EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Claire Shad **v** **The Doctor's Laboratory Limited**

Heard at: Watford (via CVP) **On**: 27 September to 1 October 2021

Before: Employment Judge Andrew Clarke QC
Members: Mrs I Sood
Mr I Middleton

Appearances

For the Claimant: In person
For the Respondent: Mr Tim Welch, Counsel

JUDGMENT

1. The claims for indirect discrimination, failures to make reasonable adjustments and victimisation are dismissed.

2. The claimant's application for an order under Rule 50 of the Employment Tribunals Rules of Procedure to render anonymous the name of a person referred to in the reasons is refused.

REASONS

Introduction

1. This is a claim for indirect disability discrimination, for failures to make reasonable adjustments and for victimisation. It was presented on 26 October 2018 following a period of early conciliation.

2. At a preliminary hearing on 13 May 2019 Employment Judge Alliott made orders for the hearing of all issues as to liability to take place in April 2020. Unfortunately, this hearing had to be postponed due to covid restrictions. The case has been heard in September 2021 using CVP. All witnesses were able to participate using this platform. The tribunal was provided with

access to an electronic bundle of over 700 pages and to an electronic witness statement bundle. We are grateful to all those involved in the preparation and presentation of the case for their efficiency.

3. We heard evidence from the claimant herself and, on behalf of the respondent from Ms Kargathra, Mr Pabari, Ms Eversley and Mr Matthews.

4. Ms Kargathra considered the claimant's grievance and subsequently became her line manager. Mr Pabari considered the appeal against the grievance outcome. Ms Eversley was a deputy office manager for the respondent's operations at Northwick Park Hospital. Mr Matthews was the respondent's chief information officer and the person responsible for its IT infrastructure, someone with considerable experience both working with and being responsible for medical IT systems.

5. We considered that all the witnesses from whom we heard were doing their best to recall the events on which they gave their evidence. However, the key events took place between February and May 2018, so more than three years ago and they (and we) were heavily reliant upon contemporaneous documents.

6. We did not hear from one major player in these events. This was the claimant's line manager at the time of those key events referred to above, Ms Parfaite Haydock-Wilson. However, this has not proved to be a particular handicap as we have been able to review a volume of contemporaneous documents, including detailed and comprehensive records of the important matters being investigated with her (and with the claimant) during the grievance process.

7. A list of issues was prepared for the preliminary hearing but revised thereafter. Save for one minor matter (dealt with below) that was confirmed as complete and accurate by both parties at the start of the hearing. It was prepared at a time when the claimant was legally represented.

8. The claimant has two admitted disabilities. As a result, she was given a break of 10 to 15 minutes about every hour when giving evidence or when cross examining. In addition, we gave her further time to prepare her written and oral closing submissions at her request.

Rule 50 application

9. By a letter dated 15 October 2021 solicitors instructed on behalf of the claimant made an application under Rule 50 of the Employment Tribunal's Rules of Procedure. This sought the anonymisation of the name of Ms Haydock-Wilson. The basis for that application was that the claimant had complained about Ms Haydock-Wilson's treatment of her and it was those complaints which led to her bringing tribunal proceedings. It was asserted that if her name was to appear in the judgment (and reasons) this might cause the claimant difficulties given how Ms Haydock-Wilson might then react towards her. We note that the respondent did not object to the making of such an order.

10. The nature of the claimant's allegations concerning Ms Haydock-Wilson were well known to that lady as they were the subject of the claimant's grievance which was, as we find below, extensively investigated and ruled upon.

11. The tribunal has found that Ms Haydock-Wilson's behaviour towards the claimant was not as the claimant had characterised it both in her grievance and before us.

12. If Ms Haydock-Wilson was to read our reasons, it would be quite obvious to her that she was being referred to, even if her name was anonymised in the sense of being substituted by "Miss X". This is because the allegations made before us are allegations which she knew the claimant to be making in 2018.

13. It is not likely that Ms Haydock-Wilson will take against the claimant for repeating allegations made some years ago, which allegations were largely rejected at the time and are rejected again by the tribunal. That is particularly so given our findings as to her efforts to assist the claimant.

14. There is no suggestion here that Ms Haydock-Wilson's convention rights (or those of the claimant) are in need of protection by the order sought. It is sought on the very specific basis that it is necessary to protect the claimant from the consequences of Ms Haydock-Wilson learning, from these reasons, of the allegations being made against her. As is made clear above, she will readily understand who is referred to whether she is referred to by name or in some other way.

15. In the circumstances the interests of justice do not require her name to be covered up. Giving full weight to the principle of open justice (as Rule 50 requires) it is not in the interests of justice to anonymise Ms Haydock-Wilson's name. Indeed, given that we have heard and rejected serious allegations made against her, the interests of open justice favour the opposite course.

Findings of fact

16. The claimant was employed by the respondent as a medical secretary in the Histology Department of Northwick Park Hospital ("NPH"). She had transferred her employment to the respondent under TUPE. The Histology Department processes tissue samples, often taken from those with potentially life-threatening conditions. There is an obvious pressure on the team of medical secretaries in that department to be fast and accurate in their work.

17. The Histology Department is the only department at NPH where medical secretaries (or similar staff) are employed by the respondent. Other medical secretaries in other departments are employed directly by the NHS. Other than biomedical scientists, the respondent has no non-medical secretary roles at NPH, but it has similar roles at other sites in London and elsewhere in the UK. The respondent also employs reception and administrative staff

(of various kinds) at such locations. As a large employer (of some 2,500 employees) the respondent maintains a list of such posts which are vacant at any particular time, which list the claimant, in common with other staff, could and did access.

18. The Histology Department is a busy one. The medical secretaries undertake a variety of duties, but at least 70% of the work is typing emails and reports. There are some administrative duties, but these are shared out amongst the medical secretaries, in part because they are closely related to work that they are doing. It is also necessary for these medical secretaries to undertake some administrative work in order to provide breaks from typing.

19. The amount of administrative work in the department has reduced over the last few years. In 2018 (as now) it would not be practicable to create an administrative post by drawing together the various administrative tasks undertaken by medical secretaries. This is because of the limited amount of such work, the need to give medical secretaries some relief from typing and because the nature of some of the administrative work is such that it cannot sensibly be separated from the medical secretary working on the particular case without risking delay. Furthermore, the administrative tasks are not uniformly spread throughout the day. Hence, to seek to reorganise them so that they were spread throughout a working day would, even if that were possible, lead to delay in an environment where delay may be very damaging to particular patients.

20. The claimant had been absent from work since 30 May 2018. She passed through the various stages of the respondent's long term absence process and at stage 3, in April 2021, the respondent's laboratory operations manager, Ms Bonis, terminated the claimant's employment with effect from 23 April 2021. making a payment in lieu of notice.

21. The claimant's health issues first came to the respondent's attention in spring 2015, when she sought a medical assessment in relation to shoulder pain.

22. By April 2018 the claimant was suffering from bilateral osteoarthritis in her hands, which was aggravated by typing and also from de quervains syndrome. She also had a repetitive strain injury to her right shoulder giving rise to supraspinatus tendinosis and a subacromial impingement. It is accepted by the respondent that each of those conditions amounts to a disability within the meaning of that term in the Equality Act 2010, in the latter case from 17 April 2018.

