EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4106898/2020

Hearing held in Glasgow 9 – 13 May 2022

Deliberations 16, 26 and 27 May 2021

Employment Judge D Hoey
Tribunal member S Currie
Tribunal member N Elliot

Ms M MacKay	**Claimant** **Represented by:** **Mr Cobb - Advocate** **[Instructed by: Messrs Ammar Anwar and Co]**
Taylor Wimpey UK Limited	**Respondent** **Represented by:** **Mr Hughes - Advocate** **[Instructed by: Messrs Greenwoods]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The unanimous judgment of the Tribunal is that the respondent failed to comply with its duty to make reasonable adjustments pursuant to section 20(5) of the Equality Act 2010 in respect of (1) its failure to provide auxiliary aids, namely a specialist keyboard, specialist mouse and a laptop stand during the period 17 February 2020 until 18 June 2020 and (2) its failure to provide the auxiliary aid of a headset for the period from 17 February 2020 until the end of the claimant's employment.

2. The remaining claims were dismissed.

3. While the claims raised under section 20(5) of the Equality Act 2010 were raised outwith the statutory time period, the Tribunal considered that the

claims had been lodged within such further period as the Tribunal considered just and equitable in terms of section 123(1) of the Equality Act 2010.

4. A telephone case management preliminary hearing will be fixed to determine arrangements for a remedy hearing, if the parties are unable to reach agreement as to remedy.

REASONS

1. By ET1 accepted on 30 October 2020 the claimant claimed that she had been constructively dismissed and subject to a number of discriminatory acts related to her disability. ACAS early conciliation ran from 27 August 2020 until 11 September 2020. She also alleged she had been underpaid. The respondent disputed the claims. The claim in respect of the underpayment was withdrawn.

2. The hearing was conducted in person with both agents attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly.

Case management

3. The parties had worked together to focus the issues in dispute and had provided a statement of agreed facts and a list of issues. These documents were refined by the final stage of the hearing.

4. A timetable for the hearing of evidence had been agreed and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. Each witness had provided a written witness statement with the evidence being appropriately challenged.

Issues to be determined

5. The issues to be determined were discussed during the hearing and a list of issues was provided and has been updated following the hearing. As the respondent concedes that the claimant was a disabled person at all material

times, disability status was not an issue. Remedy was also reserved in the event a hearing was needed to determine that.

Direct disability discrimination (section 13 Equality Act 2010)

1. Did the respondent do the following things:

(a) fail to initiate any action in response to the occupational health report of 7 November 2019;

(b) the decision of Ms MacPhee of 18 December 2019 to return the claimant to the status of floating sales executive;

(c) failing to undertake an impartial consideration of the grievance lodged by the claimant on 18 December 2019;

(d) failing to provide some or all of the equipment recommended by the ergonomic assessment, dated 11 February 2020;

(e) advising the claimant in early February 2020 that adjustments specified in the Request for Reasonable Adjustments letter dated 9 January 2020 might be withdrawn;

(f) failing to provide the claimant with sales training and business update specified in the Request for Reasonable Adjustments letter dated 9 January 2020;

(g) the working arrangements applied to the claimant subsequent to 24 May 2020;

(h) subjecting the claimant to unfair performance standards and criticism in a persistent manner during and after the Meeting with Ms MacPhee of 18 December 2019;

(i) their conduct of meetings and other discussions with the claimant including, but not restricted to, the meeting with Ms MacPhee of 18 December 2019; the grievance hearing with Ms Ross of 6 January 2020; the telephone discussion with Ms McDonald of 29 June 2020?

2. *Was the treatment less favourable treatment?*

3. *Was it because of disability?*

Failure to make reasonable adjustments (sections 20/21 Equality Act 2010)

4. *Did the respondent have a PCP of requiring floating sales executives to "float" across large parts of the west of Scotland?*

5. *If so, did that PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability in that the claimant could not float across that area?*

6. *Did the failure to provide the auxiliary aids identified in the ergonomic assessment of the claimant of 11 February 2020, namely a headset, chair, mouse, laptop stand and keyboard put the claimant at a substantial disadvantage compared to someone without the claimant's disability in that it impaired her ability to work efficiently?*

7. *Did the respondent fail to provide the claimant with a second chair of the kind recommended by the ergonomic assessment of 11 February 2020 in order to provide make that auxiliary aid available to her both for working from home and at Benthall?*

8. *Did the respondent know or could it have been expected to know that the Claimant was likely to be placed at the disadvantage?*

9. *What steps could have been taken by the respondent to avoid the disadvantage?*

10. *Was it reasonable for the respondent to have to take these steps and, if so, when?*

11. *Did the respondent fail to take these steps?*

Harassment (section 26 Equality Act 2010)

12. *Did the respondent engage in unwanted conduct towards the claimant by:*

a. *the conduct of the meeting with Ms MacPhee of 18 December 2019;*

b. *the conduct of the grievance hearing with Ms Ross of 6 January 2020;*

c. *meeting between the claimant and Ms Ross at Benthall around the beginning of February 2020;*

d. *the telephone discussion with Ms McDonald of 29 June 2020;*

e. *the volume frequency and timing of calls to the claimant by Ms McDonald, including but not restricted to October 2019;*

f. *the making of critical remarks about the performance of the claimant made by Ms Ross and Ms McDonald in the presence of colleagues from mid February 2020 until the date of the claimant's resignation;*

g. *a reference by Ms Ross made regarding the claimant's attendance at Teams meetings before colleagues around 15th May 2020;*

h. *the terms of the e-mail sent by Ms McDonald to the claimant on 19 July 2020?*

13. *If so, was any or all of the conduct unwanted?*

14. *Did all or any of the conduct relate to disability?*

15. *If so, did the conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

16. *Was it reasonable for the conduct to have such an effect on the claimant?*

Victimisation (section 27 Equality Act 2010)

17. *Did the claimant do a protected act under section 27(2) Equality Act 2010 by making claims of disability discrimination via a grievance dated 18 December 2019 and considered by Ms Ross at a hearing on 6 January 2020?*

18. *Was the claimant subject to the detriment of (1) not receiving any of the adaptations specified in the ergonomic assessment and (2) receiving unfavourable working arrangements after 24 May 2020.*

19. *Did the detriment occur because the respondent believed that the claimant had done a protected act?*

Constructive unfair dismissal

20. *Did the conduct of the respondent, including the acts of unlawful discrimination between 7 November 2019 until 29 August 2020 fundamentally breach the claimant's contract of employment entitling the claimant to resign?*

21. *Did the respondent thereby act in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and respondent?*

22. *If so, did the respondent have reasonable and proper cause for so doing?*

23. *Did the claimant resign in response to that fundamental breach?*

24. *Did the claimant unreasonably delay in resigning?*

Case management

6. The parties had agreed productions running to 684 pages with an additional bundle of 109 pages and with documents being inserted in the course of the hearing.

7. The Tribunal heard from the claimant, her sister and her mother and from Ms Robertson (head of customer services), Ms McDonald (sales manager), Ms MacPhee (sales manager) and Ms Ross (sales director).

Facts

8. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not

in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case.

Background

9. The respondent is a national housebuilder. On 2nd October 2017 the claimant commenced employment as a sales executive for the west of Scotland.

10. As sales executive the claimant would be required to cover specific sites, as determined by the respondent. The executive would be responsible for the site in question and receive a target (which would be a joint target with any other sales executive who was also based at the site). Achievement of the target would result in commission payments being made.

11. If a sales executive was not based at a particular site (where the individual would essentially be a fixed sales executive) the sales executive would be a floating sales executive (which would mean the executive would cover a number of different sites and assist where required). If the individual was required to carry out the role of fixed sales executive, commission would be payable if the site in which the individual is based meets the target. A floating sales executive would not be entitled to such commission (but would be eligible for a bonus). The tasks carried out by both roles are essentially the same although the fixed sales executive can have more meaningful customer engagement.

12. The west of Scotland team had a small number of line managers who managed small teams of sales executives and the claimant reported to each of the line managers during her training stage. The sales managers were close knit and would cover for each other. From October 2017 until August 2018 Ms MacPhee was the claimant's line manager. From mid December 2018 the claimant's line manager was Ms McDonald. When claimant worked in customer services her manager was Ms Robertson. Ms McDonald became the claimant's line manager again when she was she told she would remain

in Benthall in January 2020. Ms Ross was sales director for the west of Scotland area.

13. The claimant had performed well in her role and in April 2019 participated in a performance appraisal and had been scored "Good" (with a score of 3 out of 5 being awarded).

Claimant secured seconded tole as temporary customer relations manager

14. The claimant applied for and was successful in being appointed as a temporary customer relations manager (following interview), covering three sites at Strathaven, Holytown and Motherwell. Whilst on this secondment the claimant's line manager was Ms Robertson. The customer relations role involved working with site managers and customers at a later stage in the customer journey compared to sales executives. There was no specific paperwork covering the move from sales executive to temporary manager.

15. Although the claimant's performance was generally good, Ms Robertson had a number of concerns about the claimant's diary management and related work issues (which had arisen prior to any health issues arising). Ms Robertson wished to work with the claimant to deal with these issues.

Absence

16. Around 1 August 2019, the claimant contracted shingles, but continued to work from home on some days. The respondent advised the claimant that the priority was her health. In the claimant's absence it became clear that the claimant had incorrectly booked appointments and made a number of diary errors.

17. Around 25th September 2019 the claimant experienced symptoms of pain and consulted her GP who signed the claimant off work for 28 days.

18. During the claimant's absence she kept in touch with the respondent by providing updated fit notes. If they had not been provided, the claimant's line manager would telephone the claimant for an update. Sometimes the calls would be missed and the claimant and her manager would miss each other

and calls would be returned. While the claimant perceived the volume, frequency and timing of such calls to be untoward, they were reasonable attempts by the respondent to keep in touch with the claimant and to ensure the claimant was not adversely affected (such as being paid the correct amount). The timing of such calls were also reasonable. Sometimes the calls would be made later in the day or early evening but there was no requirement upon the claimant to take such calls or reply immediately.

19. The claimant did not ask for such calls to stop or raise any concerns about the calls at the time (and there was a good working relationship between the claimant and her line manager). The claimant had apologised on occasion when she had not returned calls and had thanked her manager for the support she had been given. The claimant had been advised that there was no requirement to respond out of hours. The respondent had sought to reduce the impact upon the claimant by using the claimant's personal phone (to avoid her needing to look at her work phone and seeing customer messages which could increase stress).

Medical position

20. Following further tests, the claimant received a provisional diagnosis that she had fibromyalgia from a consultant rheumatologist towards the end of September 2019. Further tests were conducted in order to eliminate other conditions. The claimant remained off work during this period.

21. Around early October 2019 the claimant was provided with a diagnosis of fibromyalgia, post viral fatigue syndrome, irritable bowel syndrome and FUS. These conditions amount to a disability for the purposes of section 6(1) of the Equality Act 2010.

22. The claimant experienced widespread musculoskeletal pain throughout her body, stiffness, fatigue, numbness and had difficulty gripping objects with her hands. Due to the pain, personal care was difficult. Driving anything other than short distances caused challenges.

Welfare meeting

23. Following the diagnosis the respondent arranged for a welfare meeting to take place on 7 October 2019, which was attended by the claimant, Ms Robertson and a colleague. The meeting lasted 20 minutes. The claimant noted that her diagnosis was likely to be fibromyalgia and she would chase her doctor for the up to date test results. Her symptoms were severe pain, tingling and numbness in her body. At times she said she was unable to hold a bag, phone or drive and there would be no warning which part of her body would be affected. She was taking pain killers.

24. At the meeting, the claimant was advised that there would be flexibility as to roles for her to carry out when she was able to return to work. If she was able to drive to the relevant sites she could return to the customer relations manager role but there was also the possibility of returning to a sales role. It was agreed that the claimant would check what she could do, work wise, with her consultant. An occupational health assessment would also be arranged. The respondent made it clear that there was flexibility to assist the claimant.

Occupational health assessment

25. The respondent arranged for the claimant to undergo an occupational health assessment on 7 November 2019 which led to a report. The report stated that the claimant was awaiting a diagnosis of fibromyalgia and that she was taking pain killers which could interfere with her ability to drive longer distances. Under the heading “Recommendations on adjustment and support” the report recommended that the claimant undertake a phased return to work of initially 50% of working hours and, if management review indicated that she was able to cope with that workload after 2-3 weeks, she could then scale up to full time working.

26. The report recommended that for as long as the claimant was on the “substantial dose of co-codamol” she then took, she should not cover various sites and should only travel to a site near her home, or consider using public transport. The report noted that the claimant appeared to require quick access to a toilet, and so a staff accessible toilet would be very beneficial.

27. The occupational physician recommended that for the claimant to drive safely she should try to reduce her co-codamol dose and discuss the pain with her GP. Long term prognosis was vague as the suggested diagnosis may only explain part of her symptoms. The physician stated that it appeared unlikely the condition would be considered a "disability" for the purposes of the Equality Act 2010 as it appeared unclear that the claimant's activities would be impaired for 12 months.

Return to work meeting on 12 November 2019

28. On 12 November 2019, a return to work meeting took place with Ms Robertson, Ms MacPhee and the claimant. By that stage the claimant had been absent for 47 days (3 days absence in August and the remainder from September and was ongoing). The claimant indicated that she was not feeling well but she wished to prepare for a return to work.

29. A discussion took place as to any reasonable adjustments needed and the claimant stated that she felt Benthall (the development closest to the claimant's home and a flagship site for the respondent) was "the only option at present" as it was local and had toilet facilities. She referred to the occupational health report which had recommended she did not cover various sites and that she needed access to a staff toilet. Her preference to was work 50% over 5 days reviewing hours, adjustments, travel distance and progress every 2 to 3 weeks. It was suggested that the claimant work Sunday to Thursday at Benthall with which the claimant was pleased. She was optimistic of carrying out the role of sales executive and would only drive when safe to do so (and otherwise use a taxi).

30. There was no discussion as to the duration of the claimant's return to Benthall. She assumed it was a permanent base (but there was no discussion of the move to Benthall being permanent). The respondent understood the move to be a temporary move pending clarification as to the health position. The meeting was supportive and positive.

31. The claimant had been supported with her return to work (from mid October 2019). The transition had been seen as positive.

Return to work

32. On 14 November 2019 the claimant's GP certified the claimant as fit to return to work. The GP Certificate stated that the claimant was fit to return to work taking account of a phased return to work. working 50% for the first 3 weeks and if going well, gradually increase over the next 3 weeks. The certificate stated that "whilst on co-codamol she should be working in local branch with ready access to toilet". This was to be the case for 42 days.

33. On 16 November 2019, the claimant began her phased return to work at Benthall. The claimant carried out the duties of sales executive. She returned to full time work on 8 December 2019.

34. The claimant wanted to understand the position regarding commission and asked her line manager at the start of December what the structure would be. Ms MacPhee told the claimant that she would visit the claimant to discuss.

Discussion as to working position

35. On 18 December 2019, the claimant met with Ms MacPhee at Benthall to discuss her return to work plan. Ms MacPhee explained that the respondent was keen to be flexible but that resources were such that a permanent full time roll at Benthall was not something that was available. Other fixed sales executives were established at that site. The claimant was offered a floating sales executive role which would result in the claimant covering other local developments, including Benthall. The respondent wanted to offer the claimant a role that was consistent with her not having to travel over 15 miles which had suitable toilet facilities (both items being what the respondent considered consistent with the medical information they had).

36. The respondent had not advised the claimant that her move to Benthall was permanent (although that was assumed by the claimant following the discussion in November). The respondent wished to support the claimant and ensure she was able to work in sites close to her home that had sufficient work for her to do. Ms MacPhee noted that the claimant would be based at Benthall until the end of the busy Christmas period. Thereafter she could

cover Benthall and up to 2 other sites. That had been a discussion managers had reached together in an attempt to find a solution that was consistent with the claimant's health issues and worked for the business.

37. The respondent understood the medical position to be that the claimant may be able to travel further if her reliance upon pain killers reduced (which was the aim) or if she could take public transport. The respondent believed that the other sites the claimant would cover would all be within a short distance of each other. At that stage the respondent did not consider Benthall could support 3 sales executives based there given the existing resources.

38. The claimant became upset during the discussion and no conclusion was reached. She believed that she should be based at Benthall permanently. No agreement had been reached as to precisely what the claimant would do (or where she would be based). The claimant had been told that the respondent was able to provide her with a floating role which would include Benthall but that it was not able to offer that on a permanent fixed basis. No agreement was reached and the claimant remained in Benthall. Her working pattern or location did not change following the meeting.

39. The claimant believed that the medical position was such that she should have a fixed role at Benthall. A discussion took place as to the occupational health report. The claimant was unhappy that the respondent was proposing to require her to attend sites other than Benthall. No firm agreement was reached as the claimant was too upset for the meeting to continue and it ended without agreement as to what the claimant would do going forward.

