three months full pay followed by three months half pay. In the third year, it is four months' full pay, followed by four months' half pay and thereafter six months' full pay followed by six months' half pay.

13. The Respondent has a Probation Policy and Procedure. Within this policy is a section on reasonable adjustments which provides that the Respondent would make adjustments for disabled employees to ensure their access requirements or support needs are met. The policy also states:

"For staff on probation, high levels of sickness absence will be addressed during the probationary review, and may constitute grounds for terminating the employment in line with the probation procedure.

A high level of sickness absence during probation is defined as more than two spells of absence totalling five days or more in the first six months of employment (pro rata for part-time staff)."

14. There is a section in the probation policy on extending probation. This

gives the Respondent the right to extend the probation period in circumstances where due to sickness, maternity leave or other authorised absence it has not been possible to assess a probationer's performance. It provides that a probation period would normally only be extended once, for a maximum period of up to three months, but that there may be circumstances where a longer extension period may be considered appropriate.

15. The Respondent has a comprehensive policy on Requesting Workplace Adjustments. Within this policy it states:

"Whether an adjustment is considered 'reasonable' depends on context. An organisation the size of UAL would be expected to meet most workplace adjustment requests. However, the potential benefit or impact for the individual and others (e.g. staff, students, visitors), resources available, practicality of the changes and costs should be considered."

16. The policy advises managers to ask new appointees to discuss their requirements before commencing work and also provides a procedure for asking for workplace adjustments once at work. There is a section at stage 4 of the procedure dealing with 'Decisions and Implementation' which states that observations and recommendations from any workplace assessments or medical reports would be considered, whether the proposed adjustment would alleviate any disadvantage experienced by the staff member, the impact on operational priorities or other colleagues, the costs and the timeframes for implementation.

17. If workplace adjustments can not be agreed, there is provision for a Workplace Adjustment Case Conference. This provides for a six stage procedure which should be completed within 8 weeks of the initial request being made. The criteria to convene a Workplace Adjustment Case Conference with when adjustments have not been agreed with 8 weeks of the initial request, or a request from the disabled member of staff for a Workplace Adjustment Case Conference.

18. The Respondent has a grievance policy which as applicable to the issues in this case, provides that the employee's manager will hear the grievance unless the grievance is about them, in which case their manager will hear the grievance.

19. The Respondent has a Dignity at Work Policy which deals with matters including harassment and provides a procedure to be used in such circumstances.

20. The Claimant attended for a pre-employment medical check with Occupational Health ("OH") before she started work for the Respondent. The OH report said that she was fit for work and set out her diagnosis of brittle asthma stating that this condition would be considered within the disability provision of the Equality Act 2010, Recommendations were set out as follows:

- *"Workstation assessment with specific attention to seating, keyboard and mouse provision*
- *Personal emergency evacuation plan (PEEP) – Camille would struggle to manage stairs in an emergency situation*
- *Flexibility to attend regular medical treatment appointments."*

These recommendations were carried out by the Respondent. The Tribunal is satisfied that at this time there was no mention that dust or high temperatures could exacerbate the Claimant's condition. The Respondent provided the Claimant with a parking space as an adjustment at her request.

21. The Claimant had periods of sick leaves in her first few months of employment resulting in the Respondent referring the Claimant to OH for an assessment. Under the heading capacity for work the report said:

"*Camille loves her job. However, she does have significant physical health problems, and with adjustments she should be able to be sustained in work. These will principally related to firstly reducing the risk of asthma through minimising dust. A flat and washable keyboard for example will help with this. Secondly, to assist with temperature control she should have access ideally to air conditioning or other ways to keep her temperature at the optimum level. She is also prone to chest infections and is likely to need for more sickness absence that other employees.*

With regard to her work station, there are two key requirements,. Firstly to have a headset to cut out noise, (for example from fans (as she has been trying to keep extraneous noise down by holding the mouthpiece, which has then caused upper limb and neck problems."

22. At this time the Claimant was using three nine-inch fans on her desk which she had provided. On receipt of this report in early February 2017 the Respondent considered the recommendations and the recommendations regarding a keyboard was implemented. The Claimant already had a noise cancelling headset however another headset was sourced and ordered. There was a recommendation for a specific chair due to a trapped nerve in the Claimant's lower spine. This was obtained by the Respondent.

