RESERVED

EMPLOYMENT TRIBUNALS

Claimant: **MISS RACHAEL GALLON**

Respondent: **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS**

HELD AT: Liverpool (by in person hearing and CVP) **ON:** 22, 23, 24, 25, 26, 19 & 30 November, 1,2,3 and 6 December 2021 (in chambers)

BEFORE: Employment Judge Shotter

Members: Ms M Dowling
Ms C Gallagher

REPRESENTATION:

Claimant: Mr Smullen, trade union representative on 22 November 2021
Respondent: Mr David Gibbons, trade union representative
Mr Davies, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim of victimisation brought under section 26 of the Equality Act 2010 is dismissed on withdrawal.

2. The respondent was not in breach of its duty to make reasonable adjustments. The claimant's claim of failure to make reasonable adjustments brought under sections 20-21 of the Equality Act 2010 are not well-founded and is dismissed.

RESERVED

3. The claimant's claim of disability discrimination set out in allegations 1 to 8, 16 to 32 and 34 to 41 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done), the complaints are out of time and in all the circumstances of the case it was not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complains which are dismissed.

4. The claimant was not treated less favourably because of something arising in consequence of her disability and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed.

5. The respondent did not harass the claimant and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 fails and is dismissed.

REASONS

Preamble

The hearing

1. This has been a remote hearing by video which has been consented to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 814 pages, the contents of which I have recorded where relevant below. In addition, the Tribunal was provided with a bundle of witness statements and separate documents consisting of written opening submissions produced on behalf of the respondent, an agreed chronology and agreed list of issues.

2. The hearing on 22 November 2021 initially took place as a hybrid hearing. Mr Davies appeared in Liverpool and the claimant by CVP during which the claimant could have as many breaks as she wanted as a reasonable adjustment. The claimant was represented by Mr Smullen her TU representative as Mr Gibbons, her representative for the rest of the hearing, was not available on 22 November. On 25 November 2021 Mr Gibbons, was unwell. It was agreed the Tribunal would adjourn until the 26 November. The Tribunal took the view that it was not in the interests of justice for the hearing to continue until Mr Gibbons was well enough to represent the claimant. The hearing continued from 26 November with Mr Gibbons representing the claimant.

3. At the end of this hearing the Tribunal thanked Mr Gibbons and Mr Davies for the assistance given to the Tribunal and the courtesy and sensitivity shown to witnesses. It has taken into account the claimant's lengthy written submissions prepared with the assistance of Mr Gibbons that includes new evidence and a substantial amount of repeated evidence. For example, reference was made to the following; "Alternative duties were offered. However, they were not suitable. One such alternative was floor walking. Although Miss Gallon was not expected to walk along the floor constantly there is some walking to and from desks and leaning over to look at screens and help staff members" which was not before the Tribunal at the liability hearing and nor were the respondent's witnesses cross-examined on this.

Claimant's disability

4. The claimant withdrew reliance on any claimed disability except fibromyalgia. The respondent has previously conceded that the claimant was a disabled person by virtue of fibromyalgia at all material times and maintains that concession. It does not concede any other disability, including anxiety and depression, conditions the claimant references but does not rely upon as clarified in evidence on cross-examination. It appeared from the written submissions prepared by the claimant and Mr Gibbons that the claimant was trying to make the case that the ear infection was linked to fibromyalgia. In oral closing submission Mr Gibbons accepted that there was no diagnosis, it was a suspected link that never developed to a confirmed diagnosis and the claimant was not relying on her ear condition as a disability. For the avoidance of doubt, without any supporting medical evidence the Tribunal was also unable to conclude that the claimant's ear condition was a recognised symptom of fibromyalgia, which Mr Gibbins accepted.

The pleadings

5. In a claim form received on 10 February 2020 following ACAS early conciliation between 29 December 2019 and 29 January 2019 , the claimant, who at the time was employed by HMRC as an assistant officer at the Triad, Stanley Road in Bootle, and this remains the case although she has since moved from the first floor to the second floor, claims the following:

5.1 Discrimination arising from the claimant's disability contrary to section 15 and 39 of the Equality Act 2010 ("the EqA");

5.2 Failure to make reasonable adjustments in respect of the claimant's disability contrary to sections 20, 21 and 39 of the EqA.

5.3 Harassment under section 26 of the EqA.

5.4 Victimisation under section 27 of the EqA, withdrawn at the liability hearing.

5.5 Detriment under section 44 of the Employment Rights Act 1996 as amended.

6. The Tribunal has taken a great deal of time to understand the claimant's claims which have been included and amended in numerous documents. It was agreed from the outset with the parties that the Tribunal would consider and take into account the document referred to as "the annex" at pages 231 to 235 and the list of allegations in the substitute response at pages 237 to 259 and not the earlier further information provided by the claimant, which was extensive and confusing. The Tribunal has noted that there are differences in the further information provided by the claimant, the annex and substitute response, which it has endeavoured to deal with as best as possible given the considerable number of individual allegations and the confusion caused by the information contained in different documents that did not always follow chronologically and were not numbered. As agreed, the Tribunal has inserted allegation 35 inadvertently omitted from the substitute response. The Tribunal has also inserted the claimant's original numbering in square brackets having listed the allegations in chronological order within the factual matrix to assist their understanding and that of the parties.

7. Mr Davies provided an 'Opening Written Argument' setting out the law and legal principles that were agreed and relied upon by both parties in their closing submissions. The law relied upon by Mr Gibbons as recorded in the time limit issue set out the relevant legal

principles accepted by Mr Davies. After the hearing the Tribunal expressed its gratitude to both representatives for the effort they have made and the positive way in which this hearing has been conducted.

Agreed issues

8. The parties agreed the issues as follows;

Section 15 complaint

8.1 Did Brian Blanchflower ("BB") treat C as alleged at 1-13 of the Annex in the period from 11 July 2019 to 4 November 2019

8.2 Did BB treat C unfavourably?

8.3 Was any unfavourable treatment because of something arising in consequence of C's disability? *The admitted disability is fibromyalgia*

8.4 Can R show that any such treatment was a proportionate means of achieving a legitimate aim? *The respondent's defence is in the Substituted Response at* **238-249**.

Section 20/21 complaint

8.5 Did R have or apply the alleged PCPs set out at 14-15 of the Annex (not providing suitable equipment to allow the use of Dragon Dictate / not providing suitable seating)?

8.6 Is either capable of amounting to a PCP?

8.7 Did the alleged PCPs put C at the substantial disadvantage set out at 14-15 of the Annex (could not perform duties without typing because of wrist pain / pain and discomfort)?

8.8 Was any substantial disadvantage because of C's disability?

8.9 Did R fail to take such steps as it is reasonable to take to avoid the disadvantage (C says: suitable equipment for using Dragon Dictate should have been provided by 17 June 2019 / appropriate seating should have been provided by 4 November 2019).

Section 26 complaint

8.10 Did BB engage in the conduct alleged at 16-34 & 36-39 of the Annex?

8.11 Did Marie Daley ("MD") engage in the conduct alleged at 35 of the Annex?

8.12 Did the conduct amount to unwanted conduct?

8.13 Did the conduct relate to C's disability?

8.14 Did the conduct have the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Section 44 ERA complaint

8.15 In circumstances of danger which C reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, did she leave work or refuse to return to work?

C says she did so on 11 September 2019 at 41 of the Annex.

8.15 Was C subjected to any detriment on the ground that she had left or refused to return to work in such circumstances?

8.16 Did BB withhold C's wages on 26 September 2019?

Jurisdiction (time)

8.17 Is any complaint out of time? The respondent's case is any complaint about a matter which occurred on or before 30 September 2019 is out of time.

8.18 If so, is it part of an act extending over a period of time and or should time be extended?

Evidence

9. The Tribunal heard evidence under oath from the claimant and from Philip Dickens, Union Representative for the PCS Union, who assisted the claimant in the period June to November 2019. It also had before it the witness statement of Joshua Walmsley who did not give evidence as his statement concerned the victimisation claim withdrawn by the claimant, his evidence became irrelevant and the parties agreed he need not be called to give oral evidence.

10. On behalf of the respondent the Tribunal heard from Brian Blanchflower, the Front-Line Manager in the Personal Tax Operations team now and at the time of the events complained of. Brian Blanchflower was the claimant's line manager referred to in the "Annex" as the only person involved in the s.15 discrimination arising from disability and s.27 victimisation complaints, the only person involved in all but one of the s.26 harassment complaints and as one of the persons involved in s.44 Health & Safety complaint.

11. In addition, we heard from James Patrick McCarten, the Operations Manager now and at the time of the events complained of, Brian Blanchflower's s line manager referred to in the "Annex" as one of the persons involved in the s.44 Health & Safety complaint, Samuel Langan, Assistant Officer in the Personal Tax Operations team at the time of the events complained of and James McCarten's line manager referred to in the Annex as one of the persons involved in the s.44 Health & Safety complaint, Marie Daly, Team Leader in the Personal Tax Operations team now and at the time of the events complained was referred to in the "Annex" involved in one of the s.26 harassment complaints, and David Bradley, Senior Officer in charge of the Personal Tax Operations. Regional Resources Team at the time of the events complained, dealt with the claimant's informal grievance.

12. There were a number of fundamental conflicts in the evidence to be resolved by the Tribunal, which it has clarified as set out in the findings of facts below. In short, it did not find the claimant an entirely credible witness for the reasons stated, preferring to rely on the contemporaneous correspondence and the uncontradictory evidence given by the

respondent's witnesses, particularly Brian Blanchflower and Marie Daly whose evidence remained consistent throughout.

13. The Tribunal has considered the documents to which it was taken in the bundle, the agreed chronology incorporated into the finding of facts, written and oral submissions, which the Tribunal does not intend to repeat in full and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts having resolved the conflicts in the evidence on the balance of probabilities.

Facts

14. The respondent is a non-ministerial government department and the United Kingdom's tax and customs authority. It is based in a number of offices throughout the UK. This case involves the offices known as The Triad and Litherland House based in in Bootle, Liverpool.

15. The respondent had and continues to have an active trade union presence in the workplace where managers and union representatives engage to address employee concerns, and meetings often place between the two in the "blister rooms" within The Triad. A number of union representatives were responsible for health and safety matters. Health and safety of employees was taken seriously by the union and respondent who was aware of its duty to make reasonable adjustments and had a number of employees, including managers, who were disabled. Marie Daly was disabled with fibromyalgia, worked on the second floor and had a specialised desk and chair.

Respondent's policies and procedures relevant to this claim.

16. The respondent issued a number of policies and procedures including 'Raising a concern: our approach and what you should do,' 'HR27002 Attendance Management: Policy Overview,' 'HR83006 Workplace Adjustment – Disability Adjustment Leave (DAL), and HR23100 Unauthorised Absence.

17. HR23100 Unauthorised Absence sets out a number of provisions including; "Any absence from work, for example, annual leave, sickness absence, special leave, etc **must be authorised by your manager or else it is an unauthorised absence**. Under the terms and conditions of your employment, unless you have a legitimate reason to be absent, you must attend work if you are fit enough to do so. **The Department reserves the right to stop or suspend your pay in certain cases, for example, where absence is not authorised.** Unauthorised absence is a breach of conduct which if proved may ultimately result in the loss of earnings or dismissal…**Unauthorised absence occurs when you do not attend work and you fail to provide a satisfactory explanation or medical certificate for your absence**" [the Tribunal's emphasis]. The procedure included a checklist for managers including "If you are not satisfied with their explanation, complete and issue the Contact HR iForm to HRSC stating that the absence should remain unpaid and that pay should be reinstated from the 'return to work date'.

Disability Adjustment Leave

18. With reference to Disability Adjustment Leave ("DAL") under the policy relevant at the time DAL was described as follows:

> 18.1 "DAL is paid special leave granted for a reason related to someone's disability. **It is one possible workplace adjustment that managers can consider to allow disabled jobholders who are fit for work and attending work to have a reasonable amount of paid time off work to attend appointments or consultations or hospital treatment related to the management of their disability**. DAL can be granted only to jobholders who are likely to meet the definition of a disabled person under the EA/DDA. **It is not a form of sickness absence and can't be used to cover sickness absence.** DAL does not count towards disability trigger points.
>
> 18.2 To be eligible for DAL an employee "they have a disability covered or likely to be covered by the EA/DDA, **they are fit to attend work on the days that they have applied for DAL, the period of absence is directly due to managing the effects of disability and they aren't already on sickness absence or a phased return to work, they aren't on annual or special leave.**
>
> 18.3 DAL can be applied for in relation to the disabled employees equipment and adaptations for training "to allow the use of specialist equipment related to a disability, **to allow other workplace adjustments or adaptations to be made [and when] damage to equipment that prevents someone from attending work".**
>
> 18.4 DAL does not apply "**when the individual is not fit for work – that is sickness absence.** For any treatment started while the jobholder is already on sickness absence. Appointments or treatment not connected to an individual's disability. The jobholder is on a phased return to work. There may be other situations when DAL is appropriate. Where there is any doubt, managers should contact CSHR Casework for advice."
>
> 18.5 **DAL will only be allowed for short periods of absence, usually up to five working days for each occasion**. The overall amount of DAL awarded in a twelve-month period will not normally exceed three months [the Tribunal's emphasis].

<u>The claimant</u>

19 The claimant was born on the 22 March 1983. The claimant has been employed for a period of ten years as an assistant officer on part-time hours by the respondent. The claimant is disabled with fibromyalgia as a result she experiences pain to her back, shoulders, hips, arms and wrists. According to reports provided by occupational health referred to below, she has light sensitive migraines. The physical effects of fibromyalgia can vary day to day and the claimant had a number of adaptations and pieces of specialist equipment to enable her to carry out her role including Dragon software used by the claimant from December 2018 onwards. Dragon software is voice activated and it allows the claimant to navigate the respondent's systems and dictate notes. In order to interact with the system, she used a headset which incorporated a separate microphone. The headset could be put around the neck if the wearer wanted to rest their ears and the microphone could still be used to dictate.

20 The claimant joined Brian Blanchflower's team as an assistant officer on 28 November 2018, following a transfer from floor 15 of 19 floors to the first floor. Due to her mobility issues the claimant was unable to evacuate safely if there was a fire alarm from floor 15 hence her transfer to the first floor. The claimant was issued with an evacuation chair ("Evac chair") and two "buddies". The two buddies were specifically trained employees located on the second floor. The union and respondent were aware of possible issues arising from the limited number of buddies available to assist disabled and injured employees in the event of an evacuation. It was recognised that the number of injured and disabled people on the first floor who needed the assistance exceed the number of non-disabled and uninjured employees in the event of an emergency, especially during peak holiday season, for example, summer holidays. The respondent and union were looking at resolutions, one of which was relocating employees to Litherland House.

21 Litherland House was 5 minutes walking time away (for a non-disabled person) from The Triad. The Triad was a 5 minute' walk from the train station, Litherland House a ten-minute walk for a non-disabled person. Litherland House was on one floor and a number of disabled people agreed to be moved there, but not the claimant who refused. The claimant was unhappy with the prospect of using the Evac chair whatever floor she worked on and informed the respondent she would not use an Evac chair and this gave rise to a health and safety issue resolvable by a move to Litherland House. Nevertheless, the claimant refused a transfer to Litherland House.

22 On the 1 January 2019 the claimant commenced a period of sickness absence with "back pain" returning to work on 21 January 2019.