23. Once alerted to the claimant's problems with her shoulder, the respondent referred her to Occupational Health. Dr Pattani provided a report on 28 July 2015. She recommended that the claimant should type for only half a day for the next three weeks and should take a break each hour. The respondent adjusted the claimant's duties to fit with this proposed regime.

24. Although only intended to be temporary, the regime persisted for a substantial period into late 2017 when the claimant began to experience problems with her hands.

25. Initially, in 2015, the claimant's condition did not improve and she was off work for four weeks in August of that year. However, in September Dr Pattani reported on a 50% improvement in her condition and the claimant began a phased return to work. By 1 December the claimant's symptoms continued to improve and her condition overall was described as 70% improved by the doctor. The final Occupational Health report from that period noted that no further appointment was necessary.

26. The respondent and its manager were sympathetic and supportive towards the claimant and did what they could to assist her, including by obtaining a special chair for her and a different keyboard and mouse. Up to December 2017 the claimant was occasionally asked to type longer medical reports, and of her own volition occasionally did not take a break every hour. Sometimes she declined to undertake particular work where she considered that she could not do it in an appropriate timeframe due to her condition. This was a rare occurrence.

27. Occasionally in this period to the end of 2017 colleagues were overheard by the claimant suggesting that she was using her condition to avoid typing, but she referred them to the advice of Occupational Health and her own doctor. We doubt that any of the overheard comments would have been viewed by the claimant as significant after the event, but for the deterioration in her health from this time onwards. Indeed, it is clear that up to late 2017 the claimant's shoulder pain was better on some days than others and that sometimes she felt able to and did do more typing than on other days.

28. In late 2017 the claimant was suffering again with her shoulder and now also experiencing pain in her hands and she and Ms Haydock-Wilson, who had been her line manager since about August 2016, had a general discussion about the possible need for further adjustments to her job.

29. From 28 December 2017 to 6 February 2018 the claimant was absent sick due to pain in her hands. Her last fit note suggested that her workstation be reviewed and that keyboard work should be limited at her return.

30. On her return she met with Ms Haydock-Wilson. They reviewed which of her duties she was presently able to undertake. One aim was to minimise her typing in the short term and the possibility of her using voice recognition software was discussed. A revised list of duties was produced either at the meeting, or very shortly thereafter, based on what had been discussed and agreed.

31. Among matters discussed at the meeting on 6 February was the suitability of the claimant's workstation, which included her chair and her telephone. The claimant suggested adding a headset to her telephone. Ms Haydock-Wilson wrote to the respondent's Health and Safety staff on the same day asking for the claimant's workstation to be assessed.

32. The claimant repeated her suggestion about the provision of a new chair in an email of 8 February, but accepted in evidence that this would need to await the Health and Safety advice sought on her workstation. She referred to her need for a headset later in February, but this was also dependent upon the advice from Health and Safety, so far as Ms Haydock-Wilson was concerned.

33. The claimant was still able to type, albeit taking regular breaks. She did so, although dealing with emails and not reports to begin with.

34. In March 2018 Ms Haydock-Wilson asked the claimant to type some reports as well as emails, doing typing only for similar periods and taking similar breaks to those she had been taking when typing only emails. The claimant was reluctant to do this.

35. The claimant told us (and we so consider) that Ms Haydock-Wilson was being sensible, reasonable and supportive of the claimant in the way she was treating the claimant at this time.

36. The claimant has periodically maintained that their relationship broke down from 2 March 2018. We disagree. However, their relationship did become a little strained from late March onwards, so far as the claimant was concerned, because of her desire to type emails and few, if any, reports. It is clear that Ms Haydock-Wilson could see no sensible basis for the claimant agreeing to type emails (which could themselves be quite lengthy and relatively urgent) whilst declining to type reports. So far as Ms Haydock-Wilson was concerned, provided the claimant was taking similar breaks there could and should be no distinction between the two. Despite the claimant's efforts to persuade us to the contrary, we consider the position taken by Ms Haydock-Wilson to be entirely reasonable and sensible.

37. That finding (and Ms Haydock-Wilson's contemporary views) are consistent with the fact that at a meeting on 3 March 2018 the claimant agreed with Ms Haydock-Wilson that she was permitted and able to do typing, provided she had reasonable breaks.

38. On 12 March 2018 the claimant was referred to Occupational Health in order to establish, with as great a degree of certainty as possible, how much typing and with what breaks the claimant should be asked to undertake. This was done because of the claimant's concerns about typing reports and also because Ms Haydock-Wilson was of the view that any permanent variation to the claimant's job description would require the involvement of the respondent's HR Department and could only be undertaken in the light of an up to date Occupational Health report. Ms Haydock-Wilson also had in mind that while she had asked for the claimant's workstation to be assessed in early February, no assessment had yet taken place, because the Health and Safety advisors would not make the assessment without being provided with such an up to date Occupational Health report.

39. At various points in her evidence, the claimant told us that Ms Haydock-Wilson should have supported her by ordering a new chair and a headset on or shortly after her return to work. However, she ultimately accepted that such steps would have to await expert advice.

40. On 27 March the claimant met with Ms Haydock-Wilson. Ms Haydock-Wilson told the claimant to stop doing the email work and to type only reports, but using the same regime that she had used for typing emails. That had now developed to a regime whereby she would type for 15 minutes and then undertake non-typing activities for 15 minutes. Ms Haydock-Wilson suggested the claimant could take a walk during the non-typing period (rather than undertaking administrative work) if that would help.

41. The claimant has suggested to us that this was an unreasonable instruction, given the difference between typing emails and typing reports. However, as we have already noted, we do not accept that the claimant was able to put forward any basis (contemporaneously or before us) to justify that distinction. The key feature was that the claimant should type only for short periods taking a regular break. This was acceptable to the claimant when typing emails and in line with Occupational Health advice.

42. At the meeting on 27 March the claimant was also told to keep a record of what work she was doing. We accept that this was in order that the respondent could see what work she was doing. This was important in the context of the need to consider varying the work she was required to do in order to take account of the condition of her shoulder and hands.

43. Periodically throughout her evidence the claimant suggested that Ms Haydock-Wilson should not have been giving her any typing work to do because her GP's last fit note had referred to minimising keyboard work, not to excluding it. Further, the claimant had no problem with typing emails provided she had breaks and the reports she objected to typing were to be typed using the same regime of breaks. We also note that the next Occupational Health report from Dr Pattani (of 17 April 2018) suggested typing for no longer than 15 minutes at a time, taking a break to do non-typing duties. This was, in fact, the regime which the claimant had operated from shortly after her return in February.

44. On 1 May 2018 Ms Eversley assigned the claimant to type a report. The claimant refused. She told Ms Haydock-Wilson and Ms Eversley that she should not be at work at all and that her doctor would not have allowed her to return had he known that she was to undertake typing. We consider that the claimant was upset and that this caused her to exaggerate and (to an extent) misrepresent her position and that of her GP. She knew that Doctor Pattani's report had said she could type, with breaks and that she had been happy to type emails and, with some initial reluctance, shorter reports. Ms Eversley wanted her to type a somewhat longer report, albeit stressing that she should do this taking the usual necessary breaks. In the event, the claimant arranged for a colleague to type it and took, in exchange, a series

of short reports which she felt able to undertake. Ms Eversley accepted this, albeit reluctantly.

