Case Number: 3307569/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr D Virdee	v	London Borough of Islington

Heard at: Watford, in person and (on 5 October 2022) via CVP

On: 4-7, 10 and (in private) 11 October 2022

Before: Employment Judge Hyams

Members: Ms M Harris
Mr D Wharton

Appearances:

For the claimant: Mrs P Virdee (the claimant's wife)
For the respondent: Ms Andrea Chute, of counsel

UNANIMOUS RESERVED JUDGMENT

1. The claim of breaches of section 15 and 39 of the Equality Act 2010 succeeds. The claimant is entitled to the sum of £14,000 by way of compensation for injury to his feelings and pain and suffering plus interest of £3,620.82.

2. The claims of failures to make reasonable adjustments within the meaning of sections 20 and 21 of that Act were made out of time and are dismissed.

REASONS

The claims made by the claimant in this case

1 By a claim form presented on 6 December 2019, the claimant claimed (by ticking the box on page 6 for "disability" discrimination) that he had been "discriminated against on the grounds of" disability. Those words are not apt to cover the precise terms of the Equality Act 2010 ("EqA 2010"), even in regard to a claim of direct discrimination within the meaning of section 13 of that Act, given that the words "on the grounds of" nowhere appear in that Act, and given that the applicable word in section 13 is "because". That observation is, of course, applicable to all claims of discrimination contrary to the EqA 2010 made to an

employment tribunal, since claimants are obliged to use the ET1 claim form. It illustrates, however, the caution which must be applied when considering precisely what a claimant is in fact claiming.

2 In this case, the claimant claimed in addition in the box on page 6 of the claim form, which was on page 9 of the hearing bundle (any reference below to a page is, unless otherwise stated, a reference to a page of that bundle), that he was "making another type of claim which the Employment Tribunal can deal with" of this sort:

> "Injury to feelings and harassmnet [*sic*] related to my sickness and disability".

3 In box 8.2 of the ET1 form, on page 10, there were at the start of the box these words.

> "I have attached a document which I submitted as a grievance to the respondent. It includes most of the basis of my ET claim. The grievance is still outstanding and the responses I have received back I believe also further discrimination."

4 In the middle of box 8.2, on page 10, this was said (and we quote the words as they were used, precisely, complete with all original textual errors):

> "Here is a summary of the issues
>
> Outcome: Injury to feelings compensation ? due to the fact that the council failed to make reasonable adjustments for up to 1.5 years. This feel this has effected my physical and mental well being. I have been continually harassed and been discriminated towards relating to my disability. Variously extremely offensive remarks were made undermining my disability by managers and HR even though they had access to all my medical records.. My manager falsified my sickness record and failed to follow the councils managing attendance policy to progress me to the final stage without due justification. This caused me a lot of stress and lead to me lodging a grievance. At this time the GP diagnosed me with work related stress and prescribed me with medication."

5 In box 9.2 of the claim form, on page 11, in addition to compensation, the claimant said that he was seeking "Reasonable adjustment to be put into place and no further acts of discrimination, harassment or victimisation to occur."

6 The grievance document attached to the claim form was detailed. It was at pages 15-25. It had four sections which the claimant described as "the headings under which I would like to raise my grievance". They were these:

6.1 "Factually inaccurate information as justification to progress to Stage 3 of the managing attendance process";

6.2 "The failure of to adhered to the managing attendance policy";

6.3 "Failure to make reasonable adjustments under the Equalities Act 2010";

6.4 "Harassment and Disability Discrimination".

7 The first and second of those three complaints were not ostensibly within the jurisdiction of the tribunal.

8 There was a section headed "Expected Outcomes" at pages 24-25 which started in this way:

> "1. The progression to Stage 3 to be retracted, as the sickness policy has not been followed. Also, the basis on which the progression to Stage 3 has been justified is full of inaccuracies, which have been highlighted in my grievance and attached response to Stage 3 email dated 5th March 2020.
>
> 2. I request for the Council to review my situation properly and make the necessary reasonable adjustments. Below I outline the reasonable adjustment, which I feel would be greatly beneficial in removing any barriers, which put me at a substantial disadvantage due to my disability.
>
> - Working from home 2 days a week (Ideally Tuesdays and Thursday) – Travelling to work on consecutive days causes considerable strain on my back and I am physically limited to be able to do this. If I travel consecutive days my health will deteriorate and render me unable to work.
> Removing this travel barrier will allow me to continue to work with my disability. This will not have any negative impact on my ability to fulfil my work duties. This has been supported by numerous medical professionals, (OH, GP, chiropractor and physiotherapist) that this would certainly be beneficial in managing my condition.
>
> - Off Peak Travelling – Travelling off peak reduces the time I am sitting in traffic and overall commuting time. I am requesting and change in working hours to the following - Start at 10am and finish at 5pm, take 30 mins lunch break on the days I am in the office. Working from Home days Start 9am and finish 5.15pm, with 30mins lunch break. This would allow me to fulfil my contractual hours of 35 per week This has been trialled since last 6 weeks and proven to help and working well and have no impact on the business."

The original response to the claim

9 The respondent's grounds of resistance as originally presented were at pages 32-38. They correctly pointed out that the claimant had notified ACAS on 1 June 2020, that the early conciliation certificate was issued on 15 July 2020, and that the claim was therefore outside the primary time limit in respect of any conduct (including any omission) of the respondent which occurred before 2 March 2020. The respondent's substantive response to the claims (ignoring its narrative response, which was in paragraphs 4-45) was on page 37 and was this:

> '**Response to the Claims**
>
> 46. The full nature and extent of the Claimant's case is insufficiently pleaded and unclear at present.
>
> 47. The Claimant has referred to disability discrimination, harassment and failure to make reasonable adjustments. He has attached a grievance document stating in Box 8.2 "It includes most of the basis of my ET claim" he then refers to a "summary of the issues". The Claimant has failed to properly plead his alleged claims of discrimination, harassment and failure to make reasonable adjustments to enable the Respondent to make out a claim to respond to.'

The preliminary hearing before Employment Judge Tobin of 23 August 2021

10 There was a preliminary hearing by telephone on 23 August 2021. It was conducted by Employment Judge ("EJ") Tobin. The claimant attended the hearing in person and the respondent was represented by Ms S Parker, a solicitor. EJ Tobin's record of the hearing was at pages 46-53. In paragraphs 2-5 on page 47, he described the claim in this way.

> "2. The claimant claims disability-related harassment indirect disability discrimination and a failure to make reasonable adjustments. He is currently still in employment with the respondent. The respondent denies disability discrimination although it's accepts that [*sic*], at all material times, the claimant was a disabled person (within the meaning of s6 Equality Act 2010) because of his degenerative disc disease, which affected his lower back and neck.
>
> 3. We discussed claim in detail, and I note that the respondent has previously requested Further Particulars. It seems to me that all of the claimant's claims are properly in respect of a failure to make reasonable adjustments although Mr Virdee said that he would think about his allegations carefully when he provides the Further Particulars I have ordered.
>
> **List of issues**

4. Although the claimant's claims of disability discrimination not clear, Ms Parker has had a go at drafting a list of issues. Once the claimant provides his Further Particulars and the respondent has formally clarified its position in a Reply, the parties will need to agree (if possible) a list of issues.

5. A list of issues is a short statement of the factual and legal disputes that the Tribunal will determine. The list of issues should set out the appropriate legal tests and is usually drafted as a series of questions (where there is a dispute) and short statements (where the parties are agreed upon a particular relevant issue). The respondent will go first drafting the list of issues as it is represented by a solicitor. If the list of issues cannot be agreed, and then this will be determined by the Hearing Judge at the outset of the final hearing."

11 That was the only description of the claim in EJ Tobin's record of the hearing. He ordered this in respect of the issues (at page 50):

"**3. The list of issues**

3.1 The respondent shall draft a list of issues and send this to the claimant by no later than 11 October 2021.

3.2 The claimant shall confirm his agreement to the respondent's draft list of issues by no later than 25 October 2021 or provide the respondent with a draft version of its list of issues.

3. Any dispute in respect of the issues to be determined by the Tribunal shall be resolved by the hearing judge at the commencement of this hearing."

12 In addition, in the preceding order, EJ Tobin ordered this (at pages 49-50):

"**2. Further particulars of the claim.**

2.1 By no later than 13 September 2021 the claimant shall provide the following Further Particulars.

- in respect of each allegation of a failure to make reasonable adjustments:
    a. What reasonable adjustments does the claimant say they respondent [*sic*] ought to have made; and
    b. When should such an adjustment have been made?

- in respect of <u>each</u> allegation of harassment:
    a. A brief summary of what happened or was said, i.e. the allegation
    b. When it occurred

c. The individual(s) the allegation is directed against, i.e. who said it
d. Where the incident occurred (if appropriate) or who witnessed the incident or confirmation that there were no witnesses

2.2 The respondent shall provide a full and detailed Reply to the claimant's Further Particulars by no later than 11 October 2021."

Subsequent developments in relation to the clarification or otherwise of the claim and the response to it

13 At pages 56-59 there was a document entitled "[DRAFT] LIST OF ISSUES". Paragraphs 1 and 2 on page 56 included the claimant's text, written in response to the respondent's draft list. The claimant's text is underlined by us in the following quotation of those paragraphs and the heading(s) to them.

"**JURISDICTION**
Claims under the Equality Act 2010

1. Did the Claimant bring his complaint within the time prescribed by Equality Act 2010 (**EqA**) s.123? In particular:

a) What is the act or acts to which the complaint relates?

Failure to make reasonable adjustments - under EqA

b) Did the act or acts amount to conduct extending over a period? Yes, the acts amount to conduct over a period. The complaint concerns a "continuing act" of discrimination where the time runs from the date of the last act relied upon, as it is part of a continuing act of discrimination.
c) When did the act or acts to which the complaint relates occur?

Jan 2019 - March 5th 2020 (Date of last act relied upon for time limits). Acts continued after this time also.

2. If the Claimant did not bring his complaint within the time prescribed by EqA s.123, is it nonetheless just and equitable that time be extended? The complaint was within the time limits as the respondent's conduct has been a 'continued act'."

14 On pages 57-59, the claimant's claim of a failure to make adjustments within the meaning of sections 20 and 21 of the EqA 2010 was stated, apparently by the claimant, in some detail. The document at pages 56-59 was stated on page 59 to have been "Last updated" on 13 September 2021. It was sent under cover of the email from the claimant to Ms Parker (who was, and remains, a member of the

respondent's in-house legal team) at page 55, which was dated 13 September 2021 and had as its substantive text simply this:

> "Please find attached the draft list of issues (further particulars) as ordered by the Judge at the preliminary hearing on 23/8/21."

15 The document contained a list of three claimed reasonable adjustments. The first was "Managing Attendance (MA) review meetings to be held over telecom rather than face to face to avoid travel, sitting for long periods, unnecessary stress and pain due to the claimant disability whilst the claimant was signed off sick by GP and OH." The last date when that adjustment should, it was claimed, have been made, was 15/10/19.

16 The second claimed reasonable adjustment was "Working from home (wfh) 2 days a week on a permanent basis". It was claimed that that adjustment should have been made on 29/1/19, 14/7/19 and 15/10/19.

17 The third claimed reasonable adjustment was "Flexibility to be able to work from home when back flares up (recommended by OH in report dated 9/10/19)". The final date when this adjustment should, it was claimed, have been made, was 2/12/19.

18 On the next day, 14 September 2021, Ms Parker replied (page 54):

> "Thank you for the amended draft list of issues, which contains further particularisation of your reasonable adjustment claims.
>
> Please can you confirm that this is all that you will be providing in terms of further particularisation of your claims, and specifically that you do not intend to pursue claims of disability related harassment and indirect disability discrimination?"

19 The claimant replied on 16 September 2021 in his email on the same page:

> "I do not intend on pursuing claims for harassment and indirect disability discrimination. As the judge mentioned at the preliminary hearing the case seems to be more appropriately categorised as a failure to make reasonable adjustments case. I have taken this on board.
>
> Please let me know if you require any further clarification."

20 The respondent then sent some amended grounds of resistance which contained this amended response to the claims (on page 67), which replaced in their entirety paragraphs 46 and 47 which we have set out in paragraph 9 above.

> "**Response to the Claims**

52. The Claimant has, by amending a draft list of issues on 13 September 2021, provided further particulars of his claim, and detailed 3 adjustments he alleges should have been made.

53. The Claimant has confirmed by email dated 16 September 2021 that he is not pursuing any further claims.

Failure to Make Reasonable Adjustments

54. The Claimant alleges that the Respondent failed to make reasonable adjustments in relation to:
    i. Not conducting management review meetings on 30 May 2019, 26 June 2019 and 24 July 2019 and the return to work meeting an 15 October 2019 over telecom;

    ii. Not allowing the Claimant to work from home 2 days a week on a permanent basis following requests by the Claimant to do so on 29 January 2019, 14 June 2019, 26 June 2019, 4 July 2019, 14 July 2019 and 15 October 2019; and

    iii. Not allowing the Claimant to work from home on 15 November 2019 and 2 December 2019.

55. As pleaded above, the Respondent denies that it has failed to make the reasonable adjustments as alleged, or at all.

56. The Respondent asserts that these claims have been made out of time and that there is no continuing act to bring these matters within the jurisdiction of the employment tribunal."

21 That amended response to the claim was dated (on page 68) 11 October 2021. On that day, Ms Parker sent the email at page 72 to the claimant, which started thus:

> "Dear Mr Virdee
>
> Please find attached the amended draft list of issues, which has been updated following receipt of your further and better particulars on 11 September 2021. Please note that the list of issues has been phrased in questions based on the factual and legal issues that Tribunal will need to determine when considering your claim.
>
> I look forward to receiving, by 25 October 2021, your agreement to the draft list of issues or alternatively your draft version of the list of issues."