23. Given the recommendation about controlling temperature, Ms Friskey discussed the report with the Claimant and then made enquiries of HR, Estates, Health and Safety and Facilities to work out what options there were to regulate the temperature at the Claimant's workstation. The advice received was that a Dyson fan would be effective to control the temperature without causing noise issues which the current fans were. The Tribunal notes that the OH report does not rule out using fans and expressly says that a noise cancelling headset may help in cutting out the noise of fans. These fans cost about £250.00.

24. There was discussion about other options, including portable air conditioning units which the Claimant wanted. However the advice was that this would be impractical. In their considerations the Respondent considered the impact of any potential adjustment on the Claimant's colleagues who worked nearby. For example a portable air conditioning

unit would need to be vented out of a window, this would mean that the blinds could not be pulled right down which would cause glare on computer screens. Health and Safety and Estates said that the portable unit would not meet the Claimant's requirements due to the expanse of space involved. A built in unit was considered but at a cost of £5-7000 was considered excessive but more importantly it was not considered this would help given the layout of the office space.

25. As a result the Dyson fan was purchased. The fan was in place on 6 April 2017 however the Claimant was on sick leave then so worked using this fan on 19 April when she returned to work. She was then on sick leave from June 2017 to 30 August 2017.

26. Counsel for the Respondent set out a table in submissions which is reproduced below. The Claimant has not said that this table is incorrect. The parties were invited to reply to the submissions made if they felt this was appropriate. This table also sets out percentage of working time off sick and what adjustment had been made at the various periods of absence.

Period	**Adjustments**	**No of working days in period**	**No of days of disability related absences**	**Disability absences as % of working days**
01.11.16-18.04.17	No air-conditioning or cooling device in place and tried by C (NB: Dyson fan in office from 06.04.17, but C did not attend until 19.04.17)	117	34	29%
19.04.17-30.08.17	No air-conditioning. Dyson fan in place and tried by C.	94	38	40%
31.08.17-06.10.17	In air-conditioned High Holborn office	27	10	37%
10.10.17-02.03.18	C on special leave, then air cooler etc., in place, but C did not attend until 02.03.18	N/A	N/A	N/A
03.03.18-31.08.18	Air cooler, air purifier and screens in place and tried by C (air-conditioning unit in place from 17.08.18 but C did not attend until 03.09.18)	127	66	52%
03.09.18-30.09.19	Air-conditioning unit in place and tried by C.	275	121	44%

27. The Claimant requested a Workplace Adjustment Case Conference. In her application she said she wanted a second opinion on the workplace adjustments. She asked if she could be moved to the Holborn offices which were air conditioned as a reasonable adjustment. This was something the Respondent had previously considered but at that time there was no space.

However, at the time of this request there was space, and arrangements were made for the Claimant to start a one-month trial period. There is no parking at the Holborn offices, so the Claimant travelled by public transport.

28. The trial commenced on 30 August 2017. The Claimant was on sick leave on 19 September and then again from 25 September 2017 onwards. The air conditioning did not seem to improve her health. There were other practical issues in that the Claimant's work on the telephone interrupted other staff working nearby who needed to concentrate; additionally, the Claimant was separated from her team which cause operational difficulties and the Claimant also found the travelling difficult. This was not a successful trial and ended with the Claimant taking sick leave from 25 September 2017.

29. The Respondent then allowed the Claimant to take special paid leave while they investigated the adjustments further. The Claimant was on this leave from 10 October until 3 March 2018 when she returned to work.

30. On 14 September 2017 in response to a letter from the Claimant Ms Friskey sent a letter to the Claimant. The Claimant had complained that the Workplace Adjustment process had not been followed. This letter set out the various things that the Respondent had done to address the various issues as they arose. It was pointed out to the Claimant that the issues had come to light at different stages and at each point they were considered by the Respondent. This letter is four pages long so not reproduced in this judgment. Its letter set out that the issues arose first in the pre-employment assessment, then following a workstation assessment on 13 December 2016 and then in the OH report in February 2017. A stress risk assessment was carried out by Ms Friskey on 12 April 2017 (at which it is recorded that the Claimant agreed the situation had improved significantly).

31. The letter recorded that all adjustments had been made, including additional sickness allowance which was increased by 40% before it triggered sickness monitoring. It recorded the efforts made by the Respondent to source an effective solution to the temperature issues and the trial of moving the Claimant to air-conditioned offices in Holborn.