45. When Ms Haydock-Wilson (accompanied by Ms Eversley) spoke to the claimant about this refusal on 2 May, Ms Haydock-Wilson was firm (but not aggressive) in explaining that the claimant should not have refused to undertake work which she was capable of doing. She emphasised that the claimant had not simply been given the report, but had been told to take the same breaks she had been taking whilst typing shorter reports in the previous few weeks.

46. The three of them met again on 3 May to discuss what work the claimant should be doing in terms of typing (and non-typing work in the breaks between typing). On both 2 and 3 May the claimant was upset. Ms Haydock-Wilson was friendly, but serious and firm. She was never angry at either meeting. She did not suggest (as the claimant maintains) that the claimant had refused to consent to a referral to Occupational Health. However, she did advise the claimant to be careful about making accusations against others, which Ms Haydock-Wilson believed that the claimant had done. The details of what underlay that advice are not material. Nor does it matter whether the claimant had made the accusation which was reported to Ms Haydock-Wilson. We are satisfied that Ms Haydock-Wilson dealt with the matter in a sensible and sensitive manner. In essence, she did no more than advise the claimant, who was clearly upset, to take care what she said to and about others.

47. We consider that the content of the 3 May meeting provides an important insight into the real disagreement that lies at the heart of this case.

48. Dr Pattani, in her 17 April report, had suggested that the claimant and Ms Haydock-Wilson should discuss what the claimant could and should do, having regard to what was said in the report. Dr Pattani intended that she would then provide a further report in about six week's time.

49. The claimant complained to us that Ms Haydock-Wilson had refused to discuss the report with her and that they had never sat down to discuss what work she could and should do.

50. In fact, the claimant's note of the meeting of 3 May shows that they did discuss that matter. The difference between their respective positions was made clear in an answer that she gave to us in cross examination. She told us that what she could do would vary dependent upon her level of disability on any particular day. Hence, as she was the person with that disability, she should decide what work she did. Ms Haydock-Wilson and Ms Eversley were adamant that they needed to manage the department and decide who did what work, but making due allowance for the claimant's state of health which would require her to type only for limited periods with significant breaks. It was clear to us, from the claimant's evidence and, in particular, from her refusal to type the report given to her by Ms Eversley on 1 May, that her view was that she should be left to chose what work she did and, in effect, to redistribute work around the department.

51. Ms Haydock-Wilson and Ms Eversley told the claimant that she should do filing and dispatch work between bursts of typing which the last Occupational Health report had contemplated. They told her that even if she had completed all of the non-typing work assigned to her, she should not then take on other non-typing work of her own accord, because it was for them to distribute non-typing work around the department. However, she was told that if she found that she could not manage the amount of typing work given to her then she should put aside what she could not do.

52. The claimant saw (and continues to see) this as unacceptable high-handed conduct on the part of her managers, which did not take account of her disability. We consider that the regime they desired made due allowance for that disability and provided to the claimant an appropriate level of discretion to limit the typing load in circumstances where her condition was worse on any particular day. Furthermore, it prevented the claimant from taking non-typing work from others where the managers might have already determined that this work should be undertaken by one of the other medical secretaries either in order to provide that secretary with an appropriate break from typing, or because the work was urgent and diverting non-typing elements of the work to the claimant would involve delays.

53. Having heard her evidence, looked at the contemporaneous documents and having heard from Ms Eversley, it is clear to us that the claimant's real aim at the time was to cease to do any typing. What she wanted was to do all the admin work in the department. Ms Haydock-Wilson and Ms Eversley could not countenance that. For reasons which we have already explained, collecting all of the administrative work together was impracticable. In particular, it might well lead to delays in reports being prepared and it wold lead to other medical secretaries getting insufficient breaks from typing. Furthermore, the latest Occupational Health report was clear that she could type, provided she had the requisite breaks.

54. The claimant's answer to this problem was that the respondent should engage further typists. That would, of course, enable the existing typists to take breaks, but would not address the problem of work being delayed by moving admin tasks associated with particular reports to the claimant. Furthermore, we accept that the likely outcome would have been to have typists who were taking breaks doing nothing. We are not satisfied that the claimant raised this at the time, but had she done so she would have been told that taking on more typists was unnecessary, because the clear advice from Occupational health was that the claimant could type, albeit for limited periods.

55. As at 17 April, the Health and Safety report on the claimant's workstation remained outstanding. As already noted, the Health and Safety Department had stated that they required an up to date Occupational Health report before they could do this. Unfortunately, the Occupational Health report obtained in April did not provide the required guidance. It envisaged a discussion of tasks taking place and a further report being prepared. The discussion between the claimant and her managers reached the impasse described above.

56. Although Ms Haydock-Wilson and Ms Eversley made clear what they expected, the claimant remained very unhappy. Hence, Ms Haydock-Wilson decided to arrange a meeting between the claimant, herself, Human Resources and, if it could be arranged, Occupational Health and Health and Safety in order to try to reach an agreed position with all relevant participants present.

57. In fact, this meeting was not arranged prior to the claimant raising a grievance against Ms Haydock-Wilson on 28 May and the claimant did not then want it to happen until this grievance was resolved. The claimant then went on sick leave from 30 May 2018 from which she never returned, prior to her dismissal in April 2021 at the conclusion of the long-term absence procedure. There was then no reasonable prospect of her returning to work in the foreseeable future either in her original role (modified in some way) or any alternative role. This was due to a combination of her mental health (which led to the original sickness absence in May 2018) and her disability. We consider it entirely reasonable for Ms Haydock-Wilson (and, later, Ms Kargathra) as the claimant's line manager not to seek to arrange that meeting at any time after 28 May, in those circumstances.

58. Although she had specified what the claimant should do by way of non-keyboard work at the meeting on 3 May, Ms Haydock-Wilson did not regard that as fixed in stone and was still looking to see what other work the claimant might be able to undertake. Hence, on 4 May, she wrote to Dr Pattani asking for specific advice on the claimant's ability regularly to do work on the telephone and to collect material from the storeroom and collect mail from the post office using a trolley.

59. As we have already noted, the claimant had periodically mentioned that she considered that she would be able to deal with phone calls better if she had a telephone headset. The Occupational Health report in April did not mention this, despite the request for the report asking for the issue of adjustments to be addressed. On 10 May the claimant sought an update on her request for a chair and a headset, despite the Occupational Health report not suggesting that these should be provided. To an extent, Ms Haydock-Wilson pre-empted Dr Pattani's further advice, because on 11 May she had ordered a headset. As we have not heard evidence form her, it is not clear to us why she did this in advance of any response form Dr Pattani. However, we speculate (and it can be no more than that) that the relatively small cost involved influenced her decision. In fact, Dr Pattani's response to the letter of 4 May (dated 15 May) suggested that this be done.

