EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100684/2018

Held in Glasgow on 30 May and 7 June 2019

Employment Judge R Gall
Tribunal Member P Kelman
Tribunal Member D McAllister

Mrs L Cantell	**Claimant** **Represented by:** **Mr P Deans -** **Solicitor**
Ayrshire & Arran Health Board	**Respondent** **Represented by:** **Ms L Gallagher -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUJNAL

The unanimous Judgment of the Tribunal is

(1) That the respondents failed to make reasonable adjustments to avoid disadvantage to the claimant in circumstances where a provision, criterion or practice of the respondents put the claimant as a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled. This is in breach of the terms of Sections 20 and 21 of the Equality Act 2010. This caused upset and distress to the claimant. An award in respect of injury to feelings is made. The compensation which the respondents are ordered to pay to the claimant in respect of her injury to feelings is £7000. Interest at 8% is applicable from 14 March 2018 until 10 May 2019. Interest payable in addition to £7000 is therefore £653.33.

(2) That it is recommended that the respondents implement a reasonable adjustment of provision of a fully functioning laptop with assistive software, the recommendation to be complied with within 28 days of date of issue hereof. Both parties are to co-operate with each other to ensure that the recommendation is met.

REASONS

1. This case called for hearing at Glasgow on 30 May 2019. There had been a Preliminary Hearing ("PH") at which this hearing was set down. It had been anticipated that one day would be sufficient to allow the evidence to be heard and submissions to be made. That did not however prove to be the case.

2. The second day of hearing was therefore set down for 7 June 2019. The evidence and submissions concluded in the afternoon of that day. The Tribunal then met and deliberated.

3. During the case, the claimant was represented by Mr Deans. She gave evidence and was the sole witness in her case. The respondents were represented by Ms Gallagher. Mr Hogarth gave evidence on their behalf. A joint bundle was presented.

Brief summary of positions

4. The claimant was disabled under the terms of the Equality Act 2010 ("the 2010 Act") as she was affected by the conditions of dyslexia, dyspraxia and Meares Irlen syndrome. The respondents accepted that at the relevant time she was disabled for the purposes of the 2010 Act.

5. Both parties agreed that the provision criterion or practice ("PCP") involved which placed the claimant as a disabled person at a substantial disadvantage was the requirement for notes of clinical interactions and treatment to be entered and recorded by the claimant on the respondents' Care Partner system without delay and ideally on the same day that the treatment or consultation took place. It was accepted by the respondents that this PCP placed the claimant at substantial disadvantage.

6. The claimant referred to 2 adjustments which she said were reasonable adjustments in terms of the 2010 Act. Those were (1) provision to her of a quiet room and (2) provision to her of a laptop with assistive software installed and with a larger screen than would be the case in laptops generally supplied by the respondents to employees. Ultimately, the respondents had provided a quiet room for the claimant. They had ordered for her a laptop with a larger screen, although that was not to hand at date of the Tribunal hearing.

7. The claimant said the respondents had failed to meet their duty to make reasonable adjustments in that it had taken them too long to make the adjustments referred to. The respondents said that they had made these reasonable adjustments within a reasonable timeframe having regard to the circumstances applicable at the time.

8. The respondents also argued that the claimant could not be successful in her claim as it was time-barred. It was, they said, not just and equitable for time for presentation of the claim to be extended to enable the claim to proceed. The claimant maintained that the claim was brought in time. In the event that the Tribunal was against her on that point, it was argued on her behalf that it was just and equitable for the claim to be permitted to proceed.

9. There was a large measure of agreement in relation to the facts of the case.

Facts

10. The following were found to be the relevant and essential facts as admitted or proved.

Background

11. The claimant is employed by the respondents as a community mental health nurse. She has been employed with them for many years. She is currently based at Ailsa Hospital. She was previously based at Auchinleck. Her role involves her visiting people during the day and returning to her office/base whenever possible and at the end of the day. Returning to her base enables her to update the respondents' central information storage system with notes of her visits and medication provided.

12. The claimant was at time of relevance for this claim disabled in terms of the 2010 Act. The conditions by which she is affected and which mean that she is disabled are dyslexia, dyspraxia and Meares Irlen syndrome. The respondents were at the relevant time aware of these disabilities affecting the claimant.

13. The conditions which affect the claimant make it hard for her to read documents and to input information onto records held by the respondents on a computer system. As a community mental health nurse, the claimant travels to appointments with patients. She requires during the course of the working day to update the computer system of the respondents with the notes of those meetings and details of any medication arrangements made during the course of a consultation. She would generally do this towards the end of her working day.

14. The computer program operated by the respondents and updated by the claimant and others electronically was formerly known as FACE. It is now known as Care Partner.

15. To assist the claimant with inputting of information, the respondents have installed on the desktop computer used by the claimant a program known as Read and Write Gold. This provides prompts to the claimant to assist her. It provides spelling assistance. It gives the meaning of words. The look and feel of the computer screen or display terminal can be changed so it is almost opaque. That assists the claimant. The program will learn phrases and words which are often used by the claimant and suggests those as options. The claimant's condition is such that she can often think of the opposite of the word she wishes to use rather than the word itself. The claimant can enter that word and Read and Write Gold will provide her with the opposite to the word so that she can enter that on the system. There is also a mind map function which assists the claimant with organisation of information, facilitating preparation of reports and letters to GPs or consultants.

16. The respondents have also provided to the claimant a software program known as Dragon Dictate. That is a voice recognition program which enables

the claimant to dictate verbally with the dictation then appearing as words in a document.

17. When entering information on FACE or Care Partner, the claimant's condition is such that she sometimes hears conversations of others in the room where she works and ends up typing those rather than the information which she planned to enter on the computer. On occasion Dragon Dictate will also "pick up" conversations in the room and type those onto the computer rather than typing what the claimant was saying. Both of these occurrences require the claimant to read and edit information, something which she finds very difficult.

Adjustments

18. Pages 56 to 65 of the bundle comprised a Clinical Neuropsychological Report Prepared by Dr Williams, clinical psychologist, in relation to the claimant. It was dated 9 March 2008. It contained the following assessment at page 61 of the bundle: –

"Environmental changes

Ms Cantell will be easily distracted and thus working in a busy environment where she is subject to interruptions will affect her work. Allocating a private workplace is not always possible but any flexibility to provide a quiet working environment will be helpful. Working in a room without fluorescent lighting may also help.

The introduction of FACE has implications for when and where people complete their notes. Previously Ms Cantell often worked at home which enabled her time and space to complete her work. If there was any way in which FACE could be made transportable this would arguably be of benefit."

Quiet Room

19. At this point, the claimant worked at Auchinleck. By agreement with the respondents, she moved into a room occupied by herself and one other person. This was of great assistance to her. It contributed to her being able to complete her work by 5 or 6 PM each night.

20. The claimant continued to be in this quiet room at Auchinleck until she moved to work at Ailsa Hospital around 2015.

21. When the claimant moved to Ailsa Hospital she began working in an open plan area. She asked about moving to a quiet room. The respondents were not very positive as to that being possible. They said that they would obtain relevant software and provide her with appropriate training. They said that there was at that point nowhere for her to go in terms of a quiet room or area and that there was nothing that they could do. The claimant was conscious that she was part of a new team at Ailsa Hospital. She was also of the view that the respondents had tried to do their best, as she saw it.

Laptop

22. In discussion with Dr Williams around the time of preparation of the report in March 2008, the Claimant and Dr Williams regarded the most appropriate way of ensuring that FACE was transportable, as he had hoped would be possible, was for the claimant to be provided with a laptop. When this was raised around this time by the claimant, her then line manager discussed this with her. It was explained to her that the software program, Read And Write Gold, would be made available. It was anticipated that this would provide her with a lot of assistance.

23. The document at page 69 of the bundle was a report from Duncan Smith, Senior Occupational Therapist. It was produced in connection with possible funding from Access to Work in relation to provision of a laptop for the claimant. The report referred to a successful demonstration of Read and Write Gold software and its ability to work with FACE. This demonstration was on 1 October 2009. The report supported use of a laptop on the part of the claimant which it was said might provide her with the greatest flexibility when using the software. Mr Duncan sent this report to the claimant and to Mr Fleming, then her line manager, on 19 October 2009.

24. FACE was subsequently replaced by Care Partner. The obligation on the part of the claimant to enter details of her consultations and dispensing of medication on the day of the appointment with any patient continued.

25. Read and Write Gold worked with Care Partner. There were some issues with tailoring the use of the program to the individual needs of the claimant. No laptop was however purchased for the claimant.

26. The claimant was aware in 2009 that the respondents had decided that purchase for her of a laptop was not something which they would do. The claimant did what she could working with the system and software which she had. This was easier for her given the quiet room which she had at Auchinleck.

