THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Muigua	**v**	**Apple Retail Limited**

Heard at: London Central

On: 6-10 and 13-15 December 2021
In chambers 8 February 2022

Before: **Employment Judge Glennie**
Ms T Breslin
Mr S Godecharle

Representation:
Claimant: Ms I Egan (Counsel)
Respondent: Mr M Sethi QC

JUDGMENT

1. **The unanimous judgment of the Tribunal is that the complaints are dismissed.**

REASONS

1. By her claim to the Tribunal the Claimant, Ms Muigua, made the following complaints:

   1.1 Failure to make reasonable adjustments contrary to section 21 of the Equality Act 2010 ("EqA").

   1.2 Discrimination because of something arising in consequence of disability contrary to section 15 of EqA.

   1.3 Harassment related to disability contrary to section 26 EqA.

2. The Respondent, Apple Retail UK Limited, resists those complaints.

3. The Tribunal is unanimous in the reasons that follow.

The issues

4. There is no dispute that the Claimant is disabled by virtue of the condition of nystagmus. The relevant effects of this condition are summarised later in these reasons.

5. There was an agreed list of issues in the following form.

6. Jurisdictional issues

   6.1 Does the Tribunal have jurisdiction to hear the Claimant' claims that relate to allegations that date on or before 11 March 2020 or are these out of time?

   6.2 Has there been a continuous act of discrimination against the Claimant?

   6.3 Has the Claimant delayed unreasonably in bringing claims which date from on or before 11 March 2020?

   6.4 In all the circumstances, would it be just and equitable to extend the time limit?

7. Failure to make reasonable adjustments

   7.1 Did the following occur, and if so was the Claimant thereby put at a substantial disadvantage:

   7.2 Being required to carry out training on the Learning Lite website and the Learning App.

   7.3 Being required to use on her iPad the applications specified at paragraphs 6(a) to (d) of her further and better particulars ("FBPs").

   7.4 Being required to use on a Mac computer the applications specified at paragraphs 8(a) to (k) of her FBPs.

   7.5 Not being provided with training material in advance of training sessions or meetings.

   7.6 Being unable to participate in meetings (on Webex or in-store) and/or missing out on relevant training because she did not have accessible materials.

   7.7 Not being provided with adjustments recommended in the 18 August 2020 Occupational Health report, namely Sidecar, DragonAnywhere, Zoomit and a Display Screen Equipment risk assessment.

8. Did the Respondent fail to make reasonable adjustments for the Claimant, in particular were the following adjustments reasonable:

   8.1 Providing the Claimant with training materials in an accessible manner, as set out in paragraphs 3 to 5 of her FBPs, in particular, in relation to the Learning Lite website, displaying materials in a particular font and against a particular background by enabling Safari Reader.

   8.2 Providing the Claimant with an iPad with specialised software as set out in paragraphs 6(a) to (d) of her FBPs.

   8.3 Providing the Claimant with a computer system with specialised software as set out in paragraphs 8(a) to (k) of her FBPs.

9. Did the Respondent provide the adjustments or other similar adjustments to those detailed above.

10. Where the Respondent did not provide the requested adjustments, did it make alternative adjustments.

    Discrimination because of something arising in consequence of disability

11. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability. In particular:

    11.1 The Claimant asserts that the "something" is the requirement to have specialised software and relevant materials in advance.

    11.2 Did the Respondent fail to provide the adjustments sought by the Claimant as set out above.

    11.3 If so, was that failure to provide adjustments unfavourable treatment.

    11.4 Did the Respondent remove tasks from the Claimant, thereby changing her role, rather than implementing her proposed adjustments.

    11.5 If so, was this change to her role unfavourable treatment.

    11.6 If there was unfavourable treatment, was this because of the "something" arising from the Claimant's disability.

    11.7 If there was unfavourable treatment by the Respondent, was that treatment a proportionate means of achieving a legitimate aim.

12. Harassment Did the Claimant suffer from harassment related to her disability. In particular:

12.1 The Claimant complains of comments allegedly made on 17 February 2020, 3 August 2020 and 12 January 2021. In respect of each:

12.2 Did the Respondent engage in that conduct.

12.3 Was the conduct unwanted.

12.4 If so, was this related to the Claimant's nystagmus.

12.5 If so, did the Respondent's conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

13. Remedies The Claimant seeks compensation for injury to feelings.

14. The Tribunal has recorded the list of issues as agreed by the parties. We noted, however, that under the jurisdictional issue relating to time limits, the non-statutory element of whether there had been unreasonable delay had been introduced; and that under issue 8, the statutory test of whether the adjustments were such as it was reasonable for the Respondent to have to make had been misquoted as the question whether the proposed adjustments were reasonable. The cross-references to the contents of the further particulars did not help with the clarity of the list

Procedural matters

15. The Tribunal records the following procedural matters. First, by way of reasonable adjustments, the Claimant gave evidence only during the mornings of the relevant days of the hearing, and was assisted throughout by her partner, who read relevant parts of the documents to her.