60. The claimant's grievance of 28 May raised a series of points that are relied upon as detriments in relation to the victimisation claim. We deal with each in turn. The grievance was dealt with by Ms Kargathra interviewing each of the claimant and Ms Haydock-Wilson and reviewing various relevant contemporaneous documents. Ms Kargathra carefully considered each point and set out her findings in an outcome letter of 25 July 2018. She rejected three of the points, partially upheld the claimant's complaint on another and fully upheld the fifth. While we have been assisted by the notes of the grievance interviews and by the reasoning in Ms Kargathra's letter,

our findings set out below are our own based upon that evidence and upon the other evidence which we have heard and seen. This includes the outcome of the grievance appeal which varied her outcome a little.

61. The first point dealt with in the grievance concerned the claimant talking holiday on 15/16 May 2018. She had booked the holiday in November 2017, but the respondent's computer system (called HR.NET) recorded only one day of absence because it had mis-recorded her regular working days. When this was realised, the claimant added a note to the system (on 9 May) relating to the missing day. The system treated this as a new request for absence. It was forwarded to Ms Haydock-Wilson who declined it as this would leave the department significantly understaffed on that day.

62. The claimant maintains that Ms Haydock-Wilson knew of the error on the system and knew that both days had been authorised. Hence, when she received an email rejecting her supposed application for the second day of absence, the claimant did nothing. She simply took the day off. This led to Ms Haydock-Wilson calling her to find out where she was. We find it unsurprising that a busy manager did not recall, when in receipt of a request for holiday, that she had already granted it some six months previously. The problems could have been averted had the claimant responded to the refusal of the request by explaining to Ms Haydock-Wilson (or someone in HR) what had happened.

63. On balance, we regard this as an instance of confusion caused originally by an error within HR.NET. Like Ms Kargathra we do not consider that Ms Haydock-Wilson was likely to have been motivated to act as she did because of any animus towards the claimant. We do accept that relations between the two of them were a little strained as a result of the attitude that the claimant had displayed at the meeting on 3 May. However, it appears to us that Ms Haydock-Wilson remained supportive of the claimant, hence her seeking further guidance from Occupational Health and ordering the headset.

64. The second point in the grievance concerned the alleged failure to discuss the April Occupational Health report, ignoring requests for a headset and a further chair, not arranging a Health and Safety assessment of the workstation and being unsupportive regarding amending her duties.

65. Our findings in respect of these matters are set out above, but we draw them together here.

66. The key issue arising from the Occupation Health report of April2018 was discussed on 3 May. The claimant's real difficulty was that Ms Haydock-Wilson would not leave her to determine her own duties day by day and reduce her trying to nil, or almost nil.

67. The request for a headset and chair were not ignored. The first stage was to get a Health and Safety assessment of the claimant's workstation. This had been requested in February, but Health and Safety had asked that an up to date Occupational Health report be obtained first. One was sought

and obtained. Unfortunately, for these purposes, it provided limited guidance as to the duties the claimant could be asked to undertake and suggested that this be discussed with the claimant before a final determination was made and a further report produced. There had already been discussions and (see above) further discussions followed. The report made no mention of the headset and chair, despite being asked to address the issue of further adjustments. Ms Haydock-Wilson therefore sought further clarification and, eventually, took it upon herself to order the headset anyway. The claimant had accepted in cross examination that it would be inappropriate for Ms Haydock-Wilson to order a second new chair until she had at least obtained Occupational Health advice in that regard.

68. The respondent was supportive regarding changes in the claimant's duties to accommodate her disability. The respondent never required the claimant to undertake more typing than was recommended by Occupational Health, or more than she herself appeared able to cope with. She was always instructed to take necessary breaks and to put work aside if she could not do it. Ms Haydock-Wilson intended to reach a final determination of what the claimant could and should do with Occupational Health, Human Resources, Health and Safety and the claimant participating in the process. What she would not do was, in effect, to leave the claimant to manage herself, choosing what work she would do, in particular allocating to herself such administrative work she thought appropriate.

69. The third point in the claimant's grievance relates to Ms Haydock-Wilson accusing the claimant of refusing to do work given to her by Ms Eversley. The claimant did refuse to carry out the work in question, albeit that the situation was resolved by a colleague swapping her shorter reports for the report in question. Ms Haydock-Wilson's concern was that this was an illustration of how the claimant wished to be the one who determined what work she undertook, whereas this was a management decision to be taken having due regard to the limitations on the claimant's activities and the needs of the department, the patients it served and the other medical secretaries.

70. The fourth point in the grievance concerned the notification procedure used by the claimant in relation to her absence to have a wisdom tooth extracted. The matter, viewed in isolation, is trivial. It achieved a level of significance for the claimant that it hardly deserved because it took place against the background of the matters already discussed.

71. The claimant was very worried about her health. It is clear, with hindsight, that her physical condition was not improving and had, possibly, deteriorated and there did not appear, certainly to her, to be a prospect of improvement. As a consequence of this and her perception of her treatment at work, her mental health was deteriorating. Instead of speaking to Ms Haydock-Wilson about her intended absence, as she should have done, she left a message with Ms Eversley which as she said in her grievance, was "not correctly relayed" to Ms Haydock-Wilson. However, we also note that Ms Eversley asked the claimant to speak to Ms Haydock-Wilson directly. The claimant's failure to contact Ms Haydock-Wilson herself, in the context

of a mis-relayed message, led to Ms Haydock-Wilson contacting her and asking that in future she follow the correct procedure.

72. The fifth point was that Ms Haydock-Wilson failed to conduct a back to work interview on the claimant's return after her half day of absence concerning her tooth. Again, the allegation is a trivial one, taken out of context. Ms Haydock-Wilson spoke to the claimant on her return, but did not conduct a more formal return to work interview both because they had spoken and because the absence was only for a half day. Whether or not such an absence required a formal interview, it appears to us that Ms Haydock-Wilson's reason for not conducted one is entirely understandable.

73. Ms Kargathra suggested that a meeting should take place between the claimant and Ms Haydock-Wilson, facilitated by an external body, to rebuild the relationship between them. The claimant refused this. This was not, in our view, because the relationship had broken down, but because the claimant could not see how Ms Haydock-Wilson would ever accept that typing should be virtually eliminated form her role and that exactly what she did day to day could and would be determined by the claimant depending upon how she perceived her condition on any particular day.

74. On 3 August 2018 the claimant appealed against the findings of Ms Kargathra which were not favourable to her. This appeal was heard by Mr Pabari. He considered the appeal document, the grievance outcome letter and various contemporaneous documents. He also interviewed the claimant and then conducted a formal appeal hearing with the claimant in attendance and able to present her case. Throughout this period the claimant was absent from work with fit notes referring to her mental health and, latterly, cardiac issues.

75. On 26 October 2018, whilst the appeal was being considered, the claimant issued these employment tribunal proceedings.