27. The claimant continued to be of the view that a reasonable adjustment for her was provision by the respondents of a laptop with the Read and Write Gold software installed on it. As mentioned, certainly after the report from Duncan Smith in October 2009, she was aware that the respondents were not going to obtain such a laptop for her. Despite this, she did not raise any Tribunal claim. She carried on as best she could, doing her work and managing to do that within office hours whilst based at Auchinleck, having the advantage of the quiet room. There was less of a requirement for the claimant to travel when she was based at Auchinleck as her office there was based closer to locations of appointments. It was also easier to get back there, with less traffic delays than was the case when the claimant moved to Ailsa Hospital. The respondents ultimately made available for her in May 2019, as detailed later, a laptop with assistive software installed and a larger than normal screen.

Position after 2015 and move of office to Ailsa Hospital

28. As mentioned, the claimant moved to Ailsa Hospital. This was in the first half of 2015. She commenced working in an open plan area there. Whilst Read and Write Gold and Dragon Dictate were of assistance to her, working in the open plan area meant that it was far more difficult for her to fulfil the requirement that she update the Care Partner system after appointments, on the day of appointment. She found it very difficult to concentrate and to block out any background noise. Equally the programs which transcribed words dictated would pick up voices other than that of the claimant and transcribe what others were saying. The claimant herself would on occasion dictate what she overheard others saying rather than what she intended to say.

29. As she did not have a laptop, the claimant required to remain at work late in the evening to ensure that she had the necessary peace and quiet to concentrate and to be able to update the FACE/Care Partner system as required. She regularly worked 3 hours beyond her normal finish time. She would return home exhausted. She was affected regularly by migraines. This was due to computer use and the impact of fluorescent lighting in the open plan area. Having completed work for the day she was very disinclined to log onto a computer or to make use of any form of electronic communication. This was partly due to exhaustion from a long day and partly because she had "*had had her fill*" of working with a computer screen by that time. She had very little contact with friends or family and no meaningful social life.

30. Although conscious that the respondents had said to her that they could not meet her request for use of a quiet room due to there being no space available, the claimant reached the point where provision of a quiet room and suitable laptop to her was something which she regarded as being of increasing importance.

Grievance

31. The claimant raised a grievance with the respondents. A copy of her grievance notification appeared at pages 77 and 78 of the bundle.

32. The grievance was lodged on 25 September 2017. In it she referred to various discussions, emails and requests for assistance from, for example, IT. In relation to discussions which had been held she said:-

"*Ongoing discussions re assistive (software) technology not working well with partner recording note system, "care partner"*

less access to (illegible) *non-dyslexic as assistive software only installed on 1 machine*."

33. The claimant was aware that her desktop was the only computer on which the assistive software utilised by her was installed. Her colleagues who did not require the assistive software were able to update Care Partner by logging onto any computer. This enabled them to work in a different area of the

hospital or in the surgery of a GP, for example. The claimant could not do this as she required to work at the one desktop, her own, on which the assistive software was installed. Having moved to Ailsa Hospital she required to travel back there from appointments in order to be able to update Care Partner after visiting a few patients. The journey times were significant in terms of her working day.

34. When asked in the grievance form as to the formal grievance raised, the claimant completed the form by stating: –

"*Dyslexia – reasonable adjustments identified in original recommendations not followed through despite agreement. Less access to as described above.*

(sic) *Being informed its my individual responsibility to try and speak to care partner to resolve this.*

Ongoing time elapsed since original requests, confirmed non-engagement as to clear path re who is responsible. Impact on the health/worklife balance."

Reaction to grievance

35. Mr Hogarth was asked to deal with the grievance submitted. He sought to clarify with the claimant which individual it was she complained about. He also highlighted his view that a grievance was about seeking to find a resolution with there being no punitive outcome for a manager. The claimant's issue was said by her to be a failure to provide, recognise and accept a way for her to carry out a job with the same level of support that non dyslexic/dyspraxic/Meares-Irlen colleagues had. Her view was that the situation had continued without resolution. A copy of the exchanges between Mr Hogarth and the claimant appeared at pages 79 to 82 of the bundle.

Letter from the claimant's solicitors

36. By letter of 20 December 2017 the claimant's solicitors wrote to the respondents. She had met with the solicitors prior to that. The letter appeared at pages 84 to 86 of the bundle. The respondents were and still are unaware of having received this letter.

37. That letter set out the problems being experienced by the claimant due to the medical conditions by which she was affected. It referred to the PCP and to the requirement that reasonable steps were taken to avoid disadvantage to the claimant. It detailed the disadvantage as being the time it took the claimant to record consultations, which resulted in her seeing fewer patients than colleagues and resulted also in her regularly working longer hours than her colleagues, involving staying late in the office so that she could have appropriate conditions to use the voice to text software. In a passage which appeared at page 85 of the bundle the following appeared: –

> "*We have advised Mrs Cantell that providing her with access to a quiet room at Ailsa Hospital as well as provision of a laptop installed with Dragon and Read and Write Gold software (with full functionality) are likely to be considered the reasonable steps envisaged by section 20 of the Equality Act*."

38. The letter requested that those reasonable adjustments were implemented.

Events after presentation of Form ET1

39. As the respondents had no record of receipt of this letter, they did not respond to it. The claimant presented a claim to the Employment Tribunal on 25 January 2018. A copy of the claim form was then sent to Mr Hogarth. This was the first occasion on which Mr Hogarth appreciated and understood that the claimant sought a quiet room as well as provision of a laptop with functionality for Read and Write Gold and other assistive software.

40. Mr Hogarth met with the claimant and her line manager Stephen McCutcheon on 6 April 2018. The claimant was also accompanied by Mr Cairney from Unison. A copy of the letter sent by Mr Hogarth to the claimant following that meeting appeared at pages 87 and 88 of the bundle. It was dated 18 April 2018. In relation to the provision of a laptop, Mr Hogarth established with the respondents' IT department, known as e health, their view upon that possibility. He confirmed by email of 26 April 2018 to the claimant, a copy of that email appearing at page 89 of the bundle, that e health were of the view that:-

"*a laptop is not practical given the size of screen/monitor you require. You did acknowledge that you use a larger than average screen and that you find this helpful. However you did state that your personal view was that a laptop remained an option.*

At the meeting, I explained e health's view that we should consider other reasonable adjustments to assist with your record-keeping. As a result, the focus of our conversation then moved to installing Text Help on a hot desk PC at Biggart Hospital, Prestwick. As Biggart is closer to your caseload area this removes the necessity to always return to your base at Ailsa Hospital, Ayr."

Text Help is another name for Read and Write Gold.

41. In his letter of 18 April Mr Hogarth confirmed that an order had been placed for a further licence for Read and Write Gold. He confirmed that this would be installed on the hot desk PC at Biggart Hospital. He also confirmed that a quiet room was being sought at Ailsa Hospital "*as a matter of urgency*." He said that Ms Gemmill, Head of Clinical Support Services (South) had been contacted as she was the point of contact for accommodation requests. In contacting Ms Gemmill Mr Hogarth had emphasised to her that the move of the claimant to a quiet room was required for health reasons. It had been confirmed to him that this request would be dealt with as a matter of urgency. Accommodation management and any moves of personnel within Ailsa Hospital are dealt with by the Accommodation Committee. Account requires to be taken by them of the overall picture in relation to accommodation, viewing that on a holistic basis.

42. Around this time the claimant had tried her daughter's laptop which had a larger screen and was fitted with Read and Write Gold as her daughter unfortunately is affected by some of the same conditions as affect the claimant. She was satisfied that with the size of screen which her daughter had on the laptop, the software systems program worked satisfactorily.

43. Mr Hogarth visited the claimant at Ailsa Hospital on 30 April 2018. He saw Read and Write Gold working in an operational setting. He confirmed this in

his letter of 18 May 2018 to the claimant, copy of which appeared at pages 90 and 91 of the bundle.

44. That letter also said that e health had advised, in connection with the licence for a further version of Read and Write Gold being installed on the hot desk computer at Biggart Hospital, that a fresh or replacement PC was required. A licence would be purchased once the suitably configured PC was set up.

45. In relation to the quiet room at Ailsa Hospital, Mr Hogarth said: –

"*you explained that Consultant colleagues are possibly going to be relocating their offices in the near future (no specific date was known) and that this may have an impact on the availability of rooms close to your current base. I therefore contacted Helen Gemmill to ask if a timescale can be identified and to once again state the urgency of securing you a quiet room as a reasonable adjustment. Once again, as soon as the situation becomes clearer I will update you as a matter of urgency*."

46. As far as the laptop was concerned, Mr Hogarth said that e health remained of the view that this would not be a suitable option for the reasons he had previously outlined. He said that he would contact the head of e health to ask if the initial advice could be reviewed or if any options which had not previously been considered might exist.

47. At page 92 a letter dated 6 July 2018 from Mr Hogarth to the claimant appeared. It provided a further update.

48. This letter confirmed that an additional licence had been obtained for Read and Write Gold and was being installed on the PC at Biggart. It confirmed that head of digital services had commented in relation to the claimant's request for a laptop, that the view remained that a laptop was not appropriate. It set out the rationale as detailed to Mr Hogarth, being: –

"*The recommended device for using Read and Write Gold software would be a desktop PC, with full-size keyboard and a large screen monitor. It is e Health's view that a laptop screen would not be large enough to offer a*

suitable resolution for this type of literacy support software which contains additional toolbars."