16. Second, the hearing was listed to take place in person. Tribunal member Ms Breslin was initially unaware of this and attended by video on day one (6 December 2021). This was of no practical consequence as the Tribunal decided to use that day as a reading day. All concerned therefore attended in person on 7 December. Mr Sethi was then exhibiting flu or cold-like symptoms. The Tribunal expressed some concern about continuing in person in the circumstances and, with the agreement of both parties, the hearing continued by video.

17. On 8 December, after the Claimant's evidence had commenced, an issue arose concerning the list of issues itself. Mr Sethi submitted that, to the extent that the Claimant was arguing that specialised software should have been provided by way of a reasonable adjustment, it was incumbent on her to name the software concerned. Mr Sethi continued that the only software named in the Claimant's pleadings was Safari Reader, and so this should be the only software under consideration.

18. Ms Egan submitted that the Claimant had identified in paragraphs 6(a) to (d) of her further and better particulars at pages 29 to 31 of the bundle what specialised software should achieve, and that she should not be required to identify specific software that could achieve these things.

19. The Tribunal concluded that, on a fair reading of the list of issues and the further particulars of the claim, the Claimant had identified a need for specialised software that would achieve the following:

    19.1 Greater contrast between the text and background colours, the Respondent's standard colour scheme being grey font on a white background.

    19.2 Font size of 18-24.

    19.3 Arial or Arial bold font type (the advantage of this being that it is a plain "sans serif" style).

20. The Tribunal ruled that these were the adjustments identified in the claim and confirmed that the Claimant was not required to identify specific software that would achieve these things.

Evidence and findings of fact

21. The Tribunal heard evidence from the following witnesses:

    21.1 The Claimant, Ms Muigua.

    21.2 Mr Antony Kennedy, a software engineer who also runs the Respondent's Accessibility Team.

    21.3 Ms Jessica Wyatt, at the relevant time a Genius Bar Manager.

    21.4 Mr Gavin Locke, one of two Store Leaders at the Respondent's Covent Garden store.

    21.5 Mr Tim Rumble, an Employee Relations Business Partner.

    21.6 Ms Lois Perkins, an Employee Relations Business Partner.

    21.7 Ms Tiffany Smith-Robinson, a Genius Bar Manager.

    21.8 Ms Deborah Otton, an Employee Relations Business Partner

22. There was an agreed bundle of documents and page numbers that follow in these reasons refer to that bundle unless otherwise indicated.

23. The Respondent is the United Kingdom organ of the worldwide Apple brand. The Respondent uses its own terminology for employees who provide after-sales technical support. The department providing this is

known as the Genius Bar. At the relevant time there was a senior manager of the Genius Bar at Covent Garden and five managers. There were around 160 team members, including five Lead Geniuses (assistant managers with a technical role) plus Geniuses (who would carry out repairs); Technical Experts and Technical Specialists who would carry out some repairs, training and support for customers; and Genius Admins who would coordinate the repairs process and are said to be like project managers.

24. The role of a Genius Admin included receiving the device in question, arranging the repairs to it, whether on the site or at a repair warehouse, keeping the customer updated, and informing them when the device was ready. A Genius Admin also liaises with the operations and logistics teams regarding the repairs, orders repair parts and arranges the recycling or return of devices or parts that no longer work.

25. The Claimant began work for the Respondent in Manchester in September 2015. In September 2019 she relocated from Manchester to Covent Garden following the completion of a grievance process in which she complained of the need for adjustments and of hostility experienced from colleagues and customers. The Claimant provided a substantial amount of background evidence in her witness statement about her experiences in Manchester. The present hearing, however, was concerned with events at Covent Garden.

26. The Claimant had been provided with an iPad at Manchester with specialised software to assist in relation to her disability. When the Claimant transferred to Covent Garden, the iPad was returned to storage instead of being sent on to that store with her. In paragraph 32 of her witness statement, the Claimant described this as an error. In cross-examination, the Claimant said that she thought there was “something vindictive” about this event, but said that she was unable to prove that it was not an error.

27. When the Claimant commenced work at Covent Garden her line manager was Ms Wyatt. Mr Locke was the store manager with responsibility for the Claimant. It became apparent that her iPad had not been sent from Manchester and there was correspondence about this beginning on 9 September 2019 at page 130. It is not necessary to describe this in detail. However, it is apparent that the iPad had been returned to the warehouse rather than sent to Covent Garden and could not be retrieved. Internal correspondence continued during October and November about what was required and why.

28. The Claimant began a period of sick leave on 15 November 2019. The initial statement of fitness for work for this at page 716 gave the reason for her absence as “anxiety over lack of workplace adaptations for nystagmus”

29. Mr. Kennedy became involved in the correspondence about the Claimant’s iPad. On 28 November 2019 at page 126 he sent an email to a colleague which contained the following in relation to that issue:

> "….since we've offered this as an accommodation in the past, the onus is on us to continue to offer it unless there is a strong reason as to why we cannot, and I'm not seeing that here. This employee is currently on extended leave until we find an appropriate response."