Occupational health report 18 February 2019

23 On 18 February 2019 an Occupational Health report was received for the Claimant recommending specialised equipment including a chair following a workstation adjustment arranged by Brian Blanchflower. The report confirmed all of the claimant's equipment had been moved with her, including the "sit-stand" desk she had been using. A new chair was recommended and various other recommendations totalling 7 in all were suggested and carried out including an electric sit/stand desk as it was expected the claimant would switch between standing and sitting whilst carrying out her work. The new chair was on order and the agreed evidence before the Tribunal was that there was no issue with the claimant using her existing specialist chair for the duration and this was not part of the claimant's discrimination complaint.

24 Brian Blanchflower made a referral to the Reasonable Adjustments Support Team ("RAST") on 22 February 2019 in relation to specialised chair.

April 2019

25 In April 2019 the claimant went on holiday, and contracted an ear infection unconnected with her disability.

26 As the weeks progressed the claimant found it more difficult to wear the headset over her ears. On some unknown dates the claimant tried on different headsets with the DSE local assessor. Brian Blanchflower saw the claimant trying on headsets and discussing a one-piece headset with the DSE assessor. The claimant originally gave evidence she had approached Brian Blanchflower in April about the problems she had wearing the headset.

When giving evidence on cross-examination the claimant confirmed she had approached Brian Blanchflower in May 2019 and not April, and the Tribunal preferred Brian Blanchflower's evidence that on or around 14 May 2019 he was made aware the claimant wanted a bone conducting headset to replace her existing headset to avoid touching her ears. As the DSE assessor and health and safety representative were also involved Brian Blanchflower reasonably took the view the matter was in hand with people more experienced than he was in headsets. Brian Blanchflower's understanding was that the claimant carried out some phone work as and when she chose to do so, which required the use of a headset and had informed him a headset was necessary. Brian Blanchflower took the view, after a cursory internet search, that a bone conducting headset may not be suitable. Brian Blanchflower left it to the experts, and understandably it did not occur to him that the claimant could use her existing headset around her neck on the basis that the earphones were not needed and the microphone could be used if steadied by tape, which is what in fact took place after a lengthy period of trying to establish with the claimant what type of headset was needed. It transpired the claimant was mistaken, she did not need a headset at all and required a microphone which could be provided without any difficulty.

May 2019

27 On the 9 May 2019 the claimant commenced a period of self-certified sickness absence due to "musculoskeletal pain" returning to work on the 14 May 2019. Brian Blanchflower's understanding at the time was that the claimant had an ear infection and nothing more serious. He was unaware of the full extent of the claimant's ear condition. Between the 14 May and 11 June 2019 the claimant was not saying that she was so incapacitated with her ear infection that she could not work.

Redeployment Register.

28 Discussions had taken place concerning the claimant's transfer from The Triad in Bootle to India Buildings in Liverpool city centre, which she had refused, and was aware redeployment would take place as a result.

29 The claimant went to see her GP on the 17 May 2019. The medical records do not reflect the claimant reporting that she was so incapacitated she could not work, and referred to the first time the ear pain. Had it been the case the claimant could not work and could not use a headset the Tribunal would have expected this information to have been reflected in the GP's records, and the MED 3 forms which followed, concluding on balance that the claimant's evidence was confused and could not be relied upon. It is notable the GP treated the ear infection with antibiotics.

30 In a letter dated 24 May 2019 the claimant was informed "so that you can have priority for vacancies in HMRC you will join the redeployment register on 29 May 2019**. Your manager will shortly discuss with you what joining the register means and how they will support you in finding suitable redeployment**" [the Tribunal's emphasis]. The claimant accepted that it was reasonable for Brian Blanchflower to discuss redeployment with her in the near future.

June 2010

31 On the 10 June 2019 the claimant took time off due to her daughter being unwell. Brian Blanchflower gave the claimant a days special leave.

32 On the 13 June 2019 the claimant went off sick with anxiety and fibromyalgia and no reference was made in her communications to the respondent to her being unable to work due to her headset.

MED3 13 June to 11 July 2019

33 On 22 May and 6 June 2019 the claimant returned to her GP with the ear infection, and on 13 June 2019 the claimant was diagnosed with anxiety and fibromyalgia unfit for work 13 June to 11 July 2019, a 4-week period. No adjustments were suggested. Brian Blanchflower was entitled to take the GP';s medical advice at face value and conclude the claimant was not fit enough to carry out any work with or without any workplace adjustments, and so the Tribunal found.

34 It is notable the GP made no reference to the ear infection as a reason for the absence. The GP's record reflected the information provided by the claimant at the time concerning her "typing a lot" and having panic attacks at work, and yet there was no mention of the claimant being unable to work due to ear infection and inability to use earphones/headsets. The consultation on the 13 June 2019 was dominated by the claimant's anxiety symptoms and fibromyalgia and this was reflected in the MED3.

Section 26 [allegation 16]: April 2019 ignoring my request to contact RAST for specialist equipment and instead going to an in house DSE assessor with no specialist experience, making me feel ignored and upset.

35 The claimant's union representative contacted Brian Blanchflower on 17 June 2019 about the extent of the claimant's ear problem affecting the pain in her wrists and the Tribunal accepted Brian Blanchflower's evidence that this was the first time he was made aware of the full extent of the claimant's issues due to her ear problem. Brian Blanchflower did not act as alleged in allegation 16 in April 2019, the date relied upon by the claimant and the incident did not take place.

The first HRACC1 form 17 June 2019 and Brian Blanchflower's knowledge

36 The claimant submitted a HRACC1 form on the 17 June 2019, which was the first indication Brian Blanchflower had of the seriousness in which the claimant regarded her ear condition. In the HRACC1 form the claimant was reporting work related ill health and she confirmed the "accident" had taken place on the 10 June 2019. The claimant confirmed symptoms were first noted on the 1 May 2019 as "aggravating wrist condition and pain to ears" having developed a virus in May 2019 "as this affected me, my headset became more and more unconfutable and exacerbated the pain in my ear due to the pressure it put on my ear." Reference was made to the claimant asking Accessibility Support for their recommendation.

37 The claimant in her report to the GP and the HRACC1 form described the pain as being similar to that "an airline cabin when your ears feel they will painfully pop."

38 It is notable in the information provided by the claimant attached to the HRACC1 form she wrote; "I have been seen my GP, who advised me that due to problems with my wrists, I should not be attempting to work manually, and the problem with the headset would only continue to aggravate the problem with my ear and cause further pain, and that I should refrain from using." This information was provided by the claimant on the 17 June and she

had last seen her GP on the 10 June 2019. The GP records reflect no such advice being given. The claimant was challenged in cross-examinaiton on why the ear pain was not on the sick note. The claimant responded that it could have been included but the GP felt that there was no need to put everything on there. It is notable in the penultimate paragraph on the HRACC1 form the claimant confirmed her "symptoms had worsened." In oral evidence the claimant stated she had discussions with her GP during this period that the adjustment she was seeking was a headset that did not touch her ears, and she confirmed that had the headset been provided, as requested by her, she would have been able to continue working. The claimant was unable to provide any explanation for why the GP had confirmed in the MED3 she was not well enough to work even if adjustments had been made. It was a relatively straight-forward matter for the GP to have included in the MED3 the fact the claimant could have worked with the adjustment of headphones that did not touch her ears, and the Tribunal concluded on the balance of probabilities that this information was not before the GP at the relevant time, which it found surprising given the contents of the HRACC1 form.

Section 26 [allegation 17]: June 2019 Being flippant regarding the pain I was suffering with the comment 'it is what it is, just do what you can'. This made me feel insignificant and impacted my ability to communicate effectively, also made me feel I had no other choice but to use my headset or type, exacerbating my injuries.

39 The HRACC1 form dated the 17 June 2019 made no reference to Brian Blanchflower "being flippant" regarding the claimant's ear condition, which the Tribunal finds surprising given the claimant went into some detail in her witness statement about the stress she was under. Mr Davies submitted the claimant also failed to raise a grievance, and cross-examined the claimant on this issue. The claimant's evidence that she was too stressed to bring a grievance was not a credible explanation taking into account the fact the claimant, albeit with assistance, prepared and filed the extensive HRACC1 form. Brian Blanchflower denied he had said "it is what it is, just do what you can" to the claimant, and on the balance of probabilities the Tribunal preferred his evidence to that of the claimant's which could not be relied upon, and whose evidence was not supported by any of contemporaneous documents. It is uncontroversial between the parties that the claimant was left to her own devices to choose what work she could carry out, with no control and that Brian Blanchflower asked the claimant every morning how she was, and the claimant's response was "I'm here aren't I."

40 In oral evidence the claimant alleged when she told Brian Blanchflower that she was in pain, he brushed it off. The Tribunal found that was not the case. It found Brian Blanchflower measured, he accepted what the claimant was telling him about her health, and actioned it with the claimant's health and safety in mind to such an extent that she could chose whether or not to take telephone calls and carry out floor walking, which the claimant did on occasions when she decided to do so. The claimant unusually had an apparent freedom to select what tasks to do, when and on what days, confirmed by the undisputed evidence of Brian Blanchflower who had made it clear to the claimant she should not carry out work that endangered her health and safety throughout her time in the department.

41 Brian Blanchflower responded to the HRACC1 dated 17 June 2019 recording the claimant went to see the DSE assessor on 3 June 2019 and trialled headphones, including a headset that looped over one ear without the bulkiness of the "traditional headsets" and "no reasonable adjustments could be put in place without knowledge of the issue. The first reporting was a text by Rachael on the evening of the 5/6/19 advising me she would not be

in work tomorrow as she had an appointment with her GP. In her words 'she was well enough to be in work so would be a days leave and not sick…at 12.18pm I received a further text advising me Rachael had been signed off work for 4 weeks with anxiety and Fibromyalgia. Leading up to this I was not made aware to the full extent of Rachael's condition. The information I had was Rachael trialling different headsets with the help of the DSE assessor…"

Date of knowledge

42 The date of Brian Blanchflower's knowledge of the "full extent" of the claimant's ear condition and her need to find an alternative headset was 17 June 2019 at the earliest following the discussion with the claimant's union representative and receipt of the HRACC1 dated 17 June 2019 by which time the claimant had been certified absent with no reasonable adjustments and this was the position until 9 August 2019 when she commenced term-time leave in accordance with her contract.

July 2019

43 On the 12 July 2019 the Claimant was signed off sick for a further four weeks with "anxiety, fibromyalgia, Eustachian tube dysfunction" ("ETD"). The second MED3 was the first medical reference to the claimant's ear condition and a diagnosis of ETD. The GP confirmed the claimant was unfit to work with no adjustments suggested, despite the claimant's evidence before this Tribunal that the GP was only signing her off whilst she was waiting for a suitable adjustment and had informed Brian Blanchflower of this, evidence that was not supported by any contemporaneous documents and found not to be credible by the Tribunal.

Section 15 [18]: July 2019 Proceeding with 28-day absence route when absence was due to lack of RA provision making me extremely stressed.

Section 26: 11/07/19 Proceeding with 28-day absence route when absence was due to lack of RA provision making me extremely stressed [this was included in the further information provided by the claimant and substituted response but not the Annex.

44 In an email sent on 11 July 2019 by Philip Dickens, the claimant's union representative, to Brian Blanchflower, Mr Dickens proposed the claimant's absence should be DAL rather than sickness; "she is off due to her equipment**, in this case headset, not being suitable.** Beyond that, she is still not in receipt of her specialist chair which I understand was ordered from an OH assessment earlier this year. As such, appropriate equipment for her to attend work safely isn't in place and so DAL applies…I understand an OH referral has taken place" [the Tribunal's emphasis]. He proposed contact was made with RAST and ATW, ignoring the fact that an agreement had been reached concerning the specialist chair and this was not an obstacle to the claimant working. The issue was the headset when in reality a microphone was all that was required and the claimant could use the microphone she had as an interim measure. The Tribunal have inferred either Philip Dickens and/or the claimant from this point on were intent on using specialist equipment, namely the headset, as a leverage for DAL in order that the claimant could stay at home on full pay.

45 On oral evidence on cross-examination the claimant confirmed the specialist chair was not an issue for her at the time, and had the headset been provided she could continue working safely. Philip Dickens in his oral evidence confirmed he was not aware of what was in place, which the Tribunal found surprising given the content of his email. If this was the case it must follow Philip Dickens was not provided with the relevant information by the claimant seeking DAL was because the headset had not been provided and for no other reason.

Attendance Management Policy

46 On the 12 July 2019 an email was sent by from Brian Blanchflower to Philip Dickens confirming that claimant's absence will be managed in accordance with Attendance Management Policy. The claimant had been absent for 28-days and Brian Blanchflower was following procedure, as confirmed by the claimant when giving oral evidence on cross-examination. Mr Dickens had experience in such matters as a union representative and would have been aware due process was being followed, and so the Tribunal found.

47 Philip Dickens responded on 12 July 2019 at 12.42" as the absence isn't sickness but an inability to attend work safely due to the lack of reasonable adjustments, DAL should apply." He argued the "barrier" to the claimant's return to work was "lack of equipment i.e. the proper chair and headset, and so a return to work date is entirely in HMRC's hands."

48 Brian Blanchflower responded at 13.01 "If you are telling me Rachael is well enough to return to work if we had a replacement chair and headset then this is something we could discuss at the meeting as we can always found Rachael a temporary role such as mentoring the telephony staff on working post for example, however her fit note does not suggest this is the case. Obviously we both have Rachael's well-being in mind and we all have to be "reasonable" to secure an agreeable resolution." The email was not copied to the claimant, who was informed of its contents by Philip Dickens and she instructed him to respond as follows.

49 Philip Dickens responded at 13.39 "I do see what you are getting at. However, my particular concern is that the attendance management process obviously comes with certain consequences and penalties which would be wholly inappropriate." It was apparent to the Tribunal that the attendance management process was a key issue for the claimant and Philip Dickens. The claimant was aware at the time that the only issue preventing her from working was suitable headphones in relation to a medical condition that was not linked to her disability and therefore any absence she had would fall squarely under the attendance management process if it was attributable to her ear condition alone.

50 Philip Dickens continued "Having spoken to Rachael, we agree that she would be well enough to return if the proper equipment was in place, but as one of those pieces of equipment is a chair there's not really an alternative role that is suitable as it would leave her standing all day." Philip Dickens was misleading Brian Blanchflower. He did not convey the correct information which was that the chair was on order, but more importantly, the claimant had an existing chair which she was using and there was no need for her stand up all day. The Tribunal concluded the claimant and Philip Dickens were prepared to use any argument to force the respondent's hand to agree to DAL. The claimant's objective was to remain at home on full pay without the possibility of being taken down the attendance management

route. The Tribunal found it surprising the claimant and Philip Dickens did not discussed how the claimant could use her existing headphones around her neck and did not need headphones at all, which eventually became part of the resolution in this case.

51 Brian Blanchflower responded at 13.57 “we were advised when we were attempting to re-order a replacement chair that the one in place was adequate for time being…As far was the consequences and penalties you refer to are concerned these can be looked at with manager’s discretion…By returning to work Rachael would be helping us to help her and would also show a measure of goodwill on her behalf…which would be taken into account…” Brian Blanchflower’s attitude in this email was reflected in all of his dealing with the claimant and union, and in direct contrast to the claimant he has been entirely consistent in his evidence. He was always keen to have a discussion the claimant back in work to discuss and trial adjustments, and so the Tribunal found.

16 July 2019 meeting

Section 26 [Allegation 19]: 16/7/19 BB opening the 28-day absence meeting with the comment ‘I’m not here to argue, we’re going to discuss it like adults’ making me feel intimidated

Section 26 [Allegation 20]: 16/7/19 BB Handing me an ill health retirement guide during the meeting causing anxiety about losing my job.