22 On 22 October 2021, the claimant sent (under cover of the email at the top of page 72) the draft list back with amendments. The draft list as sent by Ms Parker to the claimant as amended by the claimant was at pages 74-76. The draft that

Ms Parker had sent the claimant had (apparently as a result of a deliberate decision on Ms Parker's part) omitted almost all of the text which we have set out in underlined font in paragraph 13 above. That can be seen from the fact that the draft list contained this text only in paragraphs 1 and 2 (to which the claimant had made no amendments):

> "**JURISDICTION**
>
> 1. Did the Claimant bring his complaint within the time prescribed by Equality Act 2010 (**EqA**) s.123? In particular:
>
> a) What is the act or acts to which the complaint relates?
>
> *Failure to make reasonable adjustments – under EqA*
>
> b) Did the act or acts amount to conduct extending over a period?
>
> *The Claimant asserts that there was a continuing act*
>
> c) When did the act or acts to which the complaint relates occur?
>
> 2. If the Claimant did not bring his complaint within the time prescribed by EqA s.123, is it nonetheless just and equitable that time be extended?"

23 On pages 75 and 76, there was this text, which included (in green font in the original; we have underlined those words instead) the claimant's additional words, which he had inserted in response to the draft list:

> "The Claimant contends that the following adjustments for his disability would have been reasonable:
>
> a. Conducting management review meetings on 30 May 2019, 26 June 2019 and 24 July 2019 and the return to work meeting on 15 October 2019 over telecom;
>
> b. Allowing the Claimant to work from home 2 days a week on a permanent basis following requests by the Claimant and when it would have been reasonable for the Respondent to do so on 29 January 2019, 14 June 2019, 26 June 2019, 4 July 2019, 14 July 2019, 15 October 2019, 24 January 2020, 4 February 2020, 5 March 2020 and as an outcome of claimants grievance raised on 23/3/2020; and
>
> c. Allowing the Claimant to work from home on 15 November 2019, 2 December 2019 and 3 February 2020."

24 The respondent did not respond to the claimant's email of 22 October 2021 until 8 February 2022, when Ms Parker sent her email at page 78, in which she said this:

> "Dear Mr Virdee,
>
> I have reviewed your suggested changes to the draft list of issues and I attach an amended version with changes tracked.
>
> Where your changes are agreed, I have changed the front colour to black. I have amended the wording slightly at paragraph 4a [which we have not set out above], so the question remains phrased in the same way, whilst incorporating your amendment, in so far as it is accepted. I have deleted the changes which are not agreed. Notably, you seem to be trying to add additional particulars to your claim, which were not included in your further particulars provided on 13 September 2021. You were directed to provide full particulars by this date, and you confirmed that the document you provided on 13 September outlined all your particular of claim, so the Respondent duly responded to these particulars on 11 October 2021. Any further additions to your claim are therefore not agreed."

25 The document enclosed with that email was at pages 81-83 and it showed the underlined words that we have set out in paragraph 23 above as having been deleted. On 11 February 2022, the claimant responded (pages 77-78):

> "As per the court orders, I provided a response to your draft list of issue on 22 October 2021 which was within the court order timeline of 25 October 2021. I was in agreement with the draft list of issue on the proviso of a few amendments. As I did not hear back and it is now 5 months later, had deemed this as being accepted. My whole disclosure of documents was based on this. It seems unacceptable that 5 months later the respondent has only just reviewing the draft list issues.
>
> I refer to the court orders, section 3.
>
> 3. The list of issues
>
> 1. 3.1 The respondent shall draft a list of issues and send this to the claimant by no later than 11 October 2021.
> 2. 3.2 The claimant shall confirm his agreement to the respondent's draft list of issues by no later than 25 October 2021 or provide the respondent with a draft version of its list of issues.
> 3. 3.3 Any dispute in respect of the issues to be determined by the Tribunal shall be resolved by the hearing judge at the commencement of this hearing.
>
> My understanding is that if we are not in agreement we refer to point 3.3."

26 Ms Parker responded on the same day (in the email at the start of page 77):

> "I apologise for the delay, but I have not had conduct of this matter since early October, and responded to you as soon as I was able to do so.
>
> I have outlined the Respondent's position, that your amendments to the list of issues are not accepted as you are seeking to amend your claim. If your position is that all your amendments should remain, I will add your email below and the disputed list of issues to the bundle and this matter can be raised at the final hearing."

27 And that was the position at the start of the hearing before us.

What happened at the start of the hearing

28 Ms Chute on behalf of the respondent sought the determination as a preliminary point of the issue whether the claim was all out of time and therefore outside the jurisdiction of the tribunal. She pointed out that the claimant's claim was now only of a failure to make reasonable adjustments within the meaning of sections 20 and 21 of the EqA 2010 and she said that it was asserted by the claimant that final time by which such an adjustment should have occurred was 2 December 2019.

29 The claimant's response was to say that his claim was made on the basis that there had been a continuing failure to make reasonable adjustments, and that the failure had continued until 5 March 2020, when the respondent had sent an email to the claimant advancing his case to stage 3 of the respondent's procedure for managing attendance, stating that he might be dismissed because of his record of absences from work on account of sickness.

30 EJ Hyams then sent to the claimant and Ms Chute a copy of the report of the decision of the Court of Appeal in *Matuszowicz v Kingston upon Hull City Council* [2009] IRLR 288, and explained his (EJ Hyams') understanding of the effect of that decision in relation to the question of when time was to be regarded as having started to run for limitation purposes in connection with the making of a claim of a failure to make an adjustment within the meaning of sections 20 and 21 of the EqA 2010. That was that a failure to make a reasonable adjustment has to be regarded as having occurred when the person who could reasonably have been expected to make the adjustment decided not to make it or when, if the employer had been acting reasonably, it would have made the reasonable adjustment.

31 EJ Hyams then sent the parties a copy of the judgment of Griffiths J in *Cole v Elders' Voice* UKEAT/0251/19/VP, [2021] ICR 601, and referred Ms Chute to what Griffiths J said in paragraphs 60 and 61 of that judgment about assisting a claimant to formulate his or her case. EJ Hyams said that as far as he could see, the claimant had believed that he had the right to make a claim of a continuing

failure to make a reasonable adjustment and had (as recorded by us in paragraph 19 above) given up the right to press a claim of indirect disability discrimination and/or harassment in the belief that it would in no way prejudice his claim by doing so. In addition, EJ Hyams pointed out, the claimant had expressly stated to the respondent in the document at page 56 that which we have set out in paragraph 13 above that the last act in respect of which the claim was made was "March 5th 2020". Furthermore, the claimant had added into the respondent's list of issues drafted following the claimant's reference to that last act of claimed discriminatory conduct (which list had, as we say in paragraph 22 above, apparently as a result of a deliberate decision on the part of Ms Parker, not included the claimant's claim that the last act of claimed unlawful conduct was 5 March 2020) references to acts occurring after 2 December 2019 (including on 5 March 2020), and the respondent had refused to agree to the inclusion of those references.

32 EJ Hyams then said that as far as he could see, given what the claimant had said in paragraphs 60 and 61 of his witness statement (which we have set out in paragraph 37 below), the most obviously viable claim in respect of the sending of the email of 5 March 2020 to which we refer in paragraph 29 above was one made under section 15 of the EqA 2010, which is (so far as relevant) in these terms:

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

33 EJ Hyams said that such a claim was plainly capable of being based on the content of paragraphs 60 and 61 of the claimant's witness statement. EJ Hyams also pointed out to Ms Chute and the claimant the analysis of Elias LJ in paragraphs 24-27 of his judgment in *Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216. That was that a claim of a failure to make a reasonable adjustment within the meaning of sections 20 and 21 of the EqA 2010 was determinable by reference to the same evidence as was a claim of a breach of section 15 of that Act and a claim of a breach of section 19 of that Act in relation to the same circumstances. Those claims were different sides of the same coin (assuming that a coin has three sides).

34 The claimant then said that he wanted to make a claim under section 15 of the EqA 2010 as well as under sections 20 and 21 of that Act. We said that he should formulate it in writing and send it to the respondent and the tribunal by 4.00pm on that day. We said that if he did so then we would consider it at the start of the next day.

35 We also concluded and said that we would not consider the issue of whether the claim was out of time as a preliminary issue, but, rather, after hearing all of the evidence. We then (at 12:50) adjourned the hearing to 10:00 on the next day, so that we could conclude our reading of the witness statements and the relevant documents in the bundle.

36 At 15:05, the claimant sent a document containing the following formulation of his claim under section 15:

> "The Claimant was treated unfavorably by being pushed through the Managing Attendance Procedure to a Stage 3 meeting, where the Claimants ongoing employment is discussed and there is potential of dismissal. The stage 3 meeting arose in consequence of the Claimants disability in that he was unable to travel to the office on consecutive days due to his disability, thus leading to the Claimants condition flaring up which then resulted in the Claimant being off sick.
>
> The Claimant had been required to travel to the office 4 days a week which he could not cope with given the difficulties arising from his disability and which thus amounted to unfavorable treatment because of something arising in consequence of his disability and in respect of which the Respondent had failed to comply with its duty to make reasonable adjustments.
>
> The Claimant states that the treatment was not a proportional means of achieving a legitimate aim.
>
> This is addressed in the Claimants witness statement at paragraphs 60 and 61."

37 Those paragraphs were as follows.

> '60. On 5/3/2020, I was extremely surprised to receive a letter pertaining to the meeting on 24/2/2020, but it was a Managing Attendance – End of Review Period and Next Steps – End of Stage 2 and referral to Chief Officer Stage 3. At no point was my TU representative or I were made aware that the meeting on 24/2/2020 was an End of Stage 2 meeting. This letter had a whole raft of surprising content which was not discussed at the meeting on 24/2/2020. It was also full of inaccuracies. Not at any point during the meeting were the concerns raised that were in this letter. In the letter, was another failure to make reasonable adjustments as it was stated that *"Working from home must be flexible and temporary, we must ensure the needs of the Council are covered as well as enabling you to work at your best in IDS…….. Work of the Project team - including the Programme Manager, Project Manager and Senior Project Manager and Project Support officers need to be present in the office full time. As per the JD and work we are delivering. Taking into account the flexible working offering of the Council we noted Islington working practice allows/supports one day a week at home to be*

flexible and not fixed and also not necessarily every week again to meet the needs of the Council according to the needs of the business and work in flight.". This was the point where I had no other option available but to lodge a grievance. **(please see doc 99 - Email from Sue Besbrode to Claimant re: Managing attendance-End of Review period and next steps-End of stage letter- DV)**

61. On 6/3/2020, I replied to the above letter as I was extremely concerned. Stage 3 is where an employee's ongoing employment is discussed and there is a potential of a dismissal. I spoke with my TU rep, Marie Mccormack and she also said that, to push me to Stage 3 was extremely premature. I addressed all the inaccuracies and prior agreements that were made that were not reflected in the letter. A specific section of my response stated, *"As Islington Council and yourself are fully aware of my disability I feel applying this blanket rule is discriminatory as it puts me at a substantial disadvantage compared to non-disabled employees."*. My reference was to the ongoing failure to make reasonable adjustments for a disabled employee as compare to a non-disabled employee under the Equality Act 2010. **(please see doc 100 - Claimant's response to Stage 3 letter sent on 5 March 2020, page 339, paragraph 5)**'.

38 The email of 5 March 2020 to which the claimant referred in paragraph 60 of his witness statement had been sent by Ms Besbrode. It was at pages 331-333. It contained among a number of other things this passage on page 333:

> "I am now concluding that in accordance with the Managing Attendance Procedure the stage has been reached where your sickness record is such that consideration must now be given to your continued employment with the council in accordance with paragraph 6."

39 The respondent witness statements were made by Mr Jon Cumming, the respondent's Director of Digital Services, and Ms Donna Labor, who was employed by the respondent as a Human Resources Business Partner and had been responsible for advising on and participating in the process about which the claimant complained in the proceedings before us. The claimant's line manager until the end of December 2019 was Ms Sue Graham. After then, the claimant's line manager was Ms Besbrode. Both of them reported to Mr Cumming. Mr Cumming's witness statement contained a detailed section on the business reasons of the respondent for denying the claimant's requests to work from home on Tuesdays and Thursdays except as part of a phased recovery from a period of sickness absence.

40 Ms Chute told us that Ms Besbrode no longer worked for the respondent and the respondent did not know how to contact her. Ms Chute said that Ms Besbrode had left the respondent's employment in July of this year, 2022.

What happened at the start of the second day of the trial, 5 October 2022

41 At the start of the second day of the trial, 5 October 2022, Ms Chute objected to the claimant's application to advance a claim under section 15. She asserted that it was "an entirely new claim", said that the respondent had had only two business hours to consider it, and said that it would not be fair to the respondent to permit the claimant to advance it.

42 EJ Hyams then asked her what extra evidence the respondent was asserting it would need to adduce if the claimant were given permission to advance a claim under section 15 as well as under sections 20 and 21 of the EqA 2010. Ms Chute was able to say only that if Ms Besbrode were able to give evidence then she could say why she had sent the email of 5 March 2020 at pages 331-333. After a discussion with EJ Hyams, however, during which EJ Hyams (a) referred Ms Chute to (1) the decision of the Court of Appeal in *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209, (2) the decision of His Honour Judge James Tayler sitting in the Employment Appeal Tribunal ("EAT") in *Vaughan v Modality Partnership* [2021] IRLR 97, and (3) paragraph 31 of the judgment of Simler P (as she then was) sitting in the EAT in *Pnaiser v NHS England* [2016] IRLR 170, and (b) sent her and the claimant copies of all of those reports, we adjourned the hearing from just before 12 noon to 2pm to give her and the claimant time to read them.

43 During EJ Hyams' discussion with Ms Chute in the morning of 5 October 2022, EJ Hyams pointed out that it was very difficult to see how the respondent could argue that the causation test in paragraph 31(b) of *Pnaiser* was not satisfied. That test was the question whether the claimant had at least on 5 March 2020 (if not at all material times) been treated by Ms Besbrode unfavourably because of something arising in consequence of his admitted disability of a degenerative back condition. EJ Hyams said that because Ms Besbrode's email of 5 March 2020 contained this paragraph at the bottom of page 332:

> "In conclusion of my review and with the evidence of working dates and attendance since November 2019 to February 2020 I confirm that your return to work has not been completed or successful due to your continued ill-health. The unpredictability of your condition and pain levels are a cause for concern as it suggests a level of uncertainty about your ability to attend work on a regular basis. The impact of your absence on the service and the expectations around project deliverables is one that cannot be ignored."

