



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Clarkson-James

Respondent: York & Scarborough Teaching Hospitals NHS Foundation Trust

HELD in Leeds by CVP

ON: 7-11 November 2022

BEFORE: Employment Judge JM Wade

Members: Ms L Anderson-Coe
Mr G Corbett

REPRESENTATION:

Claimant: Mr G Singh, ILEX

Respondent: Mr B D Williams, Counsel

Note: A summary of the written reasons provided below were provided orally in an extempore Judgment delivered on 11 November 2022, the written record of which was sent to the parties on 21 November 2022. A written request for written reasons was received from the claimant on 2 December 2022. The reasons below, corrected also for elegance of expression and error, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 11 November 2022 are repeated below:

JUDGMENT

The Tribunal's unanimous decision is that the claimant's remaining Equality Act complaints are dismissed.

REASONS

Introduction, allegations and issues

1. The claimant previously worked as a medical secretary for the respondent. Shortly after starting a new role she was diagnosed with hearing impairment. On 22 September 2021 she presented claims, some of which were struck out during case management, leaving these disability discrimination complaints. In May 2022 a deposit was ordered as a condition of pursuing them. The claimant had pursued a grievance about bullying by her colleagues from March 2021, eventually leaving the respondent in December 2021. There were no complaints before the Tribunal about the ending of employment.
2. The allegations of harassment or direct discrimination because of, or related to, disability were clarified in a case management hearing in May of 2022 as follows:
 - 2.1. From about December 2019 to June 2020 Claire Sesum deliberately gave the claimant MDT meetings to type that she knew the claimant would find difficult because particular consultants had attended whom the claimant found it difficult to hear because of her hearing impairment. She also deliberately gave her H's work to type for the same reason. Janet Bolton, Lyn Dear and Debbie Manton colluded with Claire Sesum about this. Claire Sesum said that the claimant would struggle with H's dictations. She gave the claimant his work and the typing of MDT meetings only when there was a meeting involving a greater number of participants i.e. when it would be more difficult for the claimant to do.
 - 2.2. In the December 2019 Janet Bolton challenged the claimant in the presence of colleagues as to why she had not typed the MDT minutes. She belittled the claimant's difficulties saying, "but you managed to do it didn't you Lyn" and "so you had to do it instead"
 - 2.3. In January 2020 Janet Bolton said within the claimant's hearing in a louder voice "we'll give the MDT to Denise to do now shall we? Claire Sesum laughed and replied "yes, that's a good idea Janet, Denise did you know you're doing the MDT from now on?"
 - 2.4. Janet Bolton made unnecessary comments about the claimant wearing a hearing aid, including in her appraisal in January 2020 when she told her that she had told Z (the claimant's consultant) that she wore a hearing aid, and at secretarial meetings in February and April 2020 when she made comments like, "Make sure you've got your hearing aid in" and "I've told Denise she needs to have her hearing aid in."
 - 2.5. From March 2020 to July 2020 Debbie Manton and Claire Sesum excluded the claimant, for example, talking in the corner and not including her. This was because they found it too difficult to include her because of her hearing impairment.
 - 2.6. In April 2020, Claire Sesum deliberately did not give the claimant the MDT meeting to do in the quieter weeks but then gave it to her to do on 9 June when the meetings were back to full capacity attended by a consultant who she could not decipher