Section 26: [Allegation 21]: 16/7/19 BB Asking me about a redeployment pool causing me anxiety about my job.

Section 26 [Allegation 22]: 16/7/19 BB Reading through the sickness policy indicating disciplinary action when absence was due to lack of RA provision.

Section 26 [Allegation 23]: 16/7/19 BB Bombarding me with questions and asking when I would return to work resulting in me suffering a panic attack

Section 26 [Allegation 24]: 16/7/19 BB Refusing to consider DAL for the absence, which was due to lack of RA provision, despite union recommendation

16 July 2019 28-day absence meeting with claimant

52 On the 16 July 2019 Brian Blanchflower held a 28-day absence meeting with claimant. The Tribunal accepted Brian Blanchflower’s evidence on cross-examination, which was not disputed, that he had no discretion other than a few days either way, to have a 28-day absence meeting. Brian Blanchflower was following policy, as conceded by Philip Dickens in oral evidence.

53 It was agreed the meeting would take place in the claimant’s house, and Brian Blanchflower was aware the claimant had moved home during her sickness absence. Brian Blanchflower was put out because the claimant would not let him, pending the arrival of her union representative, and he had to wait outside in the car. Brian Blanchflower was following policy, and the claimant’s attitude set the scene for what followed and put the words used in context. The Tribunal found that the emails sent by Philip Dickens referred to below, misrepresented the true position. The claimant’s refusal to allow Brian Blanchflower in the house set the scene for a more difficult meeting between manager, employee and union representative than it should have been. The meeting went as follows:

53.1 At some stage early on in the meeting Brian Blanchflower said words similar to “I’m not here to argue, we’re here to discuss it like adults.” He said that because he did not want to argue, he wanted a positive discussion and to move forward. The words were not said to intimidate or disparage the claimant and so the Tribunal finds, taking into account Brian Blanchflower’s explanation. Brian Blanchflower’s explanation under cross-examination, which was not disputed by the claimant, was that it was based on his feelings about the trade union approach and wanting to defuse the situation. Given the factual matrix, the Tribunal found the explanation credible, was not tainted by disability discrimination and the words could not be described as harassment. As submitted by Mr Davies, it is notable neither the claimant nor her union representative complained, and the reason the claimant left the meeting was not because of harassment, but due to Brian Blanchflower discussing her return to work with reasonable adjustments, which the claimant did not want to do as she preferred to remain at home under DAL.

53.2 In accordance with procedure the claimant was handed an ill-health retirement guide, and the claimant’s evidence that this caused her anxiety about losing her job was not credible. The claimant was a union representative herself who had undergone recent training, supported by another experienced union representative and the policy is clear. There was no hint before this meeting that the claimant was at any risk of losing her job. It was very clear in Brian Blanchflower’s communications that he wanted the claimant back at work with reasonable adjustments to suit her as confirmed in the email sent 4-days before the meeting. Allegations 19 to 24 are an attempt by the claimant to bolster up her claim. At the time the claimant, who had shown herself capable of being assertive, did not state she was intimidated, and the Tribunal found that she was not. Brian Blanchflower handed the guide to the claimant in compliance with procedure, and the claimant’s union representative said nothing. It is notable in the claimant’s grievance submitted later, she did not mention feeling intimidated, and “being panicked” because she had not expected the Policy. The claimant’s issue was she thought the absence would be treated as DAL and it was not.

53.3 It is notable at this meeting Brian Blanchflower displayed considerable sensitivity towards the claimant when he apologised to her for the stress caused by the meeting, and the claimant made the decision to continue until the conversation reached the issue of adjustments and the claimant’s return to work, which made the claimant experience anxiety because she believed DAL would and should be granted. The claimant’s anxiety had nothing to do with Brian Blanchflower’s actions and was due to the claimant’s belief that the meeting was to discuss that her absence should be treated as DAL, as confirmed in the claimant’s written grievance. DAL was the claimant’s objective throughout and so the Tribunal finds on the balance of probabilities.

53.4 Following up on the earlier meeting and email concerning re-deployment in May, Brian Blanchflower asked the claimant if it was all right to talk about the redeployment issue whilst they had a chance to speak face to face, and the claimant agreed to talk about it. Redeployment was not discussed because the claimant left the meeting. At the meeting the claimant’s union representative raised no issue with Brian Blanchflower

asking her if he could raise redeployment and it only became an issue with these proceedings in mind. Brian Blanchflower confirmed in cross-examination it was important to discuss redeployment and get the claimant on the register so that she had every chance to apply for a role, and he seized the opportunity not thinking it would be a problem the claimant having agreed to do so.

53.5 Brian Blanchflower admitted explaining the potential outcome of sickness absence could result in dismissal or ill-health retirement if a return to work was unlikely as he was required to do under the respondent's standard procedure, and there was no objection at the time, or any complaint in the follow up after the meeting. The claimant agreed in cross-examination Brian Blanchflower was applying the standard procedure. No disciplinary proceedings were threatened and the claimant was not dealt with under the respondent's Absence Review Procedure at any point in the future. In the claimant's grievance there is no reference to any complaint suggesting allegation 22.

53.6 The notes taken of the meeting do not reflect the claimant being "bombarded" with questions about her health and when she would be returning to work. The claimant did not point to any errors in these notes. Brian Blanchflower was not cross-examined on this allegation, and the Tribunal accepts Brian Blanchflower's evidence that it was reasonable for him to discuss the reasons for the claimant's absence and what steps could be taken to get her back into work. The meeting was adjourned to give the claimant a break. The claimant's union representative made no complaint about the way the meeting was conducted. Brian Blanchflower, who did not have sight of Occupational Health report, was entitled to discuss the claimant's medical condition. The Tribunal came to the conclusion the claimant's response to the meeting was the thwarted DAL, it had nothing to do with any alleged bombardment of questions (which did not take place), or the allegations 19 to 23.

53.7 There was a discussion about the current position with the headset. The claimant's union representative suggested a headset that sat around the claimant's neck. The claimant's evidence on cross-examination was that it was a pendant microphone and that this was the first time she was aware Dragon could be operated without a headset. What the claimant did not say was that she no longer required earphones to carry out her work, and Brian Blanchflower indicated at the meeting the bone conducting headphones suggested by the claimant (after her own research supported by the union health and safety representative) were not suitable. Brian Blanchflower suggested that he and the union representative discuss the matter after the meeting so that he could take it up with the DSE assessor. Brian Blanchflower later contacted the claimant's union representative with a view to a meeting "to find a way forward with Rachael's headset."

53.8 At the meeting the claimant made it clear the adjustments needed was a chair and earphones/headset despite the fact an agreement had been reached in respect of the chair which was not a barrier to her return to work.

RESERVED

54 On the 11 July 2019 the claimant was informed of the estimated delivery date for her chair.

Occupational Health Report

55 On the 16 July 2019 the Occupational Health report recommended a referral to RAST in relation to replacement headset. Occupational Health confirmed the claimant's "current fit note is until the 7/08/2019. She feels she can return to work before the end of her fit note if she has the correct equipment and I would agree with this." The report included the following:

55.1 Reference was made to a number of underlying conditions including the claimant's disability and ETD, described "usually" as a "temporary problem during and after a cold…she is experiencing constant earache in both ears which is made worse by pressure on her ears…she has been unable to use a headset due to problems with her ears…she informs me she is waiting for specialist equipment – chair, screens, document holder since early 2019…she would be able to undertake her work and meet demands if she had the right equipment…she would be fit for work if she could be provided with the equipment required as identified in the workplace assessment…She would be able to return to work if she has a suitable chair and a handset or suitable head set. This is essentially a management issue…"

55.2 A phased return to work was recommended "on half her usual hours and building up gradually over the first 2-4 weeks."

56 Occupational health advised the respondent without knowledge of the full picture regarding the specialist chair currently being used by the claimant with her agreement pending the provision of a different specialist chair. The Tribunal found the claimant needed to keep the specialist chair in the forefront because without it she would not be eligible for DAL as the headset was unconnected to any disability, and this accounts for the exaggerated and misleading information given in respect of the specialist chair when there was no issue.

57 Occupational health's view was essentially that it was a management issue, which did not suit the claimant who refused to meaningfully take part in any discussion on reasonable adjustments made to her duties within the workplace so she could return and not be required to use the headset and so the Tribunal found.

Section 15 [Allegation 3]: 25 July 2019 issuing an email informing of the outcome of the meeting 16/07/19, stating the business would support the absence this time but may not be able to in the future, causing anxiety about losing my job.

Section 26 [Allegation 25]: 25 July 2019 BB Issuing an email informing of the outcome of the meeting 16/07/19, stating the business would support the absence this time but may not be able to in the future, causing anxiety about losing my job.

Section 20-21 [Allegation 14] : 17/06/19 Failure to provide suitable equipment to allow the use of Dragon dictate. (This is an auxiliary aid complaint)

58 In a letter dated 19 July 2019 the claimant was informed of the outcome of the 16 July 28-day absence meeting and Brian Blanchflower's decision to support her sickness absence as follows; "I may review your absence regularly and may reconsider my decision at any time if it becomes unlikely that you will return to work in a reasonable period of time" reflecting the

policy applicable at the time and following the respondent's template letter exactly in this regard. There was no intention on the part of Brian Blanchflower to cause the claimant any anxiety about losing her job; and the claimant, had she stepped back and looked at the matter objectively, should have appreciated that her job was not at risk following the 28-day absence review meeting which culminated in her absence being supported. Brian Blanchflower had received HR advice before and following this communication, and it is clear he was following this and the respondent's procedure, which would have been apparent to the union and the claimant she was not at risk of losing her job and allegations 3 and 25 were an attempt to bolster up this claim, the Tribunal having found the claimant's evidence less than reliable.

59 On the 22 July 2019 Brian Blanchflower made referral to RAST for the Claimant in relation to headset, and he received advice that the claimant should contact Access To work ("ATW") for a workplace assessment. He concluded the claimant's absence should be recorded as sickness absence and not DAL. On the 23 July 2019 RAST emailed Brian Blanchflower recommending the claimant contact Access to Work, which she did.

60 On the 31 July 2019 the claimant's specialised chair was delivered. Before and on 31 July 2019 the respondent had complied with its duty to make reasonable adjustments and so the Tribunal found. The claimant's second chair had been delivered and was available for her return to work. The provision of headphones was not a reasonable adjustment that required any phased return to work and so the Tribunal found.

August 2019

Section 26 [Allegation 27]: 1 August 2019 Contacting me regarding the HRACC1 having still not contacted RAST and insisting he was unaware of the issues. This made me extremely anxious to the point of requesting leave rather than go into work.

Section 15 [4]: Overpayment of wages which was later recovered.

Section 26 [allegation 30]: between June & August 19 BB Failure to update HR records on time resulting in an overpayment of wages despite me calling HR and been told the pay was correct.
Section 26 [allegation 31] BB late updating of HR records resulting in recovery of overpayment. An email was issued to myself and Brian form HR to inform of this on 18 September. Brian knew I had no access to work emails but made no attempt to inform me of this. This resulted in financial hardship and anxiety.

Section 26 [allegation 31]: August 19 – September 19 An email was issued to myself and Brian, from HR to inform of this on 18th Sept. Brian knew I had no access to work emails but made no attempt to inform me of this. This resulted in financial hardship and anxiety.

August 2019

61 On 1 August 2019 Brian Blanchflower sent the claimant a copy of the HRAcc1 form with his comments, having already sent a copy to her union representative on 20 June 2019.

62 The Tribunal found there was no evidence to the effect that Brian Blanchflower failed to update the claimant's records between June and July 2019. The relevant period is August

2019 when the claimant was paid SSP between 12 August 2019 to 31 August 2019 when she was no longer absent off sick and was on a contractual non-working period of one month known as “term time leave”. The claimant knew she was overpaid, and contacted HR to check and was told the amount of pay was correct. She did not contact Brian Blanchflower. The claimant suspected overpayment, and the evidence before the Tribunal was that it was a mistake and it makes no sense that Brian Blanchflower engineered overpayment of the claimant’s wages with the intention of harassing her. The Tribunal accepts a genuine mistake was made in calculating the claimant’s wages, confirmed by the entries from HR in the bundle. The claimant, in oral evidence, accepted the respondent was entitled to recoup the overpayment.

9 August 2019 sick leave ended and term time leave commenced

63 On 9 August 2019 the claimant’s sick leave ended, and she took one month’s term time leave. During the one month’s term time the claimant was fit for work, and Brian Blanchflower was entitled to take this month when the claimant was no longer unfit without adjustments as certified by her GP into account, preferring to rely on the MED3 rather than the claimant’s contention that she would be fit enough to work providing she had specialist headphones.

64 The claimant emailed Brian Blanchflower on 8 August 2019 that she would be returning to work on the 9 September 2019 “providing all of my equipment is sorted by then.” There was no reference to her requiring any phased return and bearing in mind the claimant had been fit from 9 August 2019 there was no expectation on either the claimant or respondent’s part that a phased return was necessary.

65 Brian Blanchflower was informed on 20 August 2019 by the DSE that no headset could be found online that would not touch the claimant’s ears, and he was advised by HR that it was acceptable if “meaningful work” was found for the claimant when she returned after the one month’s term time leave, and DAL was not appropriate. Brian Blanchflower was happy and eager to proceed a holistic workplace assessment and for the respondent to contribute to the cost of an appropriate headset, and an early assessment was requested. During this period there was no issue with communicating with the claimant or her union representative including via email. The Tribunal found allegations numbered 27, 4, 30 and 31 had not basis and were an attempt by the claimant to bolster up her claim.

September 2019

Section 26 [allegation 28]: 09/09/19 In my return to work interview Brian stated he would not call the absence ‘sickness’ as there had been disputes as to whether it should be sickness or DAL. This made me feel intimidated and confused as the ‘sickness’ was still to be recorded on my HR record.

Section 26 [allegation 29]: 09/09/19 Failure to consider phased return to work as advised by Occupational Health stating the reason as I had just had 4 weeks off (term time) – although no RA had been implemented at this time, making me further stressed about the situation and in danger of causing pain and injury

Return to work meeting 9 September 2019.

66 On the 9 September 2019 the claimant returned to work following term-time leave and a return to work meeting took place between Claimant and Brian Blanchflower. The Tribunal found the following transpired at that meeting.

66.1 The claimant was told she was not required to carry out any onerous duties or unsuitable duties and that was the case. The claimant's health and safety was not put at risk. Essentially the claimant spent the first two days catching up on her emails. At no stage did the claimant request a phased return. The respondent was not in breach of its duty to make reasonable adjustments by failing to offer a phased return, and Brian Blanchflower was following policy given the fact the claimant had not been certified incapable of working without adjustments for the month of leave, reinforced by the claimant's argument that she was well enough to return to work with a headset provided.

66.2 The claimant's allegation that Brian Blanchflower stated he would not call the absence 'sickness' as there had been disputes as to whether it should be sickness or DAL was not established by the claimant in her evidence, who was not sure on cross-examination what exactly had been said. The Tribunal preferred Brian Blanchflower's evidence that he did not say this and he was not cross-examined on this point. Brian Blanchflower's position had always been the claimant's absence was treated as sickness as supported by the MED3, and she was not eligible for DAL. The Tribunal found the claimant was not made to feel intimidated and confused as she now alleges, and allegations 28 and 29 have no basis.

66.3 The claimant was not told her absence would not be called sickness absence. Brian Blanchflower denies this allegation, he was not cross-examined on it. His position has always been throughout was the claimant was on sickness absence and not eligible for DAL and so the Tribunal found.