44 We ignore here the fact that that passage was (as we say in paragraph 122 below) inaccurate in a material respect. We set it out to show that "the reason in the mind of [Ms Besbrode]" for sending the email was plainly the claimant's "absence", which was plainly on the evidence before us (from both parties) caused by the claimant's back pain.

45 Ms Chute did not seek to argue that the causation test in paragraph 31(b) of *Pnaiser* was not satisfied. She nevertheless argued that Ms Besbrode could, if she were called to give evidence, say something about the objective justification for the sending of the email of 5 March 2020 which was in addition to that which

Mr Cumming was going to be able to say. Ms Chute also argued that if we did give the claimant permission to run a claim under section 15 as well as under sections 20 and 21 of the EqA 2010, then we should adjourn the hearing to permit the respondent to take instructions from Ms Besbrode about the reasons why she had sent the email of 5 March 2020 at pages 331-333 and, if so advised, to adduce evidence from her.

46 There was in the bundle a report of an external investigator into the grievance which the claimant had stated and included with the ET1 as the document stating the substance of his claim. That investigator had reported (at page 406) this (the reference to "SB" being to Ms Besbrode, the reference to "JC" being to Mr Cumming, and the reference to "DV" being to the claimant):

> 'In interview SB states,
>
> *"I realised early on that he was happy during the phased return, because he would be working from home some days and some in the office. His point was that he had an ongoing problem, he would never have a time to rest his back. I think that he felt that he would need to work from home more permanently and this was what he wanted to achieve."*
>
> SB states that she took advice from JC and reports the following,
>
> *"At that time, I discussed this case with Jon Cumming, he stated that the policy was that staff would only work 1 day a week from home, JC informed me that this covered all staff and consequently the plan was to ensure that DV returned to the office 4 days a week."*
>
> ...
>
> SB has identified that she was not authorised in any case to be able to change the policy.'

47 In those circumstances, we concluded that the claimant should be permitted to advance his claim under section 15 of the EqA 2010. That was for the following reasons.

Reasons for permitting the claimant to advance a claim under section 15 of the EqA 2010 as well as under sections 20 and 21 of that Act

48 In our judgment, the claimant's claim had always formally covered and in part been in respect of the sending of the email at pages 331-333, on 5 March 2020. We came to that conclusion given the history that we have recounted in paragraphs 1-26 above.

49 Only as a result of the process followed in relation to the list of issues was the respondent able to argue with any credibility at all that the claim was not about that email. However, even that argument did not withstand scrutiny given that the

claimant had expressly stated in the document at pages 56-59 to which we refer in paragraphs 13-17 above (on page 56) and (see paragraphs 21-26 above) the list of issues at pages 75-76 that the claim was in part about the 5 March 2020 email at pages 331-333. He had also claimed expressly in the document at page 56 that (see paragraph 13 above) his claim was about "conduct over a period" amounting to "a continuing act of discrimination". That document was expressly stated by the claimant in his covering email (see paragraph 14 above) to include the further and better particulars of his claim. The fact that the respondent had apparently deliberately excluded most of those parts of his further and better particulars which we have underlined in paragraph 13 above from the respondent's draft list of issues (see paragraph 22 above) did not in any way support the assertion that the claim was no longer about the things written about in the omitted text.

50 It was relevant here that the claimant was not a lawyer and could not have been expected to know about the effect of *Matuszowicz*. He certainly did not know about it.

51 The claimant had given up the right to press a claim under section 19 of the EqA 2010 on the basis that he had been (see paragraph 10 above) led to believe by EJ Tobin that the claim was best regarded as having been made under section 20 of that Act and in the circumstance that he, the claimant, thought the claim was capable of being made on the basis that there had been an ongoing failure to make the adjustments which he (the claimant) believed it would have been reasonable to make.

52 In any event, the respondent knew all along that the claimant thought that his claim was about events up to and including the email of Ms Besbrode of 5 March 2020. The respondent had chosen not to adduce evidence from Ms Besbrode about the sending of her email of that day.

53 In fact, we could not see what Ms Besbrode's evidence could have added to that of Mr Cumming about the objective justification for refusing to agree to the claimant being permitted on a routine basis to work from home on Tuesdays and Thursdays.

54 In all of those circumstances, we concluded that the claimant should be permitted to run a claim of a breach of section 15 in the manner sought by him. It was in our view no more than a re-labelling of the claim, but if it was more than that then in our judgment it was firmly in the interests of justice to permit the claimant to run the claim under section 15 as well as under sections 20 and 21.

55 In addition, it was also firmly in the interests of justice not to adjourn the hearing to permit the respondent to take instructions from Ms Besbrode and, if so advised, adduce evidence from her. That was because in our view the sole, or at least the main, issue here in regard to at least the majority of the claim was that of objective justification for not permitting the claimant to work from home on Tuesdays and Thursdays, and because Ms Besbrode's evidence on that

justification was going to be at best no better than that of Mr Cumming, and was probably going to be no more than a repetition of his. The same was true in relation to the evidence of Ms Graham.

56 We add that after we had heard all of the evidence and submissions, while the parties were still present, we revisited our decision not to adjourn the hearing to permit the respondent to contact Ms Besbrode or (if it wished) Ms Graham to see whether either of them could give any additional material evidence. We concluded at that time that there was no justification for revisiting that decision.

The evidence which we heard and read

57 We heard oral evidence from the claimant on his own behalf and from Mr Cumming and Ms Labor on behalf of the respondent. We had before us a hearing bundle consisting of 544 pages not including its index, and we read the parts to which we were referred in it and any other parts that seemed to us to be material to the determinations that we had to make. We had also before us a short witness statement made by a Mr Rotimi Ogunnubi on behalf of the claimant. Mr Ogunnubi did not give evidence, but his evidence was so far as relevant consistent with that of Mr Cumming. Having heard and read all of that evidence, we made the following findings of fact.

The material evidence and our initial findings of fact

The respondent's "Managing Attendance Procedure"

58 The respondent had a document entitled "Managing Attendance Procedure". It was at pages 92-114. On pages 102-103 there was this passage.

> "**5 Long-term sickness absence**
>
> 5.1 Long term sickness absence is defined as a continuous absence from work normally of at least four consecutive weeks.
>
> 5.2 Each employee's case will be reviewed as their circumstances progress with the approach taken being determined by the employee's particular circumstances but in all cases of long term absence, the following general principles will apply:
>
> - Regular and reasonable contact will be maintained between the Manager and the employee. The method and frequency of this contact will depend on the employee's particular circumstances, but may be by telephone, in writing (including email or text) or, with the employee's agreement, through home visits or meetings at other suitable locations. The Manager should keep a record log of this contact."

The respondent's flexible working policy

59 At pages 478-497, there was a copy of the respondent's "Flexible Working" policy and its "Work life balance guidance". The latter included as one of its "Options for flexible working" this on page 493:

> "**Options for flexible working**
> The options described below are designed to support all employees including those with caring responsibilities for children and older relatives. The council already meets the statutory requirements by giving employees the right to request to work flexibly. As a council, our first priority is to meet the needs of our customers and any flexible working request must have regard to this. There are a number of options identified below and the choice will often depend upon the nature of the work undertaken by the employee and service needs:
>
> ...
>
> - **Working from home / Remote / SMART working**
> an employee with the agreement of their line manager on either a one off basis or regular basis works from home or another council site."

Working from home by digital services employees in 2018

60 At pages 139-144, there were emails from the claimant, Mr Christopher Smith, Ms Francesca Mars, Mr Amir Taj, Mr Andrew Williams, Mr Mark Jelbert, and Mr Michael Piraner, about working from home. The emails showed that at that time, those people worked from home as and when they wished, judging for themselves whether or not it was appropriate to do so. At that time, the employees were all part of a "Shared Digital" team, which served the needs of three London borough councils: the respondent, Haringey, and Camden.

The arrival of Mr Cumming as Interim Chief Data & Information Officer

61 On 10 July 2018, Mr Cumming started working as the respondent's Interim Chief Data & Information Officer. At the time of giving evidence to us, Mr Cumming was, and had been for several years, the respondent's Director of Digital Services. In that role, Mr Cumming was the head of the respondent's department which it called "Islington Digital Services", to which it referred (and we refer below) as "IDS".

62 Mr Cumming's witness statement did not say this, but he told us when giving oral evidence, that when he arrived in his post of Interim Chief Data & Information Officer, the practice of working at home when staff wanted was rife. He did not believe that it was helpful. (We record one of the things he said in that regard in paragraph 127 below.) In paragraphs 14-16 of his witness statement, he said this.

> "<u>Working from home generally (Pre-March 2020 and Covid pandemic)</u>

14. Within IDS, and I believe this was mirrored across the Directorate, there was (until the Covid Pandemic) a practice of office-based staff working one day a week from home, where their work permitted and with line manager approval (to ensure sufficient office cover). This arrangement was in place prior to my joining the Council and also applied when the service was under the management of Camden through the 'Shared Digital' arrangement.

15. Within IDS, there was a historical practice of staff who chose to work from home (and not all did), working from home on a Friday. This was generally treated as a 'catch up' day, when staff focused on paperwork and tying up loose ends. This generally worked well, as most people were in the same mode and so communication needs with others were few and generally involved emails or occasional phone calls. By contrast the other days (Monday to Thursday) were highly interactive and when most meetings were scheduled. Project Managing by nature is the core of many, if not all, project meetings from project boards to working groups, so the attendance of the Project Manager at these meetings is vital. As a result, a Project Manager not being available on a Friday, was generally not a problem, but any other day of the week made it very hard to get all the necessary people together.

16. There were unfortunately limitations with the Council's technology, which resulted in some difficulties for staff working from home. There was no effective virtual meeting capability. The Wi-Fi in buildings was poor and it was the largest source of IT complaints; the internal network could not support video calling and the external bandwidth to the internet was also not capable of supporting video calling to any useful degree. Skype was available but not used for these reasons. In addition the meeting rooms had no audio-visual capability, other than some with a simple monitor. Audio communication was limited to some shared loudspeaker phones (held by admin staff, which could be booked for meetings), but these were impractical as each meeting organiser would need one in advance of the meeting, along with the correct contact number, and therefore common practice was to use a loud-speaking desk phone or cell phones on loudspeaker, although some rooms had no cellular reception. In my view, these methods were an ineffective way of participating in meetings, let alone leading them. A further difficulty with any use of loudspeakers, was that they could not be used in an open plan office, and they needed to be used in meeting rooms, which were always in high demand. Remote access for laptops working from home using Global Protect technology was new to the Council and rolled out to Council Windows7 laptops just one week before lockdown commenced. Citrix remote access was limited in user numbers and is not fully functional for remote access. It was used largely for technical support rather than day-to-day working."

63 There was, however, no document in the bundle which referred in any way to a policy of the respondent not to permit staff to work from home before the first lockdown imposed in response to the Covid-19 pandemic. We return to the significance of this in our conclusions below. Here, we say only that while we accepted some of Mr Cumming's evidence in paragraphs 14-16 of his witness statement, we did not accept all of it. We saw that Mr Cumming referred in paragraph 14 to a "practice", and not a "policy" regarding working from home one day per week. We also saw that the evidence at pages 139-144 to which we refer in paragraph 60 above contradicted his evidence if and in so far as it could be understood as being that there was before his arrival on 10 July 2018 a practice in IDS of working only one day per week at home. So did his oral evidence to which we refer in the opening part of paragraph 62 above.

The events which led to the making of the claimant's claims to this tribunal

64 In January 2019, the claimant suffered from problems with his back. He had by the time of the hearing before us suffered from such problems for about six years. In paragraph 7 of his witness statement, he said this (which we accepted):

> "At this time [i.e. the start of that period] the problem was causing me issues in commuting to work but fortunately I was able to work flexibly and work from home."

65 On 16 March 2017, the claimant sent his then line manager, Mr Paul Savage, the email at page 498, which was in these terms:

> "Paul,
>
> I'm working from home today due to chronic pain in my upper back/shoulder which has been getting worse over the last two weeks.
>
> I am seeing a specialist tomorrow morning.
>
> Dalbir"

66 In November 2018, Mr Savage ceased, and Ms Sue Graham started, to be the claimant's line manager. In the following month, the claimant and Ms Graham exchanged the emails at pages 499-502 which showed that the claimant's back started "playing up" over the weekend of 15-16 December 2018. On 18 December, the claimant wrote (page 502) that his back was "still not good" and that "The journey to the office [would] be difficult." He therefore asked if it was "ok if [he worked] from home" that day. Ms Graham agreed to that.

67 On 24 January 2019, the claimant wrote to Ms Graham (pages 504-505):

> "Hi Sue,

> I hurt my back yesterday whilst drawing window blinds. It was a sharp shooting pain from my back down my leg. I have had this before and seems to be sciatica. I literally couldn't move yesterday as the pain was really bad. I took some pain killers and went to bed.
>
> I am going to take some pain killers now and attempt to come to the office. I may be a bit slow out of the blocks this morning. If I take the painkillers and they do not help I'll let you know."

68 On 28 January 2019, the claimant wrote to Ms Graham (page 508):

> "My back is still not great. Although I'm not sick per se that I can't work, mobility is currently an issue.
>
> I am able to do everything I would do in the office from home as I do not have any meetings until Wednesday.
>
> I am proposing to use my two days working from home today and tomorrow. I'll make my way to the office on Wednesday.
>
> I think a referral to occupational health may be a way forward to see if they have any recommendations/advice."