32. In response to the Claimant's complaint that a case conference had not been organised, Ms Friskey said that a case conference was not required if all adjustments had been considered an implemented. Her position was that as the issues arose, adjustments were considered and implemented so a case conference was not necessary at that point. She decided a case conference should be set up as the Claimant had requested one. A timeline of events was recorded as follows:

"Pre-employment questionnaire – dated 0/11/16
Car parking requested – 31/10/16
Car parking agreed – 31/10/16
Workstation assessment – 11/11/16
PEEP assessment completed – 7/11/16
Ergo rest – Ordered 15/11/16

Footrest – Ordered 15/11/16
OH assessment – 1/2/17
Chair in place – 20/2/17
Lynn started – 01/3/17
Keyboard – 14/03/17
Headset ordered – 15/03/17
Aircon response from estates – 27/3/17
Dyson Fan in place – 06/04/17
Holborn formally raised 19/08/17
Trial starts 30/08/17"

33. On 18 September 2017 the Claimant attended OH for a further assessment. This was when the Holborn trial was in progress, but before she went on sick leave. At that point in time, the report said that the air quality was improved which had led to an improvement in her health. It also stated that *"Clearly it is early days but the medical view would be that reduction of dust in the atmosphere and the provision of clean air at a steady temperature with controlled humidity would be expected to assist an individual with such severe asthma."* This was the first time that dust and humidity had been identified as a problem. Despite the OH report reporting an improvement when the Claimant was at Holborn, it later transpired that it did not assist as the Claimant again went on sick leave.

34. The workplace adjustment case conference took place on 17 November 2017. During this, the question of a portable air conditioning issue and this time it was decided that the Respondent should purchase a portable unit for the Claimant long with an air purifying device. Precisely what device should be ordered was researched after this meeting. The Respondent moved the Claimant's workstation to be by a wall. It had been suggested it should be in a corner to increase the effectiveness of the air conditioning unit, but this was not possible given the layout of the office. Screening was provided to try to enclose the Claimant's workstation to maximise the effectiveness of the unit. Consideration was given to relocating the Claimant elsewhere in the building, but this was not practicable.

35. The Respondent accepts that it took time to source and obtain an air condition unit, having seen the correspondence in the bundle, the Tribunal is satisfied that the Respondent took reasonable steps in obtaining one. On 22 November 2017 the Claimant's union representative met with Ms Friskey on the 13th floor to view desk locations. The new equipment arrived on 5 December 2017 and the Claimant was asked to come to view the equipment and desk space and provide feed back the same day.

36. The Claimant did not reply until 8 December 2017 stating she would visit the office on 13 December 2017 to view the equipment and desk location. There is a differing account of what happened. The Respondent's evidence is that Ms Friskey and Ms Foster greeted the Claimant and her union representative and then left so that they could discuss the equipment and set up privately. The Claimant's evidence is that they remained, and she felt intimidated. There was no evidence from Ms Riley, the Claimant's union representative. On balance the Tribunal prefers the evidence of the Respondent.

37. No comments were received about the equipment on the day of the visit and therefore the Respondent thought the Claimant was satisfied and would be returning to work on Monday 18 December 2017. She was advised that this was expected on 14 December 2017 in a letter from Ms Matharu. This letter said:

    "Further to the WPA case conference meeting and agreement of the adjustments to be put in place (attached for ease of reference), all the agreed reasonable adjustments have now been put in place. It is acknowledged that the location of the desk is not in a corner, but it is next to a wall with all the relevant equipment in place.

    I am aware that the workstation was reviewed yesterday and given that everything that has been agreed is in place it is expected that you will return to work on Monday 18 December to trial the workstation, and failure to do so, will be deemed as frustration of this process."

    The Claimant was still on fully paid special leave at this time.

38. The Claimant did not return to work on 18 December 2017 and instead sent an email saying that she was waiting for Mr Riley to return from annual leave so she could take direction from her. In this email she said she had raised concerns about the workspace.

39. In January 2018 Ms Riley contacted the Respondent to say that the Claimant felt intimidated when she went to the office on 13 December 2017, and she considered the equipment to be inappropriate and unsuitable as what had been purchased was fan cooler rather than a stand-alone air-conditioning unit. Her position was that this would circulate dust which would be harmful. She raise humidity as a potential problem as well as the noise distortion on her headset. The Claimant did not attend the office to try the equipment out.