76. The claimant complained that one matter the subject of the grievance had not been properly investigated because an employee who was involved, whom we shall refer to as Ms MM, had not been contacted. It was alleged by the claimant that Ms Haydock-Wilson had complained that the claimant had suggested that Ms MM complain to her about a holiday request being disallowed. The claimant said that she had not incited Ms MM to do so. In fact, Ms MM could not be contacted when HR sought to do so at Mr Pabari's request. She was certainly on leave for some part of the time between the appeal and its outcome being announced in November. Whether she was avoiding being involved at other times is unclear. Mr Pabari could not resolve the issue. Where the truth lies is impossible for us to determine. The claimant does not dispute talking to her colleague, but denies inciting her to complain. What Ms MM may have told Ms Haydock-Wilson as to the reason for her complaining we cannot determine. That Ms Haydock-Wilson told the claimant that her involvement was, if it was as characterised by Ms MM, inappropriate does not appear to us significant, as it is not relied upon as a detriment in the victimisation claim and, in all the circumstances,

appears to us to be a reasonable comment for Ms Haydock-Wilson to have made.

77. Mr Pabari considered that the claimant had followed an adequate procedure in relation to notifying Ms Haydock-Wilson of her absence to have a tooth removed. Hence, he considered that her grievance in respect of the complaint by Ms Haydock-Wilson that she had not followed the correct procedure should have been upheld. This differed from Ms Kargathra's conclusion. Nothing turns on this change of conclusion. We have set out above our own findings as regards Ms Haydock-Wilson's behaviour in this regard.

78. Mr Pabari also recommended external mediation between the claimant and Ms Haydock-Wilson, but again the claimant declined. He also suggested that efforts should be made to reach a conclusion on what work the claimant could do and what further adjustments, if any, were needed to her physical environment and equipment to facilitate her work. In that regard he suggested that a follow up with Occupational Health should take place.

79. On 13 November 2018 Ms Kargathra became the claimant's line manager, instead of Ms Haydock-Wilson. She followed up on Mr Pabari's recommendations as far as she could with the claimant off sick. To this end a further Occupational Health report was obtained on 4 December 2018 from Dr Pattani. It gave much more specific guidance on the amount of typing the claimant could do. Dr Pattani said that the claimant should only do 5 to 10 minutes of typing at any one time and this should be followed by a period of 30 to 45 minutes on other duties. Given that this was a reduction from what had been indicated previously by the same doctor, we suspect that it shows that the claimant's condition may have deteriorated, but we recognise that we have no medical evidence on this and the claimant was now absent with mental health problems which may have impacted on this advice.

80. As the claimant readily accepted in evidence, this meant that she could not do the job of a medical secretary. The only options were for her to have voice recognition software or for all or almost all the administrative work in the Histology Department to be bundled together into a new job for her, or that she was found a job elsewhere which involved little typing.

81. Ms Kargathra considered that bundling the administrative duties up to form a new job could not sensibly be done. We have already set out our findings on this.

82. As to voice recognition software, we heard evidence from Mr Matthews which the claimant carefully examined by her questions, but did not ultimately challenge. Voice recognition software cannot function as part of the bespoke LIMs software used by the respondent at its various sites and the claimant stated that she would not expect the respondent to change or upgrade its whole software system. We accept that the respondent would have had to do this across all of its sites, that this would be a process which would take many months to complete (including training) and that using

voice recognition software with such a system posed many challenges, which it would not necessarily be possible to overcome, so any change to facilitate voice recognition might well prove to be a significant waste of time and resources.

83. In summary, there are various technical reasons why voice recognition software might ultimately prove unusable in this context. Furthermore, using it in a world involving complex medical terminology which must be stated with absolute accuracy would pose its own problems. Finally, the office-like environment in which medical secretaries work, would have to be adapted significantly in order to allow for the use of voice recognition software by any of them, lest their talking in a way audible to their colleagues would disturb their colleagues and/or their typing accuracy.

84. The claimant asked Mr Matthews to consider the possibility of her using voice recognition software in conjunction with Microsoft Word and then cutting and pasting the resulting text into a report. This would have required changes in the reporting protocols to which the respondent has to work and he could not countenance the use of such a system. This was because there would be no background audit trail and no way of easily and accurately checking that the correct text was being pasted into the appropriate report. He considered that there would be unacceptable risks to patient safety. He contrasted this with material for reports sent in as part of Word documents or emails from other sources, such as other hospitals. In the case of those documents all patient details and reference numbers would appear in the document part of which was to be cut and pasted. Hence, that the details were the same as those in the report could be easily checked at the time and audited as the full report or email from which the text was cut could still be available. As we have noted, the claimant carefully investigated these matters in cross examination, but did not challenge Mr Matthews' clearly and carefully reasoned conclusions.

85. Ms Kargathra searched for possible jobs elsewhere for the claimant. This search continued up to the time of the third stage long-term absence meeting, following which the claimant's employment was terminated.

86. The respondent had no suitable roles at NPH as it only had work in the Histology Department. Roles in central London were identified, but none proved suitable. One limiting factor was that the claimant was unwilling to commute on busy trains due to her inability to cling on to handles, bars and seat backs, which would be necessary if she was unable to find a seat. That understandable limitation severely restricted the available range of jobs. Furthermore, following the Occupational Health report in December 2018, it was clear that the claimant could not do a job which required any significant amount of typing unless voice recognition was available. The respondent's regular list of vacancies was available to the claimant, but neither she, nor Ms Kargathra, was able to locate a job that she could do.

87. Ms Kargathra nevertheless kept in regular contact with the claimant, reminding her to keep checking the available vacancies, asking about her

state of health and keeping her up to date with changes in the Histology Department at NPH.

88. Sadly, for much of the period prior to her dismissal, the claimant was anyway unable to work due to her mental health, and her physical health did not improve in that period. Having seen the log of Ms Kargathra's calls to the claimant and the brief description of their subject matter, we consider that she did all that she could as a responsible and caring employer to keep in touch with the claimant and seek alternative work for her, bringing that process to an end only when it became clear that no return to her NPH job (even in some modified form) was likely in the foreseeable future and when finding the claimant a suitable job in the foreseeable future appeared very unlikely.

The law

89. We invited and gave time for the preparation of written submissions by both sides. We made due allowance for the fact that the claimant was unable to type the submissions herself, but was reliant upon her husband. The respondent produced detailed submissions both as to the law and the application of it to the facts as contended for by the respondent. The claimant's written submissions concentrated upon the facts. In so far as appropriate we have indicated the parties' submissions on issues of law when setting out the law as we understand it.

Claim in time

90. We have reminded ourselves of the provisions of s.123 of the Equality Act 2010 and noted what was said by Choudhary P in South West Ambulance NHS Foundation Trust v King [2020] IRLR 168.

> "Where a tribunal is considering whether conduct extends over a period of time, this requires the identification of specific acts as distinct from some "floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time."

91. The starting point with regard to the consideration of whether it is just and equitable to extend time into the secondary limitation period, is that time limits are to be exercised strictly. There is no sense of a presumption that a just and equitable extension should be granted unless the tribunal can justify in some way its failure to exercise the discretion in the claimant's favour. The exercise of the discretion is "*The exception rather than the rule*" as Auld LJ noted in Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576. We were reminded of a number of decisions of the EAT to the effect that there needs to be evidence upon which the tribunal can take the decision to extend time.

Indirect discrimination

92. Section 19 of the Equality Act provides as follows:

> "19 Indirect discrimination

> (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."

93. We deal briefly with the law relating to the burden of proof below and the concept of a provision, criterion or practice when dealing with the law relating to the reasonable adjustment claim.