69 On the same day, Ms Graham wrote to Ms Labor (pages 507-508):

> "Dalbir Virdee who was the subject of a sickness review whilst working for Paul Savage is having on-going mobility issues which are impacting his ability to work. Please see email trail.
> I would be grateful if you could advise on the position given he was the subject of a sickness review recently and also how I can go about referring him to occupational health.
> Jon has asked that I keep you advised and seek your advice from the outset in this situation, and incidentally the grey area around working from home, not being sick enough to be off is a significant one and one I am seeing more and more."

70 Ms Labor replied (page 507; the reply was sent on 30 January 2019):

> "Has Dalbir seen his own GP concerning his back condition? If so what has his GP said about managing the pain / condition?
> It would be interesting to know a little bit more about what Dalbir has done to help himself and useful information to feed to OH if you are making a referral. If making a referral – please follow the link below to make an OH referral. [link given].
> Dalbir will also need to complete a consent form as part of the process.
> Once you are in receipt of the report we can talk again to discuss the content. In the meantime it would be worth checking with him that his set up at home is compatible with his condition and you may with the assistance of

H&S need to carry out a workstation assessment to ensure that he [is] adequately supported when at work.
I would advise that you consider whether allowing him to work from home as an alternative to taking it as sick leave is acceptable. Maybe as a one off or on a couple of occasions you can allow this…but it cannot become a regular occurrence because the wfh may be masking the health issue. Dalbir will need to be made aware of this. His priority should be to seek appropriate assistance via his GP so that he can attend work regularly. OH is not to be seen as a replacement for seeing his GP."

71 On 29 January 2019, the claimant sent Ms Graham the email timed at 11:33 on pages 145-146. From its terms, we concluded that he had had a conversation with Ms Graham about working from home. The email was as follows.

"Hi Sue,

I have been looking through the smart working, work life balance and remote working policies. I can not seem to find anything relating to the 2 days limit and the manager authorisation.

Could you please send me the HR policy you referred to so that I can ensure that it is being adhered too?

I have been working successfully and autonomously for the last 15 years at Islington Council and since SMART working has been strongly promoted by Islington Council as the way forward.

I manage my working from home based on my need to be in the office due to meetings, type of work I may be doing and as per the policy that employees are expected to work "at least" one day from home. Being a manger [*sic*] for 15 years, I have also promoted WFH with my staff as per the attached document.

With elderly parents to care for and recent problems with my back, working from home has been imperative for me to maintain and reasonable work life balance.

I would like to propose that I am able to work from home Monday's and Friday's on an on-going basis. This will help me plan my work and meetings better, also save time for both of us in the approval process.

I am totally flexible in working on a Monday or a Friday if there is a specific business requirement and in that case could use another day in the week to work from home instead.

Let me know thoughts."

72 Ms Graham replied (page 145; the reply was dated 31 January 2019, i.e. after she had received Ms Labor's email which we have set out in paragraph 70 above):

> "Hi Dalbir
>
> Thank you for your email. Sorry we didn't have time to chat properly yesterday but pleased to see you have been able to return to work having regained some mobility. That's good news.
>
> In terms of moving forward I believe that there are four issues that we need to address:
>
> 1. In relation to the guidance on Home Working. The guidance on Izzi regarding Working from Home confirms the need to have sign-off from a senior level and also where appropriate a work station assessment. I would be pleased to consider your request if you would complete the necessary documentation and submit for authorisation.
>
> 2. In terms of the issues with your mobility and in particular your back, I do have concerns that your home work station meets the necessary standard and that you are not inadvertently putting your back under further strain continuing to work should it not be of an appropriate specification. I am therefore happy to progress the Occupational Health referral for you to ensure that we can support you in your recovery and also use any outcomes from that to provide an informed work station assessment. I have therefore put time in your diary for us to progress the referral requested.
>
> 3. In addition as a responsible employer we are keen that you follow all medical advice given, as the employee Occupational Health Service in itself is no substitute for your GP and associated referral processes. We would therefore urge you, if you have not already done so, to seek appropriate medical attention for this problem and where you consider appropriate to do so, advise us of any outcomes which will help in our support of you in the workplace.
>
> 4. I have authorised the days when you were of reduced mobility as working from home on this occasion. However it is important that between us we ensure you have the necessary support to remedy the problem in the ways outlined."

73 We pause to say that as far as we were aware, the "guidance on Izzi regarding Working from Home" was not identified to us, but that we understood it to be the passage from the "Work life balance guidance" which we have set out at the end of paragraph 59 above. We say also that we saw that Ms Graham did not reply

to the claimant's request for "the HR policy [she] referred to", unless she was by implication saying that it was that "Work life balance guidance".

74 On 14 February 2019, the claimant was certified by his general medical practitioner ("GP") to be unfit to work because of "Sciatica". The certificate was at page 147.

75 The claimant was then absent from work because of his back pain until 15 July 2019.

76 On 5 March 2019, the claimant saw an occupational health adviser at the request of the respondent. The adviser was Mr Adrian Bloom, who was, we understood from page 151 where he signed the letter at pages 150-151 which followed that consultation "Adrian R Bloom RGN OHND", a registered nurse with a national diploma in occupational health. Under the heading "Medical factors", Mr Bloom wrote this (page 150):

> "As you are fully aware, Mr Virdee appears to be suffering with a range of spinal symptoms affecting both his upper and lower spine. He describes symptoms such as referred pain to the legs suggestive of some nerve entrapment or involvement in the lower spine, but also describes symptoms in the neck and right hand suggestive of possible spinal nerve involvement in that area also.
>
> He has a lengthy history of sporadic back pain going back some four years ago or so and has sought help in the past, which was helpful. He has had an upper spinal MRI scan which showed some degenerative problems, but these symptoms appear to have worsened since then.
>
> Mr Virdee tells me that he has been referred to the musculoskeletal specialist clinic and this appointment is due to take place in early April unless there is a cancellation and it can be brought forward.
>
> Mr Virdee comes across as extremely motivated, very well informed and keen to remain at work in an effective capacity. I understand that he can work from home, which will of course be a good thing as this eliminates the driving journey to work, which will not be helping him at this time. He describes his IT or DSE work set up at home as being very good and actually better than the situation in the office.
>
> I am not aware of any other health problems or medical concerns that would affect him executing his contracted duties at this time."

77 We again pause, this time to say that the respondent (in our view rightly) did not assert that the claimant was not well-motivated and anxious to work. Plainly, he was both well-motivated and anxious to work.

78 At pages 164-171 there was an exchange of emails between the claimant and Ms Graham about what she referred to as a "Stage 1 Sickness Review". There was in the respondent's Managing Attendance Procedure, at page 104, this paragraph:

> "5.5 The employee will be entitled to five working days notice of the meeting. The employee should be informed that they may be accompanied at this meeting by a Trades Union representative or a work colleague, if they wish."

79 Surprisingly, Ms Graham nevertheless wrote in her email of 17 May 2019 at page 170:

> "I note your desire to have your TU representative present and I respect your view, however just to clarify that this is the stage 1 review which has no procedural requirement for TU representation."

80 While those words were not directly relevant, they showed that Ms Graham's approach to the respondent's written policies at least was less than thorough, and that the claimant's following email (also on page 170) showed that he was aware of that. There, he said this.

> "Hi Sue,
>
> Thank you for your email.
>
> I am a little confused as I have read the sickness policy and their [*sic*] does not seem to be a stage 1 sickness process which relates to long-term sickness.
>
> Can you please clarify the purpose of this meeting and which section in the policy this refers to so I can respond appropriately?
>
> I was under the impression this meeting was the meeting mentioned in section 5.4 in the Long-term sickness absence section based on the letter that you sent to me."

81 We do not need to go into the details of paragraph 5.4. It is sufficient to say that the claimant's confusion was justified and that the stated purpose of the meeting referred to in that paragraph was "a review meeting to discuss [the employee's] sickness absence." The manner in which such a review meeting was to be held was not stated in paragraph 5.4, but paragraph 5.4 was preceded by the passage which we have set out in paragraph 58 above.

82 The email exchange at pages 164-171 also showed that Ms Graham at first insisted on the claimant attending the review meeting in person, initially at the respondent's offices, and then either at his home or a location close to his home. She refused to agree to the meeting being held by telephone. In the end, Ms

Graham held the meeting without the claimant being present. She did that on 30 May 2019.

83 In an email of 28 May 2019 (at pages 165-166), the claimant wrote this to Ms Graham about the situation:

> "As far as I am concerned you have been vague on the purpose of the meeting so it has not been clarified.
>
> You sent me a policy document which I have been referring to and I am asking you to refer too and clarify at which section this meeting sits, 5.2, 5.3 or 5.4? To date you have not been clear.
>
> The meeting was postponed initially as you had not clarified the purpose of the meeting and I wanted my union representative present. I accepted the meeting scheduled for the 24th but you changed it without reason and without any options.
>
> I feel you that you are being very unreasonable in your insistence of the meeting on May 30th on a particular day where I am not available as I feel my input will be invaluable to the process. I really want to be present at the meeting.
>
> ...
>
> I would like to add that I am extremely upset to date with the way in which you have dealt with my absence and I do not feel you have not [*sic*] been supportive. I only feel more stressed now as your actions do not lead me to believe that my well being is the priority."

84 Ms Graham's review of the claimant's medical position and absence because of it was written up by her in her report of it at pages 182-184. She sent that report to the claimant on 6 June 2019, under cover of the email on page 181. At page 182, she wrote this:

> "From mid-December 2018 Dalbir reported issues with his back which on occasion led to him submitting urgent requests to work from home which were granted in the short-term. It was understood that this was a recurrent health issue which caused Dalbir significant challenges to his mobility and ability to commute and attend business meetings at LBI sites."

85 On 13 June 2019, the claimant attended a second occupational health assessment. It was carried out by a Dr Paul Weadick, whose report of the assessment was at pages 185-186. On those pages, Dr Weadick wrote this:

> "**Opinion**

Mr Virdee is keen to return to work at the end of his current certificate, at the end of this month. His course of treatment should have been completed by that time, so this would seem a reasonable ambition.

I understand that the office hot desks. Mr Virdee would benefit from being allocated a designated desk, then undergoing a formal ergonomic assessment (such as via Access to Work.) to ensure that he is provided with appropriate equipment. I do wonder whether, he would benefit from an adjustable desk, to allow him to alternate between standing and sitting, but this would be best determined at the suggested ergonomic assessment.

He has a commute of about an hour each way. It is often the commute, which causes many problems with musculoskeletal issues, due to postural issues. It would be helpful if he could work from home upon occasion, especially over the initial return period.

It would also seem prudent to allow him to initially work reduced hours. I would suggest 50% hours for the first week, increasing to 75% over the following week, before returning to his usual level. The number of days that he works from the office (rather than from home) could then be increased, subject to the needs of the department."

86 On 26 June 2019, there was a further meeting conducted by Ms Graham in relation to the claimant's sickness. This time, the claimant was present at it. So was his trade union representative, Mr George Sharkey. Ms Graham sent the email at pages 196-197 after it. In that email, which was dated 1 July 2019, Ms Graham recorded what had happened at the meeting. In the email on those pages, the claimant had responded to the content of the email and (we saw from page 196) returned the email on the next day (2 July 2019) with his responses. They included this passage (with the original text of Ms Graham followed by the claimant's response, which we have underlined for the sake of clarity):

> "13. SG explained that the requirements of the Senior Project Manager role meant that whilst a home based working solution could be accepted in the short term as a means for Dalbir to have a phased return to work, an extended period of home working was not an option given the responsibilities of the role and operational requirements.
>
> <u>Although we touch upon this, I am still not clear how the role has changed in that working from home would not be an option.
> This is one of the main concerns I have at the moment. In my current state I feel that some reasonable adjustments would be required to enable me to do my job without being disadvantaged. I would like a full explanation/discussion of the reasons why there could not be any reasonable adjustments around potentially working from home at times to help my recovery and to enable me to continue in my current role.</u>"

87 On 4 July 2019, Ms Graham wrote this to the claimant (page 202):

> "Dalbir
> Good to talk to you today. I was very pleased to learn that your condition has improved
>
> 1. We discussed the point about a Senior Project Manager working from home and I reiterated the formal policy requirements and our view within IDS that the role of Senior Project Manager is not compatible with working from home beyond the standard policy."

88 On 15 July 2019, as we indicate in paragraph 75 above, the claimant returned to work. On 17 July 2019, Ms Graham sent the email at pages 206-207 to him, copying it to Ms Labor, Mr Sharkey and Mr Cumming. The claimant responded to that email on the same day. On page 206, one of the things that he said in response was this:

> "Under the Equalities Act you have a legal duty to make reasonable adjustments."

89 Later on that day, the claimant wrote (on page 212): "I ... can not understand after all the medical advice presented, that you keep insisting on face to face meetings at NBW." NBW was his workplace.

90 The email from Ms Graham at pages 206-207 was about the holding of "an update meeting or a return to work interview". In the event, such a meeting was held on 24 July 2019. Ms Graham formally recorded that meeting in her email dated 6 August 2019 at pages 224-226 and some detailed notes at pages 240-246. In the email, among other things, Ms Graham wrote (on page 225):

> "Given the advice to avoid driving, I had considered an interim option around off peak travelling on public transport aligned to reduced working hours as an intermediate option to support you. Given that I understand from you that this is unworkable based on your condition/ discomfort I am seeking advice from the OH specialist as to how best to alleviate symptoms and facilitate the journey. The OH report of 13th June 2019 had anticipated a return to office based working at 4 weeks therefore it is important to have an updated view on this."

91 She also wrote (a little lower down page 225):

> "I acknowledge that you were in significant discomfort at our meeting on 24th July 2019 evidenced by your need to stand and move around the meeting area on a number of occasions. I also understand from you that this is a changing situation."

92 In her notes of the meeting, at page 243 Ms Graham recorded this (references to "SG" being to her and references to "DV" being to the claimant):

"29. In terms of working from home SG explained that there was a need for interaction with the team and the availability of project staff is not always something you can predict based on them being out and about. SG did not rule out that something could be put in place to try and make DV's involvement in the team more practicable. SG further explained that there was a Project Portfolio Team being covered by an external resource with DV not around he could miss out on the spontaneity of the project team having a stand up to discuss an issue with a project.