49. The letter went on to say that in relation to office accommodation, Mr McCutcheon will "*shortly be able to move you from the large open plan office into a significantly quieter setting. A couple of options are being discussed and a final decision will be taken, with your input, at the earliest possible opportunity.*"

50. In mid-July of 2018 the claimant reported to her solicitor that empty accommodation appeared to be available. Specific rooms which were empty were detailed. It was said that the claimant would ideally wish to move to a room which had natural light. In relation to Read and Write Gold, information on the website of the provider was referred to. It was said that this information was clear in saying that the software could be used on any device, not being restricted to use on a large desktop screen. This information was relayed by the claimant's solicitor to the solicitor for the respondents on 18 July 2018. A copy of this email appeared at page 93 of the bundle.

51. For reasons which are unclear, the information conveyed in this email did not make its way to Mr Hogarth.

52. On 18 September 2018 Mr Hogarth wrote to the claimant. A copy of that letter appeared at page 94 of the bundle. He confirmed that, as he had discussed with the claimant, e health, now known as Digital Services, had installed Read and Write Gold on a PC at Biggart Hospital. Mr Hogarth noted that when he last spoke with the claimant she had not had a chance to use the PC. In relation to office accommodation for the claimant he said as follows: –

"*In relation to your primary office accommodation at Ailsa Hospital, I have been advised that a smaller room was secured for your use. However it transpired that the office in question was windowless which you advised was not conducive with your underlying health condition.*

Upon making further enquiries, an office with the window is available with immediate effect. However this office is slightly removed from the rest of your

department being located on another floor within the Ailsa Hospital site. A further office may become available next to the department. However, as you are aware, there are currently a range of office moves going through the accommodation request system and the final situation will become clearer in the next 2 to 3 weeks. I would therefore propose that a final office location is agreed once the situation has been clarified in the coming weeks."

53. During this time, Mr Hogarth remained advised by Digital Services that functionality of Read and Write Gold on a laptop screen was not ideal. If the screen size was increased to the size at which Digital Services believed benefit would be obtained for the claimant, the concern was that the laptop would be heavy and difficult to transport. The respondents also had standard size laptop screens on the laptops which they held in stock. Obtaining a non-stock item, i.e. a laptop with a larger screen, would involve a specific order being raised and authority to expend money on that step being given. There was also now the option of use of a PC with the software installed. That PC was located at the hot desk at Biggart Hospital. Given these factors, Mr Hogarth did not, at this point, pursue the obtaining of a large screen laptop for the claimant.

54. Accommodation requests are dealt with normally by the accommodation committee when they meet bi-monthly. The request to try to accommodate the claimant in a quiet room was being dealt with as one of urgency by the accommodation committee. Although the claimant had highlighted rooms which had been vacated on her floor by the forensic team, the respondents were discussing with consultants a move by the consultants to those rooms. The consultants were strongly resisting that move. It was unclear at that point whether the consultants would ultimately move into the rooms or not. It was considered by the respondents that it was important that the claimant was not located on a separate floor to the rest of her team. That would isolate her. It would remove her from other team members, the files and other documents to which she required to have access.

55. The claimant met with Mr Hogarth on 7 November 2018. Discussion took place between them as to the alternative office available for the claimant

within Ailsa Hospital. Mr Hogarth confirmed that this office had natural light. That had not initially been thought by the claimant to be the case. Upon this confirmation being given to her, the claimant confirmed that this office was acceptable to her.

56. At this meeting the claimant also confirmed that the only remaining adjustment required as far as she was concerned was the provision of a laptop. In relation to that, Mr Hogarth said that advice to him from Digital Services was that a laptop was not fit for purpose in the particular instance of the claimant.

57. Mr Hogarth confirmed all of the above following the meeting on 7 November in his letter to the claimant of 9 November 2018, copy of which appeared at page 95 of the bundle.

58. Between 9 November 2018 and 23 November 2018 Mr Hogarth took the decision that it was appropriate to arrange for purchase of a laptop as a non-stock item with a screen large enough to accommodate the wishes of the claimant. The precise date on which he took that view is not known. The reason for the conclusion he reached was largely economic. The advice to him from Digital Services remained that a laptop was not satisfactory when operating the Read and Write Gold software. Given the view of IT, payment for the purchase of this laptop was not authorised as coming from the central budget. Mr Hogarth agreed with the senior manager for the area where the claimant worked that this cost would come from the budget for that area.

59. By email of 23 November 2018, a copy of which appeared at page 96 of the bundle, Mr Hogarth confirmed to the claimant that a new laptop was to be obtained. He said that costs and spec were being checked. He asked whether a 17 inch monitor would suffice, being aware that a 14 inch monitor was too small. He mentioned a 19 or 21 inch monitor, whilst stating that that would be "*quite a weight/bulk to carry round*".

60. There followed an email exchange between the claimant and Mr Hogarth regarding the spec and screen size of the laptop. That took place between early December and 20 December 2018. The relevant emails appeared at pages 101 to 104 of the bundle. Ultimately, on 20 December 2018 in an email

which appeared at page 101 of the bundle, Mr Hogarth emailed Mr Smith, the occupational therapist, seeking his view on whether a 15.6 inch laptop would be likely to be suitable for the claimant and, if not, a whether recommended size could be suggested.

61. Mr Smith replied by email at page 105 of the bundle, the email being dated 7 January 2019. He copied on an email from Dr Luke Williams replying to an email Mr Smith had sent to him. Mr Smith explained to Dr Williams that a laptop with a screen size of 15.6 inches had been proposed but was being resisted by the claimant who sought a larger screen. Mr Smith provided Dr Williams with a note of the conditions by which the claimant was affected. Dr Williams however said in his reply of 7 January 2019, "*I am not aware of any evidence to support the need for a larger screen for people with dyslexia but that does not mean there isn't any*." Mr Smith then expressed the view to Mr Hogarth that he would recommend the larger monitor as the cost difference might be negligible, it would be easy to achieve this and would be one step in getting the claimant back to work.

62. The respondents placed an order for the laptop on 6 February 2019. There was a lead in time until delivery. The laptop came to hand on 10 May 2019. Since that time the respondents have been working with the claimant to obtain codes and to arrange for installation of the relevant software. It was however available from 10 May 2019.

Absence from work of the claimant

63. At page 55 of the bundle there appeared a record of the claimant's sickness absence. She was absent from work due to health issues not associated with her disabilities during the following periods: –

- 15 May 2017 to 30 May 2017
- 4 July 2017 to 26 July 2017
- 23 October 2017 to 25 October 2017
- 8 January 2018 to 21 March 2018

- 8 May 2018
- 12 June 2018 to 27 June 2018
- 8 October 2018 to 23 December 2018; and
- phased return and annual leave 24 December 2018 to 1 February 2019

64. The claimant has also been absent from work from 13 May 2019 until date of the Tribunal hearing on 7 June 2019 due to migraine.

65. During times when the claimant was absent from work she had interaction with the respondents. In particular, after his involvement commenced, she interacted with Mr Hogarth at the time when she was absent from October to December 2018. She was content to have that involvement.

Awareness of the claimant as to any time limit for bringing a claim of discrimination

66. The claimant was unaware of there being a time limit within which a claim of discrimination required to be presented to the Employment Tribunal. This was so notwithstanding that she was a member of the trade union, Unison. She had also been equalities officer within Unison between approximately 2010 and 2015. In that role she provided advice in relation to discrimination claims. She worked under direction of the branch secretary and referred any more complex matters to him for guidance. She did not handle any Employment Tribunal claims whether at time of submission or by way of representation. The claimant also contacted ACAS around September 2017 soon before she submitted her grievance. No information was supplied to her by ACAS as to any time limit within which she required to bring a claim to an Employment Tribunal. The claimant did not check online as to there being any such time limit for presentation of claims to an Employment Tribunal. She was disinclined to interact with a computer and screen in hours when she was not working due to difficulties caused by her conditions and due to having been operating with a screen and computer during a substantial part of her working day. In particular she worked late, regularly to the extent of 3 extra hours, completing any relevant information to place that on the Care Partner system of the respondents, as mentioned above. This resulted in her being very tired

when not working. She often either had, or was at risk of having, very bad headaches through computer use. This also deterred her from using the computer in evenings and at weekends. She did not consult solicitors regarding any potential issue with her employers until she spoke with her solicitors in the period immediately prior to her solicitors sending the letter of 20 December 2017 to the respondents.

67. The nature of the claimant and her approach to disputes is that she wishes to resolve any issues through discussion. When she was informed in 2008 or 2009 that the respondents would not purchase a laptop for her, she was also informed of moves on the part of the respondents to obtain Read and Write Gold software and Dragon Dictate software. It was anticipated that these would substantially help the claimant. They did to a degree, as did working in a quiet room within Auchinleck until approximately 2015.