- 2.7. In a telephone call on or shortly after 9 June 2020 Janet Bolton reacted in a loud and argumentative manner saying, "Denise, you cannot get away with doing the MDT"
 - 2.8. In their written responses to her grievance in April 2021, Janet Bolton, Debbie Manton and Claire Sesum used the claimant's hearing impairment as an excuse for their treatment of her
3. All but the last of these allegations had been presented outside the Section 123(1)(a) time limit (Equality Act 2010). The claimant also alleged failures to make reasonable adjustments, the issues for which were clarified as follows:
- 3.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?
 - 3.2. A "PCP" is a provision, criterion or practice. The claim relates to the respondent's allocation of typing work. Did the respondent have the following PCPs:
 - 3.3. Allocating typing of the MDT minutes to all the team
 - 3.4. Allocating typing from other people's consultants, when those people were absent, to the rest of the team
 - 3.5. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that because of her hearing impairment she struggled to hear some of the consultants at the MDT meetings/at all?
 - 3.6. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
 - 3.7. What steps could have been taken to avoid the disadvantage?
The claimant suggests:
 - 3.8. Give her more training or time to get used to the MDT minutes
 - 3.9. allocate her the MDT meetings when few people attended, so she could become more familiar with them and hear more easily
 - 3.10. arrange for somebody in the office to help her if there was something on the tape she could not hear
 - 3.11. not allocate Mr H's work to her
 - 3.12. let her try Ms Dear's brand-new machine to see if it improved her ability to hear
 - 3.13. email consultants in advance to ask them to be as clear as they could be
 - 3.14.
 - 3.15. Was it reasonable for the respondent to have to take those steps and when?
 - 3.16. Did the respondent fail to take those steps?

Evidence

4. The Tribunal heard oral evidence from the claimant and from Ms Bolton, her manager, Ms Sesum, Ms Manton, Ms Dear, her former colleagues, and Ms Hill and Ms Scott who were involved in the claimant's grievance and appeal. We also had a file of over a thousand pages relating to the claimant's allegations. Those documents included an audit, conducted by the Trust, documenting which colleague had typed which MDT and other minutes, and their length, over

the material period. This audit was very helpful in establishing the facts, which did not align with the claimant's allegations.

The Law

5. The claims in this case are of contraventions of the Equality Act 2010 ("the 2010 Act"). Section 39(2)(d) of the 2010 Act prohibits an employer discriminating against an employee by subjecting him to "any other detriment". Any other detriment means objectively viewed unfavourable treatment, rather than a subjective and unjustified sense of grievance.
6. In this case three types of discrimination are pursued: discrimination by way of a failure to make a reasonable adjustment (Section 21), Section 13 Direct Discrimination or Section 26 Harassment. Sections 13 and 26 are well known and apparent in the way the issues for the Tribunal are described above.
7. The factual chain of events against which all complaints are made is the same and it is on the facts that our decision is focussed. Nevertheless, we remind ourselves of the precise provisions relating to reasonable adjustments because, unusually in this case, disability is accepted but disadvantage is not.
8. Section 39 (5) imposes the duty to make adjustments on employers and Section 20 explains it:
 - (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
 - (2) The duty comprises the following three requirements.
 - (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.Section 21 deals with failure to comply with the duty:
 - (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
 - (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Findings and Conclusions

9. The claimant had had a career in retail before having children. She then worked for local large and small employers. From 4 January 2011 she was employed by the respondent as a Band 2 secretary in elderly medicine. "Band 2" denotes a grading in the NHS pay scale. She had some time off in 2018 for surgery (unrelated to hearing impairment). She had applied during that time for a Band 4 promotion post as a medical secretary in the vascular team. She was successful in that application. Mrs Bolton, by then the service manager, approved her appointment and was confident she would do well. The claimant commenced the role in November 2018.
10. The claimant's team comprised three others: Mrs Manton who had joined the medical secretarial team around 2015 as a Band 3 assistant secretary; Mrs Dear and Mrs Sesum, both Band 4 secretaries. The practical and unsurprising arrangement was that the Band 4 secretaries typed for particular vascular

consultants, with Mrs Manton completing administration and appointments and so on for the whole team. Mrs Manton was without a named consultant in 2018 and 2019.