30. On 4 December 2019 provision of a replacement iPad was approved. Mr Locke or Ms Wyatt (there is no significance to who did this) communicated this to the Claimant on 9 December, but meanwhile on 6 December 2019 the Claimant had raised a grievance. This grievance is not directly in issue in the present case, but in it the Claimant referred to the "missing" iPad and to the following:

    30.1 A failure to provide materials in an accessible format.

    30.2 A failure to complete an Access to Work assessment.

31. The Claimant also said that the issues were having an effect on her physical and mental health and on her disability overall. She stated that she had lost confidence in her ability to be included in the workplace and referred to disability discrimination under the Equality Act.

32. In paragraph 36 of her first witness statement the Claimant said that around late November / early December 2019 a manager named Ms Surtees told her that she would not need to undertake training sessions or attend meetings where she could not read the materials, and that some of the duties within her role were taken away (including audits, device return and putting away delivery) because it was thought that she could not do these without adjustments.

33. This aspect was not canvassed very extensively in the oral evidence. When asked about it, the Claimant said that she felt that her duties were being "stripped back" and that she did not feel that she was still working as a Genius Admin. Ms Wyatt said that she did not agree that these tasks were fully removed, and that all the adjustments were made in consultation with the Claimant in order to establish what she felt comfortable with. Mr Locke agreed that the Claimant was concerned about the loss of elements of her role, but said: "when the situation is long term, changes to software might take years, you have to look at short term solutions."

34. The Tribunal accepted that the purpose of these changes was to provide a short term solution to the difficulties the Claimant was experiencing with certain tasks, pending a longer term solution.

35. The Claimant had also been referred to Access To Work, who provided a report on 13 December 2019 at pages 163 to 170. The recommendations in the report included the provision of software dealing with the issue of text size in electronic documents, and the provision of visual awareness training for the Claimant's colleagues and managers.

36. The grievance hearing took place on 21 January 2020 before Mr Smith. The outcome was sent to the Claimant on 10 February 2020 at pages 264273. The conclusions included the following which are material to the present case:

    36.1 The Respondent's processes prohibited items (including the iPad) being shipped between stores. The Covent Garden team had endeavoured to obtain a replacement, but Mr Smith acknowledged that the delay had caused the Claimant difficulties.

    36.2 In relation to the complaint that materials were not accessible, Mr Smith stated that now that the Claimant had the necessary iPad, she should have the flexibility that she previously had at the Manchester store. Mr. Smith continued that the Respondent would continue to work with the with the Claimant, in particular via Mr Kennedy.

    36.3 The Access to Work assessment had now been carried out. Mr Smith also recommended a display screen equipment assessment.

37. The Claimant remained absent on sick leave. Although the Claimant's entitlement to company sick they had by this time expired, Mr Locke authorised payment of full sick pay.

38. On 17 February 2020 a meeting took place between the Claimant and Mr Kennedy as recommended by Mr. Smith. The intention was to find ways for the Claimant to do her job using the Respondent's systems. Ms Wyatt and Mr Rumble were also present. This meeting gave rise to one of the allegations of harassment.

39. It was common ground that Mr Kennedy in fact made the comments which are the subject matter of the harassment complaint. One was:

    "so I see you're not using a guide dog or cane and being able to hold eye contact, what is it that you can't see?"

40. Mr Kennedy agreed that he said words to this effect. In cross-examination he denied that it was his intention to offend the Claimant, although he said that he appreciated that she was offended, and he felt bad about that. He said:

    "my question was to test and understand what level of visual acuity she had"

    And when asked about a second comment relied on as an act of harassment:

    "I did say so you are masking. I was not at all challenging her disability. I am saying are you more disabled than you appear. I am neurodiverse. Masking is a familiar term".

41. Ms Wyatt said that she did not agree that what Mr Kennedy said was offensive, although accepting that it was not for her to take offence. Mr Rumble said that he did not witness anything “untoward or challenging” but agreed that the Claimant left the room soon after Mr Kennedy's remarks. He said that he felt that Mr. Kennedy was trying to understand the situation.

42. The Tribunal accepted that Mr Kennedy did not intend to offend the Claimant and that his comments were not made with that purpose. Such a purpose would have been inconsistent with the intention of assisting shown by Mr Kennedy in his email of 28 November 2019. Additionally, in cross-examination, the Claimant said that she was not denying that Mr Kennedy was trying to be helpful at the meeting. Having said this, the we also accepted that the Claimant was in fact offended by what Mr Kennedy said. The Tribunal will set out later in these reasons its conclusions about the other issues concerning this conversation.

43. At this point, the Tribunal will also summarise Mr Kennedy's evidence about the features that are relevant to the reasonable adjustments complaint. Mr Kennedy's evidence about what the various features could or could not do was not challenged, and there was no alternative evidence about their particular properties for the Tribunal to take into account. That being so, and having no reason to doubt what Mr Kennedy said about this matter, the Tribunal accepted his evidence on this aspect.