68. Although the claimant asked the respondents when she moved to Ailsa Hospital to provide a quiet room for her to use rather than the open plan office in which she was located, the respondents refused to do this, saying that it was not possible at that point. The claimant was unable to suggest any quiet area or room given accommodation demands at that point. She therefore carried on doing the best she could and working extra hours to enable her to meet the PCP.

69. Around May 2018 the claimant became aware that the forensic team who had worked on the same floor as her had moved out of their rooms. She became aware around this time that the plan which the respondents had was that the consultants with whom the claimant worked would move into the rooms vacated by the forensic team. She was also aware however that the consultants were strongly resisting this move. The rooms in question lay empty for some months, with the claimant eventually occupying one of them, that being available to her in September and being put into use by her on her return to work in December 2018.

Impact on the claimant of the absence of quiet room and laptop

70. After the claimant moved to Ailsa Hospital, around mid-2015, she required to work in an open plan office with some 20 people. She did not have a laptop. Having a laptop with suitably and installed functional assistive software would have enabled her to log into the respondents' system from places such as hospital or surgery of a GP, through access in a private area, to the Virtual Private Network ("VPN") there. This would have avoided the need to travel back to her office. Given absence of the laptop with functioning assistive software, she required however to travel back to her office to input the information as required of her. The travelling time involved added to her day. It proved necessary for her to wait until noise in the office died down and to work after hours to do this, in order that she could concentrate and that the assistive software worked to best advantage. Through prolonged use of the computer and its screen, and with the concentration required, the claimant would become very tired. She would often have migraines. When she returned home she was exhausted and could not face further work on a computer whether for social purposes or for work. She did not socialise with friends, being too exhausted to do that. She would often require to go to bed at weekends due to being affected by migraines. She was of the view that she had no reasonable work/life balance.

71. When the respondents installed Read and Write Gold with Dragon Dictate on the PC at Biggart hospital, it remained difficult for the claimant to make use of that. The PC was provided for use of the various people on a "hot desk" basis. There were times when it was not available for use by the claimant despite her wish to use it.

72. The claimant became very frustrated with the respondents inaction through e health/Digital Services, as the respondents' IT section, to her request for a laptop. They did not speak to her or enquire of her as to the advantages or disadvantages to her of a laptop. They simply stated that the functionality of Read and Write Gold was not good on a laptop. The claimant was aware however that it could be installed as an assistive program on a laptop. She was aware from her daughter's use of that program on a laptop, that it worked

satisfactorily. She was also aware that the makers of made Read and Write Gold specifically said that it could be used on various platforms, including laptops.

73. The claimant became concerned as to how she was perceived by colleagues in that she was taking longer to prepare and input the information for Care Partner. She was unable to carry out as many patient visits as her colleagues could. She became concerned about going into the office and felt sick at that prospect. Due to not having a quiet room facility and a laptop for possible out of hours work she could not do a course involving after-work research which might have enabled her to attend and complete internal mentorship courses, something she wished to do as she was keen on mentoring students.

Position with regard to reasonable adjustments

Findings in fact and law:-

74. There was at all material and relevant times a PCP in place, the PCP being the requirement to record any clinical interaction and notes in relation to a patient accurately on the respondents' Care Partner system without delay and ideally on the same day that any visit or treatment took place.

75. The PCP placed the claimant, given her disabilities, at a substantial disadvantage in comparison with persons who were not disabled. The substantial disadvantage was that she was not able to complete the prompt recording of notes on the Care Partner system of clinical interactions and treatment as quickly or as accurately as colleagues, being liable to make mistakes and taking significantly longer than non-disabled colleagues in completing this task. She required to work extra hours.

76. There was therefore a duty on the respondents to take such steps as it was reasonable for them to take to avoid the disadvantage.

77. The respondents accept that the PCP was as detailed. They accept that it placed the claimant at a substantial disadvantage in comparison with those who were not disabled.

78. The respondents also accept that there was a duty on them to make reasonable adjustments to avoid the disadvantage. They accept that the specific reasonable adjustments which they were under obligation to make in terms of the Equality Act 2010 were:-

(a) provision of a quiet room for the claimant

(b) provision of a laptop to the claimant with a large screen monitor and with installation on the laptop of assistive software comprising Read and Write Gold and Dragon Dictate, with functionality.

The issues

79. The issues for the Tribunal were:

(i) whether the respondents had or had not made reasonable adjustments. This distilled down to the question of whether the reasonable adjustments which the respondents accepted that they were under obligation to make, and which they had now made, had been made within a reasonable time.

(ii) whether the claim had been presented in time or not. If it had not been presented in time the issue arose as to whether time would be extended to permit the claim to proceed on the basis that it was considered by the Tribunal to be just and equitable for that to occur.

(iii) what level of compensation was to be awarded to the claimant in the event of success for her in her claim?

Applicable law

80. The obligation to make reasonable adjustments and the circumstances in which that applies are set out in Section 20 of the 2010 Act. The terms of that section are not set out given the acceptance by the respondents that the duty was triggered in the case of the claimant and that the reasonable adjustments sought by her were properly so regarded and indeed were ultimately steps taken by the respondents.

81. The Equality and Human Rights Commission Code of Practice on Employment 2011 ("EHRC code") is a statutory code. An Employment Tribunal must take into account any part of the EHRC code that appears to it to be relevant to any question arising in proceedings. Paragraph 6.32 of the EHRC code states that any necessary adjustments should be implemented "*in a timely fashion*". In the circumstances which pertained in *Duckworth v British Airways plc* ET/330470/11 account was taken of delay which might have been expected in implementing what was viewed as a reasonable adjustment. Making that allowance, the view of the Employment Tribunal was that a period of 6 months delay had been involved. The Employment Tribunal concluded that there had been a failure to make reasonable adjustments due to the delay in the adjustments being carried out.

82. Less relevant in this case, given the acceptance by the respondents that the adjustments, provision of a quiet room and provision of a laptop with a larger than normal screen and with functioning assistive software, were reasonable, is the legal position that it is for the Employment Tribunal to apply an objective test in assessing whether an adjustment is reasonable or not. The test is whether the adjustment might be effective in removing the disadvantage, a prospect of success being all that is required rather than any certainty or probability of success.

83. A claim under the 2010 Act may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. This is in terms of Section 123 of the 2010 Act. Sub-section (3) (b) states that "*failure to do something is to be treated as occurring when the person in question decided on it*." Sub- section (4) of Section 123 states that in the absence of evidence to the contrary a person is taken to decide on the failure to do something when they do an act inconsistent with that or, if there is no inconsistent act, on expiry of the period in which they might reasonably have been expected to do whatever is required.

84. In considering whether a possible extension of time to enable a claim brought late was to be permitted, nonetheless, to proceed, the Tribunal must keep in

mind authorities including, in particular, *British Coal Corporation v Keeble & Others* 1997 IRLR 336, *Robertson v Blexley Community Centre* 2003 IRLR 434 and *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 EWCA Civ 640.

85. *Blexley* saw the Court of Appeal emphasise that granting an extension of time on the basis that it was just and equitable is the exception rather than the rule. The Court of Appeal also made the decision in *Abertawe*. That case is relevant in relation both to determination of time-bar and whether time would be extended to permit a late claim to proceed. In the former context, the Court said that time ran from the period in which the employer might reasonably have been expected to comply with the relevant duty. That is assessed by looking at the matter from the point of view of the employee. An employee may therefore be of the view on a reasonable basis that the employer is doing something to address the disadvantage when in fact that is not the case.

86. The case of *Abertawe* also saw the Court emphasise that the provision within Section 123 of the 2010 Act conferred the widest possible discretion on the Employment Tribunal. Relevant factors which were said to be almost always relevant for consideration were the length of and reasons for the delay and whether the respondents have been prejudiced by the delay by, for example, being unable to investigate the claim when matters were fresh. It was confirmed that the Employment Tribunal was not acting unreasonably when it took account of the fact that the claimant was pursuing an internal grievance process in its assessment of whether the claimant was "culpable" for delay during that time. It was also said that there was no requirement that an Employment Tribunal had to be satisfied that there was a good reason for the delay before it could reach the view that time should be extended on the basis that it was just and equitable so to do.

87. The case of *Apelogun v Lambeth Borough Council and another* 2001 ICR 713 is an earlier Court of Appeal decision which takes the view that pursuit by a claimant of an internal grievance or appeal procedure is not normally viewed as being a sufficient reason to delay presentation of a claim to the Employment Tribunal.

88. In *Keeble* the elements mentioned in the later case of *Abertawe* were highlighted as being relevantly considered by a Tribunal in deciding whether to exercise its discretion. In addition further elements which would generally be weighed by an Employment Tribunal in exercise of its discretion are the promptness with which the claimant has acted once he or she knew or facts giving rise to the cause of action, and the steps taken by a claimant to obtain professional advice once the possibility of taking action was known to that claimant.