30. DV felt he could respond from home. GS asked if the stand ups were scheduled. SG replied that they weren't - that they were impromptu and required spontaneity.

31. DV explained that he had lots of experience of stand ups and could manage the situation."

93 In an unsigned and undated document (which was formally proved by Ms Labor in paragraph 61 of her witness statement) headed "Appendix 4 – Managing Attendance - Statement of Fitness for Work or 'Fit Note' – Return to Work Plan" of which there was a copy at pages 221-223, this was written on page 222 in a row next to the question: "If adjustments/adaptations cannot be made, state the reasons why?"

"• Difficult to manage ad hoc meetings which are called usually at a point of urgency- if this is a time the employee is at home and away from their desk or telephone walking around. We can facilitate to a point using the loud speaking telephone at IDS end but if the employee is uncomfortable or away from their desk at home at that time the meeting cannot be held up due to the resource implications.
- In addition, the meetings are often held at ad hoc locations on floor 2 where the loud speaking telephone may be impossible to accommodate due to the open nature of the workspace.
- The changeable/ fluid nature of the condition means that meetings are difficult to plan- e.g. several meetings have had to be altered in format including the return to work interview based on inability to attend due to medical condition. Whilst some of these can be undertaken by telecom some require face to face discussion with stakeholders with breakout sessions for problem-solving and collaborative working."

94 The claimant sought assistance by paying for a Doctor of Chiropractic to advise him. That was a Dr Michael Lanning, whose report was dated 5 September 2019 and was at pages 227-229. Most of the report consisted of x-ray images. At its end, Dr Lanning said this:

"Due to the nature of Mr Dalbir's [*sic*] problem I have advised he continue to work from home as he has the ability to work in an appropriate position and follow advice that has been provided to help alleviate his symptoms."

95 The claimant was then from the next day onwards absent from work because of his back pain until 15 October 2019. In the meantime, further occupational health reports were obtained. The first was dated 12 September 2019 and was at pages 232-236. That was written by Dr Samina Siddiqui. Among other things, in her report she referred to the claimant (on page 233) as having "a diagnosis of right shoulder bursitis which is inflammation of fluid within the bursa of the shoulder". Further down that page, she wrote this:

> "**Current Status and Fitness for Work**
>
> Given his significant right arm symptoms, my impression is that Mr Virdee is currently unfit for work. I advise that he continues with his chiropractic treatment over the next 3 or 4 weeks and anticipate that he should improve with regard to the trapped nerve symptoms that he has. The anticipation is that, after 4 weeks, he should be able to return to work and adjustments will need to be considered at that time. I would suggest that a phased return is adopted at that time and, if operationally feasible, a combination of working from home and working in the office. He should have a Display Screen Equipment (DSE) Assessment prior to his return to work and should take a break for 5 minutes every hour to avoid a prolonged static posture. He will also need to move around as needed, depending on his sitting tolerance.
>
> I would advise a further Occupational Health review in 4 weeks to assess his fitness status and confirm that he is fit to return to work.
>
> **In Answer to Your Specific Questions**
>
> **1. Is the employee fit to be at work?**
>
> He is currently unfit for work.
>
> **2. Does the employee need any adjustments to their role? If so, for how long?**
>
> Yes, I have outlined some adjustment recommendations above but these will be discussed again at his next Occupational Health review.
>
> **3. Are these temporary or permanent?**
>
> These are likely to be longer term recommendations."

96 On 16 September 2019 there was a further meeting between the claimant and Ms Graham. It was noted at pages 248-252. On page 251, under the heading "Reasonable Adjustments", this was recorded:

> "SG explained that she was for a phased return to work, but that the key area of concern for her was the duration of the phased return given she believes (whilst acknowledging the difference in view between herself and

DV) that the SPM role cannot be conducted on a long term basis from home."

97 On 9 October 2019, the claimant attended what was in the event the fourth and final occupational health consultation which occurred before the email from Ms Besbrode of 5 March 2020 at pages 331-333 (to which we refer in paragraphs 29, 32, 38, 42, 45, 48 and 49 above and return to below) was sent. The consultation was again with Dr Siddiqui, whose report (dated 9 October 2019) was on pages 253-255. On pages 253-254, Dr Siddiqui wrote this:

"Current Status and Fitness for Work

Mr Virdee is now reaching fitness to return to work, and I suggest this is planned for next week after his current fit note expires. I suggest an eight-week phased return is adopted given the long-term nature of his condition and the time he has been off with it. This will allow him to build-up up [*sic*] his confidence and resilience back in the workplace.

I suggest for the first four weeks he works 50% of his usual hours with a mixture of working from home and in the office to allow him to avoid commuting on a consecutive basis. For the first two weeks I suggest he works three days at 50% hours with a day off in between to rest and work on his rehabilitation. For the third week I suggest he works four days a week with a day off in the middle of the week and for the fourth week I suggest he works five days at 50% hours.

For the next four weeks I suggest you increase his hours to 75% of his contractual requirement, again with a mixture of home and office working.

In the longer term, given the long-term nature of his back condition and the fact that it may flare-up from time-to-time, I suggest that you look at adopting a flexible approach to him working from home as needed when work allows him to and/or his back is playing up. I would also suggest over the eight-week phased return he has a short one-to-one on a weekly basis with his Line Manager to check on his well being and ensure that he is managing with his work requirements. It would also be helpful to monitor his workload over the eight-week phased period to limit his workload and ensure that he does not have excessive demands placed upon him. After the eight-week period I anticipate he should be able to get back to his full work duties.

You mentioned a number of reasonable adjustments on the previous management referral and these are all suitable and appropriate. I have covered my recommendations with regard to phased return, reduced hours initially, work duties and working from home. I think it would be helpful for him to come into the office at least once or twice a week during the first four weeks of a phased return to be able to engage with the office environment and build-up his confidence. After that time, I think he can work as needed in whatever location.

...

Is the employee fit to be at work?

Yes, he is fit to return to work with adjustments and phased return on a temporary basis as mentioned above. In the longer term I suggest some flexibility with regard to him being able to work from home is the only adjustment required."

98 On 15 October 2019, the claimant was due to return to work and on that day he had another review meeting with Ms Graham. The meeting occurred at the respondent's offices. The claimant asked for it to be held by telephone, but Ms Graham insisted on it being held in person. The claimant's car was being repaired at the time, so he could not drive to the respondent's offices. He informed Ms Graham of that in his email of 14 October 2019 at page 258, where he said this: "Public transport is terrible for my condition at this time." Ms Graham as a result, after first insisting (in her email also of 14 October 2019 at pages 257-258) that he attended the meeting as it was his "responsibility as an employee to arrange [his] journey to work", organised the sending of a taxi to collect the claimant from home.

99 There was at pages 260-262 a document headed "Appendix 3 – Managing Attendance - Return to Work Form". It referred on its first page to the claimant's date of return to work and the date of the return to work interview as being "15.10.19". On page 261, in the box containing a "Summary of issues covered in the return to work interview", Ms Graham had written this (the reference to "DL" being to Ms Labor):

> "6. DL asked DV about the list of reasonable adjustments he had been working on. DV acknowledged that all bar one of his had been incorporated in SG's proposals. The final adjustment DV requested related to working more than one day per week at home after week 8 which SG felt could not be accommodated given the severe organisational pressures IDS face.
>
> 7. However, she did agree to consideration being given to a reasonable adjustment of the working of one day per week from home beyond week 8. The following work pattern of Wednesday (WFH) which would break the week up to 2 days commuting, one day WFH, 2 days commuting, weekend, could then be followed."

100 The claimant's witness statement contained, in paragraph 49, the statement that he had during the meeting of 15 October 2019 asked to be allowed to "work 2 days from home to avoid commuting on consecutive days". He was cross-examined on that and it was put to him that he had not asked to work two days per week at home. However, Ms Graham's own note referred (see paragraph 6 set out in the preceding paragraph above) to the claimant as

having asked to work "more than one day per week at home after week 8". Thus, we accepted the claimant's evidence that he had asked to be allowed to work two days per week at home, and not just one.

101 In paragraph 50 of the claimant's witness statement (which, in so far as it was a description of factual matters rather than in effect submissions, we accepted), he described the situation in the period immediately following 15 October 2019.

> "50. As the phased return progressed and number of hours/days in the office increased, it was clear that this was starting to exacerbate my back problem, as I was travelling 4 days in a week to the office. This was around the 6th week in the phased return. On 15/11/2019, I was in pain and unable to commute, so I made a request to Sue Graham whether I could work from home. I explained how this would assist my rehabilitation and how it would not have any negative impact on the business on that particular day. My request was abruptly declined; no other options were presented to me and I was forced by Sue Graham to take the day off as sick or annual leave. Even though I was fit to work, however, unfit to commute. I had no meetings in the office that day. The piece of work did not require me to be in the office. This continued insensitive and inflexible approach by my manager Sue Graham also serves as another example of management failure to make reasonable adjustments and ignoring OH advise of allowing flexibility on particularly bad days. I took it as annual leave as I did not want this to affect my sickness record and I was left with no other alternative. The way that situation was managed was very stressful for me as no alternate options were offered to me to continue to work."

102 The exchange between Ms Graham and him to which the claimant referred in that passage was in email form and was at page 275. In the exchange, the claimant wrote to Ms Graham:

> "Sue,
>
> My back is been pretty bad this week.
>
> Particularly yesterday and this morning.
>
> I have not had the chance to go to my chiropractor either as I have been worried about the travel there.
>
> I am proposing that I work from home today as the commute is going to be extremely painful and difficult.
>
> I am able to continue with the apps piece from home. I have no meetings today in the office.

Although, sitting will be difficult I will have more flexibility to move around, change positions and take breaks at home.

Let me know if this is acceptable.

If not, am I able to take annual leave rather than sick leave."

103 Ms Graham's response was this:

"Morning Dalbir. I am sorry to learn that you are in considerable discomfort.

I am keen for you to avoid exacerbating your back further and given we are at the start of the day the normal recourse would be to take sick leave.

If you do not wish to take sick leave then if you apply for one days annual leave I will authorise it."

104 The parties agreed that the claimant was working from 18 November 2019 to 4 December 2019 with the following exceptions. On 22 November 2019, the claimant wrote to Ms Graham (pages 286-287):

"As I mentioned in the well-being meeting on Tuesday my condition is flaring up and I was worried of a relapse. I mentioned that I can feel lower back going again.

By the end of the week it is certainly taking its toll.

Yesterday was the first day since the beginning of the phased return that I have taken diclofenic and co drydomol. This was actually not for my lower back but for my neck.

The combination of the commute of an hour+ and then sitting for long periods is causing me problems.

I feel that today I will be able to continue the piece of work for Clare but am asking for some flexibility as per the OH reports to WFH to avoid the commute.

At home I am able to be in a more relaxed environment with the ability to take appropriate breaks and move position more easily."

105 Ms Graham then authorised (in her email on page 286) the claimant to work from home on that day. In the email, she said this:

"Yesterday you mentioned that you were in considerable pain during our 1-2-1 which we ended prematurely as we had covered much of the material earlier in the week but also we agreed that it would be helpful for you to go out for a walk given the intense pain you were experiencing."

106 On 2 December 2019 the claimant again asked to be permitted to work from home. He did so in the email of that date at pages 291-292. His reasons for doing so were these:

> "I want to finish off the VM piece. There is no real reason I need to commute l- l .30hrs to sit in the office to do this piece of work.
>
> I have everything I need to complete this.
>
> I will be much more productive at home.
>
> The commute and sitting in the office is definitely taking its toll on my back. So where unnecessary it will definitely help me."

107 Several hours later, Ms Graham responded (in her email on page 291) as follows.

> "Good morning Dalbir.
>
> - Thank you for your email. I think it would be helpful if you would comply with the phased return plan that has been agreed in conjunction with your TU representative and HR. As we have previously discussed, the phased return is a good opportunity for us all to see how you are. I am also conscious that due to various setbacks over the course of this period there have been few weeks completed to original plan.
>
> - EUC [end user computer] is reaching a critical point and therefore it is important that you are on-site to be able to talk through any issues with the team.
>
> - I am also mindful of the social aspect/ team-building part of your role. As a Senior Project Manager it is important that you are available to more junior members of the team to offer advice and support as required. It is also important for you to integrate back into the Project Practice so that the team can work with you and support you as required.
>
> - Clearly, if you are feeling unwell and unable to attend today then there is the option of sick leave or annual leave which I will work with you to facilitate.
>
> Please let me know what you decide."

108 The claimant was on annual leave from 5-13 December 2019 inclusive. On Monday 16 December 2019, at 09:38, the claimant sent Ms Graham the email at page 296, which was in these terms.

"Sue,

My back has not improved. I will not be in today.

It is unlikely I will be back before you leave the council.

My union rep is not available for a meeting tomorrow."

109 Ms Graham's response was sent on the next day, at 12:08. She wrote (on page 295):

"Thank you for your note. As will be aware from my out of office, I was out of the office yesterday. I was saddened to learn that you remain unwell and unable to work.

I have noted the following:

- receipt of your leave request for days off last week, which have been approved.

- that you feel it unlikely that you will be back before my last day in IDS (20.12.19). I would therefore be grateful if you would confirm whether you intend to take annual leave or sickness to cover this absence".

110 The claimant's reply to that email (after Ms Graham had sent the "chasing" email on 18 December 2019, at pages 294-295) was sent on 19 December 2019 and was this (page 294):

"I am off sick for this week which I explained at the beginning of the week. From next week I am on annual leave until Jan 6th."

111 Ms Graham's response was sent on the same day and was at the top of page 294. She asked the claimant to "provide a sick note to cover the absence at your earliest convenience" and to "apply for annual leave for next week." The claimant's reply was sent also on 19 December 2019 and in it (it was at page 293) he wrote this:

"Well if you require a definitive answer, I will not be in this week due to work related stress which caused tension in my back which triggered a relapse.