44. Not all of the features identified by Mr Kennedy in his witness statement were in play, in the sense that he accepted that the devices used in store by employees were one development behind those available to the public. The Tribunal will therefore focus on those that were available to the Claimant at the material time.

45. In relation to the matter of colour contrast between text and background, Mr Kennedy stated that Apple applications usually involve dark grey text on a pale grey background as opposed to black on white. In both cases (i.e. text and background) Mr Kennedy stated that grey could mean anything from almost black to almost white, and that the user could vary the contrast.

46. In relation to text size Mr Kennedy identified “Text-only Zoom”, saying that this was generally available but had the limitation of a need to scroll the text if that became too large for the device screen. Mr Kennedy also identified “Hover Text” saying that this could be used to control font size and text colour. In his oral evidence, Mr Kennedy stated that he understood that Hover Text could not be used on the iPads provided to employees in the Covent Garden store, but that it was available from February 2020 to those working on a Mac device, as the Claimant was when she was working at home during the pandemic.

47. In relation to font type the Claimant identified Arial as the ideal font for her to use. Mr Kennedy's evidence was that this was not available on Apple devices or programmes but that the Apple font SF (San Francisco) achieves the same effect as Arial because it is a plain “sans serif” font.

48. In his oral evidence Mr Kennedy stated that the software named Safari Reader is already installed on every Mac and iPhone. It can be used to make a standalone article containing headlines, text and photographs easier to read by setting it out in a linear form, but cannot be used with websites. He also stated that "whether Safari Reader was enabled would depend on the page", (which the Tribunal understood to mean the individual webpage in question) and that it would work with the "how to" applications on the Respondent's website.

49. In more general terms, Mr Kennedy said that in the situation involving the Claimant there was a need of feedback from her. He said that all the available features had their limitations, and his evidence was that the best way to find out which were appropriate and useful to the Claimant was for her to try them and to give feedback about the results that she achieved. In the course of his oral evidence Mr Kennedy said:

"I think it is for the Claimant to explain what's working and what's not working well. If we had had feedback we could have proposed alternatives."

Mr. Kennedy also said in answer to a question from the Employment Judge:

"My belief is that there is no third party software that would do a better job than the Apple ones on the three items [meaning contrast, font size and font type]"

50. The Tribunal accepted Mr Kennedy's evidence on this last point. It was evident that Mr Kennedy had extensive knowledge of the subject, and the Tribunal had found him to be frank in his evidence about other matters, such as the comments that the Claimant complained of, and that all of the available features had their limitations. Furthermore, there was no suggestion from the Claimant (other than Safari Reader) of identifiable software that might have assisted further.

51. Returning to the chronology of events, on 11 March 2020 the Claimant submitted an appeal against the grievance outcome. By this time, the pandemic had arrived. On 14 March 2020 the Respondent closed all its UK retail stores and required all employees (including the Claimant) to work from home.

52. At around this time there were some discussions between the Claimant, Ms Wyatt and a colleague Ms Stephenson-Hope about whether a different role might be more suitable for her, but these did not reach any conclusion.

53. Following the requirement for all employees to work from home, the Respondent introduced a system named "Learning Lite" which was designed to facilitate training of those working from home. In paragraphs 8 and 9 of her witness statement Ms Smith-Robinson explained that during lockdown, there was no work on the retail side of the business as the stores

were closed, and so employees were required to carry out training and attend meetings during their scheduled working days. Ms Smith-Robinson further stated that there was no time limit within which to complete the training. She was not challenged on this evidence, and the Tribunal accepted it.

54. The Claimant contacted ACAS with regard to a potential claim on 11 June 2020. The early conciliation certificate was issued on 25 July 2020.

55. The Claimant had asked Mr Locke for a different line manager and on 15 July 2020 Ms Smith-Robinson replaced Ms Wyatt in this role. A referral to Occupational Health was made on 29 July 2020.

56. A grievance appeal hearing was arranged for 3 August 2020, chaired by Ms Perkins. This meeting also gave rise to one of the allegations of harassment. Prior to the meeting there was a series of emails from 23 July onwards between the Claimant and Ms Perkins concerning adjustments proposed for the hearing.

57. The Claimant asked for an audio recording to be taken as she had struggled on previous occasions with confirming notes of hearings. Ms Perkins had said that the Respondent's policy was not to have recordings of meetings, but later said that she would get further information about this. Ms Perkins suggested that she could send the Claimant her questions for the latter to answer in her own time and to keep a record. The Claimant responded that she valued the human connection in a meeting.

58. Ms Perkins then suggested that she could arrange for a note taker. In particular, she suggested that the Claimant's companion (union representative in the event) could assist her with reviewing the notes. The Claimant replied that the union representative would be attending as such, not as a carer or reader. The Claimant added that on previous occasions she had been too exhausted to review notes on her iPad and again she suggested an audio recording.