40. Ms MacPhee was not aggressive or unreasonable towards the claimant during the meeting which had lasted around an hour. She did not wave her finger aggressively at the claimant nor act in an otherwise inappropriate way. She wanted to fully understand the position and engage with the claimant. Because the respondent was exploring options other than being permanently based in Benthall, the claimant perceived Ms MacPhee's intention as being to discriminate against her and interpreted what happened during the meeting as negative and combative, rather than supportive and engaging, what was

its purpose and intention. As the claimant could not understand why the respondent was not giving her the permanent role she believed she was entitled to, she regarded Ms MacPhee's approach as aggressive and intimidatory when in fact it was seeking to support the claimant and explore all options.

41. Ms MacPhee advised the claimant it may be possible for her to remain in Benthall but as there were already 2 other sales executives there, remaining there would not be on a targetted basis, which was not attractive to the claimant. Ms MacPhee offered to consider a later start to ensure the claimant avoided any traffic issues and was seeking to agree matters with the claimant.

42. The claimant did not wish the meeting to continue and it ended without agreement. The conduct and approach of the meeting was reasonable.

43. The claimant read out a preprepared note from her phone (that she had prepared in advance) and asked Ms MacPhee to send her an email confirming the position. Ms MacPhee was concerned the claimant had been recording the meeting and asked for confirmation. The meeting was not being recorded. The claimant did not raise any concern with Ms MacPhee during the meeting as to the conduct of the meeting or approach Ms MacPhee took. The claimant advised Ms MacPhee that she did not consider it personal against her but was something the claimant needed to do for herself.

Ms MacPhee confirms position following meeting

44. Shortly following the meeting, Ms MacPhee sent the claimant an email summarising the discussion that had taken place stating the respondent wished to be as flexible as possible in light of and subject to the medical position. The email stated: "Since your return on 14 November we have followed the recommendations with regard to working in a location that minimises your drive time. This will continue until the end of the year. As our resource capability evolves we always seek to place our resource into a full time role however understand that you may require certain locations. That leaves our current suggestion to be that we can accommodate and offer the

role of a floating sales executive covering various developments. We would need to know how far you are willing to travel."

45. The email continued: "Unfortunately a permanent full time role at Benthall and many other sites isn't available due to an established resource in place. I know you will appreciate and recall from your previous time within the sales executive role that we don't make very regular changes to designated staff sites in an effort to avoid disruption for out customers and the wider teams although I would expect Benthall to feature in the floating role".

46. Ms MacPhee stated that: "I appreciate the conversation caused some upset and distress and therefore it may be easier if you can propose the developments that you can work on that is supported by GP and Occupational Health and we can review." She was advised that if she wished to escalate matters further she should contact Ms Ross.

Claimant unhappy with discussion

47. The claimant was unhappy and sent an e-mail to Ms Ross. The email stated that she was coming to terms with her diagnosis with her health as a priority alongside her career. She asked that her current working arrangements be "solidified" and she receive the same remuneration as colleagues who work there. She enclosed a document setting out her concerns.

48. In the document she complained how she felt she had been treated by Ms MacPhee. She said the email Ms MacPhee was "entirely false" in terms of describing how the meeting went. She said that if the meeting had been conducted as set out there "would be no cause for her to accept she caused me upset and distress". She said that it was disingenuous to offer her the role of floating sales executive when she had been on a temporary secondment from the permanent sales executive role. She argued staff changes do take place and she had experience of working in Benthall.

49. She stated that it was stark that she retuned to full time employment on 8 December 2019 with certain adjustments and less than one month's grace was being given in terms of proposed changes. The claimant said she was

feeling stressed and that the respondent seemed to be doing the very opposite to that recommended by the medical professionals.

50. The claimant argued Ms MacPhee was aggressive, such as physically pointing her finger in her face while aggressively asking if the claimant was recording the meeting when she was upset and tearful reaching for her phone to refer to notes she had made in preparation for the "unknown" of the meeting. She argued the conduct was bullying, accusatory and wholly unprofessional and there was a void of empathy.

51. She stated that she should be placed in Benthall on a permanent full time basis which she believed was a reasonable adjustment. She noted it was one of the respondent's busiest sites and if another staff member had to be relocated that was something the respondent could arrange. She wished this resolved before Christmas.

52. She argued that she should be targetted when in the permanent full time position, which would be the same as other sales executives based there (but different to floating sales executives). She argued she had a strong sales record and not giving her a target would be discrimination and bullying.

53. The claimant ended her communication with the words "without prejudice" which was a term a family friend who was a lawyer had suggested she use.

Claimant's concerns treated as a grievance

54. Ms Ross treated the claimant's email as a grievance and told the claimant she would copy the email to the new HR business partner. By letter of 23 December 2019 Ms Ross assured the claimant the issues she raised would be investigated and a grievance hearing meeting was proposed for 6 January 2020. The office was closed between Christmas and New Year. Ms Ross told the claimant to continue to work at Benthall (on a fixed basis). Her working arrangements did not change from those that operated before December.

Respondent wants to explore working arrangements and grievance

55. In correspondence Ms Ross confirmed that she wished to fully understand the claimant's concerns, many of which related to the adjustments the claimant needed. The claimant was to remain at Benthall to allow the respondent to understand the situation, address her concerns and make a longer term plan. The claimant wished confirmation that she would be placed at Benthall on a permanent basis (and would have been content for the matter to have been dealt with without a meeting if that were the outcome). Ms Ross wished to meet with the claimant given the references made to management conduct.

56. The claimant had been advised that the respondent would extend their policy and allow her to bring a companion to the meeting, provided such a person was not a "legal or HR professional as that would be deemed inappropriate to the structure of the meeting". The claimant had responded saying her sister worked in policy for the Scottish Government. The claimant brought her sister who was a lawyer but had ceased to practise (formerly having worked as a solicitor for the Procurator Fiscal service). The claimant (and her sister) did not advise the respondent as to this.

Grievance hearing of 6 January 2020

57. The grievance hearing of 6 January 2020 was attended by the claimant, her sister, Ms Ross and an HR business partner. Summary notes were taken by the claimant's sister, Ms Ross and the HR business partner (in varying levels of detail with no verbatim notes taken). Each note dealt with the points in a different way (and from a different perspective). Both the claimant and the claimant's sister believed that the respondent was not supportive of the claimant and perceived and interpreted the actions of the respondent in a negative way (rather than in a supportive way, which was their intention). The notes of Ms Ross and the HR business partner set out key points.

58. The atmosphere at the meeting was tense (as the claimant and her sister made minimal eye contact with Ms Ross) and Ms Ross perceived an air of hostility towards her by both the claimant and her sister. Ms Ross wanted the meeting to address the points raised in the claimant's grievance and ensure she created a working environment that was safe and suitable for the

claimant. Given the pain the claimant had experienced and her absence, Ms Ross was also keen to ensure a stable team was created without placing unnecessary pressure on other sales executives or the wider resource pool which is allocated in advance to cover all sites.

59. The meeting explored the claimant's absence history and medical position. The claimant and the claimant's sister took an active role in the meeting. The claimant (and her sister) were unhappy with the respondent's approach to her working arrangements. The claimant's sister noted that the claimant's sister had been involved in the meeting. For example she recorded in her minutes that she had said the respondent's approach to the claimant's working arrangements and adjustments was contradictory (in suggesting the claimant not be based in Benthall permanently). The claimant's sister had engaged in substantive discussion (in support of the claimant's position).

60. Ms Ross wished to explore the tasks the claimant could carry out and fully understand the impact of her illness upon her role, to ensure the tasks given to the claimant were appropriate. The claimant interpreted the discussion as negative and was tearful during the discussion. The claimant and her sister perceived the approach taken by the respondent as negative. Objectively viewed, the meeting was conducted in a fair and reasonable way.

61. Ms Ross discussed the concerns the claimant had raised about the discussion with Ms MacPhee and stated that she would investigate the matter.

62. Ms Ross had (correctly) understood that the claimant had been assigned to Benthall on a temporary basis as the duration of her assignment had not been discussed.

63. There were times during the meeting when the HR business partner required to address points that arose given the nature of the discussion (which covered policy matters and formalising of adjustments). The meeting lasted over 2 hours. The claimant found it difficult given the issues that were being discussed and her disability. She viewed the approach taken as negative and perceived the issues raised as an attempt to challenge the claimant whereas

the purpose of the meeting was to seek information from the claimant with a view to assisting her.

Outcome following meeting – medical position

64. On 9 January 2020 Ms Ross sent a letter to the claimant headed "Request for Reasonable Adjustments". Ms Ross confirmed that having reviewed matters following the meeting, the claimant's place of work would be fixed at Benthall with no requirement to travel. She would also have a target. A risk assessment would be arranged. The adjustments would be reviewed to ensure appropriate support is provided and the claimant was to advise if her position changed. If the business situation changed the respondent would seek to agree with the claimant another suitable location. The adjustments set out in the letter were subject to review, whether due to the claimant's health and/or changes in business circumstances.

65. Ms McDonald would (again) become the claimant's line manager (to whom day to day matters should be addressed, including absence reporting). If there were any parts of the role that the claimant was unable to fulfil she was to raise these matters. Training would be provided to the claimant on a one to one basis (avoiding the need for travel). In fact the claimant did not ask for specific refresher training. She was kept up to date with business updates on a regular basis as advised.

66. The grievance issues were to be dealt with separately, following investigation.

67. The claimant confirmed that the proposed adjustments were acceptable to her. She wished to clarify the financial position (and whether her target was being backdated). The claimant indicated that the outcome was a "huge relief" and allowed her to continue to work hard in a role she enjoyed. Ms Ross advised the claimant that there would be a period of time to refamiliarise before the targets would be engaged (which would be the same when returning from absence). She had authorised a commission and bonus payment to the claimant.

9 January 2020 – claimant's return to work as sales executive

68. Around 9 January 2020 Ms McDonald resumed as the claimant's line manager and the claimant worked as a sales executive.

Progressing an outcome to the grievance

69. Following the grievance meeting Ms Ross considered the points raised by the claimant and met with the managers involved. The claimant was asked for a copy of the notes her sister had taken "to help ensure all aspects of the grievance are investigated with the details provided during the discussion". The claimant's sister advised that her notes "centred on the issue of reasonable adjustments/targeting/working arrangements" and having reflected she did not see merit in providing her notes. She did not do so.

Outcome of grievance

70. On 23 January 2020 Ms Ross issued a decision letter in relation to the claimant's grievance. The letter noted that investigative meetings took place on 20 January 2020 with Ms MacPhee and Ms Robertson. Reference was made to the grievance letter and points made by the claimant at the grievance meeting. Ms Ross decided to reject the grievance finding that the contact made by the claimant's managers was appropriate. Ms Ross noted that the 18 December 2019 meeting had not ended on a positive note but there had been friendly conversations. Ms Ross noted that Ms MacPhee denied the accusations the claimant had made with regard to aggression. She accepted she had been frustrated as the meeting did not end in a satisfactory way and that the atmosphere was tense. Ms Ross was unable to reach any definitive conclusions and took steps to provide managers with guidance on such meetings to ensure managers were better equipped to deal with such meetings going forward. The claimant was advised as to the right of appeal.

71. The claimant did not appeal against the outcome of the grievance.

Claimant works at Benthall

72. Around mid January 2020 the claimant spoke with Ms McDonald, who was her line manager again. The claimant told Ms McDonald that she was unhappy with how she had been treated (which she believed was as a result

of her disability) and that she was concerned there was a belief the claimant could not carry out her role. Ms McDonald explained that she believed the respondent had supported (and would continue to support) the claimant.

Workplace assessment confirmed

73. On 13 January 2020 Ms McDonald requested an ergonomic assessment for the claimant's workstation (as had been noted in Ms Ross's letter of 9 January 2020). A meeting had been arranged for 11 February 2020 to progress this but it was postponed. Ms McDonald chased the company responsible (which had been subcontracted from the occupational health provider) and on 7 February 2020 she asked HR to seek to expedite matters. The company responsible was able to reinstate the meeting for 11 February 2020.

74. The ergonomic assessment took place with the claimant on 11 February 2020 and a report was produced. The report noted that the claimant had indicated she experienced pain throughout her body with her hands, wrists, torso and hips being worst affected. She had indicated she had fibromyalgia and had good and bad days and her working posture could aggravate the pain and sitting can be painful. The workstation was observed and it was recommended that the desk was suitable, monitor was too low, keyboard mouse and phone were suitable but she did not have a headset for her phone. A normal office chair was not suitable. She was advised to take a break every 45 minutes.

75. Recommendations were that a specific chair be obtained which would provide excellent support for her spine and had lumbar support. The claimant would be put at a substantial disadvantage compared to those without her disability in not having the additional support the chair offered given the pain created.

76. Other items recommended were:

    a. a number slide keyboard (which is narrower and allows more space for arms when typing and reduced shoulder strain and would have reduced the pain the claimant experienced such that the claimant would be placed at a substantial disadvantage compared to those

without her disability in not having the additional support the keyboard offered),

b. a special mouse (which can alleviate upper limb disorders and reduces elbow strain (also reduce the pain the claimant experienced such that the claimant would be placed at a substantial disadvantage compared to those without her disability in not having the additional support the mouse offered),

c. a laptop stand which may assist her (allowing variable heights and reducing neck strain thereby reducing the pain the claimant experienced such that the claimant would be placed at a substantial disadvantage compared to those without her disability in not having the additional support the stand offered) and

d. a blue tooth headset (which may benefit the claimant freeing hands when on the phone for other work when on a call). The substantial disadvantage to which the claimant was put was in having to lift a telephone which caused her pain and a headrest would have removed the disadvantage the claimant had (compared to those who did not have her disability).

77. These items were summarised and there was a “quote” at the end of the report. The quote covered 5 specific items and came to £1,249.26.

78. Ms McDonald assumed the items she was purchasing within the quote were the items recommended but in fact the quote only covered the chair with specific additions (pair of arm rests, neck rest, padding upgrade and set up).

79. Ms McDonald received the report at 11.56am on 17 February 2020. Ms McDonald replied at 1.29pm asking how this was taken forward and if the company that provided their support supplied the “chair etc”. The next day Ms McDonald contacted the company by email and asked that the items contained in the quote be delivered to the site the claimant was based. She asked that an invoice be sent to her. She understood the quote which was being processed included all items but in fact only included the chair (and

additional items related to the chair). She did not verify that what she was purchasing was all the items within the report which was her understanding.

Concerns raised about claimant's working relationship with colleague

80. In mid to late January 2020 the claimant's colleague who had been based at Benthall as a fixed sales executive for some time had raised concerns, in confidence, with Ms McDonald about the claimant's lack of communication, her communication style and failure to keep customer records up to date following her returning as a sales executive. This led to Ms McDonald setting out a protocol for all staff at the site when dealing with emails and communication. That protocol had been used in other sites. The claimant confirmed she would follow the protocol.

Ms McDonald meets claimant in February 2020

81. During February 2020 Ms McDonald met with the claimant. It was not unusual for Ms McDonald to visit different sites and catch up with her staff. A general discussion took place. The claimant had been concerned that the respondent wished to change what had been agreed with regard to the outcome of the grievance. The claimant was not told that any of the adjustments that had been agreed would be changed,. The position that was agreed following the grievance meeting continued to apply. The claimant continued to be based at Benthall and proceeded as had been agreed.

82. The claimant continued to work at Benthall with her colleague (who was permanently based there). The claimant interpreted discussions that took place with her managers as negative and discriminatory. She believed that the respondent was not supporting her and that comments made were negative and directed at the claimant. Ms McDonald did not act in an inappropriate way and sought to work with the claimant and support her. While other staff knew of the claimant's fibromyalgia, it was more likely than not that this knowledge was gained from discussion amongst staff (including the claimant) and not as a result of the claimant's managers discussing it (but the claimant assumed this was something her managers had disclosed and

discussed to her colleagues as a result of the way in which she perceived the respondent to behave towards her).

83. While issues of performance were raised, these were general in nature and not solely directed at the claimant. There were no unfair criticisms made of the claimant in the presence of the claimant's colleagues by any of the respondent's line managers. The discussions that took place were reasonable and general and the claimant was treated in the same way as her colleagues in that regard. Although the claimant perceived her managers as treating her differently and believed that she was being singled out, this was not in fact what was happening.

Impact of the pandemic

84. Around March 2020 the coronavirus pandemic hit the UK followed by a national lockdown. There was uncertainty as to what was and what was not permitted and what people could do, whether at work or elsewhere.

85. On 19 March 2020 Ms McDonald sent an email to all relevant staff entitled "Home Working – Double manned sites" indicating that the company was working with Government guidelines in terms of social distancing and managing interactions. Working from home guidance was issued asking staff to work together to ensure appropriate communication between staff and with line managers. The guidance would evolve as matters developed. The claimant made a number of suggestions as to how to manage matters to which Ms McDonald responded. She had been taking guidance from her managers who were issuing guidance centrally.