40. This resulted in further investigations being made and correspondence between Ms Matharu and Mr Riley. After various assurances about humidity and dust and the Respondent's reasoning as to why at that time a portable air conditioning unit would not be suitable given the Claimant returned to work on 13 March 2018.

41. The Claimant raised a grievance in relation to the adjustments. The Respondent initially appointed Ms Friskey and Ms Matharu to hear the grievance as they managed the Claimant, and this was in accordance with its grievance policy. The Claimant said she did not want them to hear her grievance as they had been involved in the process. The Respondent agreed to change the personnel and other colleagues were appointed.

42. The Claimant complains that Ms Friskey and Ms Matharu were involved in who did hear the grievance. They accept that they gave some guidance to who may be suitable but say they had no hand in making the decision. In her evidence the Claimant accepted that the reason Ms Friskey and Ms

Matharu were initially to deal with her grievance was not because she had raised the grievance but because of the policy. The judge's note of evidence is as follows:

First part of your complaint outlined on Monday is you told that Mrs N Foster and Friskey going to hear grievance you say act of victimisation or harassment re disability, but nothing to suggest if you told that it was because of your grievance or disability	My understanding it was not related to harassment. The lighting issue was harassment.
So you don't say being involved in grievance was harassment	No not what I am saying
Are you saying you were told they would be involved in grievance because you raised a grievance ie victimisation?	No it wasn't

43. Throughout this process the Respondent was guided by Estates. On 30 May 2017 following a conversation between Mr Demuth in Estates and Ms Riley, he said it was possible to fit an air-conditioning unit and he had one in his garage. This could not be used for health and safety reasons and PAT testing requirements. When Mr Demuth was interviewed on 31 May 2017, as part of the investigation into the grievance that the Claimant had raised, he said he would not recommend a portable air conditioning unit as it could not control the humidity in the Claimant's workspace. Despite this, the Respondent felt that notwithstanding having expected the Claimant to try out the air-cooling unit and other adjustments it had put in place, that it would purchase the equipment. Ms Foster's witness statement says that they wanted to support the Claimant back to work and that it was easier to purchase the equipment than continue arguing about it.

44. The equipment was provided and installed on 17 August 2018. The Claimant says she is happy with it, although, as can be seen from the table of absences above the Claimant's absence rate has not improved in the year from September 2018 to September 2019. In this period, her absence percentage was 44%. As pointed out by the Respondent in submissions, the time when there was the smallest percentage of absence was between November 2016 and April 2017 when the percentage was 29%. At that time there was no air conditioning or cooling device in place.

45. Due to the Claimant's high levels of sickness her probation period had been extended three times. Ms Foster felt her attendance levels were still unacceptable and that her performance was below the level of her colleagues. Ms Foster also said that the Claimant's behaviour had been unacceptable at times, for example insisting the windows were opened resulting in the office getting very cold and her colleagues having to work in their coats. She did not want to confirm the Claimant in post, however, was overridden by HR who advised that she should be confirmed. The Claimant was then confirmed in post.

46. There was also an issue with lighting in September 2018. The Claimant

alleges that the Respondent failed to address her concerns and that this was victimisation as she had made a protected Act. The Respondent's position is that the Claimant's concerns were addressed. Ms Foster said she had to get a Lux lighting survey done and that it was not possible simply to change the lighting for her needs as the needs of her colleagues needed to be considered as well. Some lights which were out of order were fixed. The Claimant says she had to wear a cricket hat to cut out the glare which she found humiliating. Ms Foster says that being and Arts university the dress code is very relaxed and many people wear headwear which can be 'striking'.

Submissions

47. Both parties made written submissions which were carefully read and considered by the Tribunal. They are not reproduced here. The case law referred to by the Respondent was considered by the Tribunal in coming to its decision. This case law included:

    a. **Madarassy v Nomura International PLC [2007] EWCA Civ 33; [2007] ICR 867** which held that "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".*

    b. **Romec Ltd v Rudham [2007] 7 WLUK 408** which held that in considering whether an adjustment was reasonable, the Tribunal must consider whether the adjustment contended for would or could have removed the disadvantage.

    c. **Environment Agency v Rowan [2008] ICR 218** which held that It is necessary for the Tribunal to identify the substantial disadvantage faced by the Claimant.