59. The Claimant then asked for her own reader in addition to the note taker. Ms Perkins, in an effort to reassure the Claimant about the note taker's neutrality, said that they had not previously met. Ms Perkins then suggested the use of voice over: the Claimant said that she was nervous about testing this out on the appeal. Finally, the Claimant stated that she had arranged a reader named Nica to attend with her in addition to her union representative.

60. In relation to the complaint of harassment, the Claimant's case as set out in paragraph 65 of her witness statement was that she asked Ms Perkins for the minutes of the meeting at its conclusion, and that this was refused by her. The Claimant stated:

"I was advised that I did not need the minutes since I had a reader to assist me during the appeal hearing. I had mentioned to Ms Perkins that

requesting the minutes were not part of my adjustments but rather my right as part of the grievance process. Ms Perkins responded by saying that after all the adjustments that Respondent had provided, I wouldn't need the minutes. I was hurt and offended by the response of the Respondent and I believe that the Respondent do not realise how hurtful such comments are. I received the meeting notes on 5 August 2020."

61. Ms Perkins' evidence was that she did not impliedly refuse to send the notes, but said that in the previous email exchanges the Claimant had stated that she did not want to read a long document. She said that she then subsequently had the notes sent immediately to the Claimant.

62. In cross-examination Mr Sethi put it to the Claimant that she was fabricating her account of this exchange. The Tribunal did not accept this suggestion, but found that Ms Perkins' account was the more accurate one as a matter of probability. We so found for the following reasons:

    62.1 The notes of the meeting at page 513 contain the following exchange. The Claimant is recorded as saying "just for consistency, would it be possible to have a copy of the notes as they are now?" Ms Perkins is recorded as replying "the only thing I would say is that you didn't want to read through a really long document". To this the Claimant is recorded as saying: "I'm not going to read it, I just want to make sure that I have a copy of the notes after the meeting". All of this is consistent with Ms Perkins' account.

    62.2 As the Claimant perceived matters at the time, there was then a 2 day delay in her receiving the notes. In fact it is evident from the email at page 517 that 3 minutes after the end of the meeting the notes were sent to her work email address, to which she did not have access at the time. The notes were then sent to the Claimant's personal email address 2 days later. This indicates an intention to provide the notes, although initially sent to an email address which the Claimant was not using at the time, and is inconsistent with a refusal to send them.

63. On 13 August 2020 the Claimant attended an Occupational Health assessment. The report arising from this at page 562 onwards was received on 18 August 2020. The report included the following: "It is clear that [the Claimant's] difficulties have been considered very carefully by management, and any feasible adjustments have been made up to this point". That is not a conclusion that is in anyway binding on the Tribunal; nor is it evidence that "any" feasible adjustments had in fact been made. Those are matters for the Tribunal.

64. The Occupational Health adviser felt that she could only make limited suggestions about further action. She raised the possibility of a magnifying application for the Claimant to use, and voice over technology, but no specific tools beyond Sidecar and Dragon Anywhere.

65. The Claimant presented her claim to the Tribunal on 20 August 2020.

66. On 17 September 2020 Ms Perkins sent the grievance appeal outcome. It is not necessary for the Tribunal to describe this in detail. The outcome covered some 50 pages, albeit in large font. Ms Perkins did not upheld the majority of the Claimant's complaints. However, she upheld 4 of them: Ms Perkins found that the union representative should have been allowed to ask questions and make representations at the meeting; she found that the question of difficulty with lighting in the stores had not been addressed; Ms Perkins found that there was a lack of clear findings regarding the "missing" iPad; and found that there had been a failure to identify complaints arising from the Claimant's time at the Manchester store.

67. On 12 January 2021 the Claimant attended (remotely) a meeting chaired by Ms Otton about the Employee Retain Forum. In paragraph 75 of her witness statement the Claimant said that she spoke to Ms Otton before and during the meeting, saying that the materials were not accessible to her and that she would not be able to follow the meeting. She also said that other colleagues had been provided with the materials in advance. In paragraph 76 the Claimant stated that Ms Otton said that she did not need the materials in advance or in an accessible format as she was reading them out in the course of the meeting.

68. When cross-examined on this aspect, the Claimant said that after the meeting she told Ms Otton that she had not seen the email with the questions before the meeting. The Claimant continued that Ms Otton said that no one had seen them in advance, and added something to the effect that she had read it anyway, in an argumentative way.

69. In paragraph 5 of her witness statement Ms Otton said that at the start of the meeting she said that there was no need to have seen the email containing the three questions that were relevant to the meeting as she was going to go through them in detail. Ms Otton stated that most of the people attending had not seen it as they were working from home using their personal email accounts. She said that after the meeting the Claimant had said that she felt unequal, and that she could hear that the Claimant was upset.