Chasing the equipment

86. The respondent had created an email address for staff to raise specific issues which was called "AskPete" (referring to the respondent's chief executive). On 19 March 2020, the claimant sent an email Ms McDonald, which was copied to the "Ask Pete" portal and copied directly to the chief executive. The email made several suggestions with regard to operational matters in response to the pandemic referring to Government guidance and some suggested

measures. The email ended: “While I have you here Susan, could I ask if you know the latest position with my chair and other aids per the assessment? To expedite things it might be worth highlighting I’m entering my 5th month without appropriate equipment which continues to adversely affect me”.

87. Ms McDonald explained to the claimant that she was following guidance that had been issued by headquarters and would continue to do so. The claimant perceived the response as negative and unsupportive but Ms McDonald was seeking to ensure consistency. The claimant interpreted the actions of Ms McDonald as negative and “shutting her down” but Ms McDonald was not treating the claimant unfairly or in a negative way.

88. The next day (20 March 2020) Ms McDonald telephoned the claimant to update her as to the position with regard to the equipment. She also stated that she felt the claimant raising the issues as to the adjustments with the chief executive was “below the belt”. The claimant felt Ms McDonald was acting inappropriately towards her during that discussion due to her belief that she was being discriminated against because of her disability. In fact Ms McDonald was seeking to resolve matters locally and felt there was no need to raise the issues in the claimant’s email (nor send it to the chief executive). Ms McDonald understood how important it was for the equipment to be received and undertook to chase the order which she understood had been made and was being processed.

Equipment is sought

89. Ms McDonald had chased the equipment on a number of occasions. She also spoke to her line manager about the delays. An issue had arisen as to how the company received payment and was being dealt with.

90. On 20 March 2020 Ms McDonald sent an email to the claimant noting head office was seeking to expedite matters. She noted that she had accepted the quotation following the assessment which had been carried out on 11 February 2020 and accepted the quotation that has been issued on 17 February 2020 the day after it was received. She had asked when the order would be fulfilled and was told the matter was being processed. Further

chasers had followed. Ms McDonald had stated that she had hoped the equipment would be in situ sooner rather than later.

91. The claimant replied saying: “That’s great thanks very much Susan. I know you have been chasing the equipment for me already and it’s much appreciated!”.

92. Ms McDonald continued to chase the provider of the equipment on a number of occasions. She was told an update would be provided “as soon as possible”. On 25 March 2020 the company advised the respondent that they were unable to bank the cheque that had been sent due to the pandemic and asked for another method of payment.

Pandemic results in home working

93. On 23 March 2020 the claimant began working from home as the result of the pandemic

Help offered to claimant

94. On 27 March 2020 Ms McDonald sent the claimant a text stating saying she had been on Facebook and seen a mat that could help those with fibromyalgia. The claimant was grateful and said she would investigate. Ms McDonald replied saying “Are you suffering just now. That’s rubbish x”.

Continued chasing of equipment by respondent

95. On 31 March 2020 Ms McDonald sought a further update and was advised that the chair typically has a 3 to 4 week lead time for delivery and the payment should be able to proceed. Ms McDonald sent an email to the claimant the same day noting she had been chasing the company which had suggested delivery could be 4 weeks (which may have been down to the pandemic). She noted that the claimant might want it delivered to her home (given it could be as uncomfortable to work at home as in the office). Ms McDonald noted that there would probably need to be a relaxation with regard to lockdown to allow this to happen but she asked the claimant to have a think.

96. The claimant replied later that day noting that she was unsure how the pandemic would affect matters and would speak to her parents (given their vulnerable status and the uncertainty of the pandemic). On 1 April 2020 the respondent was advised that the chair could be available in around five working days and they would be in touch to arrange delivery. Ms McDonald contacted the claimant noting the expedited delivery and asked the claimant if she wished it delivered to her home or it could wait until after lockdown.

97. Two days later the claimant replied indicating that it was not worth the risk and it would be best to hold off until after lockdown. She indicated she had bought her own adjustable laptop stand in the meantime. Ms McDonald replied saying she had contacted the company and confirmed installation could take place once the business was fully operational. She advised the company that all development sites were closed at the moment and so there was no way to take delivery and the claimant had been asked if she wished it delivered to her home but was not comfortable given those staying with her at that time and the pandemic. When the respondent was able to accept delivery she would advise the company.

Claimant placed on furlough

98. Following the impact of the pandemic the respondent took time to consider how to deal with matters. Sites had been closed with staff working from home where they could. The respondent decided that the impact of lockdown meant it was not possible to continue to employ all staff in the normal way and some required to be furloughed. For sites that were double manned (such as Benthall) a decision was taken, to furlough one member of staff, with the other employee remaining at work (with work being done from home). That decision was based randomly and there was no formula or criteria used to select who was to be furloughed. The claimant was furloughed with her colleague being asked to continue to work from home. It was not possible to have a rotational basis and given one person had to continue to work, the claimant's colleague was chosen to work. On 9 April 2020 the claimant was placed on furlough.

99. Guidance issued by the respondent stated that those who were furloughed should not attend work nor perform normal duties. Staff were advised that they could still access their emails so they can stay connected and an out of office message should be added. Contact with colleagues and managers was permitted. It was important those on furlough did not undertake any work. That included taking part in work meetings albeit some contact was permissible (such as to progress customer queries where the information could not be readily obtained elsewhere). The guidance noted that the situation was unprecedented and the matter would be kept under review. Guidance was sent to staff as it was updated.

100. The claimant checked her company emails around once a week to allow her to keep in touch with the respondent while on furlough. The claimant was also given regular updates and attended the weekly teams calls led by Ms Ross which provided a general catch up and keeping in touch chat. This was an example of the claimant being kept in the loop with regard to business matters. The claimant believed that she had been singled out as a result of Ms Ross noting the claimant had not attended the meeting but that was due to Ms Ross not seeing the claimant's name during the call (when there could be a number of participants). It was a genuine error and the claimant was able to correct it and the call continued. It had not been possible for Ms Ross to see who was on each call given the number of people present. Ms Ross did not unreasonably single the claimant out nor treat here in any unfair or unreasonable way during any of the catch up sessions.

Request for information

101. Around 12 May 2020 the respondent sought to understand the IT position of its staff to assess what additional hardware was needed. On 12 May 2020 an urgent email was sent to all staff by Ms Ross noting she had been asked to check what IT equipment staff had and need to allow home working. Ms Ross had also asked all staff to confirm they had completed the telephone training which had been sent to all sales executives. Ms Ross explained that the telephone training request had been sent 3 times and the respondent was looking to assist its staff to work remotely.

102. The claimant had not seen the email and a further request was sent to the claimant on 14 May 2020 and again on 15 May 2020 by email. The claimant replied on 15 May 2020 apologising for the delay in response noting she had suffered bereavements and had not been checking her email as regularly. Ms Ross replied saying: "I'm very sorry to hear that. As if it's not hard enough right now.". She also noted that there had been some communications to colleagues during the pandemic which were supportive measures and the claimant was to advise her line manager how best to keep in touch with her. The claimant replied noting she had been at each of the weekly catch up meetings (and had only missed one). The claimant completed the training.

103. The claimant perceived Ms Ross's requests to complete the training as her being treated differently to her peers but the request had gone to all staff (and similar chaser emails had been issued to other staff too). She was treated in the same way as her colleagues. The treatment the claimant received by Ms Ross was not unreasonable (or discriminatory) treatment. It was the same treatment all staff had received.

Return to work

104. The claimant was advised by letter dated 19 May 2020 that she would return from furlough on 31 May 2020. On 23 May 2020 Ms Ross sent a communication to all staff noting that the rote was being prepared for a return to work noting the arrangements for the return to work given the ongoing pandemic. Ms Ross asked staff to confirm whether or not they were able to work from the sales office when allowed to do so (given the special leave policy and issues of shielding etc) or if there were any staff required, for example, to work from home. That would allow planning for all sites.

Request for information

105. Ms McDonald followed this up with an email to all staff asking staff about whether they can work in the office and if so on which days. The claimant had spoken to the colleague who worked in the same site as her and the colleague had replied with a suggested rota including the claimant and her colleague. In the absence of an response from the claimant Ms McDonald sent an email to

the claimant on 24 May 2020 proposing a working pattern and asking her to contact her if she had any concerns. The claimant responded with an alternative working arrangement in an email noting she had been checking emails once a week when on furlough and that her colleague had replied on both individual's behalf. Ms McDonald had no issue with the claimant's proposal and it was accepted.

106. The claimant had perceived the respondent as discriminating against her by not taking into account her pattern but that had only been done as the claimant had not replied to the email herself. Once the claimant had done so, her position was accepted. Ms McDonald had no issue with the claimant's proposed working pattern.

107. Ms McDonald replied to the claimant explaining that the purpose of asking individuals as to their position was to ensure the respondent knew of each individual's position to allow them to plan across the business (as some staff may need to be moved around sites to ensure appropriate cover). She also noted that the equipment suggested by the ergonomic assessment had been ordered and delivery was awaited. The claimant replied noting that the respondent now had the proposed agreed pattern the claimant and her colleague could work if and when lockdown eased.

Equipment chased again

108. On 25 May 2020 Ms McDonald contacted the provider of the equipment, copying the claimant stating that the sites open on 29 May 2020 and asking for delivery on that date. The next day the company replied stating that due to the ongoing situation, delivery and installation would not be possible. The company asked whether delivery on a self build was to be completed or whether the respondent wished to await a time when it was possible to deliver and assemble. The claimant was copied into that email.

109. On 26 May 2020 Ms McDonald replied stating that they would await the easing of restrictions and asked the company to confirm when delivery can be arranged. On 27 May 2020 the claimant sent an email to Ms McDonald thanking her for the update and confirmation that the equipment had been

ordered. She noted she would be back as an operational member of staff from Friday of that week.

110. On 31 May 2020 the claimant sent an email to Ms McDonald asking if it was possible for the equipment to be delivered to her home or if it had been delivered to site for her to pick it up. She said she was feeling the impact of being back at home and believed it would make a big difference. Ms McDonald replied stating the company was unable to deliver at that time but would confirm when they could do so, which was due to ongoing restrictions. The company had advised Ms McDonald that they were unable to deliver and install the chair. Due to an oversight she had not appreciated the company could have arranged to ship the chair via courier only, on a self build basis.

111. On 5 June 2020 Ms McDonald and the claimant had a further discussion and Ms McDonald contacted the provider and asked if the chair could now be delivered to the claimant's home address, copying the claimant into the email. Ms McDonald wished to ensure the claimant had the chair as soon as possible and the claimant would arrange to assemble it.

112. The claimant and Ms McDonald discussed the position if the claimant returned to the office to work. The claimant believed Ms McDonald was not supportive as Ms McDonald was not certain two chairs would be purchased. Ms McDonald did not wish to order a further chair if it was not required as it was then uncertain what the position as to home and office working would be. The claimant perceived this as a "discriminatory attitude" but the respondent was seeking to ensure the claimant had appropriate equipment at the right time.

Only the chair is delivered – other items outstanding

113. On 9 June 2020 the recommended chair was delivered to the claimant's home. The claimant had checked the order form which had only detailed the chair and not the other items. She asked Ms McDonald what the position was. Ms McDonald believed she had ordered all the items from the ergonomic report. On 9 June 2020 Ms McDonald contacted the provider asking why all the items that had been ordered had not been delivered. Ms McDonald checked the matter and advised the claimant that she had understood all

items were included in the quote but it appeared that the actual quote had only included the chair. The claimant had purchased a laptop stand herself. Ms McDonald undertook to order the additional items (and did so, with exception of the headset which she missed in error). While the claimant argued Ms McDonald had deliberately avoided ordering the other items, it was a genuine error. Ms McDonald believed all items had been ordered and had understood that was what had happened. She ordered the remaining items (keyboard, mouse and laptop stand) items as soon as this was discovered. Due to a genuine oversight Ms McDonald omitted to include the headset.

Discussion between Ms McDonald and the claimant on 12 June 2020

114. On 12 June 2020 Ms McDonald had a discussion with the claimant and her colleague. After the general discussion Ms McDonald and the claimant had a discussion. The colleague was gong on leave and Ms McDonald wanted to check the claimant was comfortable in her absence. Ms McDonald asked how the claimant was feeling and about the chair, including whether she was happy with it at home or whether she wished it in the office (if the office was going to open again). Ms McDonald was exploring options. No decision had been taken, not least given it was not clear when the claimant would be able to return to the office given the pandemic and her health position.

Discussing return to office 14 June 2020 onwards

115. On 14 June 2020 the claimant sent an email to Ms McDonald discussing the return to the office and her position (with an underlying health condition). She noted that before she returned to the office it was important to ensure all appropriate equipment was in place to avoid previous delays. She indicated that she was happy taking the portable equipment to and from the office (and to home when she was working there) but the chair was not portable. She asked for confirmation as to what was to happen to having a suitable chair when she was in the office working and asked that the remaining equipment be sent to her home when delivered. Ms McDonald wanted the claimant to have the correct equipment wherever she was based.

116. On 15 June 2020 Ms McDonald asked HR to make enquiries and ensure the remaining equipment was delivered as soon as possible given it was for a vulnerable member of staff who was currently shielding (and the equipment was needed urgently).Ms McDonald also followed that instruction with an email to the company asking for delivery to be scheduled as soon as possible to the claimant's home. This was chased again on 16 June 2020 and Ms McDonald was told delivery would be 3 to 4 working days.

117. On 17 June 2020 Ms McDonald told the claimant the respondent wished to ensure she had the correct equipment wherever she was based. She was advised to continue working remotely until the guidance changed. She indicated that matters could be clarified once the guidance became clear as to those shielding. Given it was possible a return to the office could be some time away Ms McDonald did not wish to unnecessarily order additional items at that stage. The claimant was placed on the working from home rota.

Remaining equipment arrives (except headset)

118. On 18 June 2020, the recommended number slide keyboard, penguin mouse and laptop stand were delivered to the claimant's home. The recommended headset was not provided but the claimant did not raise any concern that it had not been delivered. Had Ms McDonald known the headset had not arrived she would have ordered one herself personally. Ms McDonald had inadvertently omitted to include the headset when asking the other items to be delivered and this had not been picked up.

Enquiries as to second chair if and when claimant works on site

119. On 19 June 2020 Ms McDonald made enquiries with the author of the ergonomic report noting the respondent had provided the specialist chair as recommended which would be used for home working. She asked whether or not there was a recommended limit on the use of a normal office chair (when the claimant would be working in the office). Ms McDonald wished to check the position if and when the claimant was able to return to the office.

Customer complaint

120. The claimant believed that the approach the respondent was taking to her was discriminatory and would perceive discussions by her manager as negative and unsupportive.

121. An example of this was in relation to a customer complaint that had been raised with Ms McDonald in relation to a plot sale that the claimant had managed. The customers had complained that the claimant had not reverted to them in relation to a matter which had concerned them. Ms McDonald was concerned that the claimant had not fully kept the plot file up to date. The claimant maintained that she had done nothing wrong and told Ms McDonald she believed things had been getting personal. Ms McDonald had replied explaining that she required to investigate the complaint as the customer had raised it. The claimant believed this was an example of "manufacturing performance issues and falsely attacking her" but Ms McDonald was seeking to investigate an issue that had been raised by a customer. Ms McDonald had not acted inappropriately.

Issues with team in which claimant worked

122. Concerns had been raised with Ms McDonald by the colleague with whom the claimant worked at Benthall at the start of 2020. The colleague was concerned that the working relationship was poor. The colleague had raised the matter in confidence with Ms McDonald. This had been raised over a period of time but Ms McDonald had hoped that the colleague would speak with the claimant directly as there appeared to be a working relationship that ought to have facilitated that. Ms McDonald had been advised that the claimant had become angry and defensive whenever the issue was raised and attempts to improve communication had not worked. Ms McDonald decided to meet with the team.

123. On 28 June 2020 a Teams meeting was arranged with the claimant, colleagues from Benthall and Ms McDonald. The aim of the meeting was to encourage better team communication. Ms McDonald left the meeting with the Benthall staff left to discuss how best to work together. Ms McDonald then received a call from the claimant's colleague who had left the meeting as the claimant had become angry arguing that she had been spoken about behind

her back. The claimant had become upset and believed she had been singled out when in fact the meeting was about encouraging the team to work together as a whole. She wrongly believed she was being treated differently or blamed for the issues. Ms McDonald was seeking to encourage better team working and improve the team dynamics and communication (without disclosing the fact a colleague had raised issues specifically about the claimant). During the discussion the claimant deduced from the nature of the discussion that one of her colleagues had raised issues about the claimant and she was unhappy.