94. We were referred to s.136 of the Equality Act and the law relating to shifting burdens. We do not set it out here because we have been able to make our findings without resort to it and because the conduct of the respondent relied upon either did not take place or was adequately explained in a non-discriminatory way.

95. As regards the reasonable adjustments claim the claimant is required to establish the provision, criterion or practice relied upon and, having established it, to demonstrate the substantial disadvantage arising from it. The burden then shifts to the respondent to show that no adjustment or further adjustment should be made (see Project Management Institute v Latif [2007] IRLR 579]).

96. As regards the burden of proof in victimisation claims, we have kept in mind what was said by the Court of Appeal in Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425, especially at paragraph 29 to the effect that "*the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act*." However, again, we were able to reach findings without debating who had the burden of proving what aspect of this claim.

Failing to make reasonable adjustments.

97. The duty to make reasonable adjustments is set out in s.20 of the Equality Act as follows:

> "20 Duty to make adjustments

> (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."

98. The word "substantial" used in sub-section 3 is defined in s.212(1) to mean "more than minor or trivial."

99. As to the meaning of the phrase "reasonable steps" we were invited to consider the guidance provided in paragraph 6 of the Equality and Human Rights Commission Code of practice of 2011. We have refreshed our memories of that and carefully considered, in particular, sub paragraphs 23 to 29.

100. As regards the concept of a "provision, criterion or practice" we have kept in mind the guidance in paragraph 6.10 of the EHRC Code and we were taken to the guidance given by the Court of Appeal in Ishola v Transport for London [2020] EWCA Civ 112, especially at paragraphs 35 to 37.

101. What is reasonable in this context is for the judgment of the tribunal. We also noted what was said by the Court of Appeal in Griffiths v Secretary of State for Work and pensions [2017] ICR 160, to the effect that it may be that it is not clear whether a particular step proposed will be effective or not, but that it may still be reasonable to take the step notwithstanding that success is not guaranteed, but that uncertainty is one of the factors to weight up when assessing the question of reasonableness. (see, in particular, Elias LJ at paragraph 29).

102. We accept the point made by the respondent to the effect that a proposed reasonable adjustment has to be judged against the statutory requirement that it has to prevent the PCP applied by the employer from placing the claimant at a substantial disadvantage when compared with persons who are not disabled. As was made clear by Elias J (as he then was) in Tarbuck v Sainsburys Supermarkets Limited [2006] IRLR 664, adjustments that do not have the effect of alleviating the disabled person's disadvantage are not reasonable.

103. An employer is not expected to make adjustment in the case of an employee on long-term sickness absence when there is no foreseeable prospect of the claimant returning, even if appropriate adjustments were made (see Home Office v Collins [2005] EWCA Civ 598). The respondent cited a number of authorities to illustrate the practical impact of this general proposition, but we did not find them of particular assistance in this case.

Victimisation

104. Victimisation is defined in s.27 of the Equality Act as follows:

> "27 Victimisation
>
> (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."

105. A detriment, according to the well-known case of Shamoon v Chief Constable of Royal Ulster Constabulary [2003] UKHL 11 is:

> "Treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment… an unspecified sense of grievance cannot amount to "detriment"."

106. The causative link required between the protected act and the detriment is as set out by Underhill LJ at paragraph 12 of Chief Constable of Greater Manchester v Bailey:

> "An act will be done "because of" a protected characteristic, or "because "the claimant has done a protected act, as long as that had a significant influence on the outcome…"

Application of the law to the facts

107. As already noted, disability is conceded save as regards the claimant's shoulder prior to April 2018.

108. Nothing turns on whether she was disabled in that regard prior to that date as it has not been suggested that the respondent discriminated against her prior to the advent of the problems with her hands. It is obvious why this is so. Upon being alerted to problems with her shoulder, the respondent referred the claimant to Occupational Health and made appropriate adjustments to her job content and workstation.

Indirect disability discrimination

109. The PCP relied upon is that the claimant was required to work her full job description including typing for extended periods.

110. That is certainly a PCP applied to the claimant's colleagues doing the same job who had no such disabilities. However, once the respondent knew of the claimant's difficulties with her shoulder (from 2015) and with her hands as well (from her return to work in February 2018) this PCP was not applied to her.

111. She was not required to work her full job description. A reduced job description was agreed (albeit temporarily) on 6 February 2018 and further varied thereafter, particularly on 3 May 2018. The claimant was asked to do only such typing as she was able to do and required to take breaks doing other work (or, possibly, no work if she thought that would assist her). She was instructed to put to one side typing work with which she could not cope.

112. The PCP relied upon for the reasonable adjustment claim is very similar, but the difference is that it refers to requiring the claimant to do any typing. Trying to make sense of this, we anticipate that the PCP would actually be to require the claimant to type or to type excessively. The respondent did not dispute that formulation of the PCP when investigated in debate. Although the claimant was legally represented when the issues were formulated, we consider it appropriate to consider that variant of the PCP in this context (of the indirect discrimination claim) as well as in relation to the reasonable adjustment claim. We put that to the respondent and there was no objection.

113. The claimant certainly did undertake typing after her return to work on 6 February. Her GP's fit to work note did not say she should not do any typing and we note that the Occupational Health reports obtained subsequently never suggested that either. The issue, therefore, arose as to how much typing the claimant should do. We have found that the amount of typing was the subject of discussion on 6 February and thereafter. The claimant was happy to do some typing, taking breaks. She was concerned when asked to type reports, but we have found that the amount of typing and the breaks were the same as before that request, only the type of document changed and we have found that change to be immaterial.

114. The claimant only suggested that she should not be typing at all on 3 May, but we have found her comment to be inaccurate and made in the heat of the moment when upset. The Occupational Health report of 17 April had not suggested that she should not type. Indeed, it preceded from the premise that she would do limited amounts of typing with breaks and that the precise regime should be discussed with the claimant.

115. In those circumstances, asking the claimant to do such amounts of typing with breaks did not amount to a requirement to do more than that quantity of typing as envisaged by the claimant and Occupational Health. The quantity (and the taking of breaks) was a matter of agreement, albeit in general

terms and as regards typing reports was derived from the amount of email typing work which the claimant was doing without complaint. Even if it could be said that the claimant was required to do report typing from 27 March, this did not put those sharing her disability at a particular disadvantage because she was only being asked to do what she was already doing and had agreed to do and she was told to put it aside if it was too much for her.

116. In case we are wrong we have considered whether the requirement to work in accordance with this regime represented a proportionate means of achieving a legitimate aim. The respondent considered that two matters had to be kept in balance by the respondent. The first was to enable the claimant to return to work rather than remaining on sick leave) and carrying out a level of typing work, with breaks, with which she was comfortable whilst a permanent reorganisation of her work was agreed after input from Occupational Health, Human Resources and Health and Safety examining her state of health and her work and working methods. The second was to ensure that the other medical secretaries in the department had a sufficient amount of administrative work to do to provide breaks in their typing and that they were not overburdened with typing work so as to imperil the efficient preparation of accurate medical reports. To require her to do an amount of typing she herself was comfortable with (albeit in relation to a type of document she would rather not type) whilst keeping this under review was a proportionate means of achieving that end.