70. When cross-examined, Ms Otton said: "of course, if I had known that the Claimant had a visual impairment ahead of the session I would have had a discussion with her about what she required." Ms Otton agreed that she said that no one had had the materials in advance: her account was that she also said she hoped that what she had read out had enabled the Claimant to participate, and that she said that she was sorry, she was not aware of her impairment.

71. It was common ground that Ms Otton made some reference to needing to get to another meeting. Ms Otton also stated that the Claimant had made a good contribution to the meeting. The Claimant agreed that she had contributed.

72. The Tribunal found that there was little material difference between Ms Otton and the Claimant as to what was said. The real issue was as to Ms Otton's tone. The Tribunal concluded as a matter of probability that the did not speak to the Claimant in an argumentative way. There was no particular reason for her to have done so, and the agreement about the fact that the Claimant had contributed to the meeting suggested that, to the extent there was a difference, Ms Otton's recollection was probably more reliable.

73. When cross-examined about this aspect, the Claimant said that felt "interrogated rather than listened to". The Tribunal concluded that this was not a fair characterisation of the conversation, and probably reflected the Claimant being already upset when the conversation began.

74. Finally, a practical issue for the parties, although not one that is for determination by the Tribunal, was that at the time of the hearing the Claimant had been unable to return to work in store because of the Respondent's requirement for employees to wear masks, and her own (accepted) inability to do so. There was evidence from the Respondents that when circumstances enable the Claimant to return, there will be the possibility of further progress with adjustments. The Tribunal, however, while hoping that the parties will be able to resolve matters in the future to the satisfaction of all involved, is concerned with past events.

The applicable law and conclusions

75. The Tribunal had in mind in relation to all the heads of claim the provisions of section 136 of the Equality Act 2010 about the burden of proof:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

76. This provision was considered by the Supreme Court in **Efobi v Royal Mail Group Limited [2021] ICR 1263**. Giving the judgment of the Court, Lord Leggatt confirmed that the provision had the same effect as those on the burden of proof in the earlier anti-discrimination legislation, and that the two-stage test identified in **Igen v Wong** and **Madarassy v Nomura** remained valid. Lord Leggatt also cited with approval the following observations on those provisions made by Lord Hope in **Hewage v Grampian Health Board [2012] ICR 1054:**

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer when the Tribunal is in a position to make positive findings on the evidence one way or the other.

77. In the present case neither counsel placed any great emphasis on the burden of proof. The Tribunal found that this was the sort of situation envisaged by Lord Hope in the passage from **Hewage** quoted above.

78. **Reasonable adjustments**

79. The Tribunal first considered the complaint of failure to make reasonable adjustments. Section 20 of the Equality Act includes the following provisions:

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, requirement or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

80. The Tribunal first considered the issues as to specialised software, and reminded itself that the aspects under consideration were (in summary) contrast, text size and font type. We found that there was a PCP that the Claimant was required to use the software on the iPad and Mac issued to her by the Respondent.

81. In relation to contrast, the Tribunal found, in accordance with Mr Kennedy's evidence, that on all of the Respondent's devices the user can vary the colour contrast from almost black to almost white. The user could therefore have almost black type on an almost white background. There was no evidence that being able to achieve "absolute" black on "absolute" white would make a difference of any real value. The Tribunal therefore concluded that:

81.1 The PCP did not in this respect put the Claimant at a substantial disadvantage in comparison with persons who are not disabled.

81.2 It would not be reasonable for the Respondent to have to provide software that would achieve an "absolute" black / "absolute" white contrast.

82. In relation to text size, the Tribunal accepted that text only zoom clearly has limitations, as described by Mr Kennedy. Hover Text was available to the Claimant when she was working from home using a Mac device. It could not be used on the equipment (iPads) provided in store. The Tribunal found that:

82.1 The PCP did put the Claimant at a substantial disadvantage in comparison with persons who are not disabled when she was working with an iPad in the store, as Hover Text could not be used,

but did not put her at that disadvantage when she was working on a Mac from March 2020 onwards.

82.2 It would not, however, be reasonable for the Respondent to have to provide software that would provide a better result than text only zoom. The evidence was that Hover Text could not be used on iPads. There was no evidence as to what (if any) other software might exist that could achieve the desired result, or whether it was compatible with the Respondent's devices. There was also Mr Kennedy's evidence, which the Tribunal accepted, as to his belief that there was no third party software that might do a better job.

83. With regard to the issue about font type, the Tribunal understood that a sans serif font type had the advantage of being easier to read because it was plainer than other font types. There was no evidence of any particular sans serif font type having an advantage over another. The Tribunal found that the Respondent's SF font achieved the same effect as Arial. We therefore concluded that:

83.1 The PCP did not in this respect put the Claimant at a substantial disadvantage in comparison with persons who are not disabled.

83.2 It would not be reasonable for the Respondent to have to provide software with Arial font available.

84. The only software identified by name by the Claimant in her pleaded case was Safari Reader. Mr Kennedy accepted, as did the Tribunal, that this too had limitations: it would work better with some pages than with others. The Tribunal considered it likely that there would be some pages where it would provide no improvement at all for the Claimant. This did not, however, mean that the Respondent had failed to "enable" Safari Reader: there were limitations on what it could do. There was no evidence about what could have been done to improve its performance, and whether this would have been feasible in the circumstances.