89. In terms of Section 124 of the 2010 Act an Employment Tribunal may make a declaration as to rights of the claimant and respondent, may order the respondent to pay compensation to the claimant and may make an appropriate recommendation.

90. The amount which a Tribunal may award is to be set with regard to the cases of *Vento v Chief Constable of West Yorkshire Police (No.2)* 2003 ICR 318 and *Da'Bell v NSPCC* 2010 IRLR 19. The Tribunal should also keep in mind the Presidential Guidance issued on 5 September 2017, the guidance relevant to this case, where the claim was presented on 25 January 2018. That guidance reflects the position in respect of claims presented on or after 11 September 2017 as involving a lower band of compensation of £800-£8400 for less serious cases. Those figures are said to include the 10% uplift detailed in *Simmons v Castle* 2012 EWCA Civ 1039. A Tribunal is to set out reasons why the 10% uplift referred to in *Simmons* does not apply if, in its view, it is not applicable in any particular case.

91. Interest is payable on awards made in respect of injury to feelings. The relevant provisions are contained in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. In an injury to feelings award, the relevant date from which interest is to run is, in normal terms, to be the date on which the act of discrimination complained of occurs. Interest ceases to be applicable on the day when the Employment Tribunal calculates the amount of interest. This is in terms of Regulation 6 (1) (a). Regulation 6 (3) authorises an Employment Tribunal to use a different period for calculation of interest if there would be "serious injustice" if other dates were not used.

92. In assessing compensation payable, an Employment Tribunal is able to reduce any award might otherwise make. It might do this, for example, if it viewed the claimant's actions as having either caused in part or having aggravated the effects of discrimination. This is a power equivalent, in effect, to finding that there has been contributory conduct. The concept that a claimant may have contributed to discriminatory conduct is, however, a difficult one to regard as apposite. It would require a clear and somewhat unusual set of circumstances for it to be properly considered as applicable, it is anticipated.

93. Over the years, the authority of the Tribunal to make a recommendation has altered in its scope. Section 124 of the 2010 Act in the terms applicable to this claim provides at sub- section (3)

"*An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate*."

94. Any recommendation made cannot therefore deal with the broader position in relation to other employees within the employment of a respondent. It must be a recommendation that the respondent takes specified steps to obviate or reduce the adverse effect on the complainant of any matter to which the proceedings relate.

Submissions

95. Both Mr Deans and Ms Gallagher had prepared written submissions. They passed those to the Tribunal and spoke to them. What follows is a brief summary of the submissions. The submissions themselves are attached as appendix 1 (submissions by Mr Deans for the claimant) and appendix 2 (submissions by Ms Gallagher for the respondents).

Submissions for the claimant

96. Mr Deans rehearsed the factual position as he urged the Tribunal to find it. He narrated the events which occurred following the lodging of the grievance

by the claimant in September 2017. He highlighted the duty of the respondents to make reasonable adjustments in terms of the 2010 Act. Those reasonable adjustments were provision of a quiet room and a laptop with a larger screen and with assistive software. Steps taken by the respondents in relation to both of those elements and the time taken by them was then highlighted by Mr Deans.

97. Mr Deans then drew the attention of the Tribunal to the legal provisions regarding the obligation and the duty to make reasonable adjustments and cases which dealt with that topic. It was important, he submitted, that timely steps were taken. He referred to *Duckworth* and to a further case, that of *Conry v Worcestershire Hospital Acute NHS Trust*, an Employment Tribunal case dealt with under reference 130 3171/15.

98. Mr Deans submitted that provision of a quiet room and a laptop would be effective in the preventing the substantial disadvantage to which the claimant was subject by reason of the PCP. The cost of provision of a laptop was not high. Empty rooms were available. Whilst there was a process to be followed as far as the respondents were concerned both in obtaining a laptop and in securing a room for the claimant, the respondents had taken steps far too slowly, Mr Deans said. They could not "*hide behind*" an argument that there was a process to be followed. The laptop was not yet available.

99. There had been a failure by the respondents to make reasonable adjustments within a reasonable timeframe.

100. Mr Deans then turned to the issue of time-bar. Having set out the statutory provisions, he referred to the case of *Matuszowicz v Kingston upon Hull City Council* 2009 EWCA Civ, a case which, he said, dealt with the point from which time ran.

101. It was only in November 2018 when the move to a quiet room was granted that the respondents had done something inconsistent with the failure on their part to do something. They remained in breach of their obligation in relation to provision of a laptop. The lodging of the grievance on 2017 was one potential date on which that duty arose. An alternative date might be viewed

as being the time when the claimant's solicitors wrote to the respondents on 20 December 2017. A further possibility was the date of presentation of the claim, 25 January 2018. Certainly since the claim was lodged the respondents had acted in a way which suggested that they recognised their duty to make reasonable adjustments and intended to comply with it.

102. Mr Deans recognised that the Tribunal might find that the duty to make reasonable adjustments was engaged at some point between 2008/2009 and submission of the grievance. There was no evidence however of the respondents taking a decision not to make reasonable adjustments. They had not acted inconsistently with making those adjustments. The Tribunal therefore required to consider, in the submission of Mr Deans, when the employer would have made the reasonable adjustments if it had been acting reasonably. There was no information however to enable the Tribunal to make that assessment. It did not follow merely because of the passage of time that the time within which the respondents might be expected to have made the adjustment had passed. Fixing this date involved the setting of what was properly viewed as an artificial date, the date by which it would reasonably be expected that the employer would have fulfilled the duty to make reasonable adjustments.

103. Mr Deans referred at this point to *Abertawe*. That case highlighted that an employee might reasonably believe his employer was taking steps to address the disadvantage when in fact nothing was happening. The commencement of time running therefore had to be looked at in light of what the claimant reasonably knew.

104. Mr Deans said that the respondents had taken the time-bar point very late in the day. He accepted, when the Tribunal raised it with him, that time-bar was something which the Tribunal required to raise, even if neither party did, if it was considered potentially of relevance.

105. It was the position of the claimant that the claim had been brought in time in that the period in which the respondents might reasonably have been expected to make the relevant adjustments had not expired.

106. If the Tribunal was of the view that the claim was time-barred, time should be extended on the basis that it was just and equitable that this occurred. The respondents appeared to adopt the position of saying that they had now made reasonable adjustments whilst also saying that they had failed to comply with that duty at an earlier time. They argued that the claimant should not be permitted to proceed with her claim because she had not done so within 3 months of the earlier failure.

107. Mr Deans reminded the Tribunal that presenting a Tribunal claim was a last resort for the claimant on her evidence. He highlighted the difficulties the claimant had spoken about in evidence of working in a noisy office with the software in question, requiring to return to her office to utilise that. This had led to extensive extra hours.

108. Looking at prejudice, the prejudice to the claimant if she was not permitted to proceed was substantial. On the other hand the prejudice to the respondents if the claim was permitted to proceed was not particularly high. This was especially so given that the respondents had now accepted that they were under a duty to make the reasonable adjustment sought. The only issue was the time which the respondents had taken. The balance of prejudice favoured the claimant.

109. The claimant had not taken legal advice until the later part of December 2017. That had seen the letter going to the respondents with the Employment Tribunal claim following shortly thereafter.

110. The Tribunal had a broad and unfettered discretion to decide what it thought was just and equitable. Looking at all the circumstances the claim should be permitted to proceed if it was regarded as being presented late.

111. Mr Deans said that the claimant sought compensation. She also sought a declaration that there had been unlawful discrimination. In addition she sought a recommendation "*that the respondent implements the reasonable adjustment of the provision of a fully functioning laptop with assistive software.*" She also sought a recommendation that the respondent instituted specific disability discrimination training for its HR managers, in particular in

relation to the duty to make reasonable adjustments for disabled employees. An award in respect of injury to feelings was sought.

112. The level at which such an award might be made was appropriately set in the lower to middle of the mid *Vento* band, said Mr Deans.

Submissions for the respondents

113. Ms Gallagher rehearsed the facts which she urged the Tribunal to find. She then made submissions as to the evidence which the Tribunal had heard. She said that the respondents accepted that the claimant had given very clear and credible evidence around her position on what adjustments she had sought and when those ought to have been made. At times however, said Ms Gallagher, the claimant's evidence was contradictory and did not square with the documentary evidence in the bundle. The respondents had said that a suitable room existed for the claimant in September 2018. The claimant had accepted this initially however changed her position through further questioning. Mr Hogarth had said that the quiet room was available from September 2018. That should be accepted.

114. The claimant had said that she was available to discuss matters although absent through ill health. This was contradicted however by her evidence that she had not been able to be involved in setting up of her laptop or to engage in that process as she was absent through illness.

115. The claim was time-barred, said Ms Gallagher. The claimant's position in evidence was that a quiet room should have been provided for her at Ailsa Hospital in 2015. The laptop should have been provided for her in 2008/2009. The respondents had not done this. The claims were therefore substantially time-barred when they were presented.