Section 26 [allegation 32]: 11/09/19 BB suggesting other duties as a reasonable adjustment without considering impact on my health, namely 'floor walking' or working on a higher floor even though no PEP arrangement was considered, also my full DSE wouldn't be available i.e. my desk

66.4 Right from the outset Brian Blanchflower had attempted to discuss with the claimant and agree adjustments to duties so that she can safely return to work without the headphones and the need to use Dragon. He made it clear that the respondent, the claimant and the union should be working together to find a resolution in order that the claimant could continue working. The Tribunal found reasonable adjustments were available to the claimant and offered to her. All she needed to do was talk to the respondent and then trial any of the suggestions which could be suitable; the Tribunal accepting the claimant's evidence that some of them may not be. For example, physically walking and sitting in a non- specialist suitable chair talking to people for a long period of time. The claimant was aware that a meaningful discussions should take place following the occupational health report. The claimant was represented throughout by an experienced union official, and she together with her union representative were aware Brian Blanchflower was keen on agreeing reasonable adjustments, a resolution the claimant wished to avoid.

67 On the face of the evidence before the Tribunal it finds that a number of the suggested duties were reasonable and met the claimant's health and safety needs. The claimant assisting colleagues on the first floor was reasonable, and the claimant's evidence that it was not the Tribunal did not find to be credible. The proposal was for the claimant to remain on the first floor with all of her equipment assisting colleagues who came to her with questions about their work. The claimant did not need to move from her chair and desk for this to take place. The claimant gave oral evidence that she could attend meetings in other rooms lasting between half an hour to one hour without any of her specialised equipment, and it stands to reason that sitting/standing at her own desk and giving oral advice was a reasonable adjustment which had no adverse impact on the claimant's health and safety. This proposal was available to the claimant to take up at any stage, and it was unreasonable for the claimant to refuse it on the basis that no one mentioned she would be at her desk or using it in another location taking into account the fact that it was made very clear to her that all health and safety needs would be met.

68 At no stage did the claimant complain or question that any of the adjustments proposed would result in a delay to her desk being provided and a requirement that she sat in her chair without the specialised desk. In oral evidence on cross-examination the claimant gave evidence that it takes months to move her desk. The Tribunal preferred the respondent's evidence that it did not, moving desks can be expedited and take place within a day according to Ms Daly. The real delay was providing the equipment in the first place.

69 The Tribunal finds the claimant was not cooperating with the search to find alternative duties, and neither she nor her union representative suggested any work without Dragon suitable for her to take up. Her position was that no duties at all were possible without a bone conducting headset and the reason for this was that the claimant wanted DAL and so the Tribunal finds.

70 On the 11 September 2019 an Access to Work assessment took place, and the claimant confirmed ATW would be recommending a bone conducting headset for her. The assessment took 15 minutes. Brian Blanchflower discussed with Jimmy McCarten, his line manager , alternative duties which did not need the use of any headset, that could be offered to the claimant pending the ATW report and sourcing of the alternative headset. The alternative duties were to be short-term. Nothing came of these discussions because the only resolution for the claimant and her representative was DAL, and the arguments rejecting adjustments offered were aimed at achieving this end. The Tribunal found allegation 32 had no basis.

Section 26 [allegation 34]: 11/09/19 BB during a meeting about PEP, changing the subject to repeatedly asking why I couldn't carry out the other duties previously offered (without the attendance of my union personal case rep), causing anxiety and stress

Section 26 [allegation 35]: MD During a meeting regarding my PEP (as above) telling me there were already too many disabled people on the first floor so I would have to consider relocating to Litherland House, causing extreme anxiety and a panic attack."

<u>11.09.2019 Meeting between Claimant, Marie Daly, Tony O'Neill and Brian Blanchflower.</u>

71 At the meeting held on the 11 September 2019 alternative duties were again suggested to the claimant, including assisting other employees on the first floor, moving to

the second floor to sit with other members of staff and assist them without using Dragon, and floorwalking i.e. sitting in her chair with colleagues approaching her with their queries; the claimant was not required to actually walk the floor and would be sitting in her specialised chair. During this discussion the respondent did not tell the claimant that her specialised desk would not be moved with her, and the claimant was not interested in exploring what the adjusted duties meant for her and how they could be achieved. The evidence of Marie Daly that the claimant "shut the discussion down" was credible; she was not prepared to discuss a move to the ground floor of Litherland House in a room with dim lighting, mentoring colleagues from her specialised equipment with lifts offered by managers in their car to and from the station and Litherland House and/or a loan for taxies until the claimant had set in hand financial support from ATW.

72 Marie Daly suggested the claimant moved to the second floor, where her buddies were based, to work in Marie Daly's department known as "the model office" shadowing others doing the work and not using any keyboard. This was an opportunity for the claimant to come and have a look at working there on a short or long-term basis depending on what the claimant agreed and whether she liked the work. Marie Daly believed this was an opportunity for the claimant. Marie Daly was not asked about moving the claimant's equipment with her and how long it would take because the claimant was not interested.

73 The claimant's union representative was also not prepared to discuss the options put forward, as he wanted to proceed down the DAL route to the exclusion of anything else.

74 Marie Daly informed the claimant that they had specialist desks in the model office and asked the claimant whether changing her chair's height was possible. Marie Daly is disabled with the same condition as the claimant, has specialist equipment herself, was aware of the need for the claimant to have her specialist equipment around her and there was no suggestion the claimant would be asked to work in any venue without her specialist equipment. Marie Daly was trying to see what the claimant could do in the immediate future and she would not be asked to do any work without equipment. Marie Daly was inviting the claimant to come and have a look at the model office to see what duties the claimant could carry out and how. Marie Daly had looked at the claimant's desk, and she was seeking feedback from the claimant as to what duties she could do without the headphones, and as far as the claimant was concerned there was none. Marie Daly wanted to explore with the claimant how long she would be comfortable to travel, looking at and trialling various alternatives to see what suited her best. The claimant was not prepared to consider any alternative duties, even to the extent of looking at the model office on the second floor, and this was because she wanted DAL.

75 In relation to the second floor the claimant objected to the proposal on the basis that her personal evacuation plan ("PEP") that had yet to be formalised included two buddies already located on the second floor, with the claimant's EVAC chair and the claimant on the first floor. The claimant was upset at the thought of her buddies carrying her from the first or second floor to ground floor in the Evac chair which she found uncomfortable. As soon as the claimant raised this objection Litherland House was proposed.

76 Marie Daly denies telling the claimant there were already too many disabled people on the first floor so she would have to consider relocating to Litherland House, and the Tribunal accepted her evidence as credible preferring it to the less than credible evidence given by the claimant. The Litherland House discussion came about when the claimant's union representative stated he had sent an email to Brian Blanchflower to the effect the claimant could not work in the model office because of her PEP. Marie Daly gave evidence

that she had discussed the fact the trade union had brought up there were too many disabled people and “we did not have enough people to support the people who needed it” explaining there were employees with injuries and falls coming down the first floor, and there was a concern about there not being enough buddies to assist, for example during the summer holidays and term time. This is the context in which the discussion took place, and the Tribunal prefer Marie Daly’s evidence that Litherland House was suggested to the claimant as a resolution to any concerns she had with her PEP and a reasonable adjustment in respect of her duties whilst she was waiting for headset.

77 There was no issue with the specialist equipment which would move with the claimant, and the claimant nor her trade union representative raised any issue about the time it would take and sought no assurances. No decision had been made, the position was fluid and this meeting was an opportunity for the claimant to discuss and trial a number of possibilities, but this did not suit the claimant’s agenda which was DAL and when it became clear the respondent was not moving on that point and reasonable adjustments in respect of duties when she was working were on the table, she became upset and angry and shouted at management to “get out” when management came back into the room after getting the claimant some water. The claimant had a panic attack and went home, and the Tribunal finds there was no imminent danger to her health and safety, despite the claimant’s evidence to the contrary.

78 The meeting ended without the claimant exploring the adjustments proposed, and her next step to force the issue of DAL was to submit a second HRACC1 Form and allege there was a serious and imminent risk to her health and safety when there was not, as found by the Tribunal, bearing in mind the claimant had been working catching up without the need to use any headset before the meeting on the 11 September 2019.

79 On 11 September 2019 the claimant sent the respondent two emails, the second at 11.27 was an email which is detailed and considered bearing in mind the claimant was allegedly suffering from a panic attack at the time in fear of her health and safety. The claimant wrote “As you know due to me having been allocated a specialist work station and equipment, I cannot move into 1 North to undertake SA capture mentoring, I cannot move to 2 West to undertake work for Marie and am unable to undertake my normal day to day work until the DSE equipment has been supplied as per my access to work meeting this morning. As per department guidance DAL should be given until all of the necessary and agreed DSE is provided. Please confirm that this is correct, and if not, please provide a written explanation as to why.”

80 The claimant sent a second coherent email at 18.58 when allegedly still suffering from a panic attack mentioning a microphone could operate Dragon. On the same day the claimant informed Brian Blanchflower ATW had confirmed a bone conducting headset was necessary. The claimant knew she had a microphone and the Tribunal was satisfied that by 11 September 2019 at the very latest the claimant was aware that all that was needed for her key duties (not including the call work she rarely carried out from choice) she had a microphone to use voice to text having realised in or on the 16 July that she could operate Dragon with a microphone only. Despite this the claimant allowed ATW to advise on the basis of a bone conducting headset, the reason being was it suited the claimant to argue for DAL on the basis that she required a bone conducting headset and not a microphone which she already had, and could be more easily ordered and so the Tribunal found.

81 Brian Blanchflower replied on 12 September that he could not agree to DAL and “I would like to meet with you to establish and record all reasonable adjustments we have

discussed and why these are not suitable for your requirements." In cross-examination the claimant, when she finally answered the question after a number of attempts, agreed she was not in danger at the prospect of meeting with Brian Blanchflower.

82 The Tribunal found allegation 34 and 35 have no basis.

Section 44 ERA [allegation 1]: 11/09/19 BB Serious or imminent risk of further exacerbation of anxiety, depression and fibromyalgia pain due to working without suitable RA, and/or carrying out unsuitable other duties where current RA would not be available. Details of previously attempted adjustments including offline work activities and further injuries that resulted had been discussed but dismissed as another chain of management were involved, even though the same disabilities applied. The quote during the meeting by Sam Langan was 'that was then, we're looking at now'

83 The claimant submitted a second HRACC1 form in relation to meeting held on 11 September 2019. The copy in the bundle included Brian Blanchflower's comments.

84 It is notable the claimant referred to DAL and her view that she cannot be located in any other part of the building due to her specialist workstation, her PEP had not been put in place and "Tony stated that the rest of this discussion was to be taken up at a later date…it was then raised that there are too many people need assistance re DSE/disability on the first floor of the Triad and I should consider moving to LH, despite it being known that due to my medical conditions, I would struggle to walk to LH from the train station." The claimant chose not to mention the fact that she had been offered travel assistance by way of lift to and from work by managers, loan and ATW. The claimant also recorded how she had a panic attack following the discussion about reasonable adjustments in the workplace.

85 The Tribunal concluded that the second HRACC1 was lodged to force DAL. DAL was the first issue raised in the form, when DAL was not available to the claimant following due process, and allegation 1 has no basis.

86 On the 18 September 2019 emails were sent by HR to Brian Blanchflower and the claimant (notably to her work email address which she received in direct contrast the claimant's evidence as recorded above) regarding late notification of end of sickness absence and overpayment of wages.

Section 26 [Allegation 36]: 19/09/19 BB refusing to acknowledge my exercising my right under section 44 of the ERA to remove myself from danger in the workplace until RA were supplied. Then sending an email advising 'serious consequences' if I did not return to work causing further anxiety

Section 26 [allegation 37]: 19/09/19 BB sending an email detailing disagreement that I can't do other duties as previously offered and that I should return to work 23rd September causing further anxiety

Section 15: 23/09.2019 [allegation 8] Refusing to acknowledge my exercising my right under section 44 of the ERA to remove myself from danger in the workplace until RA were supplied. Then sending an email advising 'serious consequences' if I did not return to work.

Section 15 [allegation 5]: 20 September 2019 not applying DAL when suitable duties could not be found, failure to recognise other duties offered such as floor walking or working in Model Office on a higher floor, were not suitable due to my disability.

Section 15 [allegation 6]: 20 September 2019 Brian Blanchflower sending an email detailing his disagreement that I can't do other duties as previously offered and that I should return to work 23rd September.

87 Brian Blanchflower emailed the claimant on 19 September 2019 confirming he had discussed her case with a CSHR case worker and "as previously advised DAL is not appropriate in this case, as other work is available to you. I would therefore respectfully request that you return to work as soon as possible to enable us to discuss this in more detail. If you are unwilling to participate in this process can you please provide me with a written explanation as to why. I must…caution you that failure to comply may lead to serious consequences for yourself."

88 The claimant's response was to remove herself from the workplace under section 44 of the ERA as recorded in her union representative's email of 19 September 2019 sent at 16.04. On the claimant's behalf he requested DAL and referenced the respondent breaching the law and the claimant's duty of care.

89 Brian Blanchflower responded to the claimant assuring her "**as discussed with yourself at our last discussion, the work below highlights what you would be expected to do while awaiting a suitable outcome regarding issues with your hearing. I would not expect you to complete the work if it requires any equipment that would possibly inflame your condition**" [the Tribunal's emphasis]. A number of adjustments were set out; model office, floor walker and Litherland House including picking the claimant up and dropping her off at the station. The claimant was asked to provide details about how her health and safety was endangered and he assured the claimant "can I clarify I am not asking you to complete any work that involves you requiring any equipment (including using Dragon) until a suitable adjustment is in place for you to do so safely. With the information I currently have and the advice I have been given, I would not be able to authorise DAL at this time and as no leave is booked I would expect you to return to work on Monday 23/09/19 or the absence may be recorded as Absent without Leave. On your return I am happy to discuss any concerns **and put in place any adjustments need to ensure you are comfortable within the work environment**." " [the Tribunal's emphasis].

90 The claimant responded on 22 September 2019 making it clear she needed all her equipment, and the lighting in Litherland House was too bright, despite it having been made clear to her that a room with dimmed lighting was available. She clarified in relation to the imminent danger "…I am in imminent danger of aggravating my conditions and affecting my physical and mental health…you repeatedly expect me to work without my equipment…you are also asking me to work in other offices or areas without new DSE and OSH assessments. I would also highlight my PEP is no longer valid as my buddy has been moved to a different floor…I am therefore working on site illegally." The claimant referred to the respondent breaching the Equality Act.

91 The only option available to the claimant was DAL, and it was an all or nothing scenario for her. Unless she was provided with her specialist equipment including the headset she was not prepared to work. The Tribunal finds the claimant has chosen not to address the instructions to come into the office in order that a discussion could take place on reasonable adjustments, and any meeting with management would not have endangered

the claimant's health and safety bearing in mind the very clear assurance she had been given that her health and safety would not be put at risk at any stage. The Tribunal finds this assurance was given to the claimant in good faith, but it made no difference to the claimant because she was intent on DAL and nothing else. Relying on section 44 was yet another means of achieving this end. It was put to the claimant in cross-examination this correspondence made it clear on her return to work she would not be expected to do anything which would inflame her condition. The claimant's response was "that is what it says that is not what it was. She did not understand how I needed the chair." Brian Blanchflower and Marie Daly were fully aware the claimant needed all of her specialist equipment, and there was no suggestion that for example, were the claimant to have mentored/assisted employees on floor 1 she would not have her desk and all the equipment necessary to carry out the work.