124. Following the Teams meeting, the claimant sent an email to Ms McDonald headed "Team working". She stated that she had tried to have a chat with her colleague "as it was clear from the meeting that she had been having conversations with you regarding me generally and the handover she left". She said she had been doing her best to work together but her colleague had not been engaging. She indicated that there are "endless examples" of her colleague not working with her but she wanted to deal with matters and move on. She wished management to intervene.

125. Ms McDonald replied to the email suggesting a meeting with both individuals. She indicated that she was concerned about the inability to work together and thought an open and honest conversation would help to assist team working. The claimant replied indicating that she would be unable to meet in person and was not sure what a meeting would achieve. She felt there was some underlying resentment that had built up since furlough and home working. She believed her colleague had become defensive. She indicated that she would be happy for both individuals to copy Ms McDonald into communications as all she wanted to do was to continue with her job. She was shocked with her colleague's behaviour, given she regarded her as a friend. She believed she had drawn a line under matters and wished to move on.

Claimant calls Ms McDonald on 29 June 2020

126. As Ms McDonald was preparing a response to the claimant's email, the claimant telephoned. The claimant put this call on loud speaker so her sister could hear it, but she did not tell Ms McDonald she was doing so.

127. The claimant said she was unhappy that her colleague was speaking about her behind her back. Ms McDonald explained she considered a meeting with the affected staff to be a good way to help them work together. Ms McDonald was concerned that the relationship between the claimant and her colleague appeared to have broken down and she advised her line manager that HR advice was needed.

128. Ms McDonald had concerns about the claimant's communication style and that she had been dealing with customers via email rather than forming relationships with them. She was also concerned that the files on which the claimant had been working had not been fully kept up to date which resulted in challenges. Ms McDonald believed that the claimant had become overwhelmed by the responsibility of the role and was struggling to form positive relationships with her colleagues. These were matters Ms McDonald wished to work with the claimant in improving. It was Ms McDonald's duty to raise these matters and work with the claimant to resolve the concerns she had. This was difficult for Ms McDonald given the claimant had been arguing she was being treated differently to other staff and she had interpreted the actions of the respondent in a negative way rather than in the way in which they were intended, which was supportive and constructive.

129. The telephone call was conducted in a reasonable way given the challenges Ms McDonald was facing. The claimant was unhappy as she believed Ms McDonald was discriminating against her (when in fact Ms McDonald was seeking to find a solution to improve the team dynamics).

130. In order to try and improve the relationship between the claimant and her colleague, Ms McDonald put a regular fortnightly teams meeting in each of their calendars starting on 31 July 2020. Due to the claimant's absence she was unable to attend those meetings.

Claimant unhappy with treatment and Ms McDonald unhappy with approach

131. Shortly after the telephone call, the claimant sent an email to Ms McDonald saying she felt Ms McDonald had no intention of objectively looking at the situation. She believed she was being treated differently from other members

of staff as she felt she was being put under microscopic scrutiny. She said that as she was due to commence leave from Wednesday given how she felt after the call and the fact her mother was heading into hospital there was no way she could meaningfully participate in work that afternoon nor the next day and so she ended her email: "Therefore please extend my leave to commencing now. I will put my out of office automatic reply on to reflect this."

132. On 29 June 2020 Ms McDonald replied noting that she believed a meeting would be helpful given the issues that had been raised. She disagreed there had been any underlying resentment about the claimant. She suggested there had been a lack of engagement during the furlough period given the delayed response to requests. Ms McDonald noted that without speaking to the colleague in question there was no way of understanding the position. Ms McDonald reiterated concerns as to the claimant's communication particularly when home working (ensuring everything is documented on file to ensure everyone knows the stage at which each transaction is at). Ms McDonald sympathised with how the claimant was feeling and said she would speak with the claimant's colleague. She concluded by saying the parties needed to find a way of returning to a positive working relationship which could be achieved by having an open and honest conversation. She asked the claimant to call her if she wished to discuss.

Issues following claimant going on unauthorised leave

133. Later in the day Ms McDonald noted the claimant's statement she was taking leave with immediate effect. She expressed sympathy that the claimant could not continue to work but that the taking of unauthorised leave was unacceptable since it made management of the rota difficult. She reiterated her offer of a meeting to find a resolution.

134. The claimant's colleague sent the claimant a text message that evening saying: "I just wanted to send you a wee message to say I hope you're ok and hope you enjoy your break. Don't want you going off tomorrow and feeling stressed its just such a stressful job at times and harder with all this covid situation I don't want us falling out and want you to enjoy being off. We will

get things sorted with the workload and get a good routine going when we are both back. Take care and drink lots xxx."

Claimant on leave and experienced flare up

135. Between 29 June 2020 and 17 July 2020, the claimant was on leave. In mid to late July 2020 the claimant experienced a flare up of her condition. She was stressed as a result of how she perceived she had been treated and contacted her GP who advised her to rest.

Claimant's return to work on 17 July 2020

136. On 17 July 2020 the claimant's colleague sent her an email hoping she had a nice time off and that she could call the claimant to update her on work matters.

137. Later that day the claimant emailed Ms McDonald saying that she had been very ill during her time off and was still experiencing a flare up of her condition. She asked if she could catch up over email. Ms McDonald replied saying she was sorry to hear that and would call her the next day. Ms McDonald tried to call the claimant the next day but did not get a reply. She sent the claimant a message asking the claimant to call her.

Claimant tells her line manager she wants email contact only

138. The claimant replied to the message saying that she did not want to put herself in a position like the last call as she was still feeling the effects during leave when she was looking after her mum. She said she had received a handover from her colleague and if there was anything Ms McDonald wanted to tell the claimant (before Ms McDonald went on leave) the claimant wanted that to be sent to her in an email.

Ms McDonald expresses concerns about how claimant conducted matters

139. Ms McDonald replied later in the evening (on 19 July 2020) thanking her for the email and hoping her mum was recovering. She said: "As your manager I am very concerned at the ongoing conversations we continue to have.

Choosing not to talk to me or take my calls (which isn't the first time) makes our relationship even harder to maintain and progress in a positive direction."

140. She stated that there had now been a number of occasions whereby Ms McDonald questioned the claimant's conduct and approach including, for the second time, taking annual leave without notice adding pressure to the rota and requiring Ms McDonald to take urgent action. She said that the approach to refusing to have telephone calls and asking for email communication was not the best way to working together. She had hoped the issues with her colleague could have been dealt with informally but raising the matter with management added further tasks for Ms McDonald which was why she wished mediation meetings to encourage both individuals to find a way to work together. She explained that she was finding it difficult to manage the claimant given the stress both individuals had, taking account of the claimant's health and family issues. She indicated that she had always found the best outcome to be based on trust and on a relationship that is two way. She suggested the claimant would often rather avoid difficult conversations and formalise the position in an email.

141. Ms McDonald concluded stating that she had been keen to catch up with the claimant before Ms McDonald's 2 week leave period. She wished to address some performance and behavioural issues and suggested the matter could be addressed upon her return from leave. In her absence she was to contact a colleague as her line manager.

Claimant ill

142. The claimant experienced a further flare up in her condition and was again absent from work. Ms McDonald advised the claimant that she was sorry to hear the claimant was still feeling unwell and offered to have a chat with her when she was off if she wanted.

Checking adjustment to office chair

143. On 6 August 2020 Ms McDonald asked the company that had provided the equipment if they could hire a chair similar to the one that had been purchased

and what amendments could be made to a standard office chair (given the ergonomic chair would be used when the claimant was at home and whether it was possible to allow the claimant to work some time in the office with adjustments to the standard office chair). On 17 August 2020 Ms McDonald chased the company again stating that it was urgent. The company replied on 18 August 2020 apologising for the delay which was due to holidays. The author of the report was contacted to ascertain whether adjustments could be made to a normal office chair to allow the claimant to use that chair when working in the office (with the specialist chair when working from home). Ms McDonald emphasised that the claimant had fibromyalgia and the specified chair had been purchased but they wished to know what modifications could be made to an office chair if she was working in the office for some days of the week.

144. On 19 August 2020 the assessor replied stating: "The main thing would be to achieve a reasonable posture when working. The main issue was that the claimant was working from a laptop. This would need to be raised suitably or she would need an adjustable monitor. For the chair it may be beneficial to add a lumbar support that attaches to the back rest to allow for adequate back support. In regards movement I agree that she should sit for no more than an hour at a time but if possible move more than this." Ms McDonald would have bought another specialist chair if it had not been possible to adjust the office chair, had that been necessary and had the claimant returned to site to work.

Absence from work and legal advice

145. The claimant contacted her GP on 19 August 2020 at which point the peak of her flare up had passed. She advised her doctor that she was going to seek advice as to negotiating an exit from the respondent. She no longer wished to work there. The pandemic had made seeking advice difficult. ACAS was busy. She researched employment lawyers and spoke to someone. She had 12 days from the point of having the ability to act and make an informed decision as to her resignation.

146. On 31 August 2020 Ms McDonald had contacted the claimant to say she was looking forward to the claimant returning to work.

147. By 31 August 2020 the claimant had researched employment lawyers and sought legal advice from an employment law specialist and spoken to ACAS. The claimant had the benefit of a specialist employment lawyer who had prepared and lodged the ET1 on her behalf. There was no evidence before the Tribunal as to precisely when she sought advice nor as to the claimant's knowledge of employment law or procedure, albeit she had spoken to a family friend during her employment (who was a solicitor and suggested she use "without prejudice" on her correspondence).

Claimant resigns

148. On 31st August 2020, the claimant sent an email to Ms McDonald headed "Letter of resignation" stating: "Please accept the attached as my formal resignation". The attachment was a letter saying she was resigning. She said: "I feel I have been required to make a choice between my health and my career. This is against the background of the handling and outcome of my earlier grievance following my diagnosis of fibromyalgia and ongoing adverse and discriminatory treatment towards me since then. My notice period is four weeks so my last date of employment will be 29 September 2020."

149. On 1 September 2020 Ms McDonald acknowledged receipt of the resignation and stated that she had hoped the parties could have worked together on her return to work to address the issues both by way of the health position and general performance to allow the team work more effectively together. She wished the claimant the best in terms of her health and career.

Observations on the evidence

150. Broadly speaking the Tribunal found that each of the witnesses did their best to recall events and provide credible and reliable evidence. On occasion recollections were found to be incorrect or some errors were made.

151. The Tribunal found that the claimant begun to interpret how the respondent acted in a very negative way. She had the perception that the respondent was

treating her differently and adversely because of her disability and would decern differences in treatment which she believed was due to her disability. This was unfortunate as the respondent was seeking to work with the claimant and agree a way forward. The approach the claimant took resulted in the claimant being unable to see the supportive approach of the respondent. This was evidenced by the claimant stating in cross examination that she considered the fact her line manager provided her with some information about helping her condition as "sinister" when it was an attempt to support and empathise with the claimant.

152. On a number of occasions during cross examination the claimant sought to give a response that she believed supported her position rather than carefully answering the question that was put. A number of reminders were given to the claimant to provide her response to the question that was asked. She did her best to do so but clearly strongly believed that she had been discriminated against and wished to ensure this point was made. On occasion she was not prepared to concede that what had happened was fair and reasonable. It was clear that the claimant believed that the treatment she received was discriminatory and she viewed the treatment she received through this lens.

153. Another example of this was the comment Ms MacPhee made in her email of 18 December when she acknowledged the conversation with her had "caused some upset and distress". During cross examination the claimant repeatedly asserted that was a concession by Ms MacPhee that it was Ms MacPhee accepting that Ms MacPhee had caused the claimant upset and distress, as opposed to the circumstances in which the claimant found herself.

154. The claimant firmly believed that she was being treated differently and interpreted the respondent's actions as such. This made it difficult for the claimant to be objective about the actions of her managers. In response to a question in cross examination as to what specifically Ms McDonald had done that was adverse behaviour, the claimant said she had been "continuously falsely accused of performance and behavioural issues". Ms McDonald had in fact sought to support the claimant. She had raised issues she had with regard to the claimant but that was her job as a line manager and the claimant

was able to provide her response. It was regrettable that the claimant saw that as adverse rather than supportive.

155. A further example of the claimant interpreting the respondent's actions in a negative way is shown by the claimant's belief that Ms Ross sympathising with the claimant in her email of 15 May 2020 when she told the claimant that she was sorry to hear of the bereavements the claimant suffered "as if it's not hard enough right now" as a negative comment (rather than supportive and sympathetic as it was intended).

156. Another example of this was the claimant's belief stated during cross examintion that Ms McDonald had deliberately not ordered all of the items within the report (and therefore wished to harm the claimant) when it was clear that Ms McDonald genuinely believed all of the items recommended had been ordered. The Tribunal was satisfied that Ms McDonald had made a genuine error. She had specifically asked for the equipment within the report to be ordered and reasonably proceeded upon the assumption all equipment had been ordered. As soon as it became clear that only the chair had been ordered she placed an order for the remaining equipment. It was regrettable that in that order the headset had been omitted. Ms McDonald candidly stated that had this been pointed out to her, she would have bought the headset herself for the claimant. The Tribunal found Ms McDonald to have been fair and supportive of the claimant. Ms McDonald had made a genuine error in not checking precisely what was ordered and then in not checking that all the recommended equipment was ordered.

157. One of the key issues in dispute between the parties was what was said at meetings and phone calls and how the calls were conducted. The claimant's position was that the meetings and calls were conducted in a discriminatory way singling her out and treating her adversely because of her disability. She believed that there was aggression and unfairness in how these discussions were conducted. That was supported by the claimant's sister and mother some of whom heard the call and her sister had attended the grievance meeting. The respondent's witnesses flatly contradicted that position. Each of

the respondent's witnesses argued the meetings were on occasion fraught but that the approach was fair and reasonable.

158. As the claimant's agent submitted, both sides cannot be right. The Tribunal carefully considered the notes relied upon by the claimant in support of her position in relation to meetings that took place. Those included the evidence provided by the claimant's sister and mother. The claimant on a number of occasions asserted that the position advanced by the respondent was entirely false. However, on a number of occasions it transpired that in fact some of the content (most of which supported the claimant's position) was not in fact incorrect.

159. The Tribunal carefully analysed the evidence of the claimant and her sister and mother. The claimant's sister was clearly concerned as to how the claimant believed she had been treated and the perception the claimant had as to the respondent's approach to working with her and her disability. It was entirely understandable that the claimant's sister would support the claimant and adopt a position that was consistent with the claimant's perception. Thus the claimant's sister's notes would often place an interpretation of the respondent's approach that was seen through that lens. The notes and evidence presented by the claimant's sister (and mother) was naturally supportive of the claimant. The Tribunal did not consider the notes the claimant's sister took (which were not presented to the respondent at the time) to be an objective record but a summary of what the claimant and her sister understood had occurred (seen from the claimant's perspective). It was notable that the notes that were taken of the grievance meeting were not provided to the respondent at the time (when it would have been possible to deal with any issues that arose).

160. The Tribunal took into account the evidence provided by the claimant's sister and her mother but found that where there were disputes, the respondent's witnesses were to be preferred. This was not a criticism of the claimant or her family. It was due to the fact the claimant firmly believed the treatment she was receiving was negative and due to her disability. It was natural for her to adopt this position with her family who clearly wished to support the claimant.

The claimant's position was that much of what the respondent put down in writing was incorrect and that what happened orally was different. The Tribunal carefully considered that assertion but did not accept it. The Tribunal found the respondent's witnesses to be clear and careful in their approach to the issues and preferred their evidence.

161. In particular the Tribunal found Ms McDonald to be supportive of the claimant. She genuinely wished to assist the claimant to deal with the performance issues Ms McDonald had. Ms McDonald and her colleagues had tried to work with the claimant to support her during the real challenges she encountered. Regrettably the claimant perceived the attempts to support and work with her as negative treatment, rather than how the behaviour was intended. The written evidence supported the respondent's position which was confirmed in evidence by the respondent's witnesses who were credible and reliable.

162. The Tribunal carefully considered the evidence led both orally and in writing and considered the contemporaneous notes that were provided to the Tribunal. The Tribunal found, on balance, and after carefully analysing all the evidence led before the Tribunal, that the position adopted by the respondent was to be preferred to that asserted by the claimant. The claimant's approach had been to interpret much of what the respondent did as negative and connected to her disability when in large part the respondent was seeking to be constructive and work with her. The respondent's witnesses were credible and accepted on occasion, where appropriate, that they had not been perfect and had got things wrong. It was recognised, for example, that managers did not have experience in working with disabled staff and that training was needed (not least in terms of return to work meetings).

163. Ms McDonald also conceded that she had made a mistake with regard to procuring the auxiliary aids and she did all she could to expedite delivery. She was also exploring whether an office chair could be used with adjustments when in the office. If that had not proved possible, another specialist chair would have been purchased. It was not unreasonable to explore all options given the uncertainty at that time as to when, if at all, the claimant, in light of the prevailing circumstances, would return to office work.

164. It was accepted that the claimant's line managers had limited experience in working with an employee with the challenges the claimant found. That, however, did not mean that the approach the respondent took was discriminatory or unfair but on occasion resulted in frustration on both sides as the claimant became upset and matters were not agreed when the meeting ended.