117. In summary, we do not consider that the claimant has made out her case with regard to the application of a relevant PCP to her which put her at a disadvantage, but even if that were so, we consider that what the respondent did amounted to a proportionate means of achieving a legitimate aim.

<u>Failure to make reasonable adjustments</u>

118. We have dealt above with the distinction between the PCP relied upon here and that said to be relied upon for the indirect discrimination claim. This PCP is expressed in two alternative ways “Typing for any (or any extended) period”. The claimant was not required to type for any extended period: we have dealt with this above. Equally, we have found that in the circumstances she was not “required” to do any typing. The quantity and the breaks were agreed, as we have found, and subject to the fallback position that she could put aside any typing she felt unable to cope with. If we are wrong and what happened could properly be described as a “requirement” then it is necessary to consider the alleged failures to make reasonable adjustments.

119. Four allegedly reasonable adjustments are relied upon, namely:

    119.1 The provision of vice recognition software.

    119.2 The removal of typing and substitution of “lighter administrative duties forming part of her job description” at least until a workstation assessment had been carried out and reasonable adjustments put in

place. These are the provision of voice recognition software, a telephone handset/headset and a suitable chair; no others were mentioned.

119.3 A reduction in the expected output of typing.

119.4 A complete or partial redeployment into another role at NPH.

120. We have already referred to the fact that the PCP here relied upon is subtly different to that relied upon in respect of the indirect discrimination claim. There the PCP referred to "a requirement to work her full job description, including typing for any extended period." Here, in respect of the reasonable adjustments claim, the requirement is said to be "for an employee to work their full job description, including typing for any (or any extended) period."

121. As we have already found, a PCP requiring the claimant to work her full job description including typing for any extended period was not applied to the claimant. If one interprets "extended period" as meaning that she should type excessively. We have also find that she was not "required" to do any typing. However, in case it might hereafter be said that our conclusions in those regards were impermissible, we have considered what our conclusions would be with regard to the alleged failures to make reasonable adjustments. We shall consider each in turn.

122. Turing first to voice recognition software. That could not reasonably be provided. It could not be added to the respondent's bespoke software package which it was required to use in order to satisfy its obligations to the NHS and the claimant accepted that it would not be reasonable to change the whole package, especially as there was no certainly that voice recognition would work appropriately in any revised software. The use of voice recognition software to produce Word documents which could be cut and pasted into reports was not a reasonable adjustment as it carried too higher risk for it to be approved.

123. We then turn to the removal of all typing and the substitution of administrative duties at least until the workstation assessment had been carried out and reasonable adjustments put in place.

124. Temporarily removing all typing from the claimant until it was clear what she could do cannot be relied upon as a reasonable adjustment. This is because there was no suggestion that she could not do any typing (save at the 3 May meeting as dealt with above). She agreed to do typing as part of the revised duties agreed on 6 February, but with the taking of breaks and the introduction of additional administrative duties. She was not thereafter asked to undertake more typing and the doing of some typing was envisaged by the April Occupational Health report. The respondent was investigating the need for additional support by way of voice recognition, a telephone handset/headset and a further new chair from February 2018 onwards. This took a little time because Health and Safety wanted an Occupational Health report before considering the adequacy of her

workstation and the initial Occupational Health report in April was inconclusive and suggested further discussions between the claimant and her manager before a final report could be produced.

125. We note that whilst the claimant had mentioned the headset and the chair in February (and on occasions thereafter) there was no suggestion in the Occupational Health report in April that these were needed. We accept, as did the claimant before us, that it was reasonable to wait until the conclusion of the review process before ordering a chair, if that was recommended. The claimant's evidence was to a similar effect in respect of the headset. However, Ms Haydock-Wilson did order a headset. We think that it would have been reasonable to wait for the outcome of the review process as regards the headset as well as the chair. Ms Haydock-Wilson did seek further clarification from Occupational Health by way of a letter of 4 May. We think it reasonable for her to have acted as she did.

126. The suggestion that the typing duties should have been removed entirely "at least" until the workstation assessment had been performed indicates an alternative adjustment, namely their removal for all time. That would not be a reasonable adjustment, given that Occupational Health reports up to and including that in December 2018 all stated that the claimant could do some typing. Furthermore, she could not reasonably be provided with a job that consisted entirely of administrative duties for the reasons set out in our findings of fact. In short, there was insufficient administrative work which was not either work which could not sensibly be disengaged from report typing, or administrative work which other typists needed to do to ensure that they had adequate breaks albeit fewer and shorter breaks than the claimant was taking.

127. The third suggested adjustment is the reducing of the expected output of typing. Such an adjustment was made. The claimant was to type only for limited periods, to take breaks in between periods of typing and to put aside work she felt that she could not do.

128. As to redeployment to another role at NPH, this raises two possibilities, firstly the creation of an administrative role within the Histology Department and, secondly, appointment to another post outside that department. We have already dealt with the first, it was neither practicable nor reasonable to create such a post. As to the second, there were no other posts at NPH as the respondent only staffed the Histology Department and medical secretary roles were the only roles available for which the claimant was qualified. The other scientific roles were ones requiring qualifications which she did not have.

129. No other potential adjustments were raised contemporaneously or before us. In particular, none was suggested by Occupational Health at the time. In that regard we have noted that the December 2018 Occupational Health report did suggest a more restricted amount of typing than the claimant had been undertaking in the period from February to May 2018. We do not consider that this evidences any unreasonableness in the respondent's approach to typing in that period for reasons which we have already set out.

It is clear that having received that report, the respondent adjusted its expectations accordingly and would have expected the claimant only to type in accordance with those guideline should she returned to work.

Victimisation

130. The claimant relies upon 12 protected acts in the list of issues. At the commencement of the hearing, she sought to add a 13th, but we postponed consideration of this application until after we had heard the evidence as it was clear that the material evidence was to be heard anyway. As it turned out, the application amounted to a reformulation of the allegations regarding the events of 2 May which were already relied upon as protected acts. We consider the proposed amendment to add nothing of substance to the case. Hence, whilst we do not permit the amendment, we do not consider that in doing so we have removed from the claimant any argument not already available to her.

131. The treatment relied upon as detriments falls into seven categories. We will consider each separately and only turn to consider whether the acts relied upon amount to protected acts after deciding which acts could amount to detriments. The detriments relied upon are set out in paragraph 36 of the particulars of claim.

132. Paragraph 36(a): "The requirement from Ms Haydock-Wilson for the claimant to record her work from 27 March 2018 and the comments made that she had wanted to see what the claimant was getting paid for, no other member of staff was required to do the same."

133. The claimant was required to record the work that she did. This was to enable the respondent to analyse what she was doing for the purpose of considering how best to reorganise her job. The adjustments in place at that time were agreed to be temporary and Ms Haydock-Wilson considered (reasonably in our view) that having this information could be very useful when seeking to finalise the permanent adjustments, if any, that needed to be put in place. This was explained to the claimant. In the most general terms this could be said to be related to several of the matters relied upon as protected acts (eg, the discussions of what adjustments were necessary) but the conduct did not amount to a detriment; no reasonable worker would regard it as such.

134. Paragraph 36(b): "Ms Haydock-Wilson reprimanding the claimant on 2 May 2018 for allegedly refusing to carry out work."