92 The Tribunal finds Brian Blanchflower's repeated oral and written assurance should have laid the claimant's (and her union representative) mind at rest, paving the way for a positive discussion on reasonable adjustments in the workplace as one would expect to take place between manager, employee and union. This did not happened, and the failure cannot be attributed to Brian Blanchflower or the respondent. It was not reasonable for the claimant to take the view that Brian Blanchflower was not referring to her desk when he mentioned the specialist equipment, and all of the claimant's arguments together with those put forward on her behalf, were an attempt to get her own way on the issue of DAL.

93 The Tribunal concluded that the claimant did not want to meet with Brian Blanchflower because he was standing up to her on the issue of reasonable adjustments in the workplace and was not prepared to accede to DAL, and there was no connection with any danger which required the claimant to remove herself from the workplace. The removal under section 44 was a vehicle by which the claimant avoided the meeting, avoided the prospect of discussing and/or returning to work in any capacity and yet continued to be paid under DAL pending the supply of a headset she did not need. The claimant in cross-examination confirmed she was not being required to do work immediately, but return to work to discuss a way forward on the issue of reasonable adjustments to her duties. It is notable the claimant avoided answering questions on this issue in cross-examination and was asked by the judge on a number of occasions to answer them.

94 The email sent on the 19 September 2019 from Phil Dickens to Brian Blanchflower exercising her right under s44 Employment Rights Act 1996 and requesting she was paid DAL during the absence was an attempt to force the respondent's hand. The Tribunal was satisfied on the balance of probabilities that the claimant had been carrying out work she was capable of doing, she had never experienced imminent danger and nothing had changed since 9 September 2019 until she had decided that she should no longer attend work and adjustments offered were refused by her, unreasonably so.

<u>Claimant's unauthorised absence</u>

95 In allegation 6 above the claimant refers to an email sent on the 20 September 2019 from Brian Blanchflower to the claimant in which he detailed "his disagreement that I can't do other duties as previously offered and that I should return to work 23rd September". The Tribunal has taken into account all of the emails in the chain, including the one from Brian Blanchflower where the date and information concerning recipients has been blanked out. The claimant was required to return to work by the 23 September 2019 and assured by Brian Blanchflower that when she did "I am happy to discuss any concerns and put in place any adjustments needed to ensure you are comfortable within the work environment." Brian

Blanchflower was following the unauthorised absence policy and gave the claimant very clear assurance reasonable adjustments would be made to her duties in order that she could return to work, and so the Tribunal found, and he was entitled to take the next step and suspend the claimant's pay given her unreasonable refusal to return to work when she failed to attend on the 23 September 2019..

Section 26 [allegation 38]: 26/09/19 BB sending an email stating my absence was unauthorised and my pay was suspended causing extreme anxiety.

Section 15 [allegation 7]: 29/09/19 Sending email stating my absence was unauthorised and my pay was suspended.

Access to Work Report

96 On the 26 September 2019 the Access to Work report received by Brian Blanchflower before he wrote to the claimant concerning her failure to return to work on 23 September 2019. ATW recommended a bone conducting headset in order that the claimant could use Dragon software efficiently, confirming she was unable to use a standard headset "that goes in or over her ears." Brian Blanchflower followed this up seeking clarification of the assessors qualifications as he had received occupational health advice that the claimant's medical specialist was required to confirm the position. The medical advice given was that bone conducting headsets posed "a risk if issued inappropriately." ATW replied on 17 October 2019 at 17.29 that the claimant may wish to "consult with an audiologist if this would put their mind at risk."

97 In email sent by Brian Blanchflower to the claimant on 26 September 2019 she was informed that her absence since 23 September 2019 was unauthorised and this would have pay implications. Brian Blanchflower reached this decision following HR advice, taking into account the fact the claimant was not off ill with a Med3, she was refusing to come into work and meet with him and she was expected to return on the 23 September or she would be classed as "AWOL". HR advised Brian Blanchflower to contact Occupational Health, which he did and was advised it was a management decision. HR advised that if the claimant refused to undertake any other duties "we may have no choice but to allow DAL in the meantime." Brian Blanchflower took the view that he was making a management decision, reasonable adjustments had been offered to the claimant and as the claimant's absence did not meet the criteria DAL should not be granted. He took the view that his action was reasonable and proportionate due to the claimant's failure to meaningfully take part in the discussions about reasonable adjustments or trial those that were reasonable for her to undertake in all the circumstances.

98 Brian Blanchflower's decision to stop the claimant's pay was not taken lightly. In 15-years of management he had never stopped pay before. The Tribunal accepted Brian Blanchflower's evidence that his intention was not to punish the claimant; he felt as if they were going around in circles, not getting anywhere and having discussed the situation with his senior manager James McGovern, who agreed that DAL was not appropriate, took the view the claimant should return to work taking into account the adjustments offered to her.

Section 26 [Allegation 27]: April 19 – September 19 Repeatedly denying knowledge of the health issues I was having despite multiple conversations, emails and a detailed word document. This increased my anxiety and implicated I was lying.

Section 15 [allegation 9]: April to October 2019 failure to ensure my personal evacuation plan ("PIP") was in place.

99 There was no satisfactory evidence the claimant's health issues were ignored, and between the period April to September 2019 the respondent had taken her issues seriously and there was no implication she was lying and so the Tribunal found.

100 An informal PEP was in place and this was known to the claimant, who was aware of her buddies and the Evac chair available to her which she informed the respondent she would not use in an emergency..

Section 15 [allegation 11]: 3/10/19 Suspension of pay as a consequence of absence treated as unauthorised.

October 2019

101 In a letter dated 2 October 2019 Brian Blanchflower informed the claimant that her pay had been suspended with effect from 23 September 2019, the first day of the claimant's unauthorised absence under the respondent's Unauthorised Absence Policy.

Section 15 [allegation 12]: 4/11/2019 Refusal to accept a backdated fit note

102 On the 7 October 2019 the claimant provided a GP note backdated to 10 August 2019 stated that she **may be fit for work** with unspecified workplace adaptations and that she was "awaiting hearing test and tympanogram." The conditions listed were anxiety, depression and fibromyalgia. Reference was made the workplace adaptations having been requested.

103 The backdated GP note covered 10 August to claimant's return to work on 9 September 2019 including term time leave from 10 August to the 8 September for which the claimant received her full pay, and her attendance at work 9 to 11 September 2019 for which the claimant was paid. It covered the period when the claimant left work following the alleged panic attack from 12 September 2019 to 18 October 2019. The Tribunal concluded on the evidence before it that reasonable adjustments were offered to the claimant which she could have taken up throughout the period she could have worked in respect of the claimant's role in order that she could work without the "hearing kit."

104 The 7 October 2019 record completed by GP reflects what was said by the claimant concerning her wrist discomfort when typing, and "how using headset cause pain in ears. Explains they stopped working so claimed typed and wrists caused pain. Has had multiple meetings at work. Workplace adaptations requested." What the claimant did not explain to her GP was that in the "multiple meetings " she referenced the respondent had offered her adjusted duties to get around the difficulties she was having using Dragon, and she did not make it clear that the use of a microphone without any need for a headset would obviate any pain to her ears and wrists.

105 In oral evidence on cross-examination the claimant confirmed the backdated MED3 would have rectified the non-payment of her salary on the basis that she now has a sick note for periods of absence and should therefore be in receipt of sick pay. She expected the absence to be authorised as a result of the MED3 and for payment to follow. Brian Blanchflower took the view that the position had not changed as the claimant was refusing to attend work with reasonable adjustments being offered. Prior to the backdated MED3 the

claimant stated she was fit for work. The sick note did not resolve the problem that the claimant was fit to work with adaptations to her duties, and she continued to refuse to attend a meeting to discuss adaptations, and refused take up the reasonable adaptation offered in respect of her duties on the first and second floor and at Litherland House. There were adaptations to the claimant's role she was not prepared to even trial, even though a number of possibilities had been put to her to try out different roles, and an invite to a meeting to discuss what she could and could not do. The claimant continued to insist a bone conducting headset was necessary and without which she could not return to work and should be on DAL.

106 0n the 9 October 2019 a meeting took place following which Brian Blanchflower ordered the bone conducting headset.

107 On the 16 October 2019 CDIO Mobility and Workplace Services flagged their concern with the claimant being issued with the bone conducting headset following advice from Occupational Health that "bone-conducting headsets should only be used by people whose treating specialist indicates they are appropriate…as they do pose a risk if issued out inappropriately…given that these headsets also do not meet the safety standards of our other headset equipment I would prefer that issuing of such kit is kept to the bare minimum and only when specifically recommended by an ENT specialist…it may well be that they suggest something else more appropriate…"

<u>The claimant confirmed a bone conducting headset was not necessary</u>

108 On the 17 October 2019 at a meeting between claimant, Brian Blanchflower, Sam Langden, Phil Dickens and Jimmy McCarten the claimant stated she only needed a microphone to operate her Dragon software, and she did not need headphones. The claimant explained she could use her current headset around her neck with earpiece avoiding her ears and the microphone would pick up enough of her voice so that she could use Dragon software. The claimant informed the respondent that she did not need the bone conducting headset after approximately 5-months of argument and disruption during which she insisted on the bone conducting headset being provided. The claimant could have been working in her original role using the microphone on her existing headset throughout this period.

109 The contents of the claimant's grievance referenced below reinforced the Tribunal's suspicion the claimant knew she only needed a microphone. It is notable in the claimant's witness statement she does not make the point that she needed a microphone, and in oral evidence under cross-examination confirmed she was aware by July 2019 a microphone could operate the Dragon software. James McCarten was "flabbergasted" and Brian Blanchflower relieved because it was a "eureka moment" when the claimant admitted she did not need bone conducting headset and could use the microphone on her existing headset.

110 On the 17 October 2019 after the meeting Brian Blanchflower asked to CDIO to look into sourcing a microphone for the claimant to operate her Dragon software, and the Tribunal finds that had the claimant made her position clear at any stage prior to this, a microphone would have been ordered without the need of any input from a medical consultant, occupational health or ATW. It was a straightforward matter to provide a microphone, and DAL was not the only option despite the claimant's best endeavours to manoeuvre the respondent into providing her with DAL against the background of the claimant being placed on the redeployment list.

Grievance 17 October 2019

111 On the 17 October 2019 the claimant raised grievance dated 15 October 2019 that ran to 7-pages which concerned a number of issues including non-payment of her salary.

112 The claimant was due to return to work with Brian Blanchflower's agreement on the 23 October in order that she put in hand her childcare for which the claimant was paid, the sick note having run out of the 18 October . The claimant was granted special leave.

113 The claimant agreed that the grievance could be dealt with informally by David Bradley, who was provided with an substantial amount of information concerning what had transpired. He was aware of the alternative duties Brian Blanchflower had attempted to discuss with the claimant and the claimant's issues with regard to the bone conducting headset.

114 Following a meeting held on the 23 October 2019 between Brian Blanchflower, claimant, Jimmy McCarten and Dave Gibbons, on the 24 October 2019 the claimant returned to work and arrangements made for pay to be reinstated from 24 October 2019.

Section 15 [allegation 13]: 4./11/2019 asking the claimant to return to work before the adjusted workstation/equipment was available

Section 20-21 [Allegation 15]: 4/11/19 Failure to provide suitable seating while waiting 3 hours for a decision on whether to allow DAL, even though I was already using crutches that day.

November

November 2019 flood

115 On 4 the November 2019 flooding took place at the Triad Building. Claimant was given DAL for 4 and 5 November 2019 due the emergency situation.

116 On the 6 November 2019 the claimant returned to work along with other employees, but went home early as a result of the effects of the flood on the first floor, and the claimant's evidence on cross-examination was that she had her specialised chair, was sitting with the TU representative in a meeting room (who had provided the chair) and was then sent home soon after. The Tribunal found the claimant was not disadvantaged sitting in a meeting room for a short period of time. The Tribunal preferred Brian Blanchflower's evidence that the claimant was able to sit in her specialised chair in the blister room with her union representative, and as her specialised desk was not available for her to use due to the flood she was offered another desk which the claimant refused as it was an inch shorter in height. In short, the claimant was asked to come in, had to wait like other staff members and was at some stage provided with her specialised chair, did not require any other specialist equipment as she was not asked to carry out any work and there was no evidence of any disadvantage, and so the Tribunal found bearing in mind the claimant had undertaken meetings in blister rooms before with no issues providing she had breaks.

Grievance meeting and outcome 8 November 2019

RESERVED

Section 15 [allegation 10]: Refusing to reinstate 1 week of annual leave which I had to use as I was unable to afford childcare due to suspension of wages, despite wages being later unsuspended and repaid.

Section 26 [allegation 39]: BB refusing to reinstate 1 week of annual leave, which I had to use as I couldn't afford childcare due to suspension of wages

117 David Bradley held a meeting with the claimant on 8 November 2019 in attempt to resolve her grievance informally. He had some sympathy for the claimant due to her disability and the fact that she was a single parent. It was on this basis, with a view to claimant coming back into work, the claimant was paid for the whole time her pay had been stopped. David Bradley did not get involved in the minutia of the grievance, despite concluding Brian Blanchflower had done nothing wrong he decided to reinstate the claimant's pay for the unauthorised absence appreciating it had been within Brian Blanchflower's remit to suspend it. David Bradley hoped payment of the claimant's wages would draw a line under the whole matter.

118 The claimant and her union representative accepted David Bradley's proposals in respect of the pay, the microphone would be chased up, the claimant moved to a new team, which was on the second floor of The Triad (despite the claimant's previous objections) and a formal PEP would be put in place. The claimant asked for payment of 6 days annual leave she had previously taken and been paid for. David Bradley did not agree as the claimant already been paid for this. The grievance went no further and that was the end of the matter. David Bradley did not overturn the decision suspending pay due to the claimant being "AWOL." He changed the decision but did not disagree with the reasoning in an attempt to find a solution and draw the matter to a close as it had dragged on for a long time. It was a business decision a senior manager was entitled to take. The Tribunal is aware that decisions like this are made every day in the workplace, whatever the right and wrongs of the dispute are.

119 It is notable in the grievance the claimant criticised Brian Blanchflower who in her view "in particular seemed surprised by **my saying that I don't need to listen to anything and only really need a microphone, despite the functions of Dragon being widely known** and me having put the situation to him in writing more than once." The Tribunal finds this statement was disingenuous, and an indication that the claimant knew all along the solution was a microphone only and she had no need for headphones of any type including bone conducting headphones, and so it held on the balance of probabilities.

120 On 21 November 2019 the claimant's union representative accepted the informal grievance outcome but requested 6-days leave back that the claimant had taken previously and been paid for which David Bradley confirmed in writing in the writing on the 22 November 2019 he did not agree six days leave being given back to the claimant. This was not appealed and that ended the matter.

121 Section 26 [Allegation 33]: Dec 18 – Oct 19 BB Failure to ensure Personal Evacuation Plan was in place.

<u>December 2019</u>

122 The claimant had an informal PEP in place during the entire period she worked in the first floor as found by the Tribunal above.

123 In January 2020 the claimant moved to a different team on the second floor and continues in her employment to date.

Law

Disability discrimination arising from disability

124 Section 15(1) of the EqA provides-

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

125 Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

1.1 In order for the claimant to succeed in her claims under s.15, the following must be made out: there must be unfavourable treatment;

1.2 there must be something that arises in consequence of claimant's disability;

1.3 the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

1.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

126 Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

126.1 "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

126.2 The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination

case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

126.3 The Tribunal examined closely the conscious and unconscious thought process of the respondent’s witnesses who gave evidence before it, concluding the explanations they gave were untainted by disability discrimination.