11. By the time the claimant started in the team, Mrs Manton had recently completed a phased return with adjustments, for a back condition, having had some months off that year. Those adjustments included a raised desk and other practical measures to help her. The respondent well understood its obligations to make adjustments for disability.
12. The claimant undertook three weeks of mandatory training away from her team, including reviewing Trust policies. She then spent time being coached by Mrs Dear on the intricacies of working in the vascular team and the particular requirements there.
13. After mandatory training the claimant was allocated the typing for two particular consultants. Mrs Dear at that time also had two, including a consultant to whom we will refer as H. She had worked for him for around 16 years and his dictation was the least easy to transcribe, being heavily accented and generally at times unclear. Mrs Sesum had three consultants to type for at that time.
14. For the first few months of the claimant's appointment the manager, Mrs Bolton, was also on leave for surgery. She returned to work three days a week in March 2019. She was therefore only present in the vascular support team office two and a half days per week because she had a commitment on a half day to attend meetings elsewhere.
15. The claimant's probationary review was first undertaken in November 2018 and then again in mid-March of 2019. It was recorded that the claimant had completed her training and was working effectively and had passed her probationary period.
16. The claimant found her three close knit colleagues difficult at times in those early days. She raised this with the manager standing in for Mrs Bolton's absence. The gist of her complaint was impatience and rudeness and so on by Mrs Dear and Mrs Sesum. Their behaviour was not solely directed at the claimant but could be directed at others in the department, if they were outside a particular friendship group or "clique". Mrs Dear was known to shout at times; she also had hearing difficulties.
17. In February 2019 the claimant was diagnosed with hearing loss, and was provided with hearing aids. Mrs Bolton learnt this on her return to work in March 2019 and she immediately considered the need for noise cancelling "over the ear" headphones, so that hearing aids could be worn with them for audio dictating, rather than trying to use two in ear, or close to the ear, devices. The claimant initially cancelled that order as a potential waste of money, thinking she did not need them. Mrs Bolton then re-ordered them because she believed that they delivered better performance, from her experience, for those with hearing aids.
18. The claimant's hearing was discussed in a January 2020 appraisal and it was documented that the headphones had been provided, and with one other comment, about which the claimant complains, this was the only real mention of hearing in that appraisal. The claimant herself had made a comment in her written feedback that she was puzzled by Mrs Bolton's note that she would be followed up regularly by the ENT department. That was simply a recognition by Mrs Bolton that the claimant's hearing impairment, given the nature of her work, would require ENT follow up regularly to monitor hearing and that was

her experience of how hearing loss was approached by the respondent hospital trust. Mr Singh directed us to that particular part of the appraisal notes when we were asking to understand what it was that Mrs Bolton had done or said in these notes that were said to be an act of harassment as regards the claimant, and why.

19. There was also a discussion in the appraisal about the claimant's remaining consultant, Z. The claimant's first consultant had left the Trust by January 2020 and was being replaced by a locum. Mrs Bolton explained to the claimant that Mr Z had been provided with information by her that the claimant was wearing hearing aids, with the purpose of explaining to him the claimant's impairment. Mrs Bolton's purpose was to assist the consultant and secretary to work well together; she had also discussed other practical matters in their ways of working together. The claimant took exception to the mention to Z of her hearing loss.
20. The vascular team had a weekly typing task: the multidisciplinary meeting records - MDTs - we will refer to them as the parties did. We have heard a great deal about them during the course of this hearing. They were mostly done by Mrs Dear up until February of 2020, and she was very happy to do that work as the most senior and experienced secretary in the team.
21. In July of 2019 during a team meeting Mrs Dear indicated that she would not work past the day when she could retire. Her retirement date was the following September, in 2020. Mrs Dear was also diagnosed with hearing loss and fitted for hearing aids in September of 2019.
22. In that context Mrs Bolton was then very clear with all the team, including the claimant, that they would need to be able to take up the MDT work, and the claimant then made attempts towards taking on that task when the opportunity arose through sickness or holiday of Mrs Dear or others.
23. There had always been some such cover for Mrs Dear, but there was going to be a much greater need after her retirement. It was clear that all the team was going to have to do that work regularly, and share it. The consequences of the pandemic accelerated that need.
24. Mrs Bolton typically conducted her team meetings away from the small office where everyone worked. She was, as we have said, present only two and a half days a week. The MDT work was the most important priority in the team. In or around 9 December 2019 there was a discussion about that work in a meeting. Mrs Bolton commented that Mrs Dear had managed a set of minutes, when the claimant had been unable to, or words to that effect. The context for that comment was that the claimant was expressing difficulty over the task because it was fiddly and difficult. The claimant felt sufficiently upset in that meeting, or as a result of that meeting, to speak to Mrs Bolton's manager, feeling belittled and bullied by the way her difficulty with the task had been handled.
25. Until that point the claimant had been well supported, and had felt well supported, by Mrs Bolton, albeit she had found her other colleagues at times difficult. Mrs Bolton's manager provided the claimant with a copy of a bullying and harassment leaflet and invited her to make a complaint. Instead of a formal complaint, the claimant worked with HR over the next few weeks, and was provided with other support mechanisms such as information about the freedom to speak up guardian, the possibility of a mentor, a support line, the possibility