85. The Tribunal therefore concluded that:

85.1 It could not be said that a failure to enable Safari Reader had placed the Claimant at a disadvantage, as there had been no such failure.

85.2 In any event, for essentially the same reason, it would not be reasonable for the Respondent to have to "enable", or do something further in relation to, Safari Reader. There was nothing more to do.

86. There were two further elements to the complaint of failure to make reasonable adjustments. One was the issue about sending training materials in advance. When cross-examined about this aspect, the Claimant confirmed that she was referring to the period from March 2020 onwards, during lockdown, and the "Learning Lite" system that the Respondent introduced to facilitate training while employees were working

from home. The Tribunal has already referred to Ms Smith-Robinson's evidence about this aspect. Given that there was no time limit imposed in relation to the training, there could be no real concept involved of sending out material "in advance", and so no general PCP of not doing so.

87. The Claimant's evidence included one specific example of a meeting where materials were not sent in advance, being that held by Ms Otton on 12 January 2021. The Tribunal was not certain whether or not this fell within the term "training". In any event, however, the Tribunal conclude that:

87.1 This did not demonstrate a PCP of not sending materials in advance. The (limited) materials in the form of the questions to be considered had been sent, although only to work email addresses, meaning that many employees working from home did not receive them. The further materials in the form of the slides for the presentation had not been sent to anyone: there was no reason to regard this as involving a PCP: the Tribunal found that it was no more than what happened on the day.

87.2 If, contrary to this finding, there was such a PCP, the Tribunal concluded that it did not place the Claimant at a substantial disadvantage in comparison with persons who are not disabled. The key element here, in the Tribunal's judgement, is the requirement that a disadvantage be "substantial". There would be some disadvantage to the Claimant, as a non-disabled person would be able to read the slides more quickly and more easily as they were put up on the screen. That disadvantage would be removed by the Claimant having the slides in advance. The Tribunal found, however, that the disadvantage was substantially mitigated by Ms Otton reading out the slides as they were presented, and that any remaining disadvantage was not substantial. In support of this conclusion, the Tribunal also relies on Ms Otton's evidence, accepted to at least some extent by the Claimant, that the Claimant made a good contribution to the meeting.

87.3 If, however, the Tribunal is wrong about those elements, the Respondent has identified no objection or barrier to providing the materials in advance and no reason why it would not have been reasonable for them to have to be provided, and so that element of the test for a failure to make reasonable adjustments would have been made out.

88. The final element of the complaint of failing to make reasonable adjustments was that of failing to act on adjustments recommended in the OH report of 18 August 2020. In her closing submissions Ms Egan accepted, rightly in the Tribunal's judgment, that the adjustments in that report were not something about which the Tribunal could make findings, given that the report was received only 2 days before the claim was presented.

89. As a general observation, the Tribunal agreed with Mr Sethi's submission that the argument that the Respondent should have implemented unspecified software was, ultimately, a difficult one for the Claimant to make. To some extent, this reflected the issue raised early in the hearing as to whether the Claimant should be confined to contending only for software named in her pleaded case (i.e. Safari Reader only). The Tribunal ruled that she should not be so confined, but having heard the evidence, has found that, to the extent that the Claimant's case involves a contention to the effect that the Respondent "should have done something", it has not succeeded, as the Tribunal has not been able to discern or specify what that "something" should have been.

90. The complaint of failure to make reasonable adjustments was therefore unsuccessful.

Section 15

91. With regard to discrimination because of something arising in consequence of disability, section 15 of the Equality Act provides as follows:

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability;
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

92. The first three issues listed under this head of complaint mirrored the complaint of failure to make reasonable adjustments. The Tribunal agreed with Mr Sethi's submission to the effect that this was not a viable approach. It would involve an unrealistic, circular, analysis along the following lines: the something arising in consequence of disability was the need for specialist software and materials in advance; the failure to provide those adjustments was unfavourable treatment; and the failure to provide the adjustments occurred because of the need to provide them. A duty to make adjustments might arise because they were needed but, in the Tribunal's judgement, it would wholly unrealistic, at least in the present case, to say that a failure to make them was caused by the need to make them.

93. In any event, the Tribunal's findings on the reasonable adjustments complaint would apply and would mean that there was no unfavourable treatment of the Claimant.

94. The other element of the section 15 claim was the removal of tasks from the Claimant. The Tribunal has found that the purpose of these changes was to provide a short term solution, pending a longer term one, to the difficulties the Claimant was experiencing with certain tasks. In the light of that finding, the Tribunal concluded that:

94.1 Although the removal of these tasks came about because of something arising in consequence of the Claimant's disability (namely, her difficulty with certain tasks), this was not unfavourable treatment. We agreed with Mr Sethi's submission that this is better regarded as a reasonable adjustment, albeit one that is intended to be short-term, in the hope of a future, satisfactory long-term solution.