126.4 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…”

126.5 The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

126.6 This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

127 Mr Davies reminded the Tribunal that Whether or not treatment is “unfavourable” is largely question of fact but this does not depend just on the disabled person’s view that he should have been treated better - Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65. There must be a measurement against “an objective sense of that which is adverse as compared to that which is beneficial” - T-System Ltd v Lewis UKEAT/0042/15 *(22 May 2015, unreported).*

128 In Sheikholeslami v University of Edinburgh [2018] IRLR 1090, the EAT held that the approach to this issue requires :An investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the “something” was a more than trivial part of the reason for unfavourable treatment, then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.

129 The actual disability does not need to be the cause of the unfavourable treatment under s.15 but it needs to be "a significant influence" or "an effective cause of the unfavourable treatment" - Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT. It will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact – Pnaiser cited above.

130 It is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably. The unfavourable treatment must be because of the something which arises out of the disability - Robinson v Department of Work and Pensions [2020] EWCA Civ. 859.

131 Mr Davies submitted that an issue in this case with some of the allegations may be whether the "something" arose as a consequence of the admitted disability (fibromyalgia) or as a consequence of some other medical condition such as an ear infection or anxiety & depression (or for some other reason).

Objective justification

132 With regard to the objective justification test, when assessing proportionality, the Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer: Hensman v Ministry of Defence UKEAT/0067/14/DM. The test is an objective one according to which the ET must make its own assessment – Grosset v City of York Council [2018] EWCA Civ. 1105.

133 Mr Davies submitted that combating absenteeism at work amounts to a legitimate aim - Ruiz Conejero v Ferroser Servicios Auxiliares SA C-270/16, [2018] IRLR 372. The same applies to the application of policies involving managing sickness absence and disability absence leave as well as generally trying to avoid or reduce absences, keep employees at work if they are able to carry out reduced or different duties and ensure the appropriate use of publicly funded resources.

134 When carrying out the balancing exercise and considering proportionality the question is whether the conduct can be shown to be an appropriate and reasonably necessary means of achieving the legitimate aim, and it will be relevant for the ET to consider whether or not any lesser measure might have served that aim - Birtenshaw v Oldfield [2019] IRLR 946 EAT. The ET should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

Disability discrimination – failure to make reasonable adjustments

135 The respondent admits there was a duty to make reasonable adjustments in respect of substantial disadvantage related to the admitted disability (fibromyalgia). It denies that that there was a duty to make reasonable adjustments related to the medical conditions which are not alleged to be disabilities (ear infection and anxiety or depression).

136 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first 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. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA.

137 The EHRC's Employment Code states that the term PCP 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' -para 4.5. The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal rather than an overly technical or narrow in order to identify what it is about the employer's operation that causes disadvantage to the disabled employee.

138 In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

The PCP

139 In the Annex, it is suggested that the complaints are based on the application of certain PCPs under s.20(3). However, no reference is made to any requirements, procedures or policies in the relevant part of the Annex. As set out in the relevant part of the Substituted Response the complaints appear to be based more on s.20(5), namely a failure to provide auxiliary aids and this was confirmed by Mr Gibbons in oral and written submissions confirmed the Claimant failed to provide suitable equipment which the Claimant required to safely and properly undertake her duties, or else required her to undertake those duties without either access of correct and appropriate use of that equipment. Accordingly, the Tribunal took the view that there was no requirement for it to analyse a PCP.

140 The duty arises where the lack of auxiliary aid puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled – ss.20(3) & (5) EA 2010. The purpose of the comparison exercise is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP – *Sheikholeslami* cited above. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.

141 In terms of the application of policies to manage attendance and sickness leave and the necessary comparative exercise, the respondent referred to Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265.

142 A substantial disadvantage is one which is more than minor or trivial – s.212(1) EqA 2010. The ET must be satisfied that the PCP has placed the disabled person not simply at some disadvantage viewed generally, but at a disadvantage which is substantial - Royal Bank of Scotland v Ashton [2011] ICR 632.

Reasonableness of adjustments

143 The statutory duty is for R to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" imports an objective standard - Smith v Churchills Stairlifts plc [2005] EWCA 1220. It is important to identify precisely the step which could remove the substantial disadvantage complained of - General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43.

Harassment

144 The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

145 Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and 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 — S.26(1)(b).

146 The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

147 S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

148 Reed v Stedman [1999] IRLR 299 EAT. Mr Davies submitted that talking to a disabled employee about reasonable adjustments, absences and the sickness or DAL policy should not and did not in this case amount to unwanted conduct.

149 In order to decide whether any conduct has either of the proscribed effects under s.26 (1)(b) EA 2010, the ET must consider both (by reason of s. 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of s.4(c)) whether it was reasonable for the conduct to be regarded

as having that effect (the objective question). All the other circumstances must also be taken into account (s.4(b)) - Pemberton v Inwood [2018] EWCA Civ 564.

150 Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended - Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is submitted that a claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention.

Related to a protected characteristic

151 This is a very broad test, but some guidance about how the ET should approach the issue was provided in UNITE the Union v Nailard [2018] EWCA Civ. 1203. The ET should make findings as to the mental processes of the alleged harassers.

152 Whilst the view of a claimant might be that the conduct related to the protected characteristic is relevant, it is not determinative - Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 *EAT.* The ET has to apply an objective test in determining whether the conduct was related to the protected characteristic in issue. The intention of the actors concerned might form part of the relevant circumstances, but it is not the only factor.

Section 44 detriment claim

The protected activity

153 The claimant relies on s.44(1)(d) ERA for her right to make this claim, namely that in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she left (or proposed to leave) or (while the danger persisted) refused to return to her place of work or any dangerous part of her place of work. The ET is required to make findings as to what the claimant actually believed in order to decide whether that added up to a belief that there were circumstances of danger which were serious and imminent and to decide whether that belief was reasonable – Edwards v Secretary of State for Justice [2014] 7 WLUK 909 EAT.

Detriment

154 The meaning of “detriment” under the ERA is generally considered to be comparable to the meaning given in discrimination claims. It is to be given a wide interpretation and to be considered subjectively in relation to the particular claimant, so that there is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment - Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ. 73.

Act or deliberate failure to act

155 It must be shown that the detriment was caused by some act or deliberate failure to act on the part of the employer. A deliberate failure to act shall be treated as done when it is decided on – s.48(4)(b) ERA.

RESERVED

Done on the ground that

156 The question is what was the reason for the *act or omission*, not what was the reason for the detriment - Bolton School v Evans [2007] IRLR 140. The burden of proof is placed upon the employer to show the ground upon which any act, or any deliberate failure to act, was done – s.48(2) ERA. The employer must prove on the balance of probabilities that he was not materially influenced (in the sense of being more than a trivial influence) by the protected activity (or status) - Fecitt v NHS Manchester [2012] IRLR 64.

Burden of proof

157 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

158 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748 to which the Tribunal was referred by Mr Piddington. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Conclusion – applying the law to the facts

Burden of Proof

159 The claimant has not proved, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected her to the discrimination alleged save for allegations 1, 2 and 3, and the burden has not shifted. If the Tribunal is wrong on its application of the burden of proof, and the burden shifted to the respondent to prove on the balance of probabilities that the claimant's disability was no part of the reason: Igen cited above, it would have gone on to find the explanation given on behalf of the respondent untainted by disability discrimination. With reference to allegations 1, 2 and 3 the respondent satisfied the Tribunal it had met the burden of proving managing sickness absence was an appropriate and reasonably necessary means of achieving a legitimate aim that was objectively justifiable.

Section 15 complaint

160 With reference to the issue did Brian Blanchflower ("BB") treat the claimant as alleged at 1-13 of the Annex in the period from 11 July 2019 to 4 November 2019 the Tribunal found as follows.

Allegations 1, 2 and 3

161 With reference to allegations 1, 2 and 3 Brian Blanchflower was following due process adhering to the respondent's attendance management policy as the claimant had been off unfit for work without any adjustments being suggested by her GP since the 13 June 2019. The respondent accepts a 28-day sickness absence review was held on the 16 July 2019 because of something arising in consequence of the fibromyalgia as referenced in the MED3 certificates.

162 With reference to allegations 1,2 and 3 Brian Blanchflower not treat the claimant unfavourably, the meeting was held to discuss the claimant's health, future prognosis and what support she needed to return to work including any reasonable adjustments in compliance with the attendance management policy whose main purpose was to get staff back at work and control sickness absence, or prepare for a return to work.

163 The fact that Brian Blanchflower supported the claimant's absence in the letter of 19 July 2019 with a reminder about future possibilities, cannot objectively amount to unfavourable treatment, and his treatment of the claimant was justified in any event. It was important for the claimant to understand where she stood in respect of the sickness absence policy.

164 Brian Blanchflower's compliance with the respondent's attendance policy was a proportionate means of achieving a legitimate aim, being the control of absence within the workplace and discussions with employees to establish what the respondent could do to minimise that absence, including any reasonable adjustments that were needed on a return to work, ways of avoiding and reducing further absence and minimising the strain and stresses caused to the existing workforce caused by absences. The Policy recognises "the benefits of having a healthy and committed workforce…promoting a culture of attendance where job holders feel valued, supported and committed to the business and to their colleagues…HMRC is committed to reducing the number of working days lost through sickness absence and the impact this has on the business and other job holders."

165 The Tribunal concluded that having carried out the balancing exercise and considering proportionality, compliance with the sickness absence procedure was shown to be an appropriate and reasonably necessary means of achieving the legitimate aim, and t no lesser measure might have served that aim taking into account the claimant was supported in her absence.

Allegation 4

166 With reference to allegation 4 the Tribunal found Brian Blanchflower had made a genuine mistake which resulted in the claimant being overpaid during the confusion between her sick leave and term time leave in August. The claimant was aware at the time she had been overpaid and yet did not contact Brian Blanchflower about it. Objectively assessed, the

claimant was not treated less favourably. She received her salary early, which had to then be repaid, and it was entirely legitimate for the respondent to recover the overpayment as conceded by the claimant in cross-examination.

Allegations 5 & 6

167 With reference to allegation 5 and 6, throughout the period referred to in the factual matrix set out above, the claimant was offered suitable alternative duties taking into account the fact that she needed equipment to use the Dragon programme, which she incorrectly stated could not be accessed with her original headphones and microphone. The claimant was invited to take up, discuss and trial alternative temporary duties which were all refused out of hand as the claimant wanted DAL.

168 The respondent was prepared to be fully flexible in the interim period when it was attempting to resolve the headphone issue, and all the claimant needed to do was go into work and/or meet up to discuss reasonable adjustments with a view to trialling them. The claimant was offered reasonable alternative temporary duties on the first floor, trial/look at the model office on the second floor and a move to Litherland House which was an entirely suitable option for the claimant with the reasonable adjustments offered. DAL was not appropriate in the circumstances and the claimant was not treated unfavourably. Brian Blanchflower supported by his senior managers, genuinely took the view that there were reasonable alternative duties the claimant could undertake, she had all of her specialist equipment including the original headphones which she used at the end, it was made clear to her the duties need not include use of headphones and her health and safety would not be endangered in any way.

169 The claimant could have given the adjustments offered serious thought, which she did not because she and her union representatives were intent on DAL and nothing but DAL. It was incumbent upon all parties to work towards a suitable resolution, particularly as the claimant made the point to the Tribunal that being at work was good for her mental health. The claimant's managers went some way towards meeting their duty to provide suitable amended duties in order that the claimant could continue working. The claimant and her union representatives did not seriously engage with the efforts by Brian Blanchflower and his colleagues to get the claimant back into work safely. The claimant in a question from the Tribunal stated neither she nor her union representatives ever suggested to management that there were duties she might have been able to trial or do which did not require access to Dragon or a bone conducting headset, which made it all the more surprising that the claimant was fixated on a bone conducting headset when it was not needed and she had a microphone on her existing headset that could be used as an interim measure throughout the period in dispute when the claimant admitted in evidence she could sit comfortably in the meeting room with her union representative without specialist equipment for up to an hour after which she needed a break.

170 In submissions made by Mr Gibbons it was suggested the claimant had previously attempted the alternative duties which was not the evidence before the Tribunal and nor was this explored or put to the respondent's witnesses in cross-examination. In submissions Mr Gibbons also questioned why Mr Bradley had not explored with the claimant the fact that Dragon software could be accessed via a microphone and headphones were not required, a valid point that was not put to Mr Bradley in cross-examination.

Allegations 7, 8 & 9

171 With reference to issues 7, 8 and 11 Brian Blanchflower followed due process when he treated the claimant's absence from 11 September 2019 as unauthorised; she had refused to consider any of the alternative duties offered and exercising her right under section 44 of the ERA was an attempt to force the concession of DAL when the claimant's health and safety were not at risk in any way. The claimant was not in imminent danger as detailed in the findings of fact set out above. It is notable that she excluded herself from the office but was still capable of sending detailed, coherent and forceful emails. The claimant's upset arose as a result of the respondent failing to accede to DAL, making the position clear that reasonable adjustments to her role were being offered and she was expected to attend work.

172 The claimant was not treated unfavourably. Any employee refusing to work, whether or not they suffer form a disability, take the risk of "serious consequences" and the claimant did not suffer unfavourable treatment. It is notable before the claimant was notified that there could be "serious consequences" the respondent reassured her about what they were trying to achieve by offering reasonable adjustments, assuring her that her health and safety would be protected at all times, and that she would not be asked to do any work which endangered her. The claimant disregarded these promises because they did fit in to the case she was presenting; no headphones therefore no work and DAL should be provided. Under cross-examination the claimant accepted that she had left work because of what was said at the meeting rather than the situation at work.

Allegation 9

173 It is not the case that there was no PEP in place. With reference to allegation 9, the claimant's PEP was in place verbally but it had not been finalised in writing until December 2019 as it was under review. It was undisputed evidence that it had not been finalised for the claimant and all disabled staff was due to the ongoing building wide review by the respondent with involvement from the union. The claimant had 2 evacuation chairs, one placed close to her desk and 2 buddies. Until she was refused DAL the PEP was not an issue for the claimant, and it became yet another alleged act by which to force the DAL payment. Objectively assessed, there was no unfavourable treatment. The claimant took the approach the PEP was no longer valid because her buddies were on the second floor, the Tribunal did not find this to be the case as it was undisputed the claimant's buddies would walk down the stairs to the first floor and collect the claimant, who on her own account would refuse to use the Evac chair in any event as she found it "uncomfortable."

174 It is notable that throughout the period the claimant worked on the second floor neither she nor her trade union raised any issue about her PEP, and she had undergone training in evacuation and raised no issue. It only became an issue for her after 11 September 2019 when she used it as leverage for DAL, ignoring the offer of a move to Litherland House and the Tribunal found there no unfavourable treatment.

Allegation 10

175 With reference to allegation 10, the claimant taking leave to look after her child was unconnected to her disability. The respondent did not refuse the leave for which the claimant was paid during the period the claimant's pay was suspended due to her refusal to attend work. David Bradley at the grievance hearing upheld Brian Blanchflower's approach; the claimant had taken the leave, she was paid for it, that was the end of the matter and the

claimant did not appeal. There was no unfavourable treatment and David Bradley's conscious or unconscious thought processes were untainted by discrimination.