116. The Tribunal should refuse any extension of time for presentation of the claim. The case of *Bexley* and that of *Keeble* were referred to by Ms Gallagher. *Apelogun* was authority for the view that attempting to resolve the matter informally did not justify delay in the part of the claimant. There might be difficulties, Ms Gallagher submitted, for both parties in terms of recollection of

events dating back to 2015 or 2008/2009. The respondents had not failed to cooperate with anything asked of them by the claimant. The claimant knew the facts as they unfolded. It had to be borne in mind that she was the equalities officer and had access to union advice and indeed advice from ACAS. It was not just and equitable to extend time.

117. Ms Gallagher confirmed that the respondents accepted that the PCP as detailed above existed. It accepted that the claimant was likely to be placed at a substantial disadvantage by this PCP.

118. The respondents accepted that providing a quiet room for use by the claimant was a reasonable adjustment. Although provision of a laptop had not initially been considered a reasonable adjustment by the respondents due to their concern as to whether it would lessen the disadvantage, it was now accepted by the respondents, Ms Gallagher confirmed, that providing the claimant with a laptop with functioning assistive software and a larger screen was a reasonable adjustment.

119. Both of these adjustments had been made by the respondents. They had in the view of the respondents been carried out within a reasonable time. It was recognised that the claimant did not hold that view.

120. Ms Gallagher then considered the history to the adjustments and steps taken by the respondents.

121. In respect of the quiet room the claimant said that she should have been allocated a quiet room when she moved to work in Ailsa Hospital in 2015. The respondents had not made that adjustment. They were unaware however that this was an adjustment sought by the claimant. They only became aware in January 2018, when the claim form was served, that the claimant considered that provision of a quiet room in which to work was a reasonable adjustment. The respondents had provided such a quiet room. It took a little time. Regard had to be had however to absence of the claimant from work through ill health. Reference was made to the case of *NCH Scotland v McHugh* UKEAT S/0010/06. That case, Ms Gallagher said, detailed that it was reasonable for an employer to wait until an employee was able to give an expected date of

return to work before pursuing the possibility of a phased return in discussion with her. The accommodation committee required to deal with the claimant's request for different accommodation and other accommodation moves too. The quiet room had been provided by September 2018. Delay beyond that point was attributable to the claimant's view that the room did not have an external window and to the absence on sick leave of the claimant between 8 October 2018 and 23 December 2018.

122. Turning to the laptop, it was unclear why there had been a refusal to provide that in 2008/2009. The respondents had however provided the Read and Write Gold software together with Dragon voice recognition software.

123. In January 2018 it had become apparent to the respondents that the claimant wished a laptop. Advice from the respondents' IT department was that this was not a good option given the assistive software involved and difficulties with functionality on a standard laptop screen. The respondents were not of the view that there was any prospect that the adjustment would succeed. They came up with a different possibility however and one which they implemented. That was provision of a hot desk at Biggart hospital. That was a reasonable adjustment.

124. The respondents had ultimately proceeded with purchase and organisation of a laptop for the claimant given her insistence. This was in face of advice from their IT department and without conclusive advice from Dr Williams, the medical practitioner contacted by Mr Smith.

125. In assessing the passage of time, regard had to be had to the fact that this was a non-stock item with the delivery lead-in period. The laptop was now available, having been available since 10 May.

126. In summary, the respondents had provided the claimant with a suitable laptop without unreasonable delay, Ms Gallagher submitted.

127. Any award made by the Tribunal required to be compensatory rather than punitive. The evidence of the claimant as to how the lack of adjustments made her feel was not related to delay from the adjustments being made, Ms

Gallagher said. It related to broader issues which the claimant experienced as a result of her disability. An example of that was not being able to undertake certain courses or to mentor students.

128. Adjustments had been made.

129. The award should lie towards the low to middle end of the lower *Vento* band, Ms Gallagher submitted. That would mean it fell within the range of £800-£8400.

Discussion and decision

130. There was substantial agreement in this case in many areas. It was agreed that the claimant was disabled. The PCP was agreed. It was agreed that the PCP placed the claimant at a substantial disadvantage such that the respondents had a duty to make reasonable adjustments. It was also a matter of concession by the respondents that the two adjustments which the claimant sought were reasonable adjustments. The respondents had taken steps to make those reasonable adjustments, the reasonable adjustments being provision of a quiet room and provision of a laptop with assistive software installed and a screen large enough for functionality to exist.

131. A fundamental point was taken by the respondents, namely that of time-bar. Time-bar is of course something which requires to be raised by the Employment Tribunal even if parties do not raise it. It goes to the jurisdiction of the Tribunal. If a claim is time-barred, no matter how meritorious, it cannot proceed unless time for presentation of the claim is extended under the relevant provisions of, in this case, the 2010 Act.

Time-bar

132. The issue of time-bar became of potential relevance in the case when the claimant sent to the respondents for incorporation into the bundle the documents which appeared at pages 56 to 65 of the bundle. Those documents contained within them points for consideration by the respondents. Dr Williams, clinical psychologist, had prepared the report. He suggested a quiet working environment for the claimant. He also said it would

"*arguably be of benefit*" if FACE could be "*transportable*". That report with those comments was dated 9 March 2008.

133. This was an area explored largely in cross examination of the claimant. Her evidence was clear. She was of the opinion that a reasonable adjustment was provision of a quiet room. She was also of the opinion that a reasonable adjustment soon after preparation of this report would have been provision to her of a laptop with assistive software installed upon it.

134. The claimant give evidence that a quiet room had indeed been provided for her following the report. That had been while she was at Auchinleck. The quiet room remained the area where she worked until the time of her move to Ailsa Hospital during 2015. Her evidence was that when she moved to Ailsa Hospital she had been located in an open plan area. She had asked about a change of location into a quiet room. She was told that there was nowhere for her to go and nothing that could be done to assist. She had received appropriate training for software. Nevertheless difficulties working in the open plan area had occurred. Concentration was an issue for the claimant. Her own mind picked up any dialogue between others near to her and she would end up sometimes dictating comments that she overheard, her condition meaning that she was unable to filter those out and concentrate on dictating what she wanted to appear in initially the FACE system and subsequently the Care Partner system. She also spoke in evidence of the assistive software picking up dialogue from others around her and itself transcribing that into the note recording systems used by the respondents.

135. It is true that the claimant did not take this matter further at the time, despite the fact that she was faced with what she regarded as a refusal to make a reasonable adjustment.

136. The respondents accept that provision of a quiet room was a reasonable adjustment. There was no evidence from them as to why, at this point in 2015, it was not possible for them to make the reasonable adjustment. The closest this got in terms of any evidence heard by the Tribunal was the claimant's

own evidence that she had been told that there was nowhere for her to go and that she thought the respondents had done their best.

137. The claimant carried on working in the open plan area when she was in the office. Her evidence was that the working environment was such that she required to work late most if not every night. She would often work until 7:30 PM/8 PM. Migraines affected her. She would be exhausted by the time she returned home. Weekends were spent recovering either from ongoing migraines or simply from the extensive work hours she had to undertake in order to meet the PCP.

138. It is unclear what prompted the claimant to lodge a grievance when she did. The grievance was intimated on 25 September 2017. It did not specifically mention provision of a quiet room although it did refer to "*reasonable adjustments identified in original recommendations*". It only became clear that the claimant was seeking a quiet room once more as a reasonable adjustment when her solicitors wrote to the respondents on 20 December 2017. From the evidence of Mr Hogarth that letter does not appear to have been received by the respondents. It was certainly sent however to their head office address. Submission of the claim form on 25 January 2018 was, on the respondents' evidence, the first time the became aware that the claimant continued to seek a quiet room at Ailsa Hospital.

139. In relation to provision of a laptop, the claimant's evidence, again clear, was that the reasonable adjustment of provision of a laptop was something which should have happened in 2008 or early 2009. She give evidence of a discussion having taken place with Mr Fleming which had considered the running of Read and Write Gold. In addition, there had been discussion involving Mr Smith as the occupational therapist. That had taken place in October 2009, evidenced by the document which appeared at pages 68 and 69 of the bundle.

140. No laptop had however been provided. That reasonable adjustment had therefore not been made. The claimant's evidence was that she had been told at this point that she was not getting a laptop. No Employment Tribunal claim

however resulted. There was no evidence from the claimant of this having been raised by her thereafter, until the time when her grievance was lodged. The grievance did not specifically mention the absence of provision of a laptop as being an issue. Mr Hogarth initially thought that the grievance related to assistive technology. The letter from her solicitors of 20 December made it clear that provision of a laptop was a reasonable adjustment sought by the claimant, in addition to provision of a quiet room. That letter was not received as mentioned above, on the evidence of Mr Hogarth. The claim form specified the issue over provision of a laptop.

141. The position was therefore that both provision of a quiet room and provision of a laptop with appropriate assistive software and functionality were reasonable adjustments which were made by the respondents however not until sometime after the claim was presented. In the case of the quiet room, for the reasons identified below, this date was September 2018. In relation to the laptop with the relevant assistive software and functionality, the date regarded as appropriate by the Tribunal as being the date on which the duty to make this reasonable adjustment was made was 10 May 2019.