165. It was clear that the discussions with the claimant had become fraught. The claimant assumed that the respondent would not give her what she wanted (a permanent base in Benthall) which was why she had prepared a response when she believed the issue was going to be raised and had it in her phone. The claimant firmly believed there was only one option for her and that this was fully supported by the medical position. She was not prepared to consider any other options and was extremely upset when this was not offered to her. She assumed her managers were being aggressive and unfair to her (which she perceived as discrimination). In fact the respondent wished to explore all options open to it in light of the medical position which stated that the position could change (as the aim was to reduce the claimant's pain relief) and which suggested it may be possible for the claimant to move between sites, but in limited circumstances. The claimant perceived the respondent's attempts to explore options as aggressive as it did not meet with her desire. As a result during discussions the claimant perceived conflict. This led to frustration by the claimant's line managers at times as the claimant was unwilling to explore options or accept management discussion around this issue.

166. Having carefully assessed the evidence before it, where there were disputes as to what was said and how it was said during discussions between the claimant and her line manager, the respondent's witness evidence was preferred. The Tribunal accepted that the claimant and her sister had been present but considered their evidence to be less credible than that provided by the respondent's witnesses. This was not a criticism of the claimant or her sister but an assessment of the evidence led before the Tribunal.

167. Another specific evidential issue in dispute was whether Ms McDonald told the claimant during a meeting in February 2020 that the reasonable

adjustments were going to be changed or removed (which was the claimant's position). Ms McDonald disputed telling the claimant this. The Tribunal found that a meeting did take place but that Ms McDonald did not tell the claimant the position as to reasonable adjustments would change. There were a number of reasons for this. Firstly it was more likely than not that any changes as to reasonable adjustments would have been dealt with by Ms Ross, who had been responsible for the initial adjustments. Ms McDonald was not responsible for the adjustments. Secondly there was no suggestion raised by the claimant at the time of any such discussion having taken place. Given the importance to the claimant of the adjustments, had the discussion taken place the claimant would more likely than not to have raised the matter in writing. Finally there was no reason for Ms McDonald to suggest any such changes given the context of the discussion. Ms McDonald's evidence was preferred on this issue.

Law

Discrimination claims

Burden of proof

168. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> *"(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."*

169. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

170. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there

has been no contravention by, for example, identifying a different reason for the treatment.

171. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

172. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

173. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a *prima facie* case.

174. Thus in direct discrimination cases the tribunal can examine whether or not the treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule.

175. The Tribunal was also able to take into account the recent Employment Appeal Tribunal decisions in this regard in **Field v Steve Pye & Co** EAT2021-000357 and **Klonowska v Falck** EAT-2020-000901.

Time limits

176. The time limit for Equality Act claims appears in section 123 as follows:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable …

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it".

177. A continuing course of conduct might amount to conduct extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis** 2003 IRLR 96 which deals with circumstances in which there will be an act extending over a period. In dealing with a case of alleged race and sex discrimination over a period, Mummery LJ said this at paragraph 52: "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

178. The focus in this area is on the substance of the complaints in question — as opposed to the existence of a policy or regime — to determine whether they can be said to be part of one continuing act by the employer.

179. **Robinson v Surrey** 2015 UKEAT 311 is authority for the proposition that separate types of discrimination claims can potentially be considered together as constituting conduct extending over a time.

180. In **Barclays v Kapur** 1991 ICR 208 the (then) House of Lords held that a discriminatory practice can extend over a period. The key issue is to distinguish between a continuing act and an act with continuing consequences. The court held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.

181. The Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust** 2006 EWCA Civ 1548 confirmed that the correct test in determining whether there is a continuing act of discrimination is that set out in **Hendricks**. Thus tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

182. In **South Western Ambulance Service NHS Foundation Trust v King** EAT 0056/19**,** the Employment Appeal Tribunal observed that when a claimant wishes to show that there has been 'conduct extending over a period' if any of the acts relied upon are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act.

183. With regard to a failure to comply with the duty to make reasonable adjustments and time limits, a difficult issue is whether a failure to make adjustments a continuing act or is it an omission. In **Humphries v Chevler Packaging Ltd** EAT 0224/06 the Employment Appeal Tribunal confirmed that

a failure to act is an omission and that time begins to run when an employer decides not to make the reasonable adjustment.

184. The Court of Appeal provided further guidance in **Kingston upon Hull City Council v Matuszowicz** 2009 ICR 1170. The Court of Appeal noted that, for the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point in section 123. The first is when the person does an act inconsistent with doing the omitted act. The second presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which the respondent might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that requires an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time.

185. Sedley LJ stated that: '*claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission'*.

186. In determining when the period expired within which the employer might reasonably have been expected to make an adjustment, the Tribunal should have regard to the facts as they would reasonably have appeared to the claimant, including what the claimant was told by his or her employer.

187. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, the claimant brought a claim of failure to make a reasonable adjustment based on a failure to redeploy her to another role. The tribunal

considered that the Board would reasonably have been expected to have made the adjustment by 1 August 2011 and so this was when time began to run.

188. Before the Court of Appeal, the Board argued that this meant that it could not have been in breach of duty before that date but the Court disagreed. Not all time limits are fixed by reference to the date on which a cause of action accrued. In the case of reasonable adjustments, the duty arises as soon as the employer is able to take steps which it is reasonable for it to take to avoid the relevant disadvantage. In that case, the situation arose around April 2011. However, the Court observed that if time for submitting a claim began to run at that date, the claimant might be unfairly prejudiced. He or she might reasonably believe that the employer was taking steps to address the disadvantage, when in fact the employer was doing nothing. By the time it became (or should have become) apparent to the claimant that the employer was doing nothing, the time limit for bringing proceedings might have expired. Accordingly, for the purposes of the time limit, the period within which the employer might reasonably have been expected to comply had to be determined in the light of what the claimant reasonably knew. In that case the Tribunal found that by June/July 2011 it should have been reasonably clear to the claimant that the Board was not looking for suitable alternative roles for her. Although the Tribunal was generous in finding that time did not begin to run until 1 August, it could not be said that this conclusion was not open to it.

189. Legatt LJ set out the legal principles at paragraph 14 onwards of the judgment which we apply. We have also taken into account Richardson HHJ's judgment in **Watkins v HSBC** [2018]I IRLR 1015. That judgment makes clear that failure to comply with the duty to make reasonable adjustments ought to be considered a continuing failure (rather than an act extending over a period) such that section 123(3) and (4) should be applied (see paragraph 48).

190. The Tribunal has also considered and applied the reasoning of Lord Fairley who examined this issue in **Kerr v Fife Council** UKEATS/0022/20/SH. He emphasised the injustice of determining from the employer's point of view, for example, the period in which respondent might reasonably have been

expected to make an adjustment. The claimant might not be aware that the respondent is doing nothing about a request for an adjustment, but instead claimant might be thinking that the respondent is still considering the proposal or working towards implementing the adjustment. If it were the case that the Tribunal could determine that it would have been reasonable to expect the employer to make the adjustment within one month of the request, and time should therefore run from then, the claim could be out of time before the employee appreciated that the employer was doing nothing about her request for adjustments. The same applies to the "inconsistent act" default under section123(4); It must be what the employee would or should have appreciated as an inconsistent act, not what the tribunal determines would have been an inconsistent act from the employer's perspective.

Extending the time limit

191. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

192. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should have regard to the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

- The Tribunal should have regard to the prejudice to each party.
- The Tribunal should have regard to all the circumstances of the case which would include:
    - Length and reason for any delay
    - The extent to which cogency of evidence is likely to be affected

- The cooperation of the respondent in the provision of information requested
- The promptness with which the claimant acted once he knew of facts giving rise to the cause of action
- Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

193. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

194. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion. That has to be tempered with the comments of the Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 where it was observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

195. In **Rathakrishnan v Pizza Express (Restaurants) Ltd** 2016 ICR 283 the Employment Appeal Tribunal held that in that case the balance of prejudice and potential merits of the reasonable adjustments claim were both relevant considerations and it was wrong of the tribunal not to weigh those factors in the balance before reaching its conclusion on whether to extend time.

196. Finally the Tribunal considered and applied the judgment of Underhill LJ in **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 and in particular at paragraph 14. Ultimately the Tribunal requires to make a judicial assessment

from all the facts to determine whether to allow the claims to proceed and in particular assess the respective prejudice.

Impact of early conciliation on time limits

197. Section 140B of the Equality Act 2010 extends the time limit for lodging a claim to take account of ACAS early conciliation. In most cases (including the current case) a claimant is required contact ACAS prior to presenting a claim to the Tribunal (to obtain an early conciliation certificate). For the purposes of time limits, time stops running from the day following the date the matter was referred to ACAS to, and including, the date a certificate is issued by ACAS.

198. Further, and sequentially, if the certificate is received within one month of the ordinary time limit expiring, time expires one month after the date the claimant receives (or is deemed to receive) the certificate.

199. Early conciliation only applies where the claim is commenced before the statutory time limit has expired.

Direct discrimination

200. Discrimination is defined in section 13(1) as follows: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

201. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies: "On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

202. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person.

203. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed** 2009 IRLR 884, in most cases where the conduct in question is not

overtly related to [the protected characteristic], the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. That is what the Tribunal has been able to do in this case.

204. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In **Amnesty International v Ahmed** 2009 IRLR 884 the Employment Appeal Tribunal recognised two different approaches from two (then) House of Lords authorities - (i) in **James v Eastleigh Borough Council** 1990 IRLR 288 and (ii) in **Nagaragan v London Regional Transport** 1999 IRLR 572. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as **Nagaragan**, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in **R (on the application of E) v Governing Body of the Jewish Free School and another** 2009 UKSC 15. The burden of establishing less favourable treatment is on the claimant.

205. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of **Anya v University of Oxford** 2001 IRLR 377.

206. In **Glasgow City Council v Zafar** 1998 IRLR 36, also a (then) House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

207. In **Shamoon v Chief Constable of the RUC** 2003 IRLR 285, a (then) House of Lords authority, Lord Nichols said that a Tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

208. The Equality and Human Rights Commission Code notes at paragraph 3.4 that it is more likely an employer's treatment will be less favourable where the treatment puts the worker's at a "clear disadvantage", which could involve being deprived of a choice or excluded from an opportunity. At paragraph 3.5 the Code notes that the worker does not need to experience actual disadvantage (economic or otherwise) as it is enough the worker can reasonably say they would prefer not to be treated differently from the way they were treated. The example given is of a worker who loses their appraisal duties which could be less favourable treatment.

209. It is also important to note that the treatment would be "because of the protected characteristic" if it was "a substantial or effective though not necessarily the sole or intended reason for the treatment" (**R v Commission for Racial Equality** 1984 IRLR 230).

210. Chapter 3 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Reasonable adjustments

211. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in sections 20 and 21 and Schedule 8. Paragraph 20 of Schedule 8 states: "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, … that an

interested disabled person has a disability and is likely to be placed at the disadvantage". This is considered in chapter 6 of the Code.

212. Section 20, so far as relevant, provides as follows –

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

213. Failure to comply with the duty to make reasonable adjustments is dealt with in section 21 which , so far as relevant, provides – "(1) A failure to comply with the first….requirement is a failure to comply with a duty to make reasonable adjustments. (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

214. The importance of a Tribunal going through each of the constituent parts of section 20 was emphasised by the Employment Appeal Tribunal in

Environment Agency v Rowan 2008 ICR 218 and reinforced in **Royal Bank of Scotland v Ashton** 2011 ICR 632.

215. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Code at paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions". The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in **Nottingham City Transport Limited v Harvey** UKEAT/0032/12 and **Ishola v Transport for London** [2020] EWCA Civ 11.

216. For the duty to arise, the employee must be subjected to "substantial disadvantage in comparison to a person who is not disabled" and with reference to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) defines "substantial" as being "more than minor or trivial". The question is whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison to those who do not have the disability (**Sheikholeslami v University of Edinburgh**, 2018 IRLR 1090).

217. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

218. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. It is for the Tribunal to assess this issue. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

Harassment

219. In terms of section 26 of the Equality Act 2010:

> *(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."*

220. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** EAT 0039/19). The fact that the claimant considers the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in the manner alleged in the claim.

221. For example in **Hartley v Foreign and Commonwealth Office Services** 2016 ICR D17 the Employment Appeal Tribunal held that an Employment Tribunal had failed to carry out the necessary analysis to see whether comments made by the claimant's managers during a performance improvement meeting — accusing her of rudeness and apparently questioning her intelligence when she failed to understand a spreadsheet of comments concerning her performance — were related to her Asperger's syndrome. The Employment Appeal Tribunal emphasised that an Employment Tribunal considering the question posed by section 26(1)(a) must evaluate the evidence in the round, recognising that witnesses 'will not readily volunteer' that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way

conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic 'cannot be conclusive of that question'.

222. At paragraph 7.10 of the Code the breadth of the words "related to" is noted. It gives the example of a female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

223. The question of whether the conduct in question "relates to" the protected characteristic requires a consideration of the mental processes of the putative harasser (**GMB v Henderson** 2017 IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see **Bakkali v Greater Manchester** 2018 IRLR 906).

224. Section 26(4) of the Act provides that:

> *"(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;*
>
> *(c) the other circumstances of the case;*
>
> *(d) whether it is reasonable for the conduct to have that effect."*

225. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in **Pemberton v Inwood** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill:

> *"In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective*

question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).”

226. The Code states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant’s perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

227. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant’s dignity or creating the relevant environment) the claimant’s perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (**Lindsay v LSE** 2014 IRLR 218). Elias LJ in **Land Registry v Grant** 2011 IRLR 748 focused on the words “intimidating, hostile, degrading, humiliating and offensive” and said “Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught”.

228. Chapter 7 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Victimisation

229. Victimisation in this context has a specific legal meaning defined by section 27:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

230. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why". In other words, the protected act must be an effective and substantial cause of the treatment, it does not need to be the principal cause.

231. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC** 2013 ICR 337.

Constructive unfair dismissal

232. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) which provides that an employee is dismissed by his employer if: "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

233. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

234. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International** [1997] ICR 606 the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not: "…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

235. It is also apparent from the decision of the (then) House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A: "The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."

236. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

237. In **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908 the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

238. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King** UKEAT/0106/15/LA the Employment Appeal Tribunal chaired by Langstaff P put the matter this way (in paragraphs 12-15):

"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of **BG plc v O'Brien** [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in **Malik v BCC**I [1997] UKHL 23 as being:

"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."

13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in **Morrow v Safeway Stores** [2002] IRLR 9.

14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In **Woods v W M Car Services (Peterborough) Ltd** [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in **Tullett Prebon plc v BGC Brokers LP & Ors** [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.

15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see **Hilton v Shiner Builders Merchants** [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."

239. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35 demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978.

240. The Tribunal must decide objectively whether there is repudiatory breach by considering its impact on the contractual relationship of the parties. The fact that the employer may genuinely believe that the breach is not repudiatory is irrelevant: **Millbrook Furnishing Industries Ltd v McIntosh** [1981] IRLR 309. The Tribunal must decide objectively whether there is repudiatory breach by considering its impact on the contractual relationship of the parties.

241. There is no rule that an act of discrimination will necessarily constitute a repudiatory breach of contract (as the Tribunal should apply the relevant legal test) – see **Shaw v CCL Ltd** 2008 IRLR 284. If an employer "seriously breaches" its obligation to make reasonable adjustments over a period of time

that is more likely to amount to a breach of the implied term of trust and confidence (**Greenhof v Barnsley** 2006 IRLR 98).

242. In short, in order for the employee to be able to claim constructive dismissal, four conditions must be met:

a. There must be a breach of contract by the employer.

b. That breach must be sufficiently important to justify the employee resigning, (or the last in a series of incidents which justify her leaving).

c. She must leave in response to the breach and not for some other, unconnected reason. The breach should be a reason in the sense of played a part in the resignation (but does not need to be the principal cause – **Wright v North Ayrshire Council** [2014] IRLR 4).

d. The claimant must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract, called affirmation.

243. If the employee leaves in circumstances where these conditions are not met, she will be held to have resigned and there will be no dismissal.

244. If the claimant proves that her resignation was in truth a dismissal, Section 98 governs the question of fairness. This means that a constructive dismissal is not necessarily unfair. The Tribunal should making explicit findings on the reason for the dismissal and whether the employer has acted reasonably in all the circumstances: **Savoia v Chiltern Herb Farms** [1982] IRLR 166. In **Berriman v Delabole Slate Ltd** [1985] IRLR 305, in which Browne-Wilkinson LJ, said: "…in our judgment, even in a case of constructive dismissal, [s 98(1) of the ERA 1996] imposes on the employer the burden of showing the reason for the dismissal, notwithstanding that it was the employee, not the employer, who actually decided to terminate the contract of employment. In our judgment, the only way in which the statutory requirements can be made to fit a case of constructive dismissal is to read

section 98 as requiring the employer to show the reasons for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer."