176 With reference to whether refusing to reinstate annual leave was objectively justifiable the Tribunal concluded that it was given the requirement for a consistent and fair management of annual leave between all employees there was no good reason to reinstate the claimant's leave. In conclusion, there was no unfavourable treatment because of something arising in consequence of disability an din the alternative, if there was unfavourable treatment it was a proportionate means of achieving a legitimate aim.

Allegation 11

177 The Tribunal has addressed this in its findings of facts above, concluding the claimant's health was not in serious and imminent danger on the 11 September 2019, or at any point leading up to the date when she returned to work having confirmed she did not need the bone conducting headset after all. The section 44 claim and ensuing absence was yet another attempt to force the issue of DAL against a backdrop of DAL being consistently refused. The respondent was entitled to suspend pay, and suspension of pay in the particular circumstances of this case was not unfavourable treatment and was entirely objectively justified taking into account the fact that a number of reasonable adjustments were offered and rejected against a backdrop of the claimant having a microphone which she could have used from the outset when her ears became sore.

Allegation 12

178 With reference to issue 12, the fit note was backdated covering the month the claimant had contractual term time leave, and the three days when she was fit and attended work without issue when adjustments were made to her duties. The remaining period covered by the fit note entailed the respondent offering the claimant reasonable adjustments. It cannot be said the fit note was not accepted; the problem for the claimant was that the respondent's managers (as was the Tribunal) were bemused by the claimant's GP backdating a fit note in this way when reasonable adjustments to the claimant's duties were offered to her which she refused to consider or discuss, concluding on the evidence before it the claimant had not informed the GP of the true situation and the fact that she could have returned to work with her existing headphones in any event bearing in mind the only adaptation in issue at the time was the bone conducting headset.

179 The Tribunal preferred the submissions put forward by Mr Davies that refusing to apply the sick note retrospectively and pay the claimant was not unfavourable treatment, it was not something arising in consequence of disability and it was objectively justified in the specific circumstances of this case. The Tribunal concluded that it was objectively justifiable given the requirement for a consistent and fair management of the sickness absence procedures for all employees and there was no good reason to backdate the claimant's sick pay when (a) she had previously been absent without judgment certified by a Med3 an d(3) had she not been absence treasonable adjustments would have been made.

180 In conclusion, there was no unfavourable treatment because of something arising in consequence of disability and in the alternative, if there was unfavourable treatment it was a proportionate means of achieving a legitimate aim. Allegation 12 is dismissed..

Allegation 13

181 With reference to allegation 13, the claimant was given DAL after turning up to work in the aftermath of a flood 6 November 2019, and it was not unreasonable to ask the claimant to return to the office for a maximum of 2-3 hours, which the majority of the time she spent seated in her specialist chair talking to her union representative. At no stage did the claimant carry out any work and nor was she required to do so, during the emergency. Brian Blanchflower was not cross-examined on whether the specialist chair was recovered by the claimant's union representative or not, and his account of the incident was not disputed in cross-examination. The claimant was not treated unfavourably or because of something arising in consequence of fibromyalgia and taking into account the emergency asking the claimant to wait in a blister room for 2 to 3 hours maximum in the circumstances was a proportionate means of achieving a legitimate aim to see if some work could be sorted out for the claimant against a background of an emergency and her being sent home on full pay in the aftermath.

182 In conclusion, allegations 1 to 13 are not well founded and are dismissed.

Section 20-21 EqA complaint

Allegation14

183 With reference to the allegation 14, namely, did the respondent have or apply the alleged PCPs set out at 14-15 of the Annex (not providing suitable equipment to allow the use of Dragon Dictate / not providing suitable seating), the Tribunal found there was no PCP prohibiting the provision of suitable equipment to use Dragon dictate. The claimant relies on the respondent not providing suitable headphones as a result of her ear infection, which was not a disability relied upon and the claimant throughout the relevant period had been provided with headphones which she could use to dictate on Dragon via the microphone. Suitable equipment did not include a bone conducting headset. The microphone on the claimant's existing headset enabled the claimant to carry out her normal duties and it did not impact on her disability either before or after she was absent from work sick from 13 June 2019.

184 With reference to the issue of knowledge, Brian Blanchflower did not know the full extent of the claimant's ear pain until 17 June 2019 at the earliest by which time the claimant had been certified absent with no reasonable adjustments as set out in the MED3. Brian Blanchflower did not consider the claimant disabled with the ear condition and he was correct in his analysis, however, if she could not access Dragon software for whatever reason she was unable to carry out her normal duties as a result of her conceded disability. A microphone and not a bone conducting headset was needed to avoid any substantial disadvantage caused by her disability, and bearing in mind the evidence before the Tribunal was that employees would leave the headphones around their neck on occasions when working, it is difficult to comprehend why the claimant did not use her existing equipment which gave her access to Dragon software until she took the respondent by surprise at the meeting of 17 October 2019 following the bone conducting headset being ordered and medical advise that the claimant's treating consultant should advise given the possible damage that could be caused by inappropriate use of a bone conducting headset.

185 The Tribunal agreed with Mr Davies that the claimant's evidence that she left due to the headset issue and but for that would have been fit enough was not supported by the evidence including the health and safety report which gave the accident date as 10 June when the claimant was not at work due to childcare issues, the claimant in her text referred

to depression and made no mention of any headset and the MED3 referred to anxiety and fibromyalgia and no ear pain/reasonable adjustment of a different headset.

186 The headset requested by the claimant was not suitable or necessary; the claimant was in possession of all the equipment she needed in the interim pending the respondent providing a microphone because she could and did use her microphone on the existing headset taped up to keep it stable whilst awaiting the microphone on order. The respondent offered the claimant reasonable alternative duties which meant she did not require any earphones or microphone pending clarification of the auxiliary aid needed in order that that the claimant could continue in her original role. There was no evidence the claimant could not perform her duties with her existing headset with the temporary adaptation, which the claimant used after she informed the respondent that this was a resolution and returned to work from her unauthorised absence.

187 In the annex the claimant relies on the date 17 June 2019 when she was certified too unwell to work with any reasonable adjustments, and the respondent was not under any duty in this period as the claimant was not well enough to work with or without auxiliary aids according to the MED3 which the respondent was entitled to take on face value. The claimant trialled headsets in May/June and the Tribunal considered the entire period leading up the claimant's statement that she did not need new headphones on 17 October 2019 concluding the respondent was not in breach of its duty to make reasonable adjustments given the alternative duties available to the claimant in the interim, her sickness absence and the offer by the respondent for a range of alternative duties that did not breach any health and safety requirements.

188 In conclusion, the respondent had not failed to provide the claimant with the auxiliary aid, the claimant did not suffer substantial disadvantage by the respondent's failure to provide her with a bone conducting headset as she already had a headset with a microphone which could be used, and a number of reasonable adjustments had been offered to the claimant which did not require her to use a headset. The Tribunal has dealt with the allegation relating to the respondent's alleged failure to provide appropriate seating for 2-3 hours above, concluding the claimant was not placed at a disadvantage as she did have suitable seating and was not required to carry out any work.

Section 26 complaint

189 With reference to the issue, namely did Brian Blanchflower engage in the conduct alleged at 16-34 & 35-39 of the Annex the Tribunal found as follow.

<u>Allegation 16</u>

190 With reference to allegation 16 that references the date April 2019, the Tribunal found the claimant had not asked Brian Blanchflower to make a request in April 2019, which was before she first went to see her GP on 17 May about her ear pain, and the complaint is dismissed. The claimant's request for a new headset was dealt with by the DSE assessor before May and Brian Blanchflower was aware she was trialling different headphones. He did not engage in unwanted conduct relevant to the claimant's protected characteristic and the Tribunal concluded on the evidence before it that the claimant did not perceive herself to have been harassed under section 26 of the EqA and did not raise any complaint about her request for specialist equipment being ignored when she lodged the health and safety report.

191 The claim is dismissed.

Allegation 17

192 With reference to allegation 17, the Tribunal found Brian Blanchflower was not flippant, and the words used were not said as alleged. The Tribunal has carefully read through a great deal of contemporaneous documents and it is apparent that Brian Blanchflower was anything but flippant in his approach to the claimant, whose condition he took seriously even to the extent of proceeding down the route set by the claimant undertaking her own research for bone conduction headset after looking into the position himself via an internet search. Brian Blanchflower did not tell the claimant she had no other choice and he did not instruct her to use her headset and type as she alleges. The claimant's evidence was contradictory on this point; on the one hand she confirmed that the decision was made by her and she had total freedom to take calls or not, and there was no evidence Brian Blanchflower instructed the claimant when and how she should perform her original duties. He went out of his way to take advise from HR and higher-level management to ensure he was acting correctly and fairly, reflected by the reasonable adjustments he tried unsuccessfully to introduce with health and safety principles in mind. Brian Blanchflower cannot be faulted for the fact that the claimant and a number of union representatives failed to consider the adjustments offered, and even early on in the chronology, the impact of a microphone as per the discussion at a meeting at 16 July 2019 the claimant attended was raised. The claimant confirmed in oral evidence that this was when she realised Dragon could be accessed through a microphone, and inexplicably it took her 3-months to inform the respondent that the existing headphones could be used and a microphone was the equipment she needed.

193 The claim is dismissed.

Allegation 18

194 Allegation 18 this has been dealt with above at issue 1 and 2. Dealing with the claimant under the respondent's sickness absence procedure as opposed to granting the claimant DAL was unwanted conduct as far as the claimant was concerned because she had her sights on DAL. Brian Blanchflower's purpose was to manage the claimant's absence, which he supported taking into account the MED3 relied upon and discussed ways in which the claimant could return to work. The Tribunal accepted the submission put forward by Mr Davies that it was not reasonable for the claimant to consider the conduct as having the requisite effect, objectively assessed.

195 The claim is dismissed.

Allegation 19

196 With reference to allegation 19 this has been dealt with above and the words to the effect of "let's discuss this like adults" interpreted in their context and the Tribunal accepted the words were not unwanted by the claimant who did not complain at the time and neither did her union representative complain. The conduct did not the proscribed effects under s.26 (1)(b). The Tribunal does not accept the claimant perceived herself to have suffered the effect in question (the subjective question) and even if she had, it would not have been reasonable for the conduct to be regarded as having that effect objectively assessed taking into account all the other circumstances - Pemberton cited above. Finally, taking into account Brian Blanchflower's evidence the Tribunal concluded the purpose of him using those words was to get the meeting off to a positive start taking into account the tenor of the

correspondence sent to him by the claimant and her trade union representative leading to that meeting and the claimant's attitude towards him when he turned up to the meeting.

197 Taking in context the comment did not have the purpose of violating the claimant's dignity or creating the environment set out in section 26(1)(b) of the EqA an did was not related to the claimant's disability. The claim is dismissed.

Allegation 20

198 The Tribunal has dealt with this above concluding objectively assessed it was unreasonable for the claimant to consider the act of handing her the ill health retirement guide in accordance with a procedure both she (as a union representative) and her union representative, were aware of. Neither the claimant nor her union representative raised a complaint, which they would have done, because at the time the claimant did not consider the conduct unwanted and it did not cross her mind that her dignity had been violated and the environment set out under section 26(1)(b) created. This came later in an attempt to build up a case. It is notable Brian Blanchflower was not cross-examined on this allegation.

199 The Tribunal preferred submissions made by Mr Davies that it was not reasonable for the claimant to consider the conduct as having the requisite effect, applying the objective test and considering all the factors, the conduct was not related to her disability. The claim is dismissed.

Allegation 21

200 The Tribunal has dealt with this above in its findings of facts. In a letter dated 24 May 2019 the claimant was informed "so that you can have priority for vacancies in HMRC you will join the redeployment register on 29 May 2019**.** Your manager will shortly discuss with you what joining the register means and how they will support you in finding suitable redeployment." The claimant was aware that Brian Blanchflower would be discussing the position with her in the near future.

201 The claimant was asked at the outset of the meeting held on the 16 July 2019 if redeployment could be discussed and she agreed. In any event the discussion did not go ahead due to the claimant leaving the meeting early when she realised she was not getting DAL.

202 It was not reasonable for the claimant to consider the conduct as having the requisite effect, and applying the objective test and considering all the factors, the conduct was not related to her disability. The claim is dismissed.

Allegation 22

203 Brian Blanchflower read through some of the sickness absence policy at the meeting held on 16 July 2019 as he was required to do, and both the claimant and her union representative were aware of this requirement and the fact that the potential consequence of a sickness absence could be dismissal. As found by the Tribunal no disciplinary proceedings were threatened and the claimant was not dealt with under the respondent's Absence Review Procedure at any point in the future. In the claimant's grievance there is no reference to any complaint suggesting allegation 22.

Allegation 23

204 The notes taken of the meeting do not reflect the claimant being “bombarded” with questions about her health and when she would be returning to work. Bearing in mind the meeting was being held under the sickness absence procedure and Brian Blanchflower had yet to see the occupational health report, it was entirely reasonable for him to explore with the claimant and her union representative her sickness, return to work and reasonable adjustments. The questions asked and the manner in which they had been asked by Brian Blanchflower, who acted in a supportive way towards the claimant by offering her a break which she rejected, did not fall under the statutory definition of harassment. Had the claimant been harassed as she now alleges she and her union representative would have said something at the time, and they did not. It is notable Brian Blanchflower was not cross-examined on this allegation and the Tribunal prefer his version of events supported by the contemporaneous notes, in comparison to the claimant’s version aimed at building up her claim.

205 It was not reasonable for the claimant to consider the conduct as having the requisite effect, and applying the objective test and considering all the factors, the conduct was not related to her disability. The claim is dismissed.

Allegation 24

206 Allegation 24 is the nub of the claimant’s case, she wanted DAL and Brian Blanchflower refused her request. The Tribunal has dealt with this extensively above, which it does not intend to repeat. It found the claimant became upset when reasonable alternative temporary duties to her role was put to her, including mentoring telephone staff on the first floor and similar options involving the claimant assisting her colleagues without breaching any heath and safety responsibilities, for example, the claimant stationary with colleagues coming to see her. The claimant did not attempt to discuss and agree the array of the adjustments offered; it did not suit her to do so because she wanted DAL and thought the meeting should have been about DAL (despite it having been refused earlier) and the GP certifying the claimant was unfit to carry out any work even with adjustments.

207 The DAL policy made it clear that “DAL is paid special leave granted for a reason related to someone’s disability…It is not a form of sickness absence and can't be used to cover sickness absence.” As at the 16 July 2019 the claimant did not qualify for DAL and the fact her union allegedly recommended it is irrelevant. The claimant referred to DAL being applicable because she was waiting for a bone conducting headset, however, she did not need a bone conducting headset for any reasons connected her disability and the meeting held on the 16 July 2019 did not fall under the statutory definition of harassment. Just because the union recommended DAL does not mean that DAL was applicable, and neither the claimant nor the union objectively considered the facts in this case and the non-applicability of DAL in the light of those facts. This is a pivotal area where the communication between the claimant, her union representative and the respondent fell down through no fault of the respondent. Industrial relations does not require an employee’s demands to be met come what may. Good industrial relations incorporates a healthy tension between management, trade unions and employees to meet the reasonable needs of all, resolvable though effective communication and a realistic expectation against the backdrop of accepted policies and procedures coupled with, on occasions, custom and practice.

208 It was not reasonable for the claimant to consider the conduct as having the requisite effect, and applying the objective test and considering all the factors, the conduct was not related to her disability. The claim is dismissed.