    d. **Royal Bank of Scotland v Ashton UKEAT/532/09, [2011] ICR 632** which held that the focus of the Tribunal should be on the result of the adjustment or lack of adjustment, not on the process followed by an employer.

    e. **Land Registry v Grant [2011] ICR 1390** which held that the concepts of violating an employee's dignity or creating an intimidating, etc., environment, convey a degree of seriousness: *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute*."

f. **Griffiths v Work and Pensions Secretary [2015] EWCA Civ 1265, [2017] ICR 160** which held that the result of an adjustment does not need to be guaranteed to be a success and that the proper comparator for the purposes of identifying if a claimant is put to a substantial disadvantage in comparison with persons who are not disabled should be identified by reference to the specific disadvantage relied on.

g. **Private Medicine Intermediaries Limited v Miss C Hodkinson and ors UKEAT/0134/15/LA** which held that for treatment to be 'related to' disability in a harassment claim, a claimant must establish that there is the necessary link between their disability and the treatment complained of.

h. **Browne v The Commissioner of Police of the Metropolis UKEAT/0278/17/LA** which held that a claimant must show on the balance of probabilities that she was in fact put to the substantial disadvantage relied on and the Tribunal must have regard to the overall picture, not just medical evidence. However, it can be relevant to the determination if there is no medical assessment supporting that the claimant was put to the disadvantage relied on. This case also concerned a claimant with asthma who complained about being in an open plan office without control over the ambient temperature (in that case, to control it getting too cold). It was found that the claimant had not established substantial disadvantage even though in that case there was some evidence that attendance improved when the Claimant could control the temperature.

The Tribunal's conclusions

48. Having found the factual matrix as set out above the Tribunal has come to the following conclusions on the balance of probabilities. The Tribunal has considered each issue in turn, leaving jurisdiction to the end. The Respondent has accepted that the Claimant is a disabled person by reason of brittle asthma and that it knew of her condition at the relevant times.

Reasonable Adjustments

<u>The PCP</u>

49. The PCP relied on by the Claimant is being required to work in a non-air-conditioned environment. The first question the Tribunal considered was whether the Respondent applied that PCP? The Respondent accept that this was the case until 31 August 2017 when the Claimant went to Holborn and between 15 December 2017 and 17 August 2018 when the Respondent were exploring options.

<u>Substantial disadvantage</u>

50. The next questions are whether the PCP placed the Claimant at a substantial disadvantage in comparison with employees who were not disabled and whether the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage relied upon?

51. The Claimant relies on the disadvantage of being uncomfortable and the environment exacerbating her condition. The reference to being uncomfortable is said by the Claimant to relate to her experiencing increased sweating as a side effect of some medication she was taking.

52. The Claimant's witness statement does not address this point. The Respondent submitted that given it is not in her witness statement that it can not have been a substantial disadvantage as otherwise it would have been mentioned. The Claimant makes two mentions of excess sweating in her submissions but as noted not in her witness statement. In cross examination the Claimant said (this is an extract from the Judge's notes of evidence):

P39 4.3.1 CMO. The disadvantages were uncomfortable and exacerbate condition. Being uncomfortable is it the same thing because Asthma exacerbated or is uncomfortable separate	Being uncomfortable had excess sweating problem uncontrollable, but at hospital. And the environment exacerbating my temperature in the workplace
Your disability is Brittle Asthma, so if you have excess sweating problem with lack of air con, diff to your asthma?	No because the injection treatment I am on as a side effect is heat forming creating excess sweating so not a separate issue.
I had not understood was a separate element to your discomfort i.e. sweating, no medical evidence to support there is that issue	No, but says so in one of my OH reports, maybe the first I cant remember.
P149 para 3 so not a lack of air conditioning that causes this, it is a lack of anything to help keep the temperature down. Focussing on the discomfort, in terms of the discomfort is warmth and redness from medication, does not necessary need air con, but something to keep your environment cooler. You said exasperation of asthma in non air conditioned environment also discomfort, you say this is because of injectable medication warmth and redness in OH report. Re redness and warmth is not about air con but something to keep temperature cooler.	It is re excess sweating.
So not about the air con specifically.	It is all my medication, the steroid medication too, sweating is a comfort thing,

	combination of all my treatments for brittle asthma.
So issue from medication is sweating, sense of warmth and redness, I say those issues not about lack of air con as could be solved by cooler environment	Yes

53. The Claimant referred to the OH report of February 2017. This says *"injectable medication is also noted to cause a sense of warmth and redness".* It does not mention sweating as an issue that needed to be addressed.