245. The Tribunal must consider what the reason for the employer's actions were that led to the dismissal (which is an objective question) and then apply the statutory wording to determine whether the dismissal was fair in all the circumstances. See **Buckland v Bournemouth University** [2010] IRLR 445.

Submissions

246. Both parties produced written submissions and the parties were able to comment upon each other submissions and answer questions from the Tribunal. The Tribunal deals with the parties submissions as relevant below, but does not repeat them in detail. The parties' full submissions were taken into account in reaching a unanimous decision.

Decision and reasons

247. The Tribunal spent time considering the evidence that had been led, both in writing and orally and the full submissions of both parties and was able to reach a unanimous decision. The Tribunal deals with issues arising in turn.

Disability status

248. The respondent's agent confirmed during submissions that it was not disputed by the respondent that the claimant was disabled and that the respondent had knowledge of disability at all material times for the purposes of each of the claims. Each of the claims was, however, disputed and the Tribunal carefully considered each of the claims.

Time bar

249. The respondent argued that the discrimination claims were time barred. The claimant accepted that if considered in isolation, they could be (and that it was just and equitable to extend time) but the claimant's principal position was that none of the claims was time barred as they all formed part of an act extending over a period of time and as such they were lodged in time.

250. In order to assess the position with regard to time bar it is necessary to identify which claims have merit. This is necessary because the claimant relies upon there being an act extending over a period. Conduct which is not discriminatory cannot be relied upon in such an event. The Tribunal therefore considers the merits of the claims first and then the position with regard to time bar.

Direct disability discrimination (section 13 Equality Act 2010)

251. There were ten separate acts relied upon as amounting to acts of direct disability discrimination and the Tribunal considered each one individually.

First claim – no response following occupational health report

252. The first act relied upon was the allegation the respondent failed "to initiate any action in response to the occupational health report of 7 November 2019". It is not clear precisely what is alleged here given the respondent met with the claimant on 12 November 2019 (during which meeting the report was discussed) and the claimant indicated that she did not feel well but she wished to "prepare for a return to work" (which was the purpose of the meeting). During the submissions stage it was the delay in making adjustments which was suggested as the treatment but the respondent did initiate action in response to the occupational health report (in that a return to work meeting took place and adjustments were in due course put in place) and so this allegation is not factually made out. It is not correct to say that there was no response following the occupational health report.

253. The Tribunal considered that if the allegation was made out and the issue was the delay in taking action following the report, the Tribunal considered what the reason for that treatment was. The reason why there was some delay was not to any extent because of disability. The ergonomic assessment took place on 11 February 2020 and the next day Ms McDonald took action with regard to the equipment. It would not have been reasonable to have taken action sooner in the circumstances of this case.

254. There was no evidence to suggest that disability may be a reason why the action took the time it did. The Tribunal was satisfied that disability was in no sense whatsoever the reason why action was not immediately taken. That claim is therefore ill founded.

Second claim – offering the claimant the role of floating sales executive

255. The second claim related to the decision of Ms MacPhee of 18 December 2019 to return the claimant to the status of floating sales executive. It was not in dispute that Ms MacPhee discussed the claimant's return following her period of absence with reference to the floating sales executive role.

256. The next issue was whether the treatment is less favourable. Given a floating sales executive did not earn the same level of commission as a fixed sales executive, the Tribunal found the treatment was less favourable.

257. The final issue was whether a reason for the treatment was disability. The Tribunal considered this carefully. The claimant had brought forward facts that suggest the treatment could be because of disability (given the treatment occurred during the claimant's absence related to her disability). The question was whether the respondent had satisfied the Tribunal that the reason for the treatment was in no sense whatsoever disability. The Tribunal was satisfied that the treatment was in no sense whatsoever due to disability and the respondent had discharged the onus in that regard. The reason why Ms MacPhee offered the claimant the role of floating sales executive was because there were no fixed sales executive positions available in Benthall. The claimant's disability was in no sense whatsoever a reason for Ms MacPhee's position.

258. The claimant was employed as sales executive and had gone on a temporary secondment, which she was unable to complete due to her illness. The issue as to the role to which she returned was open for discussion. She was not contractually employed to be fixed sales executive in Benthall. She was employed as sales executive (to work at a place reasonably determined by the respondent). The respondent wished to provide her with a role that was available and worked for the claimant in light of her health. The reason why

she was offered a floating sales executive role was therefore in no sense whatsoever because of disability. That claim is ill founded.

Third claim – failing to undertake an impartial consideration of the grievance

259. The third claim under this heading is "failing to undertake an impartial consideration of the grievance lodged by the claimant on 18th December 2019". The issue here was not the fact that a Director known to the parties heard the grievance (which is a common occurrence) but that it was alleged Ms Ross did not impartially hear the grievance. It was the way in which the grievance was dealt with that was being relied upon as not undertaking an impartial consideration.

260. The Tribunal was not satisfied that this assertion had been established on the evidence it heard. The Tribunal considered carefully the evidence led, including the claimant's sister's evidence and contrasted that with Ms Ross's evidence and the claimant's position.

261. The specific way in which it is alleged Ms Ross did not consider the matter impartially is not set out but it is understood that the allegation is that Ms Ross was unfairly supportive of her managers and less so of the claimant (having spoken to managers in advance of meeting the claimant). The Tribunal was satisfied that Ms Ross approached the grievance in a fair and balanced way.

262. Firstly the claimant had indicated that she would have been happy had she been given a fixed sales executive role (which would have avoided the need for a meeting). Ms Ross was concerned about the issues the claimant had raised such that she wished to meet the claimant and explore the concerns she had raised. It was not unfair or improper of her to have had some discussions with her direct reports to understand the context of the issues the claimant had raised. The Tribunal considered the approach Ms Ross took to the grievance and the outcome and was satisfied that the grievance was handled in an impartial and fair way.

263. Secondly, although the claimant's grievance was not upheld that was because there was no way for Ms Ross to reach any definitive conclusions on key

points. That did not mean that she was unfairly supporting her managers over the claimant or not impartially considering the points the claimant's rose .She did impartially consider the points and decided that it was not possible to reach a concluded view on the material before her. She did, however, take steps to ensure managers were given guidance in dealing with such meetings. On the evidence before the Tribunal this allegation had not been made out.

264. Even if the assertion had been established in evidence, the Tribunal was satisfied that the reason for the treatment was in no sense whatsoever disability. The reason why Ms Ross conducted the grievance in the way she did was because she wished to ensure the issues the claimant raised were properly and fairly dealt with. In that regard she met with the claimant and then the relevant managers and reached an outcome. While that was not an outcome that the claimant liked, it was a reasonable outcome justified on the facts before Ms Ross. She did not unfairly support her managers nor unfairly support the claimant. She took a balanced view and decided that she was unable to reach a definitive conclusion and dismissed the grievance (but arranged training). It is notable that the claimant did not appeal against the outcome. This claim is ill founded and is dismissed.

Fourth claim – failing to provide the equipment

265. The next claim was "by failing to provide some or all of the equipment recommended by the ergonomic assessment relating to the claimant, dated 11 February 2020". This is essentially the claim for a breach of the duty to make reasonable adjustments but raised as a direct disability discrimination claim. The equipment was not provided immediately due to the prevailing circumstances as set out above. The chair was provided before the other equipment due to a genuine error on the part of Ms McDonald to verify the order. The Tribunal carefully analysed the evidence and the reason for not providing the equipment and was satisfied from the evidence it heard that the sole reason why the equipment was not provided was due to a genuine oversight on Ms McDonald's part. The reason why some or all of the equipment was not provided was in no sense whatsoever disability and so this claim is ill founded and is dismissed.

Fifth claim – advising a change to adjustments was imminent

266. The next claim is "by advising the claimant in early February 2020 that adjustments specified in the Request for Reasonable Adjustments letter dated 9 January 2020 might be withdrawn". Although this is lacking in clarity it is understood the assertion relates to the allegation that in February 2020 Ms McDonald suggested the reasonable adjustments that had been agreed in January would be removed. The Tribunal did not find that to have happened on the evidence led and the claim is not made out.

267. Although the claimant believed Ms McDonald told her the reasonable adjustments would be removed, Ms McDonald disputed such a discussion. The Tribunal considered that it was more likely than not that the claimant had been mistaken and Ms McDonald had not indicated that reasonable adjustments would be changed. Firstly it was Ms Ross who was responsible for the adjustments and she had issued the letter of 9 January 2020. For those to change Ms Ross would require to be involved. Also if this had been discussed the Tribunal considered that the claimant would have raised a concern about it, as she had done other matters. There was no evidence of the claimant raising any concern shortly following the meeting about this having been said. In fact the adjustments remained as had been agreed following the meeting. This claim has not been established and it is ill founded.

Sixth claim – failing to provide training and updates

268. The next claim is "by failing to provide the claimant with sales training and business update specified in the Request for Reasonable Adjustments letter dated 9 January 2020". The Tribunal was satisfied that relevant training was provided to the claimant if required. She did not request any sales training and had she done so the respondent would have provided it to her. The claimant was given relevant business updates and support. The Tribunal concluded that if there were any failures to provide the claimant with training or updates, the Tribunal would have been satisfied that the reason why this happened was in no sense whatsoever because of disability. It was because

the claimant did not request such training and because she received regular updates via the Teams meetings. This claim is ill founded.

Seventh claim – working arrangement applied to claimant after 24 May 2020

269. The next claim relied upon is "by the working arrangements applied to the claimant subsequent to 24 May 2020". Whilst lacking in clarity, it appears this relates to the respondent asking all staff their availability (in terms of working from home or on site) in anticipation of the office opening up again to allow a rota to be created. The claimant had spoken with her colleague and agreed with her a 50/50 split. The claimant did not herself reply to the email. The purpose of the request was to understand availability to plan in advance and be ready when matters moved on.

270. It was not correct to say that the claimant's suggestion was ignored or discounted. The respondent required to know who was available to work on site and from home. If required, staff may in principle have been asked to work in different sites. Ms McDonald had no issue with the rota that the claimant and her colleague had proposed.

271. The specific working arrangements applied to the claimant that are alleged to be less favourable treatment are not set out. The Tribunal considered the evidence and what happened following 24 May 2020. The Tribunal is satisfied the working patterns did not amount to less favourable treatment. Any individual in the same position as to the claimant (whose circumstances were not materially different but who was not disabled) would have been treated in exactly the same way. Ms McDonald had no issue with the claimant's suggested rota once the claimant responded.

272. The Tribunal would have been satisfied, had it been necessary to determine the reason why the responded acted that the reason why the respondent operated the working arrangements subsequent to 24 May 2020 was entirely unrelated to disability and solely due to the business need at the time and prevailing pandemic. Disability was entirely unrelated to the working pattern required. This claim is ill founded.

Eighth claim – unfair performance standards and persistent criticism

273. The next claim is "by subjecting the claimant to unfair performance standards and criticism in a persistent manner during and after the meeting with Ms MacPhee of 18 December 2019". The Tribunal examined the claimant's evidence and considered Ms MacPhee's response. The Tribunal did not uphold the claimant's assertion that she had been subjected to unfair performance standards and criticism in a persistent manner during and after the meeting of 18 December 2019.

274. While there were discussions as to performance and work related issues these were not unfair nor unduly critical of the claimant. The approach Ms MacPhee took was reasonable and consistent with her role as line manager. The Tribunal was satisfied had it been necessary to consider the reason why Ms MacPhee acted as she did that the treatment was in no sense whatsoever related to disability and was entirely related to Ms MacPhee carrying out her role as manager and seeking to improve the performance of her team. This claim is ill founded.

275. The Tribunal was satisfied that the conduct of the meeting and discussion with the claimant by Ms MacPhee on 18 December 2019 was reasonable and appropriate. It was not less favourable treatment because of disability. This claim is ill founded.

Ninth claim – conduct of grievance hearing

276. The next issue was the grievance hearing with Ms Ross of 6 January 2020. While the act relied upon is unclear, (and the fact there was a grievance hearing itself is clearly not less favourable treatment) it is understood that the issue is the way in which the claimant perceived Ms Ross to have dealt with the grievance hearing.

277. The Tribunal found that the way in which the meeting was handled was fair and reasonable. Although the claimant was unhappy with how it progressed (supported by her sister) the Tribunal was satisfied that the way in which the meeting was dealt with was fair and reasonable. It did not amount to less

favourable treatment. Any person who raised a grievance whose circumstances were not materially different to the claimant's (who was not disabled) would have been treated in exactly the same way. Ms Ross wished to understand the claimant's concerns. She wished to understand the claimant's capabilities and ensure a safe and suitable workplace was created. The factual basis for this claim had not been established in evidence. The treatment was not less favourable.

278. If the treatment had amounted to less favourable treatment, the Tribunal considered the reason why Ms Ross conducted the meeting in way that she did. The Tribunal would have treatment was in no sense because of disability. It was solely due to Ms Ross wishing to understand the issues the claimant had and deal with matters in a reasonable way. This claim is ill founded.

Tenth claim – telephone discussion with Ms McDonald 29 June 2020

279. The final claim is "Telephone discussion with Ms McDonald of 29 June 2020". Again although lacking in clarity (given the having a telephone discussion in itself was not alleged to be less favourable treatment) the issue is understood to be the way in which the claimant perceived Ms McDonald to have conducted the call on 29 June 2020. The Tribunal considered the evidence led by the claimant, her sister and Ms McDonald. The Tribunal preferred the evidence of Ms McDonald to that led by the claimant and her sister. The Tribunal understands the claimant's perception and the desire of her sister to assist and support her and in particular the challenges the claimant faced and that the position in relation to her work made her unhappy and caused her stress. The Tribunal found that the telephone discussion with Ms McDonald of 29 June 2020 was reasonable and was not conducted in the way alleged by the claimant, her sister and mother. It was not less favourable treatment.

280. Had it been necessary to do so the Tribunal would have been satisfied that the reason why the discussion proceeded as it did was entirely unconnected to disability. It was solely due to Ms McDonald's desire to deal with a workplace issue the claimant and her colleague had. The claimant's disability

was in no sense whatsoever the reason why Ms McDonald conducted the discussion in the way she did. The claim is ill founded.

Direct discrimination – taking a step back

281. The Tribunal took a step back to assess the treatment relied upon in the direct disability discrimination claim mindful of the need to assess carefully the evidence led and ascertain whether disability was a reason for the treatment relied upon (and in light of Eady P's reasoning in **Klonowska**). The Tribunal analysed the evidence led, both orally and in writing. The Tribunal was satisfied that there was no merit in any of these claims. The treatment that occurred in this case was entirely unrelated to disability. While the claimant perceived that to be the case, her disability (or disability generally) was in no sense whatsoever the reason why the respondent acted. The direct disability discrimination claims are ill founded and are therefore dismissed.

Failure to make reasonable adjustments (section 20 Equality Act 2010)

282. There were to separate claims of failure to make reasonable adjustments and the Tribunal considered each claim separately.

First claim – floating sales executive as a provision criterion or practice (PCP)

283. The first claim related to the assertion the respondent had a PCP that sales executives would "float" around the west of Scotland which placed the claimant at a disadvantage that could have been removed by allowing her to be permanently based at Benthall.

284. The first issue under this claim is whether or not the respondent had the provision criterion or practice of requiring sales executives to "float" across large parts of the West of Scotland.

285. The claimant's agent submitted that "the decision of Ms MacPhee that the claimant should cover more than one site, despite the effects of her disability, reflected a PCP applied by the respondent to sales executives who were not attached to a specific site or targeted for the purposes of claiming commission".

286. The respondent's agent's position was that there was no such PCP or at least no such PCP applied to the claimant. Ms MacPhee had advised the claimant that the respondent was unable to sustain another fixed sales executive at the site of her choice. They were exploring alternatives, the obvious one of which was for the claimant to become a floating sales executive (covering Benthall and other sites within a 15 mile radius). No agreement was reached and in fact no PCP was applied to the claimant. She remained in Benthall and the permanence was confirmed on 9 January 2020.

287. The Tribunal was satisfied that the respondent did not apply to the claimant a PCP that required sales executives to float. The claimant herself argued that her position (as sales executive) was fixed and that she was not a floating sales executive. The respondent's position was that the claimant had been a sales executive. Following her successful appointment as temporary customer relations manager she left the role of sales executive. Following her illness she was unable to carry out the role of customer relations manager (due essentially to the driving). The respondent wished to explore roles the claimant could carry out. A permanent role in Benthall was not available due to the established resource that was there but the respondent was exploring all options that was suitable given the health position (one of which was a floating position).