This was directly related to your inflexibility and not following guidance and advice from OH on 02/12/2019.

I will self certify 5 days sick. A note is not required.

I already have annual leave approved until Jan 6th."

112 The claimant did indeed have annual leave booked already until 6 January 2020. His witness statement contained the following passage, which we accepted, about what happened after he returned to work on that day.

> "53. On 6/1/2020, I returned to work after annual leave and the Christmas break. I met with Sue Besbrode my new manager. During our meeting, I gave Sue Besbrode an overview on my condition and reiterated my need for reasonable adjustments due to my disability under the Equality Act 2010. I again requested 2 days working from home. Learning from the previous phased return it was very clear that commuting on consecutive days was a big factor in exacerbating my back condition. So, I asked to be able to work from home Tuesdays and Thursday's. We also discussed off peak travelling as to shorten the time travelling.
>
> 54. On 7/1/2020, Sue Besbrode followed up with an email which reflected our conversation during the meeting the previous day."

113 That email was on pages 306-307. The claimant had replied to it by inserting his responses to it and sending the email back on the same day under cover of the email at the top of page 306. At the bottom of page 306 there was the following bullet point from Ms Besbrode and the claimant's response to it, which we have underlined.

> "DV considers still outstanding working from home adjustments - SB will talk to HR regarding these. A separate email will follow. <u>- I will formally put in a request for reasonable adjustments under the Equalities Act. Travelling to the office on consecutive days during the phased return proved extremely difficult and exacerbated my condition. Considering there are numerous IDS staff members that work from home regularly 2 or more days (some up 4 days a week), it would not be unreasonable for me to request working from home 2 days a week based on my medical condition. For example, if I worked at home on Tuesdays and Thursdays this would help me greatly as I would not have to travel consecutive days.</u>
>
> <u>This morning I was in a lot of pain and had to take Diclofenic and Co-Drydomol so that I could travel and sit in the office. I also took Diclofenic yesterday evening as my upper back and neck was particularly bad after sitting all day.</u>"

114 In paragraph 55 of his witness statement the claimant described the next events thus:

> "55. The year 2020 seemed to be starting off well. Sue Besbrode and I met on 13/1/2020 where we agreed a working pattern of, working Tuesdays and Thursdays from home, which would break up the commute to alternate days. Sue Besbrode started off being supportive and had said that she really wanted things to work for me. However, the supportive

> tone changed considerably after Sue Besbrode had consulted with Donna Labor(HR). In an email from Sue Besbrode dated 20/1/2020, Sue retracted the working pattern that had been agreed until further notice. I was extremely disappointed with this retraction, as I was starting to think that things finally seemed to be turning positive."

115 The email of 20 January 2020 from Ms Besbrode was at page 312 and it included this sentence:

> "Apologies as I have just found this out and wanted you to know as soon as possible."

116 We concluded from it, and from what Ms Besbrode was recorded to have said to the independent investigator on page 406, which we have set out in paragraph 46 above, that Ms Besbrode's change of tone and approach was the result of Mr Cumming telling her that it was the respondent's policy (or possibly the department's, or even possibly his, policy) that staff should have no more than one day per week working from home and that that day should normally at least be Friday.

117 The claimant's witness statement continued (and we accepted this):

> "56. On 26/1/2020, Sue Besbrode emailed after her consultation with Donna Labor on Jan 24th and said we will continue to trial this working pattern for next four weeks and after that we can see what works for you and reach a permanent solution. However, since Donna Labor intervened, Sue Besbrode started referring me to the blanket policy of working from home 1 day a week. It was starting to sound very familiar to when Sue Graham was my manager. Also, Sue Besbrode changed my working from home days from Tuesday and Thursday, which I felt, was working well to Tuesday's and Friday's."

118 Ms Besbrode's email of 26 January 2020 was at pages 315-316. It was detailed. Among other things, she wrote in it (on page 315):

> "**Working from home** must be flexible and temporary, We must ensure the needs of the Council are covered as well as enabling you to work at your best in IDS.
> I brought to your attention that the work of the Project team - including the Programme Manager, Project Manager and Senior Project Manager and Project Support officers - need to be present in the office full time. As per the JD and work we are delivering. Taking into account the flexible working offering of the Council we noted Islington working practice allows/supports one day a week at home to flex (be flexible and not fixed) and also not necessarily every week again to meet the needs of the Council according to the needs of the business and work in flight.

We discussed and you noted that this working practice we agreed is not a permanent measure or fix or long term working practice."

119 The claimant's witness statement continued:

> "57. On 3/2/2020, I emailed Sue Besbrode that my back was really bad and I didn't think I could manage the commute. As the precedent had been set by Sue Graham that on days where I had flare up the only options available to me were to go off sick or take annual leave, I requested if I could take annual leave. Sue Besbrode should have offered me a reasonable adjustment of being able to work at home as per OH recommendations."

120 The email exchange in which that occurred was at pages 318-319. On the next day the claimant had another day of bad back pain, as shown by the email exchange at pages 320-321. Ms Besbrode on that occasion authorised the claimant's working at home.

121 The claimant was then invited to a meeting on Monday 24 February 2020 described in the email of 11 February 2020 at page 324 as "Managing Attendance - End of Phased Return / 3rd Absence Review". That meeting took place on 24 February 2020. After it, Ms Besbrode sent the email of 5 March 2020 at pages 331-333 to which we have referred above in a number of places. One of the things which Ms Besbrode said in it was this (on page 332):

> "During the initial return to work period 11th November to 17th December 2019 you remained off sick and were unable to attend the original return to work meetings of 11 November 2019 and 17th December 2019, so our first two attempts to complete the return to work process was unsuccessful."

122 That was, as can be seen from what we say in paragraphs 104-108 above, inaccurate. So far as relevant, the claimant was absent with sickness only on 16 December and 17 December 2019.

123 We have set out Ms Besbrode's review conclusion, stated at the bottom of page 332, in paragraph 43 above. In fact, Ms Labor accepted in cross-examination that it was wrong to say that the claimant's "return to work ha[d] not been completed or successful". The passage which we have set out in paragraph 43 above was followed (not immediately) by the words which we have set out in paragraph 38 above, which we have taken from the final page of the email, which was page 333.

124 The email was sent to the claimant without any warning of its content. He described its impact on him in paragraph 60 of his witness statement, which we have set out in paragraph 37 above.

125 The claimant's grievance, to which we refer above in a number of places, including paragraph 6, was initially considered by Mr Cumming. His witness

statement evidence on it, and on the reasons why the claimant's requests to be allowed to work at from home on Tuesdays and Thursdays before he stated his grievance were refused, was in paragraphs 17-33 of his (Mr Cumming's) witness statement. All of those paragraphs were relevant. For the purposes of these reasons we set out only one part of them, namely paragraphs 30-32, which were in these terms.

> "30. Although the Claimant made reference (between January 2019 and March 2020) to working from home for 2 days a week on a permanent basis, this was not something which OH had recommended, despite assessing the Claimant on 4 occasions, and this was not to my knowledge put forward by the Claimant's GP. Given that there was no medical recommendation for working from home 2 days a week, the Council does not agree that this was a 'reasonable adjustment'.
>
> 31. The Claimant did not submit a formal request to change his working pattern, so the matter did not formally come to me for consideration until I informally reviewed the Claimant's attendance under the MAP in May 2020. Although there was still no formal request, the Claimant had in March 2020 submitted a grievance and was still requesting this change to his working pattern. As I explained to the Claimant, I was keen to resolve matters and move forward, and by this stage, following the Government mandated working from home, the Council had significantly enhanced its infrastructure for working from home and non-keyworker staff were permanently working from home, so there was a clear change in working practices, which meant that the Claimant's request to work from home 2 days a week could now be accommodated. I therefore agreed the Claimant's request to work from home 2 days a week on a permanent basis. This decision was not a 'reasonable adjustment' based on medical advice, rather a pragmatic accommodation, made in an environment where full time remote working had become the norm.
>
> 32. I do not believe that it would have been possible to agree the Claimant's request before this time, as the technology and working practices across the Council did not support regular working from home 2 days a week for those in roles such as the Claimant's, where meetings and project discussions were routinely held face to face in the office (for the reasons I have already outlined). The Claimant's line managers explained to me, in numerous discussions, the difficulties the Claimant's working from home during his phased returns were causing in relation to the work he was able to undertake whilst working from home (based on the limitations with the Council's technology and the then working practices in the team e.g. impromptu meetings and stand ups), and the resulting impact on his output and the implications on service delivery. This was something that they were managing in the short term, but were clear that this could not be accommodated in the longer term, as things stood. I understand that these views were also communicated to the Claimant at

the time, but that he did not agree that there was any negative impact and that he was of the view he worked effectively from home."

126 Mr Cumming's additional oral evidence (given both in answer to supplementary questions asked by Ms Chute and in cross-examination) about the possibility in practice of the claimant working from home on Tuesdays and Thursdays was this (as recorded by EJ Hyams):

126.1 The role of a Senior Project Manager is "highly directive", and involves "a lot of influencing". It also involves managing staff across the service (presumably IDS) and it is collaborative.

126.2 Interaction is a hugely important component of how you build relationships and get people to do things, which a Senior Project Manager needs to do.

126.3 All Project Managers need to deliver into the same service and need to know who is doing what at any given time.

126.4 The rate of change has, however, since the Covid-19 lockdowns, accelerated enormously. IDS has 79 projects to manage for the next year, when before the lockdowns, the number of projects managed by IDS per year was about 30.

126.5 Skype for Business was unreliable, although it did for the most part work.

126.6 Mobile telephone reception across many of the respondent's sites was "pretty patchy", especially where there was a lot of concrete in the structure of the building in question.

126.7 Even in 2019, a number of staff had software called "Global Protect", which was helpful for working from home. However, the hardware which the respondent supplied to staff was not as effective as it could have been. The software was capable of being installed on laptop computers with Windows 7 on them, but "the worst thing was the laptops themselves".

126.8 It was possible for a person to work effectively from home, if their own technology was good and they had a good internet connection, "but who on the inside could they talk to?"

126.9 "Projects don't work with you telling people what to do. With vendors [i.e. of software or cloud services] if you are not on top of them they will not deliver. You need [as Senior Project Managers] people there on top of things [so that they can] make things happen. They know what is important. They have huddles [with other staff physically]. They use

agile [which we understood to be a kind of software]. It is not about it all happening when you turn the handle."

126.10 The claimant's inability to attend work on Mondays to Thursdays inclusive without exception had led to the claimant being given work to do which was below the level usually expected of a Senior Project Manager.

126.11 The work done now as compared with before the Covid-19 lockdowns is different in that coding is now done much less than then, and what is done now is done with a view to integrating and co-ordinating the services of suppliers using cloud facilities.

126.12 Before Covid-19, "most of the interactions were with IT colleagues and finance and HR and other colleagues; depending on who we were working with".

126.13 "The other stakeholders who may have been in on a weekday were typically social services staff but they would have been in a different office [from the staff of IDS]; so it [i.e. meeting up with them] would involve travel."

126.14 Some projects would require a physical visit to premises to see precisely what hardware was there and how it was used and/or connected up.

127 Mr Cumming also said (also as recorded by EJ Hyams):

> "Were there people working at home in 2018 as they wanted? Yes; that is what I wanted to get some discipline about."

128 As we say above, the claimant's grievance was investigated by an external investigator. That was because Mr Cumming's resolution of the grievance was not satisfactory to the claimant. One reason for that was that it was the claimant's view, which he stated to us as part of his evidence, that given the quality of his own equipment at home, he would have been more able rather than less able when at home to liaise with external suppliers (the "vendors" to whom we refer in paragraph 126.9 above). We understood Mr Cumming not to disagree with that evidence, but in any event we accepted it.

129 We conclude our description of the material evidence and our findings of fact by saying that we accepted the claimant's evidence in paragraphs 78 and 79 of his witness statement about what triggered his claim to this tribunal and how his sickness record had improved dramatically as a result of him being permitted to work from home (initially, of course, as with other employees of the respondent, he was in fact required to work at home). So far as relevant, what he said in those paragraphs was this:

> "78. ... The act which triggered my claim to the Employment Tribunal was on 5/3/2020, when my requests for reasonable adjustments were again denied and I was progressed to Stage 3 of the MAP [i.e. the respondent's Managing Absence Procedure] where my continued employment was at risk. I raised a grievance on 23/03/2020 and contacted ACAS for Early Conciliation on 1/6/2020, with my intention of applying to the Employment Tribunal.
>
> 79. Had the Respondent put in place reasonable adjustments that would have removed substantial disadvantages with regards to my disability, rather than forcing one fits all policies, I feel that these would have had great potential in reduce flare ups of my condition which in turn would have reduced my sickness levels. It is clearly evident that since March 2020, as I have been working at home 5 days a week, my disability related sickness levels have greatly reduced and I have been able to manage my condition effectively. This has allowed me to be a fully productive and contributing team member in my role. From March 2020 to Dec 2020, I only had 2 sickness days relating to my disability and in 2021, I had 7 sickness days and 5 sickness in 2022 up to April 2022. In 2019, I had 122 sickness days."

130 We now turn to some relevant law.

Relevant law

Time limits

131 We have already referred to some of the relevant law. On the issue of time limits, as we say in paragraph 30 above, *Matuszowicz v Kingston upon Hull City Council* [2009] IRLR 288 makes it clear that where it is claimed that a reasonable adjustment within the meaning of section 20 of the EqA 2010 should have been made, it cannot be said that there is as a result of a failure to make that adjustment conduct extending over a period. Rather, time is to be regarded as having started to run for limitation purposes from the date when the respondent has made a specific decision not to make the adjustment or, if no such decision has been made, from the date when, if the employer had been acting reasonably, it would have made the adjustment.

132 However, a policy of not doing the thing which the claimant seeks by way of an adjustment could be, and in at least most cases will be, conduct extending over a period.