54. The Tribunal does not find that the sweating could have been a substantial disadvantage if it had been it would have been specifically addressed in the issues as what the Claimant meant by discomfort and would have been set out in some detail in her witness statement. As can be seen from the extract Counsel for the Respondent had not appreciated until this point in cross examination that excess sweating was an example of the discomfort the Claimant was complaining about in these proceedings. The Claimant accepted a cooler environment by what ever means would help and that would no doubt have included the provision of the Dyson fan. The PCP relied on is the lack of air conditioning not the requirement to work in a hot office. The Tribunal finds any discomfort to be minor given the lack of evidence on this point. This part of the Claimant's claims is dismissed.

55. In relation to the exacerbation of the Claimant's asthma the Respondent was not put on notice that air conditioning would be required when the Claimant started work despite her completing a health questionnaire and an assessment by OH.

56. On 1 February 2017 OH stated that: *"…These [adjustments] be principally related to firstly reducing the risk of asthma through minimising dust. A flat and washable keyboard for example will help with this. Secondly, to assist with temperature control she should access ideally to airconditioning or other ways to keep her temperature at the optimum level."* (Emphasis added by Tribunal). As noted above this report did not preclude the use of fans as it refers to use of a headset to cancel the noise of fans. Whist the Claimant says that the lack of air-conditioning exacerbated her condition, she has not produced any evidence to substantiate this. For example, she took peak air flow readings to monitor her condition. The judge's notes of evidence record the following:

We have looked at medical documents available at the time, they all say dust and high temp will trigger, air con accepted will help, air flow with peak flow monitoring, no medical evidence to say air con assisted with asthma and disadvantage as not having air con	When at Holborn
But then went off sick again, this was an initial view	It was the nature of brittle Asthma, constantly playing

	catch up because of what gone through
When had air cooling device you took temp and humidity readings	Yes
You also took peak flow readings by yourself	Yes I do that constantly.
What we don't have is anything showing peak flow getting worse when didn't have air con and got better when you did	I don't think so.
We do have a couple of medical documents that deal with time after air con. 481 nothing to say adjustment made a difference, just says still struggling.	And I continued to feel stressed and unhappy
Nothing to suggest an improvement with air con	I accept that

57. Even though the OH report in September 2017 referred to above, noted an improvement when the Claimant moved to Holborn, this was short lived as the Claimant was soon absent from work due to her asthma.

58. The Respondent has pointed out in submissions that the *"Claimant was made aware at the PH that she might need medical evidence to prove the effects of her asthma and said she would look into getting a GP or consultant letter [41] but did not do so. On her own evidence she consistently monitors her peak flow and so would have been able to show the impact of air-conditioning or lack thereof on her asthma, but she has not. She has also not provided her medical records to try to show a worsening in her condition at different times that is linked in some way to air-conditioning".*

59. The evidence that the Tribunal does have before it is that even when adjustments had been put in place, including the Claimant trialling working at Holborn which did have air-conditioning her absence levels did not improve. Even since the Respondent put in an air conditioning unit at her workplace, the Claimant's levels of absence have not improved to any significant degree.

60. Therefore, the Tribunal finds that the Claimant has not a substantial disadvantage by the application of the PCP.

Reasonable steps

61. The Tribunal went on to consider whether the Respondent took such steps as it was reasonable to have to take to avoid the disadvantage if it had found that the Claimant did have a substantial disadvantage due to the application of the PCP. The Claimant's case is that she should have been provided with an air conditioning unit or moved to an air-conditioned office straight after the OH report in February 2017.

62. The relevant parts of the OH report from February 2017 is set out above. As the Tribunal has already found it did not say that the Claimant had to have an air conditioning unit, it said that would be the ideal situation, but other cooling adjustments could be made instead. It did not rule out the

use of a fan. The advice at that time was that an air conditioning unit was not workable and other options were looked into. The Claimant accepted that it may have been reasonable to provide a Dyson fan especially as at this time the only objection to the fans she was using was the noise.