288. Ms MacPhee gave the claimant options, including floating sales executive. She also stated during the discussion that it may be possible for the claimant to be based in Benthall but she would not be targetted (something that was not attractive to the claimant). No PCP was in fact applied to the claimant with regard to being a floating sales executive. The respondent had not reached the stage of there being a PCP to float in the sense understood by the authorities. This is supported by the claimant noting in her proposed adjustment document when she said the respondent "tried to remove the reasonable adjustment". In other words the respondent was exploring options, but the meeting did not reach a conclusion.

289. Ms MacPhee's email following the meeting stated that business resources evolve and ideally a full time role could be found but the circumstances at that

time were such that the "current suggestion" was to offer a floating sales executive as a permanent full time role at the site was not available. At that stage matters were still under discussion. Had the claimant not escalated matters it was possible that matters would have developed such that a PCP as relied upon could have been applied to the claimant but for the period in question, December 2019 and January 2020, there was no PCP applied to the claimant that required sales executives to float.

290. There was no evidence before the Tribunal that the claimant at any stage "floated" across sites. At all times she remained fixed at one site. There was no expectation she float across the west of Scotland since it was a position that was going to be explored had the meeting concluded as was intended. Instead the meeting ended without a definitive position having been reached. The claimant wanted clarity and escalated matters to Ms Ross who gave clarity by confirming the position in January 2020 when the full time permanent base was identified.

291. As the PCP relied upon by the claimant was not applied to her, the claim is ill founded.

Second claim - Auxiliary aids

292. This claim relates to the failure to provide the auxiliary aids identified in the ergonomic assessment of the claimant of 11 February 2020, namely a headset, chair, mouse and keyboard. The position in relation to the chair differs from the other equipment given how matters transpired. The Tribunal considered these issues in turn.

Specialist chair

293. The respondent did not dispute that the claimant was put to substantial disadvantage in comparison to persons who were not disabled in having to sit at her normal office chair (since that would provide her with excellent support for her spine and had lumbar support, that is, reduce the pain in her back and lessen the pain). The question was whether the respondent had taken such steps as was reasonable to have to take to provide the adjusted chair.

294. The chair was initially identified as an adjustment in the ergonomic assessment report received on 17 February 2020. Ms McDonald ordered the chair the same day. Ms Ross had decided following the grievance meeting in January 2020 (as set out in her letter of 9 January 2020) to take steps to procure a risk assessment. There was no suggestion by the claimant (nor was the position obvious at that stage) that a specific chair would have been needed. It would not have been reasonable to have taken steps prior to the instruction of the ergonomic assessment. While it took a few weeks to progress the report, the Tribunal did not consider the time taken to have been unreasonable.

295. The pandemic then hit the UK and the respondent (and the provider of the chair from whom the chair had been ordered). It was not surprising there were delays. McDonald had been chasing the chair and following a request by the claimant on 19 March 2020 Ms McDonald confirmed that the order was being processed. The claimant thanked Ms McDonald for her efforts and said that she knew the respondent was chasing the equipment from the suppler. The supplier was a reputable supplier and the chair being sought was an expensive chair (as it was a specialist chair in line with the ergonomic assessment).

296. Ms McDonald continued to chase the company during March and April (during lockdown when the sites were closed and staff were working from home). The claimant was placed on furlough on 9 April 2020 which ended on 31 May 2020. When the claimant was on furlough, she was not working and did not need the chair. Ms McDonald continued to chase the chair during that period and liased with the claimant as to delivery.

297. The chair was delivered to the claimant's home on 9 June 2020 (which was a few working days after the end of furlough).

298. The Tribunal carefully considered the steps that Ms McDonald took and the claimant's evidence in relation to this. The Tribunal was satisfied from the evidence presented to the Tribunal that in relation to the specialist chair the respondent had taken such steps as was reasonable to have taken to have

provided the auxiliary aid. This was not a counsel of perfection and given the prevailing circumstances and issues affecting the claimant and the respondent, in all the circumstances there were no other reasonable steps that could have been taken to have provided the chair.

Specialist keyboard, mouse and laptop stand

299. When the assessment was received by Ms McDonald it had recommended a number of additional items separate from a specialist chair. The additional items comprised number slide keyboard (which reduces shoulder strain), medium penguin mouse (specially designed to alleviate upper limb disorders taking strain off the elbow) and laptop stand (which the report said the claimant "may benefit from" which adjusts the height of the laptop reducing neck strain).

300. Ms McDonald had asked the company that issued the report if they provided the equipment ("the chair etc") following receipt of the report (and quote) and was told the company did provide the "recommended equipment". She then proceeded the day after she received the information to email the company and ask for delivery of the items. At this stage Ms McDonald assumed "the items" comprised the items that had been recommended by the report. In fact the quote had only covered the chair and separate components thereof and the company had omitted to include the additional items that had been recommended.

301. Ms McDonald proceeded to chase the company to provide the equipment, reasonably believing the company was providing all the equipment had been ordered. This was a genuine error due to the way the company had set out the report and its recommendations and its quotation. Ms McDonald had made it clear she wished each of the items delivered. The company had misunderstood that and proceeded to process the order for the chair only.

302. Ms McDonald believed she was chasing the company for all the items that had been recommended and it was not until 9 June 2020 when the error was discovered. On 9 June 2020 Ms McDonald explained to the claimant she had understood all items were on order and undertook to make the order and did

so. The claimant had purchased her own laptop stand in the meantime and Ms McDonald continued to chase the equipment and it was delivered to the claimant's home (where she was working) on 18 June 2020.

303. The respondent did not dispute that the claimant was put to substantial disadvantage in comparison to persons who were not disabled in having to work on the lap top without the keyboard, mouse and laptop stand. The Tribunal found that the substantial disadvantage was the adverse effect upon the claimant's health in having to work without the equipment. The question was whether the respondent had taken such steps as was reasonable to have to take to provide these items.

304. The Tribunal took into account the full factual matrix and the evidence that was led. While there was an error by Ms McDonald, the issue is whether or not the respondent took all reasonable steps to obtain the equipment. She had not fully appreciated the quotation only covered the chair. The question is whether the respondent took such steps as is reasonable to have to take to provide the auxiliary aids. It would have been reasonable to have verified with the company that the specific items had been ordered. That was not done and it was assumed that the items were included without specifically checking.

305. Given the disadvantage to which the claimant was put, it would have been reasonable to have verified the position and the failure to do so on 17 February 2020 amounted to a failure to provide an auxiliary aid in breach of section 20(5) of the Equality Act 2010. The Tribunal finds that the respondent ought to have verified on 17 February 2020 when the order was placed that it included each of the required items. It would have been reasonable to have done so. The respondent in failing to do so failed to comply with its duty to make reasonable adjustments from 17 February 2020. The duty was complied with on 18 June 2020 when the mouse, laptop stand and keyboard was delivered to the claimant.

306. The respondent therefore failed to comply with its duty to make reasonable adjustments in respect of its failure to provide the auxiliary aids of a specialist

keyboard, specialist mouse and a laptop stand during the period of 17 February 2020 until 18 June 2020.

Headset

307. The next issue under this heading is whether the failure to provide the claimant with the headset amounted to a breach of the duty to make reasonable adjustments. Although not specifically stated by the respondent, in their ET3 it was alleged that the claimant was not put at a substantial disadvantage by not providing this (essentially because the report noted that the claimant "may" benefit from it). From the evidence before the Tribunal, however, given the impact of the pain upon the claimant and what she told the respondent, the Tribunal finds that the absence of a headset did put the claimant at a substantial disadvantage compared to workers who were not disabled given the pain she suffered in having to hold a telephone.

308. The question was whether the respondent had taken such steps as was reasonable to have to take to provide this item. The position is similar to that in relation to the other equipment above as Ms McDonald assumed the items had all been included in the quotation and all were on order and did not realise they had been omitted until 9 June 2020. Unfortunately when ordering the other items the headset had been missed and this was never provided.

309. The Tribunal considered all the evidence and finds that the respondent did not take all steps as were reasonable to have to take to have provided the headset. Ms McDonald had, in error, not included this in the request from the providing company. It would have been reasonable for her to have verified upon placing the order on 17 February 2020 that all the equipment was included, not just the chair. Had that been done, the head set would have been included.

310. Ms McDonald stated in evidence that had she known of this failure she would have purchased the headset herself and the claimant had not raised the issue with her. This was undoubtedly a genuine oversight. Nevertheless the obligation is to take such steps as is reasonable and it would have been reasonable to have checked the position when the order was made. The

failure to do so amounted to a failure to comply with the obligation pursuant to section 20(5) of the Equality Act 2010.

Second chair

311. The final claim under this head is that by failing to provide the claimant with a second chair of the kind recommended by the ergonomic assessment of 11 February 2020, the duty to make reasonable adjustments was breached.

312. There were no specific submissions as to the disadvantage to which the claimant was put in not having a second chair purchased for her. At the time in question the claimant was home working due to the pandemic. At not stage was the claimant based both in her home and at site. Ms McDonald was exploring with the claimant how the issue as to a specialist chair would be dealt if the claimant were to return to the office. At the material times there was no requirement to work at site and at home and the claimant was required to work at home only. There was therefore no disadvantage to the claimant in not having a second chair at a time when it was unclear if the claimant would ever need it. The Tribunal finds that the claimant was not put at any disadvantage in not having a second specialist chair purchased for her.

313. The respondent was exploring whether there was the option of adjusting an office chair to suit the claimant's health issues and had contacted the author of the ergonomic assessment. They had identified an adjustment that would have been suitable, had a second chair been needed. That was something that would have been implemented had the claimant required to attend site.

314. The Tribunal finds that the respondent had taken all steps as was reasonable to have to take to have provided a second chair or suitable replacement (had substantial disadvantage been established). This claim is ill founded.

Harassment (section 26 Equality Act 2010)

315. The claimant relies upon eight specific acts of harassment. The Tribunal considered each in turn.

First act – conduct of meeting on 18 December 2019

316. The first issue was “the conduct of the meeting with Ms MacPhee of 18 December 2019”. The precise way in which the meeting was conducted that is relied upon had not been set out but it is understood that the assertion is that the meeting was conducted in the way alleged by the claimant. That position was not preferred by the Tribunal. The Tribunal preferred Ms MacPhee’s position. The Tribunal found that the meeting was conducted in a reasonable and fair way. While the claimant perceived the approach taken by Ms MacPhee as negative and inappropriate, this had not been established. The conduct relied upon has not been established in evidence.

317. Had the conduct been established, the Tribunal would have found that it was unwanted conduct.

318. The next issue would have been to consider whether the conduct was related to disability. The Tribunal would have found that the conduct was not related to disability. It was a reasonable approach to manage the issues that arose in the course of business. It was not conduct related to disability.

319. Had it been necessary to consider the purpose or effect of the conduct, the Tribunal would have found that the purpose of the conduct was not to violate the claimant's dignity, nor create an intimidating, hostile, degrading, humiliating or offensive environment. If the conduct was found to have had that effect, the Tribunal would have been satisfied it would not have been reasonable for the conduct to be considered to have had such an effect given the context and issues.

320. This claim is ill founded.

Second act – conduct of grievance hearing

321. The next issue was whether the conduct of the grievance hearing with Ms Ross of 6 January 2020 was established. Again the precise way in which the hearing was conducted that was relied upon had not been set out but it is understood this claim is predicated upon the way the claimant said the hearing proceeded having been accepted. The Tribunal did not prefer the claimant’s position in this regard and found that the meeting was conducted in a

reasonable and fair way. The claimant perceived the approach taken by Ms Ross as negative and inappropriate but the Tribunal did not find this to have been established. The conduct relied upon has not been established.

322. Had the conduct been established, it would have been unwanted conduct.

323. The Tribunal would then have considered whether the conduct related to disability. The Tribunal would have found that the conduct was not related to disability. It was a reasonable approach to manage the issues that arose in the course of the grievance hearing and was entirely unconnected to disability.

324. Had it been necessary to consider the purpose or effect of the conduct, the Tribunal would have found that the purpose of the conduct was not to violate the claimant's dignity, nor create an intimidating, hostile, degrading, humiliating or offensive environment. If the conduct was found to have had that effect, the Tribunal would have been satisfied it would not have been reasonable for the conduct to be considered to have had such an effect given the context and issues.

325. This claim is ill founded.

Third act – meeting at start of February 2020

326. The next issue was whether the meeting between the claimant and Ms Ross at Benthall around the beginning of February 2020 was unwanted conduct.

327. The Tribunal did not find that there was any meeting between the claimant and Ms Ross at the start of February 2020. There was, however, a meeting between Ms McDonald and the claimant around this time. The claimant had alleged she had been told that the adjustments that had been agreed were to change but the Tribunal preferred Ms McDonald’s evidence that such a discussion did not take place. On that basis, the conduct relied upon had not been established in evidence. There were no discussions between Ms Ross or Ms McDonald and the claimant at the start of February 2020 that was found to be in any way inappropriate, unwanted or unfair. This claim is ill founded.

Fourth act – Telephone discussion 29 June 2020

328. The next issue was whether the telephone discussion with Ms McDonald of 29 June 2020 amounted to unwanted conduct. Again the precise conduct that is relied upon as being unwanted has not been set out. The Tribunal was satisfied that the way in which the discussion was handled by Ms McDonald was reasonable. It was not unwanted conduct. The conduct was not related to disability but Ms McDonald's desire to repair the working relationship between the individuals and to progress concerns. It was not unwanted conduct related to disability.

329. Had it been necessary to consider the purpose or effect of the conduct, the Tribunal would have found that the purpose of the conduct was not to violate the claimant's dignity, nor create an intimidating, hostile, degrading, humiliating or offensive environment. If the conduct was found to have had that effect, the Tribunal would have been satisfied it would not have been reasonable for the conduct to be considered to have had such an effect given the context and issues. This claim is ill founded.

Fifth act – volume, frequency and timing of phone calls

330. The next issue raised by the claimant's agent was whether the volume, frequency and timing of phone calls to the claimant by Ms McDonald, "including but not restricted" to October 2019 was unwanted conduct. The Tribunal found that the volume, frequency and timing of calls to the claimant was reasonable. The reference here may be to the calls made by Ms Robertson which the claimant in her witness statement regarded as excessive (rather than calls by Ms McDonald). The claimant had asserted there were lots of calls some out of hours and at weekends. There was no precision as to the calls (in terms of which calls were relied upon) but the Tribunal preferred the evidence of the claimant's line manager that the volume, frequency and timing of the calls was reasonable and was not as asserted by the claimant. The claimant was thankful to her line managers for her support. While there were occasions where the parties missed each other and there were return calls, that was not unreasonable. The claimant had not indicated that the

position adopted by Ms McDonald (or Ms Robertson) at the time was an issue for her. Ms McDonald and Ms Robertson were keen to ensure the claimant was not adversely affected (financially or otherwise) by not having the required information. The conduct relied upon has not been established.

331. If the conduct had been established, the Tribunal would have found that the reason for the conduct was solely due to Ms McDonald (or Ms Robertson) wishing to protect the claimant's position and receive the information required to protect her pay and benefits. It was not conduct related to the claimant's disability.

332. Had it been necessary to consider the purpose or effect of the conduct, the Tribunal would have found that the purpose of the conduct was not to violate the claimant's dignity, nor create an intimidating, hostile, degrading, humiliating or offensive environment. If the conduct was found to have had that effect, the Tribunal would have been satisfied it would not have been reasonable for the conduct to be considered to have had such an effect given the context and issues.

Sixth act – critical remarks about claimant's performance

333. The next issue was whether the making of critical remarks about the performance of the claimant made by Ms Ross and Ms McDonald in the presence of colleagues from mid February 2020 until the date of the claimant's resignation was unwanted conduct.

334. The Tribunal carefully considered the evidence led. While the claimant believed that she had been singled out by both Ms Ross and Ms McDonald, the Tribunal was not satisfied that any of the discussions that took place were unduly critical or unfair. They were normal discussions in the course of business. The assertions relied upon by the claimant had not therefore been established in evidence.

335. Had the Tribunal found that they had been, the Tribunal was not satisfied that the conduct was related to disability. The discussions had their sole purpose

of improving team dynamics and productivity. The discussions were in no way related to disability.

336. The Tribunal would also have been satisfied that the conduct did not have its purpose to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating of offensive environment for her. If the conduct had the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, it would not have been reasonable for the conduct to be considered to have had such an effect given the context and issues. The claim is ill founded.

Seventh act – criticism at Teams meetings

337. The next issue was whether the reference by Ms Ross made regarding the claimant's attendance at Teams meetings before colleagues around 15 May 2020 was unwanted conduct. The Tribunal found that Ms Ross was not sure who was on the Teams call and had made an error in assuming the claimant was not on the call. That was a mistake. The conduct was not in any sense related to disability. Ms Ross was not aware as to who was on each call and was not aware as to how often the claimant participated in the calls. Ms Ross did not act inappropriately in not knowing who was on the call or by making the comments she did during those calls. Her approach was reasonable and in keeping with her role and the circumstances.