142. This was not however a case, in the view of the Tribunal on the evidence before it, where the respondents had "*sat silent*" and where the issue might be as to when it might be taken that they had refused to make these reasonable adjustments. The position was clearer than that. The claimant's own evidence was that after asking about the quiet room when she moved to Ailsa Hospital during 2015, she had been told that this could not be done. She had been told in relation to the laptop in 2009 that this would not be provided. The position was therefore clear at those times. There had been a refusal by the respondents to make what is now accepted by them as a reasonable adjustment on both those matters.

143. On the claimant's evidence, the respondents intimated to her in 2009 their decision not to provide a laptop and therefore not to make the reasonable adjustment. Time for presentation of a claim commenced at that point. The claim when presented in January 2018 was therefore substantially out of time. In the case of the quiet room, the respondents had provided that for the

claimant in 2008. On her move however to Ailsa Hospital in 2015, they had not provided it. On the claimant raising that with them, they had intimated that no quiet room would be provided. Time for presentation of the claim would therefore start to run from that point. When the claim was presented in January 2018 it was also therefore substantially out of time in relation to the failure to make the reasonable adjustment of provision of the quiet room.

144. The claim was, therefore, presented out of time.

Possible extension of time

145. As detailed above, it is possible for a claim presented out of time to proceed. For that to occur the Employment Tribunal requires to be persuaded that it is just and equitable for that to occur. This is a wide discretion on the part of the Tribunal. Guidance has been given in case law over the years as to elements which are properly considered by a Tribunal as it exercises its discretion.

146. In this case the Tribunal concluded that it was appropriate to extend time for presentation of the claim, that being just and equitable, in its view.

147. The Tribunal recognised that some years had passed since claims might have been pursued both in relation to the laptop provision and provision of the quiet room. There is clearly a longer time period in relation to the claim being presented for failure to make the reasonable adjustment of provision of the laptop than is the case in relation to the quiet room.

148. Passage of time is of relevance but is not enough of itself to mean that it is not just and equitable to extend time.

149. One principle which must be considered by the Tribunal is that of finality of litigation and clarity upon it. Time limits for bringing a claim exist for a reason. Broadly put, those against whom a claim might potentially be made have a legitimate expectation that the claim should be brought within the time period provided. That enables them to investigate claims whilst evidence is fresh. It also means that they are not "*waiting and wondering*" for possibly lengthy periods as to whether a claim will be brought.

150. The point just mentioned overlaps with consideration of prejudice if on the one hand a claim presented late is permitted to proceed and if on the other hand it is not permitted to proceed. In that scenario, if a claim is permitted to proceed, a respondent faces a claim which it would not otherwise have to meet. If a claim is not permitted to proceed, a claimant is denied the right to seek a remedy from the Employment Tribunal. Prejudice might exist if a claim is permitted to proceed. Documents may have been destroyed and/or memories may have faded. Investigation might therefore be difficult. Personnel may have moved on. It is likely, in general terms, that a claimant has in their own mind a clearer recollection of what they believe happened than would a corporate respondent or a manager at the time within an organisation. A manager may not have realised the significance of an act or remark, for example, when it was one decision taken amongst many others. Asked about this many years later, a manager's recollection might be anticipated as being slightly vague or non-existent. Given the impact on a claimant however a claimant might be anticipated as having a more embedded memory of the matter.

151. In this case, the Tribunal viewed the balance of prejudice as favouring the claimant and enabling the claim to proceed. The respondents accepted that the adjustments sought were reasonable adjustments. There was no issue over whether there was a PCP. There was no issue over disability on the part of the claimant. It was accepted that the PCP resulted in substantial disadvantage to the claimant. This was not a case where remarks were said to have been made which were now sought to be founded upon in the claim, for instance. If that were so, the passing of time might result in more prejudice to a respondent in that memories might have faded or the person involved might have moved on from their employment. Those scenarios would hinder the ability to defend a claim. Here the respondents conceded that what were accepted as being reasonable adjustments had not been met until Autumn of 2018 in the case of the quiet room and May 2019 the case of the laptop. They did not challenge the claimant's evidence that a request for those adjustments in 2008/2019 in the case of the laptop and 2015 in the case of the quiet room

had led to the decision on their part not to make those adjustments for the claimant.

152. In assessing prejudice, the Tribunal was mindful that it had heard the evidence relating to 2017, 2018 and 2019 without there being any issue or concern over recollection, unavailability of personnel or disappearance of any relevant documentation.

153. In reaching its view the Tribunal also considered the reasons why the claimant had not advanced her claim at an earlier point. It accepted that she was not a confrontational person and that she looked to resolve matters through discussion rather than to "*take on*" her employers and others in general. That was consistent with her behaviour when Mr Hogarth became involved in trying to address her grievance. Mr Hogarth adopted a constructive approach and the claimant responded to that. It was agreed that the grievance would be "*parked*" as a resolution was worked towards. The Tribunal accepted that the claimant had lived with the situation of not having a quiet room and of not having a laptop with suitable assistive software and functionality. She had worked extensive extra hours on a regular basis. That evidence was not challenged or contradicted. Her health had been affected both by a lack of time for any social life on her part and also by migraines which affected her at weekends and at other times. All of that had eventually reached a point where she decided to raise these matters once more by way initially of a grievance, then a solicitor's letter and subsequently by presentation of her Tribunal claim.

154. It is true that the claimant was equalities officer with Unison. She did not however have involvement with Employment Tribunals from her evidence. Her role was to give very general advice and assistance to employees who had problems. Anything of a complicated nature which involved potential Tribunal cases was referred to the branch secretary. The Tribunal accepted that she did not know of there being time limits for presentation of a claim to an Employment Tribunal. She had not raised her own situation with the branch secretary. The Tribunal accepted her evidence that it was, for her, one thing to discuss problems which employees brought to her but another thing, given her character in particular, for her to raise issues in relation to her own

position. The Tribunal also accepted the claimant's evidence that she did not receive any information as to there being time limits for presentation of a claim from ACAS when she spoke to them in September 2017. She consulted with her solicitors in December 2017 and the claim was raised shortly thereafter.

155. Although therefore there were opportunities for the claimant to obtain advice, the Tribunal did not regard any advice she obtained as having highlighted or even mentioned any question of there being time limits for presentation of a claim to the Tribunal. It also did not see that the failure by the claimant to investigate that possibility was such that it weighed in any particular way against it being just and equitable for the claim to be permitted to proceed although presented late. The claimant's evidence was that she did not check out information online as to bringing a claim to an Employment Tribunal. Having stayed late at work and having worked with a computer screen which presented her with difficulties in itself, she was not inclined, she said, to use a computer screen in the evenings. In addition of course she was tired and had headaches on a relatively regular basis. The Tribunal accepted this as being a genuine and reasonable position. These difficulties restricted her ability to investigate online and to obtain any information as to presentation of an Employment Tribunal claim and the time limit which exists for that to occur.

156. From the time when the claimant decided that she should raise the issue of reasonable adjustments once more, time she presented a grievance, it did not take long for her to proceed with presentation of an Employment Tribunal claim.

157. There was no question of the respondents being obstructive in a manner which might be said to be such as weighed against them in the assessment of whether the claim should be permitted to proceed or not.

158. In this situation the onus is on a claimant to satisfy the Tribunal that it is just and equitable for the claim, presented late, to be permitted to proceed. The cases of *Blexley* and *Abertawe* are helpful and are ones to which the Tribunal had regard. It also considered the cases referred to by both parties in this area, and indeed other areas.

159. It particularly weighed with the Tribunal that the respondents accepted that the adjustments sought were reasonable. This was so notwithstanding their initial refusal to implement them. It seemed inequitable to the Tribunal that a respondent who accepted that there was a PCP placing a disabled employee at a substantial disadvantage, who also accepted that the adjustments asked for were reasonable and indeed subsequently implemented them, could nevertheless avoid a potential claim by saying that the claimant should have raised that claim at some point before she did. This was not a case therefore of the respondents continuing to deny that the adjustments were reasonable and having made their position plain at an earlier time. The respondents in this case were, in effect, recognising that they had not made reasonable adjustments for some time although they were under a duty so to do. They argued that they could avoid any potential consequences of the failure to make reasonable adjustments as the claimant had not presented her claim within the relevant time limit. That was an inequitable position in the view of the Tribunal.

160. The claim is therefore permitted to proceed as it is just and equitable to extend time to enable that to occur.

Compensation

161. The Tribunal was satisfied on the evidence that a combination of not having the laptop and not having a quiet room had resulted in injury to feelings to the claimant. Provision of the quiet room at Auchinleck had meant that the claimant was able to complete her work by close of normal working hours. It was when she moved to Ailsa Hospital that a combination of the absence of laptop and there being no quiet room resulted in substantial extra hours being spent by the claimant working. It meant that she suffered migraines and had little or no opportunity for social life due to a combination of migraines and tiredness.