133 We referred ourselves to the section in *Harvey on Industrial Relations and Employment Law* concerning this issue, namely paragraphs L[822]-L829.03] and noted in particular this passage (paragraph [826]):

> "In deciding whether a particular situation gives rise to an act extending over time it will also be appropriate to have regard to (a) the nature and conduct

of the discriminatory conduct of which complaint is made, and (b) the status or position of the person responsible for it. Certain types of discriminatory insults, for example, will by their nature indicate that they have a continuing effect and are properly seen as part of a general regime of discrimination; so too, discriminatory acts by a person in a position of authority may be more likely to create a regime of discrimination than similar conduct by a person of lower authority within an organisation. A single person being responsible for discriminatory acts is, the Court of Appeal warned in *Aziz v FDA* [2010] EWCA Civ 304, a relevant, but not conclusive factor in deciding whether an act has extended over a period."

134 We also referred ourselves to, and read, the decision of the Court of Appeal in *Parr v MSR Partners LLP* [2022] ICR 672. We found paragraph 44 of the judgment of Bean LJ of particular assistance here:

"It is instructive to revert to *Amies* [1977] ICR 308. The hypothetical case set out by Bristow J was of a school at which the position of head of department was open to men only – in other words, an absolute rule – and the hypothetical claimant would have succeeded. But Ms Amies herself lost her case, because there was no such policy. ILEA's failure to promote her was a one-off act, albeit with continuing financial consequences. So too was the employer's decision in *Sougrin* to place the claimant in grade E rather than the higher grade F. On the other side of the line are the absolute rule cases such as *Calder*, where the mortgage subsidy was only available to men, and *Kapur*, where Barclays employees of African ethnicity were working on less favourable pension terms than their white comparators. Mr Cohen reminded us that the retirement age provisions in *Seldon* allowed an extension by agreement; but, as already noted, the issue of whether they amounted to a one-off act or an act extending over a period was never considered."

135 As for the question whether it is just and equitable to extend time, assuming that there is no conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010, we reminded ourselves that that is a question which falls to be decided in accordance with the terms of section 123(1) of that Act, which provides:

"(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 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."

136 The factors to be taken into account in determining what is "just and equitable" for that purpose are subject to even more case law than that which relates to the question whether or not there has been conduct extending over a period.

Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 contains, in the headnote, a helpful comment of Sedley LJ:

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing employment tribunal proceedings, and Auld LJ is not to be read as having said in *Robertson* [i.e. *Robertson v Bexley Community Centre* [2003] IRLR 434] that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it."

137 *British Coal Corporation v Keeble* [1997] IRLR 336 has in the past been understood as being to the effect that the factors relevant when applying section 33 of the Limitation Act 1980 are to be applied in determining whether it is just and equitable to permit a claim to be made outside the primary time limit of three months (extended, if it is commenced before that period of three months ends, by any period of what is now called "early conciliation", i.e. by reason of section 140B of the EqA 2010).

138 However, in paragraph 37 of his judgment in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 27, [2021] ICR D5, with which Moylan and Newey LJJ agreed, Underhill LJ said this:

> 'The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes [in ([1995] UKEAT 413/94]) "the length of, and the reasons for, the delay". If it checks those factors against the list in [*British Coal Corporation v Keeble* [1997] UKEAT 496/98, [1997] IRLR 336], well and good; but I would not recommend taking it as the framework for its thinking.'

139 It is clear that there has to be an evidential foundation for a decision that it is just and equitable to extend time.

140 In paragraph G[279.03] of *Harvey*, this is said:

> "When considering whether to grant an extension of time under the 'just and equitable' principles, the fault of the claimant is a relevant factor to be taken into account, as it is under s 33 of the Limitation Act 1980 *(Virdi v Comr of Police of the Metropolis* [2007] IRLR 24, EAT)."

141 We reminded ourselves of what His Honour Judge ("HHJ") Auerbach said in paragraph 40 of his judgment in *Wells Cathedral School Ltd v Souter* (20 July 2021, unreported; EA- 2020-000801-JOJ) about the "public policy in those who may be on the receiving end of litigation benefitting, so far as possible, from the certainty and finality which the enforcement of time limits potentially gives them."

142 EJ Hyams said to the parties in oral discussions about the application of section 123(1)(b) of the EqA 2010 that there are in some appellate judgments references to there being a "discretion" to be exercised when applying the test in section 123(1)(b) of the EqA 2010. One such judgment is that of Underhill LJ in *Adedeji*. However, we record here that even if that proposition is qualified by the proposition that that discretion has to be exercised judicially, in reality the test is one of judgment: deciding whether it is just and equitable to extend time for the making of the claim. That was certainly how Sedley LJ described the issue in *Caston*, as can been seen from what we say about that case in paragraph 136 above. That part of the headnote was drawn from paragraph 32 of the reported judgments. Having said that, Longmore LJ specifically referred to the issue as being one of "discretion", and even Carnwath LJ, who gave the main judgment, referred (in paragraph 25) to the issue as being one of "judicial discretion". But that was after referring to "how the judgment under the 'just and equitable' provisions of the Race Relations Act and DDA fall[s] to be exercised".

Justification for the purposes of sections 15 and 19 of the EqA 2010

143 Before we heard evidence, we sent the parties the unreported decision of the EAT in *City of York Council v Grosset* (1 November 2016, UKEAT/0015/16/BA). When deliberating, we read with particular care the passage from the judgment of the Court of Appeal in *Hardy & Hansons plc v Lax* [2005] ICR 1565 which the EAT set out in paragraph 33 of its judgment in *Grosset*. While the whole of that passage was material, we saw that its final sentence was this:

> "The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."

144 We applied the test encapsulated in the following words in paragraph 32 of the judgment of the Court of Appeal in *Lax*:

> "The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary."

145 We found the following comment at the end of paragraph L[352.03] of *Harvey* (concerning justification of what would otherwise be indirectly discriminatory conduct within the meaning of section 19 of the EqA 2010) to be helpful in this regard:

> "[T]ribunals are helped by the warning given by the EAT in *Birtenshaw v Oldfield* [2019] IRLR 946 that in assessing proportionality they should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim."

146 We also found it helpful to take into account the passage immediately following that one in *Harvey*:

> "[352.04] Where the PCP [i.e. the provision, criterion or practice] is a general policy which has been adopted in order to achieve a legitimate aim, it is the proportionality of the policy in terms of the balance between the importance of the aim and the impact on the class who will be put at a disadvantage by it which must be considered rather than the impact on the individual. In *Seldon v Clarkson Wright and Jakes* the EAT said: 'Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue.' This was approved by the Court of Appeal and by the Supreme Court ([2012] UKSC 16, [2012] IRLR 590), where Lady Hale commented on the passage just quoted: 'Thus the EAT would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it.'
>
> [352.05] In *Buchanan v Commissioner of Police of the Metropolis* [2016] IRLR 918 the EAT, in the context of a claim of discrimination arising from disability (for which see further para [377] below), drew a distinction between cases where A's treatment of B is the direct result of applying a general rule or policy, and cases where a policy permits a number of responses to an individual's circumstances. In the former – of which *Seldon* was said to be an example – the issue will be whether the general rule or policy is justified. In the latter, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim."

147 We looked for case law concerning the question whether or not in deciding whether what the employer did here was "reasonably necessary" we could take into account the facts that

147.1 the claimant was actually able (in part because it was obligatory and then because the respondent had changed its working practices

generally) to work from home (in fact all the time, and not just on Tuesdays and Thursdays), and

147.2 that had worked particularly well for him (given his evidence to which we refer in paragraph 129 above).

148 We were unable to find such case law. We were, however, helped in that regard by the rather more extensive case law concerning reasonable adjustments within the meaning of section 20 of the EqA 2010, to which we now turn.

The law relating to reasonable adjustments

149 As for the law relating to reasonable adjustments within the meaning of section 20 of the EqA 2010, we found the following passage (paragraphs L[403]-[404]) in *Harvey* to be helpful.

> "[403] The duty to make adjustment arises by operation of law—it is not essential for the claimant himself or herself to identify what should have been done, although commonly this will be the basis on which a claim arises (*Cosgrove v Caesar and Howie* [2001] IRLR 653, EAT). This accords with paragraph 6.24 of the Code of Practice which says that there is no onus on a disabled person to suggest what adjustments should be made. Going further, the EAT held in *Southampton City College v Randall* [2006] IRLR 18 that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time. Similarly, the employer might satisfy the duty in relation to reasonable adjustments even though its proposals are not to the satisfaction of the employee: in *Garrett v Lidl Ltd* [2010] All ER (D) 07 (Feb), the EAT confirmed that it was not unreasonable for employers to conclude that adjustments could best be achieved by moving the claimant to a different place of work, even though the claimant did not want to move (in circumstances where there was a mobility clause in her contract).
>
> [403.01] The EAT in *Project Management Institute v Latif* [2007] IRLR 579, EAT observed that while the nature of the adjustment that is lacking need not itself come from the claimant, it does seem that there must at least be before the tribunal facts from which, absent any innocent explanation, it could be inferred that a particular adjustment could have been made. Otherwise, the respondent would be placed in the 'impossible position' of having to prove the negative proposition that there was no reasonable adjustment that could have been made. Further, the EAT emphasised the importance of tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in *Newcastle City Council v Spires* UKEAT/0034/10, [2011] All ER (D) 60 (May). The *Latif* case involved consideration of procedures followed by a qualifying body, under DDA 1995 s 14.

> '*Project Management Institute v Latif* [2007] IRLR 579: The appellant body, which conferred project management qualifications following the taking of examinations, was found to have been in breach of ss 14A and 14B of the DDA 1995, by failing to make proper accommodation for the needs of Ms Latif (a candidate who was registered blind) in its examination arrangements. While the respondent firm had provided a reader/recorder to Ms Latif, and also allowed her double time to take the examination, that was held not to have gone far enough. Another accommodation (suggested for the first time by counsel for Ms Latif at the tribunal hearing) would have been to allow her to take the examination on a specially adapted computer, and that was found to constitute a reasonable adjustment that could have been made. That decision was upheld on appeal to the EAT.'

[403.02] Agreeing with *Latif* in the context of an adjustment *of an alternative post being sought, Underhill J in HM* Prison Service v Johnson [2007] IRLR 951 went on:

> ''We are not to be taken as saying that it was incumbent on either the claimant, in advancing the case, or the tribunal, in deciding it, to identify a precise alternative posting, with every detail worked out. The degree of specificity required would depend on the nature of the evidence and the issues. In some circumstances a finding that there were "plenty of other jobs" which a claimant could have been moved to might be sufficient (at least for liability purposes). But it is necessary that that finding be made.'‘

[403.03] This was echoed by the EAT judgment in *General Dynamics Information Technology Ltd v Carranza* [2015] IRLR 43 which highlighted the importance of identifying precisely what constituted the 'step' which could remove the substantial disadvantage complained of. In that case HHJ Richardson doubted whether a mental process – of disregarding a warning – would be enough, as opposed to an action – say of removing a warning.

[403.04] HHJ Hand QC in *Jennings v Barts and the London NHS Trust* UKEAT/0056/12, [2013] EqLR 326, further warned that *Latif* did not require the application of the concept of shifting burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as to whether the adjustment contended for would have been a reasonable one.

[403.05] Highlighting again that the adjustment being considered by the tribunal – and tested to determine whether it had a real prospect of removing the disadvantage in issue – need not be one proposed to the employer at the material time, but can be one contended for the first time before the ET, is the case of *The Home Office (UK Visas and Migration) v Kuranchie* UKEAT/0202/16 (19 January 2017, unreported). There, an employee who had dyspraxia and dyslexia had undergone a Workplace Needs

Assessment, and a number of adjustments had been made including compressed hours, an opportunity to schedule hospital appointments during the working week and assistive software. The ET judgment that there had been a failure to make an adjustment to reduce workload was upheld by HHJ Peter Clark.

[404] The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. This was a point specifically addressed by Maurice Kay LJ in *Smith v Churchills Stairlifts plc* [2005] EWCA 1220, [2006] IRLR 41, [2006] ICR 524, at para 45, by reference to observations to similar effect on the part of Sedley LJ in *Collins v Royal National Theatre Board Ltd* [2004] EWCA Civ 144, [2004] IRLR 395 at para 20. In a non-employment context, the Supreme Court and Court of Appeal have each confirmed that the duty on service providers to make reasonable adjustments involves an objective test (under DDA 1995 s 21: *Royal Bank of Scotland Group v David Allen* [2009] EWCA Civ 1213; under EqA 2010 s 20: *FirstGroup Ltd v Paulley* [2017] UKSC 4, [2017] IRLR 258). The EAT held, in *Lincolnshire Police v Weaver* [2008] All ER (D) 291 (Mar), that it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer. This case involved a police officer of over 30 years' experience whose application to be placed into a '30+ Retention Scheme' which would have allowed him to receive his pension and continue in his current role, was refused. The objectives of the police force in keeping certain posts available for officers who could only undertake restricted duties was therefore relevant in measuring the reasonableness of the adjustment sought. In *Wilson v Secretary of State for Work and Pensions and others* [2010] All ER (D) 96 (Apr) the EAT considered that the employee's proposal of an adjustment of home working was not 'reasonable' as there were no home working vacancies which existed, or could be created, and therefore no evidence that it was a feasible option."

Our conclusions

The issue of time limits

150 We concluded that what had happened here was that the respondent had applied a policy (not, as we say in paragraph 63 above, a formal, written, policy) to the effect that staff in IDS could work from home only on Fridays unless there was a justification for an exception to that policy.

151 We heard evidence only about the manner in which the policy was applied to the claimant and Mr Ogunnubi. The policy was followed as far as the claimant was concerned by allowing him to work from home as a regular adjustment only when he was in a phased return to work. If he was in practice unable because of pain to travel to work then he could apply to work from home

because of the pain which he was suffering. If such an application was not allowed then the claimant had the choice of either taking a day as sick leave or as annual leave.