- of mediation and so on. All of those were discussed with her by HR and she did not make any reference to bullying connected to her hearing.
26. Mrs Dear then needed to shield for health reasons in light of the coming pandemic. She was the first member of staff to do so in February of 2020. She was unable to type MDT minutes from home. The claimant then started to take up her share of the MDT work with Mrs Manton and Mrs Sesum.
 27. Arising from the vascular meeting on 25 February, for example, they each did some of that. Similarly, they each did some of the typing arising from the 10 March meeting. This is plain from an audit conducted by the Trust.
 28. On one or two occasions in February 2020, during team meetings, Mrs Bolton said to the team, and to the claimant, that she had “told Denise to wear her hearing aid” or words to that effect, and said to the claimant, “make sure you wear your hearing aid”.
 29. From March Mrs Bolton was also not in the office due to the pandemic. By then, she too was working from home; typically from 24 March onwards Mrs Sesum and Mrs Manton were coming to the office very early, at 6am or 7am, whereas the claimant came in later and stayed later. Mrs Sesum and Mrs Manton may well have discussed matters together, whether work or private matters. That was because they had closer ties, had worked together much longer, and during Covid their hours overlapped much more so than they did with the claimant, and when they were all present, their pattern of communication continued. As to talking in a corner, Mrs Manton’s evidence was that this did not happen post Covid because of the distance maintenance recommendations, while office working – colleagues stayed at their desks. Any impression of being excluded which the claimant held, related to those long held relationships. It had been present before her hearing diagnosis, and it continued. By 2020 all of the vascular typing team had some degree of hearing impairment.
 30. The allocation of the MDTs was a matter of discussion between them and there were tensions at times. Mrs Sesum was the most experienced and most senior secretary in the team (in Mrs Dear’s absence) and she expected, reasonably, the claimant and Mrs Manton both to take their share of the MDTs, depending on everybody’s workload of ordinary typing for their consultants.
 31. There was a row on 7 April; the claimant was unwilling to take the MDT that day because she was due some leave, and/or had some other concerns about capacity. As the row unfolded, it was reported by Mrs Sesum to Mrs Bolton’s manager, and later also by the claimant.
 32. Mrs Sesum did not know that the claimant had already been in contact with HR between December and February about possible bullying allegations from Mrs Bolton and the team. Whatever transpired on 7 April, by the middle of the following week Mrs Sesum had decided that things would not be served by any sort of formal investigation. She had made allegations about the claimant’s conduct and considered it beyond the pale, but decided to let matters go. There was further MDT typing by all three colleagues in May and June, albeit tensions re-emerged from time to time.
 33. As to the detail of the claimant’s MDT case, MDT typing was a fiddly task. It involved accessing a specialist database. It involved typing content for as many patients as happened to be reviewed by multiple clinicians on any particular day. It is in the nature of that multidisciplinary working that clinicians were seeking to facilitate patient treatment and at times talked over each other on

their dictations, passing around a dictatphone. One clinician's typing, as we have already indicated, was particularly difficult and there was a requirement that all members of the team do that typing. It is much more difficult to type for somebody for whom you type infrequently.