135. The claimant did refuse to carry out work which was appropriate for her to do. She was reprimanded in the sense that Ms Haydock-Wilson and Ms Eversley made clear that they had to manage the department. They also made clear that the claimant should take breaks as before and that she could put work to one side if she could not cope with it. That approach by her mangers was entirely reasonable and appropriate. It was done because of the refusal to undertake a particular piece of work and not because of any

conduct relied upon as a protected act. In any event, no reasonable worker would regard this as a detriment.

136. Paragraph 36(c): "The behaviour of Ms Haydock-Wilson on 3 May 2018 in accusing the claimant of refusing to consent to a referral for Occupational Health in February 2018 and the suggestion that the claimant should be "very careful making accusations against people".

137. Ms Haydock-Wilson did not accuse the claimant of refusing consent for a referral to Occupational Health. She did advise her to take care when making accusations against others. That was intended to be (and was) sensible advice delivered in a calm and serious way to the claimant who was somewhat upset and emotional. It was unrelated to the alleged protected acts and did not amount to a detriment: again, no reasonable worker would have so regarded it.

138. Paragraph 36(d): "The accusation of taking unauthorised leave in May 2018 including the threat to report the absence as unauthorised leave by Ms Haydock-Wilson, leaving the claimant to feel that there was significant breakdown in the relationship between them…"

139. This set of interrelated alleged detriments relates to the confusion regarding the taking of leave on 15 and 16 May 2018. The confusion arose out of a problem caused by the respondent's absence recording software and the claimant's action in re-requesting one day's holiday which led Ms Haydock-Wilson to consider it as a new request, unaware that she had authorised such absence in the previous November. As we have already noted, that this matter reached the stage that it did was ultimately due to the fact that the claimant did nothing when she received the rejection of what was understood to be her new request to take holiday on 16 May, but simply took the holiday without informing Ms Haydock-Wilson that she intended to do so. Ms Haydock-Wilson's conduct, our findings on which we have set out above, was unrelated to any of the alleged protected acts. Furthermore, no reasonable worker (being someone who understood the circumstances which led Ms Haydock-Wilson to behave as she did) would have regarded this as a detriment.

140. Paragraph 36(e): "The criticism of the claimant from Ms Haydock-Wilson following her dental procedure on 22 May 2018 in which Ms Haydock-Wilson failed to concede any miscommunication and instead sought to criticise the claimant and emailed her in relation to this on 24 May 2018."

141. This relates to the half day's absence for the wisdom tooth extraction. The claimant had failed to contact Ms Haydock-Wilson and, thereby, failed to follow the respondent's procedures. Hence, Ms Haydock-Wilson criticised her for that failure. In doing so she was motivated by the failure and not by the alleged protected acts of any of them. That Mr Pabari, at the grievance appeal, considered that the claimant had tried to contact Ms Haydock-Wilson and should not have been criticised, does not establish the necessary link to the alleged protected acts. Indeed, his extensive consideration of this and related matters did not lead him to conclude that

Ms Haydock-Wilson had acted other than on the basis that she believed that the claimant could and should have contacted her. As we have noted, she contacted Ms Eversley instead and Ms Eversley advised her to contact Ms Haydock-Wilson. Had the necessary causative link been established we would have considered this to be a detriment. We consider that a reasonable worker could have so regarded it. However, it will be clear from our findings of fact in this regard that although it might be said to be a detriment, it was one of very limited significance as any reasonable worker would have appreciated having stood back and understood what had happened.

142. Paragraph 36(f): "Ms Haydock-Wilson's comment that the claimant needed to "stop telling lies" on 24 May 2018."

143. The claimant alleges that Ms Haydock-Wilson said this at a meeting with her on 24 May. That meeting related to the claimant's having taken unauthorised day's holiday on 16 May and having failed to contact Ms Haydock-Wilson in relation to her wisdom tooth absence. After the meeting there was an exchange of emails from which it is clear that their respective understandings of what had occurred differed, in particular as to the availability of Ms Haydock-Wilson to be contacted on the day of the tooth extraction. The emails from Ms Haydock-Wilson do not accuse the claimant of lying, but they do suggest that Ms Haydock-Wilson considered that the claimant's recollection of events was not accurate. Whether Ms Haydock-Wilson used the words the claimant relies upon seems to us uncertain, given that in her emails the claimant does not refer to it. Given all we know of her and having seen her correspondence, we are surprised that if those words were said the claimant did not quote them back at Ms Haydock-Wilson. We therefore, on balance, believe that the claimant considered this to be the effect of what Ms Haydock-Wilson was saying, rather than what was said. Ms Haydock-Wilson's attitude, as is clear form her emails, resulted from her view of what had happened and was unrelated to the alleged protected acts. Indeed, until the grievance investigation the full picture of what happened in relation to the absence on 16 May did not emerge. In any event, no reasonable worker would have considered what we have found (on balance) to have taken place to be a detriment.

144. Paragraph 36(g): "Ms Haydock-Wilson's falsification of statements of the claimant's ability to undertake certain tasks in her email to Dr Pattani on 18 June 2018…"

145. There was no falsification of statements. Ms Haydock-Wilson had failed to note Dr Pattani's response to her 14 May email for a few says. There is nothing to suggest this was other than an accident. We note that Ms Haydock-Wilson had already ordered the headset without even waiting for the response, which suggests that she was not trying to avoid seeing it. There had been discussion between the claimant and Ms Haydock-Wilson as the Occupational Health report 17 April envisaged, in particular those on 3 and 4 May. Hence, there can be no detriment established as the factual basis for the claim is not made out.

146. In those circumstances it is unnecessary for us to investigate whether each or any of the alleged protected acts actually had that status, or to consider which particular detriments might be associated with which alleged protected act or acts.

Claim in time

147. As the claims would all fail even if presented in time, we need not consider whether they were presented outside the primary limitation period and, if so, whether it is just and equitable to extend time. However, we note that had we considered any claim arising from incidents or omissions before 16 May to have merit, we would have had to address very real difficulties in the way of the claimant in showing that these formed part of a series of sufficiently connected matters for the purposes of s.123 of the Equality Act.

148. If they were not, the claimant had put forward no sufficient explanation for her failure to make a claim sooner than she did. In cross examination she said that she did not know why her claim was not made sooner, she simply left this to her legal advisors. In submissions she referred to waiting for the outcome of her grievance which she said took some five and a half months. In fact, the grievance was commenced on 28 May and finally resolved (after the appeal) in November 2018. This claim was commenced during that period. On such evidence we doubt we could have concluded that she had sufficiently explained her failure to claim sooner, but this would have had to be considered in the light of the delay since such matters as we had found to amount to unlawful discrimination. In short, we have grave doubts as to whether the claimant would have been able to satisfy us that any of her potential claims were in time, but we need not consider this further (indeed it is impossible to consider it further) in circumstances where we have rejected each and every claim brought.

Conclusion

149. In all of the above circumstances the claims for indirect disability discrimination, failure to make reasonable adjustments and for victimisation fails and all of those claims are dismissed.

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Employment Judge Andrew Clarke QC

Date: 31 October 2021

Sent to the parties on:

29 November 2021

For the Tribunal Office