63. The Claimant was absent on sick leave from June 2017 to August 2017 when she informed the Respondent the fan was not suitable and asked to move to Holborn. This request was immediately actioned on a trial basis, but the trial was not successful. The Respondent then provided an air-conditioning unit. The Tribunal finds that it was reasonable for the Respondent to consider other options to an air-conditioning unit first. Given that the air-conditioning at Holborn had not assisted the Claimant in reducing her absence levels, it would have in the Tribunal's view been reasonable for them not to have provided an air-conditioning unit for the Claimant as there was (and is) no evidence that it would help.

64. The Claimant says that an air-cooling unit was purchased rather than an air conditioning unit. The Tribunal finds that there was confusion about the difference between the two and that this does not detract from the reasonableness of the steps that the Respondent took. It did then following her grievance, purchase an air-conditioning unit, but this did not lower her absence levels significantly.

65. The Claimant complained in her evidence that she was not involved in the process of adjustments sufficiently. The Tribunal does not accept this. There was one time in March 2017 when a workplace viewing took place without the Claimant as she was on leave, however apart from that one time, the Claimant and her union representative were consulted.

66. The Tribunal finds that even had the Claimant shown a significant disadvantage that the Respondent took such steps as was reasonable to avoid that disadvantage. The disadvantage was in fact not alleviated by the provision of an air conditioning unit.

67. This part of the Claimant's claim is dismissed.

Harassment

68. The Claimant's claims of harassment are in relation to her grievance and who would conduct it. As set out above the Respondent's grievance policy provides that the employee's manager will hear the grievance. This is why Ms Friskey or Ms Foster was initially going to hear the grievance. However, once the Claimant objected the Respondent made other arrangements without any argument. The Tribunal is satisfied that once Ms Friskey, Ms Foster, and Ms Matharu were not hearing the grievance, their concern was to provide an appropriate person as soon as possible so as not to delay the process.

69. There was a conversation between Ms Foster and Ms Matharu with Ms Mayo about who the hearing manager should be. Ms May was new to the

organisation and the conversation was purely logistical. The Tribunal finds this to be reasonable and that there was no influence placed on Ms May as to who the hearing manager should be.

70. The Claimant accepted in evidence in any event, that the reason for Ms Friskey or Ms Foster and Ms Matharu being involved was not an act of harassment. Even if she had not the Tribunal would not have upheld this part of her claim. The treatment was not related to her disability, it could not have amounted to unwanted conduct as the Claimant achieved her aim not to have Ms Foster, Ms Friskey or Ms Matharu involved in the process. It is not reasonable that this matter would have the purpose or effect of violating the Claimant's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation

71. The Respondent accepts that the Claimant making a request for reasonable adjustments in February 2017 and raising a grievance in February 2018 amount to protected acts.
72. The Claimant raises the same issues with who was to hear the grievance as she does for her harassment claim and the Tribunal's conclusion for her harassment claim apply to her claim of victimisation. This part of her claim is dismissed.

73. The Claimant also complains that the issue with lighting and glare was an act of victimisation. The evidence is that the Claimant raised concerns about the lighting in the office in circumstances where the lighting was liable to cause her migraines and the terms of her extended probation prevented her from taking further time off sick in September 2018. As far as the Claimant was concerned it was a simple matter to remove the lights. However, the Respondent had to have regard to the Claimant's colleagues who may be affected by the change in lighting and go through its procedures for making such changes. The Respondent offered to get a new lux survey done if needed. The lights were changed by 5 October 2018.

74. The protected acts took place some time before the lighting issue arose and there was no evidence to suggest a link between them. In any event the lighting issue was resolved quickly any detriment was resolved.

Holiday Pay

75. In her schedule of loss, the Claimant says she is claiming 58 hours of holiday pay for the year 2017/2018. Although the Claimant has set out what she says is owed in emails to the Respondent, the Respondent disputes that it owes her holiday pay. The Claimant's employment with the Respondent was continuing when she presented her claim.

76. In evidence the Claimant suggested several other figures as the number of hours holiday she was owed. These ranged from 16 to 312. The Claimant ws unable to explain her claim for holiday pay and how much was owed or

how it was quantified. The burden of proof is on the Claimant and she has failed to discharge it. The Claimant's claim for holiday pay is dismissed.

77. Having come to these conclusions the Tribunal has not considered jurisdiction. The Claimant's claims are dismissed.

Employment Judge Martin

Date 5 May 2021