Allegation 25

209 With reference to allegation 25, the Tribunal found it was not reasonable for the email informing the claimant of the outcome of the 16 July 2019 to be considered harassment. It was sent to the claimant in line with policy, which she as a union official should have realised appreciating that her absence was being supported but may not be in the future. This was a statement of fact recorded in a template outcome letter, and the claimant nor her union representative could have reasonably interpreted it to mean Brian Blanchflower would no longer support the claimant in the future and she could lose her job.

210 It was not reasonable for the claimant to consider the conduct as having the requisite effect, and applying the objective test and considering all the factors, the conduct was not related to her disability. The claim is dismissed.

Allegation 26

211 With reference to allegation 26, the Tribunal found Brian Blanchflower on the 22 July 2019 made referral to RAST for the Claimant in relation to headset, and he received advice that the claimant contacted Access To work ("ATW") for a workplace assessment. On the 23 July 2019 RAST emailed Brian Blanchflower recommending the claimant contact Access to Work, which she did. The claimant was aware of the RAST referral and allegation 26 is disingenuous. On 1 August 2019 Brian Blanchflower sent the claimant a copy of the HRACC1 form with his comments in, having already sent a copy to her union representative on 20 June 2019. In oral evidence the claimant accepted the email of 1 August 2019 makes no reference to Brian Blanchflower being unaware of the issues; she knew he was fully aware from the HRACC1 form and action had been taken by him and RAST.

212 The claim is dismissed.

Allegation 27

213 With reference to allegation 27, the Tribunal refers to its conclusions above that Brian Blanchflower treated the claimant's health issues seriously, and at no stage did he question whether she was lying or not. On a number of occasions the claimant did not keep Brian Blanchflower fully informed, for example, in the first HRACC1. Brian Blanchflower did not deny any of the claimant's health conditions and accepted what she had to say even when he questioned whether the bone conducting headset was necessary. As recorded above, Brian Blanchflower did not possess the requisite knowledge until the first HRACC1 form was submitted and was unaware of the extent of the claimant's ear pain until he read its contents in June. The Tribunal repeats what it has said above in relation to the knowledge issue.

214 In any event, the health issues in relation to the claimant's ear infection were not a disability, and any allegations in relation to it were unconnected to her disability. It was not reasonable for the claimant to consider the conduct as having the requisite effect, and applying the objective test and considering all the factors, the conduct was not related to her disability. The claim is dismissed.

Allegation 28

215 With reference to allegation 28 Brian Blanchflower did not dispute the claimant had been off work sick, and he consistently remained of the view she did not qualify for DAL because she was certified too sick to work, and such absence was recorded on her HR record. The fact Brian Blanchflower attempted to discuss reasonable adjustments on a number of occasions with a view to the claimant getting back to work, which she told him was important to her, does not mean he was unaware or ignoring the health issues; quite the reverse as they were acknowledged and a resolution sought.

216 Brian Blanchflower denies this allegation, he was not cross-examined on it and the Tribunal concludes he did not say the claimant's absence would not be called sickness absence on the 9 September 2019 or at any time, and his position has always been throughout the claimant was on sickness absence and not eligible for DAL. The allegation is dismissed.

Allegation 29

217 With reference to paragraph 29, the claimant had been well enough to return to work from the 10 August 2019, she had 4-weeks ff prior to her return to work on the 9 September 2019 did not request a phased return, and nor did she mention a phased return at the return to work meeting held on the 9 August 2019. During the one month's term time leave the claimant was fit for work, and Brian Blanchflower was entitled to take this month when the claimant was no longer unfit without adjustments as certified by her GP into account, and there was no requirement to offer the claimant a phased return she did not need, having returned to work after looking after her child.

218 The Tribunal agreed with the submission made by Mr Davies that there was no evidence that the claimant was unfit to work on 9 September or needed a phased return to work. She was on limited duties checking emails and catching up on administration before she left work on 11 September 2019.

219 It was not reasonable for the claimant to consider the conduct as having the requisite effect, and applying the objective test and considering all the factors, the conduct was not related to her disability. The claim is dismissed.

Allegation 30 and 31.

220 Allegation 30 and 31 have been dealt with above. It was a mistake. The claimant was aware of the overpayment. She did not discuss with Brian Blanchflower the late updating of her records. The recovery of the overpayment was not related to her disability.

221 As set out by the Tribunal in its findings of facts, there was no satisfactory evidence Brian Blanchflower was aware the claimant had problems accessing her emails in September 2019. The claimant accepted this in oral evidence.

222 It was not reasonable for the claimant to consider the conduct as having the requisite effect, and applying the objective test and considering all the factors, the conduct was not related to her disability. The claims are dismissed.

Allegation 32

223 With reference to allegation 32, the Tribunal the Tribunal was satisfied that the claimant was offered a number of reasonable adjustments from coming to see what work was carried out on floor 2 in the model office, through to mentoring and assisting colleagues, floorwalking, which was not in fact floor walking but the claimant sitting when colleagues walked to her seeking advice. The claimant was also offered a transfer to Litherland House as a "floorwalker" drawing on her experience and mentoring new staff, and answering questions, on the same basis i.e. the claimant not walking at all, and the respondent ensuring all her health and safety requirements were met, to the extent that managers would pick up the claimant from the station and drop her off until she had sorted ATW and taxi fares. The Tribunal found the respondent had not stated the claimant's "full DSE" would not be provided; the respondent made it clear the claimant's health and safety would not be breached in any way. It was clear to the Tribunal it was not the respondent's intention to deprive the claimant of her specialist desk at any time, whatever the inference she drew when the respondent failed to expressly state that the desk would be included with the chair. The claimant could have relied on the repeated statements that she would be kept safe and all her health and safety needs complied with. This means all of the claimant's specialist equipment (apart from the quest for the bone conducting headphones) would be available.

224 It was not reasonable for the claimant to consider the conduct as having the requisite effect. The claim is dismissed.

Allegation 33

225 With reference to allegation 33 has been dealt with above at section 15 allegation 9. It was not reasonable for the claimant to consider the conduct as having the requisite effect. The claim is dismissed.

Allegation 34

226 With reference to allegation 34 the trade union health and safety representative was present at the 11 September 2019 meeting . It is not harassment not to have the attendance of a union representative when the claimant had not requested the attendance of her union representative and nor had she suggested the meeting could not continue without her union representative present.

227 The Tribunal did not accept the claimant's evidence that Brian Blanchflower had "repeatedly" asked why the claimant could not carry out the other duties previously offered. The Tribunal found it was reasonable for the claimant, who was fit for work back from holiday, to be asked whether there were alternative duties the claimant could have carried out. The claimant did not want to hear about alternative duties, she "shut the discussion down" because she was not getting her way, and was not prepared to discuss proposals. There was only outcome as far the claimant was concerned, and that was being given DAL whilst the bone conducting headset which she did not need, was awaited. The union health and safety representative suggested the claimant should be at home with DAL, and this got in the way of a positive discussion on reasonable adjustments being made to the claimant's duties.

228 It was not reasonable for the claimant to consider the conduct as having the requisite effect. The claim is dismissed.

RESERVED

Allegation 35

229 With reference to allegation 35, the words actually used should be viewed in contact as set out by the Tribunal above, the Tribunal preferring Marie Daly's evidence on this issue compared to that of the claimant that she did not say there were already too many disabled people on the first floor so she would have to consider relocating to Litherland House. The Litherland House discussion came about when the claimant's union representative stated he had sent an email to Brian Blanchflower to the effect the claimant could not work in the model office because of her PEP, which had been received and the claimant confirmed she would not move to the model office on second floor because of the PEP. Marie Daly gave evidence that she had discussed the fact the trade union had brought up there were too many disabled people and "we did not have enough people to support the people who needed it" explaining there were employees with injuries and falls coming down to the first floor, and there was a concern about there not being enough buddies to assist, for example during the summer holidays and term time. This is the context in which the discussion took place, and the Tribunal prefer Marie Daly's evidence that Litherland House was suggested to the claimant as a resolution to any concerns she had with her PEP and a reasonable adjustment in respect of her duties whilst she was waiting for headset.

230 At no stage was the claimant forced to go to Litherland House, and seen in context the words were not critical of the claimant or disabled employees. The issue arose when the health and safety trade union representative wanted to talk about PEP and he instigated the discussion saying the claimant could not work on the second floor because of her PEP. Marie Daly brought up the issue of insufficient buddies, a state of affairs long known to the union and the claimant. It was not harassment, the reality that existed at the time at The Triad was discussed and the claimant offered a permanent/temporary relocation to Litherland House, which she refused.

231 As submitted by Mr Davies, the claimant was aware a general issue with The Triad were the number of stairs & floors and that 2 buddies were needed for every disabled person (preferably on same floor). The context in which the words were said by Marie Daly was apparent to any reasonable person and it did not meet the statutory definition of harassment. It was not reasonable for the claimant to consider the conduct as having the requisite effect. The claim is dismissed.

Allegation 36

232 With reference to issue 36, the Tribunal has dealt with this above. In short, the claimant was not reasonably exercising her right under section 44 of the ERA and refusing to acknowledge them saying there could be serious consequences if she did not return to work was not unreasonable in the circumstances. It was not reasonable for the claimant to consider the conduct as having the requisite effect, and applying the objective test and considering all the factors, the conduct was not related to her disability. The claim is dismissed.

Allegation 37

233 With reference to issue 37, Brian Blanchflower emphasised the claimant's health and safety will be met and she was not expected to do any work which could "inflame" her disability. The fact claimant took umbrage because Brian Blanchflower disagreed with the claimant who was blocking all attempts at discussion reasonable adjustments to her role, is

not harassment even if the claimant was not interested because she was intent on securing DAL. The claim is dismissed.

Allegation 38

234 With reference to allegation 38, the Tribunal accepts that stopping pay could amount to an act of harassment but not in this case. The claimant refused to attend work for spurious reasons, her absence was not covered by annual leave, special leave or a sick note. She was aware beforehand that if she failed to attend work her pay would be stopped, and in that knowledge the claimant refused to attend work. Objectively, it cannot be an act of harassment. The claimant could not reasonably have understood stopping her pay was outside procedure, and in the specific circumstances of this case stopping the claimant's pay did not have purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her and she would have understood this from the communications warning her about the consequences of her behaviour.

Allegation 39

235 With reference to allegation 39, this has been dealt with under section 15 allegation 10. In short, the claimant had taken annual leave, paid for it and it was not reasonable to reinstate it. It was not reasonable for the claimant to consider the conduct as having the requisite effect, and applying the objective test and considering all the factors, the conduct was not related to her disability. The claim is dismissed.

Section 44 ERA complaint

Allegation 41

236 With reference to allegation 41 the Tribunal concluded for the reasons stated above that the claimant did not reasonably believe she was in serious and imminent left work refusing to return in order to engineer DAL. It had been made clear to the claimant that she was not required to use a headset when she returned to work and her health and safety would not be put in any danger.

237 Mr Gibbons submitted that the claimant was left with no choice but to remove herself from the workplace, as she had repeatedly made the respondent aware of the effect her disability had upon her and that she was unable to undertake the duties being asked of her without the appropriate adjustments in place. The respondent, he said, failed to take action to address the Claimant's concerns. He argued that the Claimant's perception was that she would have to work in unsafe conditions that she reasonably believed would be detrimental to both her physical and mental health and so felt she had no choice but to remove herself from the workplace. Subsequently her absence was deemed as unauthorised and her pay for the duration of the absence was withheld, causing her financial detriment in breach of section 44 of the ERA.

238 The Tribunal found on the balance of probabilities the claimant was not subjected to any detriment on the ground that she had left or refused to return to work in circumstances where she could not reasonably have believed her health and safety was at any risk and her working conditions unsafe.

239 Brian Blanchflower did not withhold the claimant's wages on 26 September 2019 because she relied upon section 44 of the ERA. There existed no link with the s.44 complaint

and the non-payment of wages, which was the result of the claimant refusing to return to work with reasonable adjustments to her duties when she could not have reasonably believed she was in serious or imminent serious danger that she could not be expected to avert other than attending home. There was no serious imminent risk to the claimant who had been asked to meet up with Brian Blanchflower to discuss adjustments.

240 The claimant's wording at allegation 41 in the annex starting from "details of previously attempted adjustments" and Sam Langham saying 'that was then, we're looking at now' were allegations that remained unclarified, its relationship with the section 44 complaint was not established, and the claimant gave no evidence on it. As a matter of fact the Tribunal found the claimant had not explained to the respondent in any detail whatsoever why the adjustments offered were unreasonable and could affect her health and safety when clearly the claimant would be sitting with her equipment around her, orally advising and assisting colleagues by drawing on her experience. In such circumstances there was no serious or imminent risk to the claimant who was using section 44 as a leverage for DAL.

241 Finally, Sam Langham was not at the meeting on 11 September 2019 and therefore he could not have said "that is then, we're looking at now" ascribed to him by the claimant. The Tribunal found the claimant was not a credible witness in this regard and the words were not said. Sam Langham was at the meeting held on the 17 October 2019 and the words were not said at that meeting either. Given the claimant's indication that she could use her current headset around her neck with earpiece avoiding her ears and the microphone would pick up enough of her voice so that she could use Dragon software, it would make no sense for Sam Lanham to have used the words alleged. As far as the respondent was concerned it was a "flabbergasting…Eureka" moment that changed everything. It is notable Sam Langhan was not cross examined on this allegation.

242 The claimant's claim is dismissed.

Jurisdiction (time)

243 The claim form was received on the 10 February 2020 following ACAS early conciliation between 29 December 2019 and 29 January 2019, and any complaint which occurred on or before 30 September is out of time. The complaints lodged after the 30 September 2019 were allegations 9, 10, 11, 12, 13, 15 and 33 which are dismissed. There was no continuing act in relation to allegations 9 and 33, which were also dismissed. There was no act extending over a period of time contrary to the submissions of Mr Gibbons who referred to Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the appropriate test for a 'continuing act,' arguing that the respondent was responsible for an ongoing situation and the allegations raised by the claimant satisfied the test. The Tribunal did not agree for the reasons set out above. The claimant also sought to rely on her other medical conditions and health issues as an argument for a continuing act, which does not satisfy the test.

244 The claimant, a trade union representative, was in receipt of union representation and advice throughout the relevant period, and she was well enough to write letters, attend various meetings and work, including a move to the second floor of The Triad in January 2020 in direct contrast to her oral evidence that she only had the mental capacity to deal with one thing at the time. The claimant was aware of her right to claim disability discrimination and the internal grievance process was completed by 21 November 2019 when the claimant and her union accepted the informal resolution. No good reason was put forward by the

claimant for failing to make her claim set out in allegations 1 to 8, 16 to 32 and 34 to 41 within the statutory limitation period.

245 Allegations 1 to 8, 16 to 32 and 34 to 41 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) and the complaints are out of time, and in all the circumstances of the case it was not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complains which are dismissed.

246 In the event of the Tribunal being wrong in respect of time limits, it has considered the substantive claims as recorded above, which have been dismissed on their merits.

247 In conclusion, the claimant's claim of victimisation brought under section 26 of the Equality Act 2010 is dismissed on withdrawal. The respondent was not in breach of its duty to make reasonable adjustments. The claimant's claim of failure to make reasonable adjustments brought under sections 20-21 of the Equality Act 2010 are not well-founded and is dismissed. The claimant's claim of disability discrimination set out in allegations 1 to 8, 16 to 32 and 34 to 41 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done), the complaints are out of time and in all the circumstances of the case it was not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complains which are dismissed. The claimant was not treated less favourably because of something arising in consequence of her disability and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed. The respondent did not harass the claimant and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 fails and is dismissed.

17.1.2022
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

31 January 2022

FOR THE SECRETARY OF THE TRIBUNAL