152 The only alternative offered by the respondent to working on a long-term basis on Mondays to Thursdays inclusive physically at the respondent's premises was to apply for a formal contractual change under the flexible working policy to which we refer in paragraph 59 above. That policy was not aimed at catering for the needs of persons who had a disability for which an adjustment might be required under section 20 of the EqA 2010. The respondent at the material times had no formal policy by means of which an employee could seek such an adjustment (unless the flexible working policy was such a means).

153 There were repeated refusals of the claimant's requests to work from home on Tuesdays and Thursdays. We did not accept, as Ms Chute submitted in paragraph 96 of her written submissions, that there was "scant evidence until the very end that C requested to work on non consecutive days or that doing so was causing him an issue." Applying *Matuszowicz*, in relation to the claim of a failure to make adjustments within the meaning of section 20 of the EqA 2010 time started to run for limitation purposes from the date of each such refusal.

154 However, there was at the same time, in the circumstances to which we refer in paragraphs 150-152 above, conduct extending over a period in the form of a policy. That policy was in force and relied on when Ms Besbrode sent her email of 5 March 2020 at pages 331-333. The claim was in time in relation to that email and that policy.

155 We concluded that it was not just and equitable to extend time to allow the claimant to make a separate claim of a failure to make reasonable adjustments. The main reason why it was not just and equitable to permit him to make that claim out of time was that he was at the latest by 15 July 2019 (see paragraph 88 above) aware of the "legal duty to make reasonable adjustments" under what he called the Equalities Act but which he plainly understood was the Equality Act 2010. He then chose not to make a claim about what he repeatedly said to the respondent was a failure to make such an adjustment in the form of assuring him that he could work from home on Tuesdays and Thursdays as a matter of course, at least while he had back pain which made travelling to and from the respondent's offices and being there highly problematic for him. He made such a claim, and a claim about the failure to hold review meetings by telephone, only after he had received the email of 5 March 2020 at pages 331-333. The claimant had some justification for not making a claim which was in time about the acts of Ms Graham in the latter part of 2019. That was because he was going to have a new manager at the start of 2020. However, once the new manager, Ms Besbrode, as from at the latest 20 January 2020 changed her tack and (see paragraph 115 above) refused to permit the claimant to work from home routinely on Tuesdays and Thursdays, in our view the claimant ought to have at least approached ACAS and stopped time from running by doing so. Even the claim about that refusal

was made six weeks out of time, and there was no justification for extending time for the making of a claim about that refusal, not least because the claimant had by then been referring to his rights under the EqA 2010 for over six months so that a claim to this tribunal would in all probability have been seen by the respondent only as a natural progression and no more problematic than his assertions of those rights.

The claim under section 15 of the EqA 2010

Did the respondent have a legitimate aim in requiring the claimant to attend work in effect on three out of the four days per week when the majority of his colleagues were present?

156 We were satisfied that the respondent had a legitimate aim in requiring the claimant to attend the respondent's physical workplace as much as possible in 2019 and the first two or three months of 2020. That was to maximise the effectiveness of the project management team of which the claimant was part.

The evidence concerning the claimed justification for not permitting the claimant to work from home on a long-term basis on Tuesdays and Thursdays

157 Mr Cumming gave much evidence (to which we refer in paragraphs 62 and 125-127 above) about the justification for not permitting the claimant to work from home until after March 2020, and we return to one aspect of that evidence in paragraph 159 below. Before doing so, we say that we concluded that the respondent's reasons stated at the time of refusing the claimant's request to be allowed to work from home on Tuesdays and Thursdays (or similar requests) were probably the most reliable indicators of the practical implications of working from home until after March 2020.

158 We therefore looked with particular care at the extracts from the respondent's documents which we have set out in paragraphs 93 and 107 above. As far as the question of justification was concerned, we did not see anything more by way of substance in any of the other documents before us or the oral evidence before us. Taking the relevant parts of the documents to which we refer in paragraphs 93 and 107 above in turn, our conclusions on those parts (which for convenience and clarity we have underlined in the following subparagraphs) were as follows (set out after the underlined words).

158.1 "<u>Difficult to manage ad hoc meetings which are called usually at a point of urgency- if this is a time the employee is at home and away from their desk or telephone walking around. We can facilitate to a point using the loud speaking telephone at IDS end but if the employee is uncomfortable or away from their desk at home at that time the meeting cannot be held up due to the resource implications.</u>" We could not accept that someone such as the claimant, or, indeed, the claimant, would not be contactable at home via his mobile telephone as and when required. It could have been made a specific requirement that he

had his mobile telephone turned on and with the ringer turned on whenever he was not at lunch, say. In fact, the claimant plainly did give out his mobile telephone number in his emails, as we could see from for example page 275. This justification for not permitting the claimant to work from home did not in our view bear scrutiny.

158.2 "In addition, the meetings are often held at ad hoc locations on floor 2 where the loud speaking telephone may be impossible to accommodate due to the open nature of the workspace." We thought that the only justification for not permitting the claimant to work from home was this use of ad hoc meetings in person. However, we could not accept, given our own experiences of mobile telephony in 2019, that the claimant would be unable at least on most occasions to participate in an ad hoc meeting at the respondents' premises by telephone. We accepted that in-person meetings can be more productive than telephone meetings, however. Nevertheless, if a Senior Project Manager were on holiday, then he or she would be unable to attend a "huddle" or an ad hoc meeting.

158.3 "The changeable/ fluid nature of the condition means that meetings are difficult to plan- e.g. several meetings have had to be altered in format including the return to work interview based on inability to attend due to medical condition. Whilst some of these can be undertaken by telecom some require face to face discussion with stakeholders with breakout sessions for problem-solving and collaborative working." The reference to the changing of a format for a return to work interview was not convincing here. Planned meetings could be held on the days when the claimant was able to attend in person. If he had been given the assurance that he could work from home on Tuesdays and Thursdays, then he would have been likely to suffer far less from debilitating back pain and he might have been able to attend work for in-person meetings on occasion even on those days.

158.4 "EUC [end user computer] is reaching a critical point and therefore it is important that you are on-site to be able to talk through any issues with the team." We did not see in that assertion anything that added to the three considerations which we have addressed in the preceding three subparagraphs above.

158.5 "I am also mindful of the social aspect/ team-building part of your role. As a Senior Project Manager it is important that you are available to more junior members of the team to offer advice and support as required. It is also important for you to integrate back into the Project Practice so that the team can work with you and support you as required." We could see that the "social aspect/ team-building part of [the claimant's] role" was important, and we could see that the claimant's being there for "more junior members of the team to offer advice and support as required" would be helpful. However, if the

claimant was at work for half of the weekdays when the rest of the team was there (i.e. Mondays and Wednesdays) then he would be available for at least half of the working week. In addition, many communications even in 2019 were made in digital form, such as mobile telephone texts and other forms of messaging, and, of course, by telephone.

159 Turning to the evidence of Mr Cumming, we thought that the fact that the number of projects now being managed by the IDS project management team had (as can be seen from what we say in paragraph 126.4 above) more than doubled pointed towards the conclusions that (1) remote working was particularly effective, and (2) the only (or at least the main) reason why the claimant's remote working in 2019 and the first part of 2020 was not viable was the respondent's in-house technology.

160 As we say in paragraph 128 above, we accepted the claimant's evidence that given the quality of his own equipment at home, he would have been more able rather than less able, when at home, to liaise with external suppliers, the "vendors" to whom we refer in paragraph 126.9 above.

Was there, in the circumstances, justification for refusing to permit the claimant on a long-term basis to work from home on Tuesdays and Thursdays? Was the requirement to attend work on Mondays to Thursdays inclusive a proportionate means of achieving a legitimate aim?

161 As can be seen from what we say above, this was the critical issue in this case. We were acutely conscious of the need to (see paragraph 145 above) "give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim". Nevertheless, we were unpersuaded by the evidence of Mr Cumming or anything in the documents before us that (using the words of *Lax* set out in paragraph 144 above) the refusal to agree to the claimant working from home on Tuesdays and Thursdays was "justified objectively notwithstanding its discriminatory effect".

162 Since the burden of proof was on the respondent in that regard, the claim had to succeed. However, we also, and in any event, made (again, applying the words in *Lax* which we have set out in paragraph 144 above) our "own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the [requirement to attend work on Tuesdays and Thursdays rather than being permitted to work from home on those days] was reasonably necessary". In doing so, we took into account the severe pain which the claimant suffered and of which the respondent was aware, as recorded by us in paragraphs 85 (as indicated in the third paragraph of the extract set out there), 91, 98, 104, 105, 106 and 113 above. In the light of that pain, and on the basis of the factors to which we refer in paragraphs 158-160 above, we concluded that the requirement imposed on the claimant to attend on all four days, or even three days, two of which were consecutive, on Monday to Thursday inclusive, was not reasonably necessary.

163 In addition, while the occupational health advice which the respondent had received was not determinative, it was supportive of the claimant's request to be permitted to work from home on a long-term basis more than just on Fridays. We say that if only because of the final report from an occupational health adviser to which we refer above, namely that of Dr Siddiqui of 9 October 2019. In paragraph 97 above we have set out the most material part of that report. The relevant parts for present purposes were these:

163.1 "In the longer term, given the long-term nature of his back condition and the fact that it may flare-up from time-to-time, I suggest that you look at adopting a flexible approach to him working from home as needed when work allows him to and/or his back is playing up."

163.2 "I have covered my recommendations with regard to phased return, reduced hours initially, work duties and working from home." We noted in this regard that it was possible to read "work duties and working from home" as being separate from a "phased return" and working "reduced hours initially".

163.3 "In the longer term I suggest some flexibility with regard to him being able to work from home is the only adjustment required."

164 For those reasons, the claim under sections 15 and 39 of the EqA 2010 succeeded.

Remedy

165 As for the remedy which the claimant should receive, he was now seeking only compensation for the pain and suffering he had suffered, and for the injury to his feelings. He argued that the award should be one in the middle band of the *Vento* guidelines, namely, as at March of this year, between £9,900 and £29,600. We looked at a number of the mainly first instance cases referred to in paragraphs L[1046] to L[1054] inclusive of *Harvey*, and we agreed that the award should be in the middle *Vento* band.

166 In deciding the amount that it should be, we bore in mind the fact that the claimant had made repeated requests for the adjustment of working from home and that they had been repeatedly refused. We also bore in mind the fact that that meant that the claimant was caused considerable additional physical pain. However, the claimant was not at work from 14 February to 15 July 2019, and we concluded that the compensation that we awarded should be in respect of the period from the first refusal after he returned to work on 15 July 2019 onwards. That was (see paragraph 92 above) 24 July 2019.

167 This was not a claim of direct discrimination, in which there was no possible justification for that which we found was a breach of section 15 of the EqA 2010. What had happened, however, which had, we found, truly shocked the claimant, was that he was threatened with dismissal by the email of 5 March

2020 at pages 331-333. The only reason why the pressure of the situation was alleviated was (ironically) the lockdown imposed in the light of the Covid-19 pandemic, which led to a major change in the way the IDS team did its work and the agreement of Mr Cumming in (see paragraph 31 of his witness statement, which we have set out in paragraph 125 above) May 2020 to the claimant's request to work on Tuesdays and Thursdays from home.

168 In addition, the claimant told us (and we accepted) that he had been prescribed Temazepam for anxiety which, we concluded, was caused by the manner in which the respondent repeatedly refused what we regarded as a reasonable request of his to be permitted to work from home on Tuesdays and Thursdays after his phased return to work had ended.

169 The claimant claimed in his schedule of loss the sum of £14,000 by way of compensation for injury to his feelings. We found the case of *Georgiou v Jordan Andrews Ltd*, referred to in paragraph L[1050] of *Harvey*, to be in some ways comparable. We also took into account the cases referred to in paragraphs L[1053.01], L[1053.04], L[1053.09] and L[1053.11] of *Harvey*, but we saw those cases as being worse than this one. In those circumstances we concluded that the right amount to award the claimant was the £14,000 that he was claiming.

170 The claimant was claiming in addition interest on that sum of £14,000. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, SI 1996/2803, applied. Regulation 2(1) provides:

> "Where, at any time after the commencement of these Regulations, an employment tribunal makes an award under the relevant legislation—
>
> (a) it may, subject to the following provisions of these Regulations, include interest on the sums awarded; and
>
> (b) it shall consider whether to do so, without the need for any application by a party in the proceedings."

171 Regulation 6 provides:

> '(1) Subject to the following paragraphs of this regulation—
>
> (a) in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation;
>
> (b) in the case of all other sums of damages or compensation (other than any sum referred to in regulation 5) and all arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the day of calculation.

...

(3) Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraphs (1) or (2), it may—

(a) calculate interest, or as the case may be interest on the particular sum, for such different period, or

(b) calculate interest for such different periods in respect of various sums in the award,

as it considers appropriate in the circumstances, having regard to the provisions of these Regulations.'

172 The interest which the claimant was claiming was £4,126.08. That was for 1344 days, calculated from the date of the first refusal to agree to the claimant working from home so that he did not work at the respondent's offices on two consecutive days per week. That date was 29 January 2019. However, the claimant was not at work from 14 February to 15 July 2019, and as we say in paragraph 166 above we concluded that the compensation that we awarded should be in respect of the period from the first refusal after he returned to work on 15 July 2019 onwards. That was (see paragraph 92 above) 24 July 2019. From then to the date of these reasons (17 October 2022) was a total of 3 years and 85 days. Thus, the interest that we were obliged to award under regulation 6 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 was 3.233 x 8% of £14,000, which was £3,620.82.

173 If, however, we were obliged to award interest from 29 January 2019 to the date of these reasons, then we, concluded (using the words of regulation 6(3) of those regulations), "serious injustice would be caused if interest were to be awarded in respect of the period" from then onwards rather than from 24 July 2019 onwards.

174 In the circumstances, we concluded that the claimant should receive the sum of £17,620.82 including interest.

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Employment Judge Hyams

Date: 17 October 2022

Sent to the parties on:20 October 2022
N Gotecha - For Secretary of the Tribunals