338. Had it been necessary to consider the purpose or effect of the conduct, the Tribunal would have found that the purpose of the conduct was not to violate the claimant's dignity, nor create an intimidating, hostile, degrading, humiliating or offensive environment. If the conduct was found to have had that effect, the Tribunal would have been satisfied it would not have been reasonable for the conduct to be considered to have had such an effect given the context and issues. The claim is ill founded.

Eighth act – Email of 19 July 2020

339. The final issue was whether the terms of the email sent by Ms McDonald to the claimant on 19 July 2020 amounted to unwanted conduct.

340. The Tribunal found it was unwanted conduct as the claimant was unhappy with the terms of the email.

341. The next issue was whether the conduct related to disability. The Tribunal found that the conduct was not related to disability. The email was written by Ms McDonald in response to the claimant's refusal to engage with her prior to Ms McDonald going on annual leave. The claimant had not returned her calls and did not want to engage with Ms McDonald, her line manager.

342. Ms McDonald was raising legitimate concerns as part of her role as line manager unrelated to disability. The claimant clearly was unhappy hearing of the concerns Ms McDonald had, but it was Ms McDonald's job to raise the concerns she had. Ms McDonald had hoped the claimant and her colleague would resolve any workplace issues informally. That had not happened and Ms McDonald wished to encourage better team dynamics. She considered that a joint meeting was necessary to achieve this, which failing mediation. The claimant was unhappy with this suggestion and believed that the issue lay with her colleague. Even if that were correct, Ms McDonald required to properly address the issues and her approach and comment in her email was reasonable and appropriate. The conduct was entirely unrelated to disability.

343. Had it been necessary to consider the matter, the Tribunal would also have been satisfied that even if the conduct had the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, it would not have been reasonable for the conduct to be considered to have had such an effect given the context and issues. This claim is ill founded.

Victimisation (section 27 Equality Act 2010)

Protected act

344. The first issue was whether the claimant did a protected act by making claims of disability discrimination via a grievance dated 18 December 2019 and considered by Ms Ross at a hearing on 6 January 2020.

345. The respondent's agent argued that the assertion of disability discrimination was made in bad faith and therefore was not protected.

346. The Tribunal found that the claimant did believe that she had been discriminated against by reason of disability and that she had raised those claims in good faith as part of her grievance. The Tribunal was satisfied that the clamant had carried out a protected act.

Detriment

347. The detriments relied upon were not receiving any of the adaptations specified in the ergonomic assessment and receiving unfavourable working arrangements after 24 May 2020.

348. The Tribunal found that the claimant did not receive the adjustments immediately and to that extent she was subjected to a detriment.

349. The Tribunal was not satisfied the claimant received unfavourable working arrangements after 24 May 2020. The Tribunal was satisfied that the arrangement the claimant asked had been agreed. Ms McDonald had no issue with the rota the claimant proposed and there was no detrimental treatment once the claimant responded. The arrangement was not detrimental.

Cause of the detriment

350. The Tribunal considered that the protected act was in no sense whatsoever a reason for the delay in securing the adjustments. This had been carried out by Ms McDonald within a reasonable period of time, the day after the report was received. She understood she had ordered each of the items.

351. The Tribunal considered the reason why there was a delay and was satisfied it was due to Ms McDonald's genuine error as she believed she had ordered the relevant items. From the evidence presented to the Tribunal the protected act was entirely unconnected to the detriment and the claim is ill founded. The Tribunal was satisfied that the protected act was in no sense whatsoever a reason for the delay.

352. For completeness the Tribunal considered Ms McDonald's reason for implementing the work pattern following 24 May 2020. The reason for the request for a working pattern was to ensure the respondent knew which staff were available and which were working from home or from the office. The reason why the claimant was given the working arrangements she was given was entirely unrelated to the protected act. It was due to the respondent wishing to ensure a suitable rota was created with staff being available. The protected act was in no sense whatsoever a reason for the working pattern required of the claimant. This claim is therefore ill founded.

Constructive unfair dismissal

Breach of contract/fundamental breach of contract

353. The first issue is whether the conduct of the respondent, including the acts of unlawful discrimination between 7 November 2019 until 29 August 2020 breached the claimant's contract of employment and if so whether the breach was sufficiently material to entitle the claimant to resign. The claimant relied upon the above acts taken together which led to a material breach of contract, the final straw being the email she received from Ms McDonald on 19 July 2020. Her case was that there had been a series of discriminatory acts culminating in the letter of July, which, taken together, amounted to a constructive unfair dismissal.

354. The claimant's agent argued that the Tribunal should view the history between the claimant's initial diagnosis and her resignation as a "matrix in which the claimant was the subject of unlawful discrimination, failure to provide necessary aids, and a succession of negative and aggressive meetings with managers" during periods when the claimant was unwell and experiencing severe symptoms of fibromyalgia. It was argued that the combined effect of the events described led to the telephone discussion of 29 June 2020 and the email by Ms McDonald of 19 July 2020 amounting to the "last straw" for the claimant, whose relationship with her line manager was by then irretrievably broken, owing to the absence of trust that the claimant would be fairly treated

in future. All of these circumstances can properly be viewed as contributing to a fundamental breach of the contract of employment by the respondent.

355. The Tribunal found that the respondent had discriminated against the claimant as a result of its failure to provide the specialist keyboard, mouse, laptop stand and headset. That ought to have been ordered on February 2020. The Tribunal was not satisfied, however, that any of the other acts of discrimination relied upon by the claimant had taken place or that the respondent had in any other way acted inappropriately as alleged by the claimant. The Tribunal was not satisfied that the claimant's line managers had acted in an inappropriate way towards her. There was no doubt this was the claimant's interpretation of their approach (assisted by her sister who had seen and heard some interactions) but the Tribunal considered that the claimant and her sister had viewed the interactions from a different perspective, that of assuming everything the respondent did was to inhibit the claimant or treat her adversely. The claimant and her sister were not objective in their assessment of the respondent's actions.

356. The Tribunal concluded, objectively, that the respondent's actions did not breach the claimant's contract of employment. While there was a failure by the respondent, namely the failure to provide the additional adjustments recommended by the report, that failure was due to a genuine oversight by Ms McDonald. The claimant had been told this by Ms McDonald in June and she arranged for delivery of the remaining items (with exception of the headset which she had omitted to include in the order and which was not raised by the claimant at the time). The claimant knew there had been an oversight. Viewed objectively there was no breach of contract.

357. Even if the actions had amounted to a breach of contract, given the context, the Tribunal was satisfied any such breach was not material or sufficient to justify the claimant resigning. Looking at the facts as a whole there was no fundamental breach of contract.

358. The respondent had sought to support the claimant and seek a return to work that was consistent with the claimant's needs and the respondent's business.

Discussions were fraught on occasion due to the claimant believing that she was entitled to be placed at Benthall permanently. She firmly believed this was supported by the medical position and any deviation from that position would be discriminatory. She approached her interactions with her managers with suspicion and concern and believed thereafter everything the respondent had the purpose of hindering the claimant. She viewed interactions as aggressive and sinister when in fact the respondent was seeking to support and assist the claimant. She viewed frustration as a personal attack on her when the issues arising were proper management interventions.

359. The failure to provide the equipment did not in itself result in the claimant's contract being materially breached given the fact an error had been made and this was known to the claimant. This was not a case where an employer had refused to make reasonable adjustments for a sustained period of time. The employer had agreed to make the adjustments and had undertaken steps to do so amidst a pandemic. It was due to genuine error (which was disclosed to the claimant) that the adjustments were not made in good time. The Tribunal was satisfied that such actions (by themselves) did not amount to a material breach of the claimant's contract entitling her to resign.

360. It was not the claimant's case that she relied on those acts alone to justify her decision to resign. It had not been argued that the failure to make reasonable adjustments, alone, amounted to a material breach of contract. She relied upon the cumulative effect of the treatment as justifying her resignation. The remainder of the alleged discriminatory acts had not been established in evidence and the treatment of the claimant, including the email relied upon by the claimant as the last straw, were entirely reasonable acts of the respondent and did not justify her resignation on the basis of the evidence led. Even if the claimant had relied upon any one of the acts amounted to a material breach of contract, that had not been established on the facts of this case.

361. The respondent did not act in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and respondent such as to justify her resignation. There was no breach of contract

(whether of an express or implied term) and if the Tribunal was wrong in that conclusion, any breach was not material on the facts of this case.

Reason for her resignation

362. Although not necessary to do so, the Tribunal considered what the reason for the resignation was. The Tribunal would not have been satisfied a reason for the resignation was the failure to make the adjustments (the only act that could have amounted to a breach of contract on the facts). The reason for this was because by the time the claimant had resigned, she knew that the reason why the adjustments had not been made was due to an error on the part of Ms McDonald and she resigned because of the cumulative effect of a significant number of acts, which had not been established in evidence. Further, by the time the claimant had resigned, the only item that had not been provided to the claimant was the headset (which the claimant had not raised). All other adjustments had been provided some time before her resignation.

363. Although very finely balanced, the Tribunal would have found that the claimant resigned because of her perception as to how she had been treated (the cumulative effect of how she perceived she had been discriminated against) and not because of any failure to make reasonable adjustments. She resigned because of the "matrix" referred to by the claimant's agent in submissions and the final straw of the July letter. It was not her case that she had resigned because of one act. Her resignation letter referred to the "ongoing adverse and discriminatory treatment". The failure to make the adjustments, which was known to be due to an error, was not a reason for her resignation given the facts in this case.

Undue delay

364. Finally, had there been a material breach of the claimant's contract which was a reason for her resignation, the Tribunal would have considered whether the claimant unreasonably delayed in resigning, such as to affirm the breach. The claimant's agent argued the delay was reasonable given the health position of the claimant. The respondent argued that the claimant acted unreasonably in not resigning sooner given the context of this case.

365. Having considered the evidence, the Tribunal would have found that the claimant had affirmed the contract by delaying her resignation until 31 August 2020 (with her employment ending on 29 September 2020) when she knew of the breach in June 2020. The claimant had unreasonably delayed in resigning. While the claimant had health issues, from the information presented to the Tribunal, the claimant had a reasonable period of time to consider matters. The delay was unreasonable on the facts.

366. In light of the foregoing, it is not necessary to consider the remaining issues pertaining to this claim.

367. The claimant's claim is constructive unfair dismissal is ill founded and is dismissed.

Time bar

368. The respondent argued that the discrimination claims were time barred. The claimant argued that the actions were acts extending over a period culminating in her resignation and as such the claims were in time. Only acts which are found to be unlawful can form part of an act extending over a period and so it was necessary to consider what claims were meritorious to identify whether a time bar issue arose. If any claims were time barred, the claimant argued it was just and equitable to allow the claims to proceed.

369. The Tribunal found that the respondent discriminated against the claimant by failing to comply with its duty to make reasonable adjustments. Ms McDonald failed to check all the auxiliary aids had been purchased on 17 February 2020 and discovered this on 9 June 2020 (and communicated this to the claimant). The claimant gave notice of her resignation on 31 August 2020 with her employment ending on 29 September 2020. Early conciliation ran from 27 August 2020 until 11 September 2020.

370. The first issue is to ascertain the date from which time starts to run. As this is a reasonable adjustments case, the law in this area is not straightforward. The start date is the date by which the respondent positively decided not to make an adjustment to it or, in the absence of evidence about such a decision, the

date when the respondent did an act inconsistent with deciding to make an adjustment, or on the expiry of the period in which respondent might reasonably have been expected to make an adjustment. Both of the latter dates should be viewed from the perspective of the claimant.

371. This was not a case where the respondent positively decided not to make the adjustment (as the respondent undertook to make the adjustments and took steps to do so). Time therefore begins to run from the date the respondent did an act inconsistent with deciding to make the adjustment. The respondent did an act inconsistent with making the adjustment on 9 June 2020 when the claimant discovered the equipment had not been provided. That is applying a favourable interpretation for the claimant.

372. The Tribunal also considered, in the alternative, that it would have been reasonable for the claimant to have believed that the respondent would have made the adjustment by 9 June 2020 (which was the expiry of a period in which the respondent might reasonably have been expected to make the adjustments) given the time that the parties had understood the order had been placed (and the intervening pandemic and context).

373. Time started running for the purposes of a claim in respect of the failure to comply with the duty on 9 June 2020. Early conciliation should have commenced or a claim lodged by 8 September 2020. Early conciliation commenced on 27 August 2020 and ended on 11 September 2020 (15 days). As the time limit would expire in the period between 27 August 2020 and one month after 11 September 2020, the time limit is extended by one month from the end of that period. The claimant had therefore until 10 October 2020 to raise a claim (that being a month after the expiry of the early conciliation period). The claim was lodged on 30 October 2020. The claim was accordingly raised out of time (by 20 days).

374. On 19 August 2020 the claimant had decided that she wished to leave the respondent (which was what she told her GP). She found it difficult to get advice as ACAS was busy (due to the pandemic). The claimant researched employment lawyers and managed to get legal advice from an employment

law specialist. By 31 August 2020 the claimant had spoken to ACAS and a specialist employment lawyer. The claimant had the benefit of a specialist employment lawyer who had prepared and lodged the ET1 on her behalf.

375. There was no evidence before the Tribunal as to when the claimant sought advice from an employment law specialist nor as to the claimant's knowledge of employment law and procedure. While the claimant's sister had been a solicitor, she had no expertise in or knowledge of employment law. The claimant had access to a family friend who was a lawyer (which was why she used "without prejudice" on one of her letters in December 2019).

376. The question for the Tribunal was whether the claim was lodged within such period as was just and equitable. The onus is upon the claimant to persuade the Tribunal to justify an extension, given time limits are normally rigidly applied. The Tribunal must balance all the relevant factors.

377. The absence of evidence explaining the claimant's knowledge and position is an important consideration. That, however, is balanced with the fact that the claimant believed there were other claims she had (which were in time, such as the constructive unfair dismissal claim).

378. There was no issue in terms of having a fair hearing and the short delay in bringing the claim in no way adversely affected the quality of the evidence or created any unfairness for the respondent. It was not possible to determine time bar in any event until all the evidence had been led, since had the other claims been upheld, it was possible all the claims could have been found to have been an act extending over a period and therefore in time.

379. The Tribunal has taken into account the prejudice to both parties if the claim is found to be time barred, recognising the claimant would not have the benefit of a remedy and that the respondent would require to deal with remedy in a claim that was brought outwith the statutory time period. The respective prejudice is placed in the balance.

380. The Tribunal also considered the length of the delay and the absence of a reason for it. The claimant assumed there was an act extending over a period

and as such the claims were in time, but that was a risky position to adopt given it was possible that argument may not have been upheld.

381. The Tribunal found the cogency of the evidence was unaffected and there was no suggestion from the respondent of any adverse impact of the short delay in this case.

382. It is also relevant that the claimant had a specialist adviser at the time the claim was lodged and had spoken to ACAS and a specialist solicitor prior to the expiry of the time limit.

383. The Tribunal has to balance all of the factors in considering whether the claim was lodged within such further period as was just and equitable. A fair hearing was capable of taking place and the parties were able to present their respective positions. The Tribunal had concluded that on the facts of this case, balancing all the relevant factors, the claim was lodged within such period as was just and equitable and that accordingly the time bar argument is not upheld and the case will now proceed to a remedy hearing.

Summary

384. The Tribunal unanimously found that the respondent failed to comply with its duty to make reasonable adjustments in respect of (1) its failure to provide the auxiliary aids of a specialist keyboard, specialist mouse and a laptop stand during the period of 17 February 2020 until 18 June 2020 and (2) its failure to provide the auxiliary aid of a headset for the period from 17 February 2020 until the end of the claimant's employment. While these claims were raised outwith the statutory time period, the Tribunal considered that the claims had been lodged within such further period as the Tribunal considered just and equitable in terms of section 123(1) of the Equality Act 2010.

385. The remaining claims were dismissed.

386. A telephone case management hearing will be fixed to discuss arrangements for the remedy hearing, should that be needed.

Observations

387. The Tribunal recognises the challenges and upset the claimant has faced. Unfortunately the claimant was singularly clear as to the outcome she wished and felt unable to recognise the respondent's desire to work with her to resolve matters, resulting in perceived conflict and aggression. It was unfortunate that the claimant was unable to work with the respondent to seek to resolve the concerns she had.

388. The Tribunal notes that guidance has been given to the respondent's managers to equip managers with better skills in dealing with disabled employees and workplace issues given the acceptance that managers had little experience in dealing with the issues that arose in this case. It would be of assistance for such skills to cover specific issues arising in managing disabled employees in the workplace, particularly with regard to reasonable adjustments and soft skills in managing such discussions and challenging situations. That training might best cover all staff employed by the respondent.

389. Given the impact matters had upon the claimant's health it is hoped that a swift resolution can be reached to allow the claimant to move on with her life.

Employment Judge: **D Hoey**
Date of Judgment: **03 June 2022**
Entered in register: **07 June 2022**
and copied to parties