94.2 In any event, the Tribunal found that this was a proportionate means of achieving a legitimate aim, within section 77(1)(b). The legitimate aim is that of assisting the Claimant to do her job. The means adopted were proportionate in the absence of a longer-term solution that was satisfactory to both parties (in particular, in the absence of software which the Claimant found sufficient to enable her to do the relevant parts of the job). In the absence of a long-term solution via different software, the alternative would seem to have been to insist that the Claimant should carry out tasks when she could not do so, at least not without significant difficulty.

95. The complaints under section 15 were therefore unsuccessful.

Harassment

96. Section 26 of the Equality Act provides as follows with regard to harassment:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of -
(i) Violating B's dignity, or
(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) ……

(3) ……

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) The perception of B;
(b) The other circumstances of the case;
(c) Whether it is reasonable for the conduct to have that effect.

97. In relation to the comments made by Mr Kennedy on 17 February 2020, the Tribunal found that this conduct was unwanted and was related to the Claimant's nystagmus (the comments were about the Claimant's condition).

98. When considering subsection (1)(b) (purpose or effect) the Tribunal will use the shorthand term "the purpose or effect of harassing" the Claimant rather than repeating all the elements of that subsection. The Tribunal has already found that Mr Kennedy did not make the comments with the purpose of harassing the Claimant.

99. So far as the effect of the comments is concerned, the Tribunal found that Mr Kennedy's references to a guide dog and a cane, and to holding eye contact, were an unfortunate and clumsy way of enquiring about the nature of the Claimant's impairment, in particular because it could be regarded as reflecting stereotypical images of a "blind" person. We found that the Claimant was genuinely offended, and that she perceived the comments as having a harassing effect.

100. The Tribunal reached a somewhat different conclusion about the "masking" comment. We accepted the Claimant's evidence that she felt hurt by this. In contrast with the earlier comments, the Tribunal did not find that there was anything objectively objectionable about the use of that term in the context of a discussion about the effects of a disability. Use of the term "masking" does not mean or suggest that the person using it is not taking the disability seriously: it is an enquiry as to whether the effects of the disability may be more serious than they appear to be. We accepted Mr Kennedy's evidence that this is a familiar term.

101. The Tribunal found that it was not reasonable for the comments, whether taken individually or together, to have had the effect of harassing the Claimant. The following circumstances are relevant to this conclusion:

    101.1 Mr Kennedy continued after the first comment by saying that he was trying to understand.

    101.2 As recorded above, the Claimant accepted that he was trying to be helpful.

    101.3 Nothing else that Mr Kennedy said or did was offensive, or suggested that he was not taking the Claimant's condition seriously.

102. The Tribunal took into account the unfortunate way in which Mr Kennedy expressed himself in the first comment, the Claimant's perception of what he said, and our finding that it was not reasonable for the comments to have had the effect of harassing the Claimant. We concluded that what Mr Kennedy said did not have the effect of harassing the Claimant. In her oral evidence the Claimant said that this was "a difficult conversation and it got off on the wrong foot". The Tribunal agreed with this assessment, finding that it did not amount to more than that.

103. Given its determination of the merits of this complaint, it was not necessary for the Tribunal to decide the issue about whether it was out of time.

104. Turning to the complaint about what was said at the conclusion of the appeal meeting on 3 August 2020, the Tribunal has found in favour of Ms Perkins' account of this. The Claimant's evidence about being offended by what Ms Perkins said is based on her own account of what this was, which the Tribunal has not accepted. This complaint therefore fails on the facts.

105. Beyond this, the Tribunal also finds that what Ms Perkins said did not have the purpose or effect of harassing the Claimant. It was a reasonable thing to say given that the Claimant had said that on previous occasions she had been exhausted reading meeting minutes. Ms Perkins' purpose in saying what she did was that of checking whether the Claimant really wanted the document, given what she had said. Making that enquiry could not reasonably have the effect of harassing the Claimant.

106. The Tribunal has found with regard to the conversation on 12 January 2021 between the Claimant and Ms Otton that the latter did not speak in an argumentative way. We accepted that the Claimant felt hurt by what Ms Otton said about having read out the materials, but found that this did not have the purpose or effect of harassing her.

107. Ms Otton's purpose in saying what she did was to address the Claimant's concerns about the meeting. The Tribunal considered that the Claimant's evidence about how she felt, i.e. that she felt "hurt" and "interrogated" fell short of a perception of being harassed. In any event, the Tribunal found the words said by Ms Otton, in a non-argumentative way, were a reasonable response to the Claimant's concerns, and that it was not reasonable for them to have the effect of harassing her. We found that they did not have that effect.

108. The effect of all of the above is that the complaints of harassment are also unsuccessful.

Employment Judge Glennie

Dated: ……..26 April 2022……..……..

Judgment sent to the parties on:

26/04/2022.

For the Tribunal Office