162. There was no evidence of the claimant requiring medical assistance from her GP or otherwise due to this. Nevertheless, her evidence as to migraines,

tiredness and indeed the extra hours worked was credible and reliable in the view of the Tribunal. It was not challenged.

163. The claimant was also unable to pursue other matters which she might have had the reasonable adjustments been in place, namely participation in a mentoring scheme and online completion of courses.

164. The Tribunal regarded the date on which the obligation to make the reasonable adjustments was met as being September 2018 in relation to the room and May of 2019 in relation to provision of the laptop. It seemed that the room available in September 2018 did not have natural light. That was not of course the reasonable adjustment sought by the claimant both when raising this matter with the respondents and also in terms of Tribunal claim. A quiet room was what she sought as a reasonable adjustment. That was available from September 2018.

165. The Tribunal recognised that from making the request for the two reasonable adjustments in specific terms by way of a solicitor's letter and by way of the claim form (the latter being the document the respondents first received) a period of 9 months had elapsed in relation to provision of the quiet room until that was granted and 16 months in relation to provision of the laptop. The obligation to make the reasonable adjustment to provide the laptop had however existed since 2008/2009. The obligation to make the reasonable adjustment to provide the quiet room had existed since mid-2015.

166. It will always take a little time for an organisation to respond to a request for a reasonable adjustment. It clearly took some time for the respondents to recognise that the duty existed in relation to these two matters. The laptop took 5 months to obtain, this period running from November 2018 when it was confirmed that it would be organised until May 2019 when it was confirmed that it was available. The quiet room took from January or early February 2018 to September 2018 to organise. The duty to make those reasonable adjustments occurred well before November 2018 and February 2018, however. The Tribunal was of the view that it was appropriate to view as reasonable a period of two months to obtain the non-stock item of a laptop

with the screen of the size necessary for the claimant and with the assistive software which required to be installed. In the view of the Tribunal it was reasonable for the respondents to find a quiet area for the claimant within two months. This was a health issue. The processes and procedures of the respondents ought to be capable of adaption to that situation. The possibility of temporary placement of the claimant in a quiet room may have existed. It may even have been feasible to create an area with sound baffling, for example. There was no evidence as to whether this was explored or not. The Tribunal appreciated that the respondents have procedures and processes. The Tribunal has kept that in mind in assessing what it views as a reasonable time for implementation of these reasonable adjustments resulting in the duty to make reasonable adjustments being met.

167. Given the events and history in relation to the matters accepted as being reasonable adjustments, the Tribunal considered the date which it regarded as the date by which reasonable adjustments ought to have taken place, keeping in mind the need to carry out adjustments in a timely manner if the duty is to be held as having been met. The Tribunal concluded that for the adjustments to have been carried out in a timely manner, it would have been necessary for them to have been done within 2 months of them being requested. The relevant time of request was the time the claim was raised. It was unclear until then as to what exactly the claimant was seeking as reasonable adjustments given the absence of contact on these points since 2008/2009 (the laptop) and 2015 (the quiet room).

168. Assessment of the amount of any award to a claimant is again something within the discretion of the Tribunal. It must base its view on consideration of other cases, although each case is unique. It must also have regard to its own experience.

169. Given the impact upon the claimant as she described it of the failure on the part of the respondents to make reasonable adjustments, the Tribunal concluded that the award in respect of injury to feelings appropriately lay towards the upper end of the lower band of the *Vento* scale as that has been adjusted by *Da'Bell*, Presidential Guidance and *Simmons v Castle*.

170. The Tribunal awards £7000 by way of compensation to the claimant for injury to feelings. The Tribunal did consider whether the award should be split between the two elements which were each accepted as being reasonable adjustments. It concluded, however, that it was hard to distinguish between the two reasonable adjustments accepted as being appropriately carried out to fulfil the duty upon the employer. Each required the other, it seemed to the Tribunal, for effectiveness in removing the substantial disadvantage caused by the PCP. The figure awarded is therefore in respect of the failure to implement both reasonable adjustments.

Recommendation

171. Although the claimant sought a recommendation in broad terms as to training for HR managers, that is not in the view of the Tribunal an appropriate recommendation in that it would not be one made for the purpose of obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate. On the other hand, the recommendation sought that the respondents implement the reasonable adjustment of provision of a fully functioning the laptop with assistive software would address the matter. It is of course the position at the respondents say that they are in course of meeting that obligation and are ready to provide the laptop with certain input from the claimant. The recommendation is however made with the time period attached to it under on the basis that both parties will cooperate one of the other to achieve the desired outcome.

Interest

172. The Regulations which provide power to Employment Tribunals to award interest on awards in discrimination cases are those in 1996 quoted above. The relevant starting date for calculation of interest in a case where compensation is to be ordered for injury to feelings is the date on which the act of discrimination complained of occurred. The end date is the day on which the Employment Tribunal calculates the award of interest. Those are the general provisions.

173. Regulation 6 (3) enables an Employment Tribunal to calculate interest for periods other than those just mentioned. This is possible where there would be "serious injustice" if different dates were not used.

174. The Tribunal recognised that it was somewhat unusual to depart from the normal provisions in relation to interest.

175. As far as start dates for interest were concerned, the Tribunal was of the view that the act of discrimination in relation to the failure to make reasonable adjustments occurred, in respect of the laptop, in June 2009. This is on the basis that discussion had taken place between the claimant and the respondents during March 2008 and the claimant had in following up that discussion been clear that a laptop was appropriate. It recognised commercial reality in the view of the Tribunal that there was inevitably a period of time involved for the respondents to consider the position and then for the order to be placed and come to hand with appropriate installation of relevant assistive software taking place. June 2009 allowed that process to take place as the Tribunal saw it.

176. Whilst the respondents had taken steps to put in place the assistive software on the hot desk PC at Biggart Hospital, that was of only marginal assistance to the claimant. It was not the respondents' argument at Tribunal that this was a step sufficient to meet the duty upon them to make reasonable adjustments. They expressly accepted that the reasonable adjustment was provision of a laptop with appropriate functioning assistive software.

177. In respect of provision of a quiet room, the act of discrimination occurred in October 2015 as the Tribunal could best estimate it. That was based on recognition of the fact that there had been a discussion on this point when the claimant took up work at Ailsa Hospital. She had asked for the reasonable adjustment of a quiet room, something she had enjoyed whilst at Auchinleck. Again processes and procedures were involved. The claimant's health however was at risk if the quiet room was not put in place. It seemed to the Tribunal that it was appropriate to allow a short period of time for consultation and consideration of other accommodation demands or possibilities. By

October 2015 however there had been sufficient time for the processes and procedures to be undertaken. The Tribunal was conscious that the respondents had referred to the accommodation committee being alerted in January 2018 to health issues with the claimant and being said to have prioritised the request. It was conscious that the respondents had also said in correspondence from Mr Hogarth that they would seek a quiet room as a matter of urgency, with urgency again being referred to in May 2018.

178. It did not seem appropriate however to the Tribunal that interest on the sum awarded run from June 2009 in the case of the reasonable adjustment comprising provision of the laptop or from October 2015 in relation to the reasonable adjustment of provision of a quiet room. Equally it did not seem appropriate that the "stop date" for interest running was date of calculation of interest given that the respondents had taken steps which meant that they met their obligations to make these reasonable adjustments. In the view of the Tribunal either of those options would involve serious injustice. The Tribunal therefore determined it was appropriate on that basis to depart from the provisions otherwise applicable.

179. In relation to start date, the reasonable adjustment ought to have been made in 2009. The claimant had not however pursued the issue in any fashion until the time when she lodged a grievance and subsequently wrote to via her solicitors and then presented the Tribunal claim. Similarly the Tribunal was of the view that there would be serious injustice if the award for failure to make reasonable adjustments through the there being no provision of a quiet room carried interest from October 2015. The claimant did not raise this matter after the initial discussion with the respondents upon her arrival at Ailsa Hospital from Auchinleck during 2015. She seemed in evidence to understand that there was no room readily available.

180. With suitable urgency applied, the respondents ought to have been able to address the provision of a quiet room and of a laptop with suitable screen size and assistive software by mid-March 2019. There was an impact on the claimant's health and they had agreed to address the room issue urgently.

181. Thus, recognising the requirement for steps to be taken swiftly given the impact on the claimant's health, the Tribunal considered that interest should run on the award from 14 March 2018 to the dates when the reasonable adjustments were made. Carrying out both adjustments was accepted as being required. The second adjustment, that of provision of a laptop with suitable screen and assistive software, was achieved in May 2019, it appeared. Both adjustments are necessary to assist the claimant given her medical conditions. They work together to mean the substantial disadvantage of the PCP is avoided. Interest is awarded for 14 months. It amounts to £653.33.

Conclusion

182. The Tribunal was very grateful to both Mr Deans and Ms Gallagher for their preparation and their thorough and full submissions.

Employment Judge: Robert Gall
Date of Judgment: 01 July 2019
Entered in register: 09 July 2019
and copied to parties