34. The claimant alleges in this case that there were two PCPs: being required to type the MDT minutes - everybody being requiring to do so; and being required to type for other consultants when colleagues were away. Certainly from the onset of the pandemic, and less so earlier, these PCPs applied.
35. The PCPs also identify the nature of disadvantages inherent in this work. WE find it was not the two PCPs interacting with hearing impairment that caused difficulty. The claimant's hearing impairment, as for others including Mrs Dear, was being treated by hearing aids. It was further addressed by the provision of over ear headphones. The claimant, as could her colleagues, adjusted volumes when typing, could play back out loud and ask colleagues for help with understanding a particular consultant's dictation.
36. Volume, hearing and clarity was not the issue in this sense: what the claimant could not do, and nor could her two other colleagues, was replace Mrs Dear's many years of working with the particularly difficult dictation of one consultant and the complexity of the MDT meetings. That was the same inherent difficulty for any colleague, who was less familiar with H's work. It is the familiarity with particular voices, particular intonations, particular forms of delivery, particular vocabulary, all of those things that come with a very sustained relationship between consultant and typist, and that was the difficulty for the claimant and indeed for Mrs Manton when she became involved in it after the pandemic.
37. These findings are corroborated by the claimant's communications about her hearing in risk assessments or other contemporaneous material. She said in different ways and on many different occasions over the period we have reviewed, that her hearing posed no issues. She said this most clearly in a grievance process from March 2021 about bullying by her colleagues. The only difficulty which arose, she said, was when mask wearing was introduced (we find later in 2020 in this team). Prior to that she said, in terms, her hearing difficulty posed her no difficulties.
38. It is convenient then to announce our conclusion on the claimant's reasonable adjustments case, which is that the proven PCPs did not put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Any relatively new colleague without hearing impairment, coming to that team, and being asked to take on MDT typing, or typing for unfamiliar consultants, would have been equally at a disadvantage in the way we describe.
39. The claimant has not proven relative disadvantage, the duty to make the contended adjustments did not arise, and those allegations would not succeed, if we extended time to consider. We also note that when Mrs Bolton did address hearing impairment by an auxiliary aid – the over ear headphones - the claimant considered this help unnecessary.
40. As to Mrs Sesum giving the MDT out to the claimant in a selective way to disadvantage her, the reality of this was that MDT problems became acute from the onset of the pandemic and the shielding of Mrs Dear.
41. Mrs Dear's MDT work had to be done by the other three secretaries, and the only work she was able to do from home was a very limited number of digital dictations. The MDT work was delivered to the team in a box typically brought

by a vascular nurse. We find Mrs Sesum was likely to start the discussion when the box of MDT work arrived because (a) she was typically at work earlier and knew what had so far unfolded in workload; (b) she was the most senior secretary in the team; and c) she was/is a strong character. The reality of those discussions is that the work had to be done, everybody had to take their share and there was nothing about the substantial audit that was subsequently done by the respondent that could sustain any findings of unfairness in allocation towards the claimant. There is some evidence that in fact the reverse of that is true, but we find, taking into account the audit and the oral evidence, that Mrs Sesum did not attempt to manipulate matters in the way alleged by the claimant to disadvantage her.

42. The audit information also corroborates our finding that the claimant did not, in fact, have difficulty undertaking that work, beyond the lack of familiarity with particular consultants. She certainly typed a range of different meetings of differing lengths at different times over the material period.
43. Returning to the chronology, on or around 9 June 2020 there was another MDT related row. Mrs Bolton intervened remotely at that time, effectively supporting Mrs Sesum and Mrs Manton, saying to the claimant, “you can’t get out of typing the MDT, Denise”, or words to that effect. We accept that was said because it reflected the reality of the situation and Mrs Bolton accepted she might have said something similar.
44. Less than a month later Mrs Bolton had proposed performance management for the claimant. By then she had received communications from other managers within the Trust with experience of the claimant. Those communications made her approach matters more firmly. She was contemplating and communicating to the claimant the start of a performance management process to put measures in place. That was an immediate catalyst for the claimant becoming unwell with stress at work. That diagnosis remained in place, with anxiety disorder on occasion, for many months, and the claimant did not thereafter return to work for the respondent.
45. The Tribunal’s Preliminary Hearing Judgment contains findings about the chronology thereafter, and there has been no appeal against those findings. In summary they included: that the claimant sought Acas help and CAB help in the summer of 2020; that it was unreasonable for the claimant to believe that she could not present claims before her employment ended; that in fact she did present her claim before her employment ended. We adopt these findings.
46. We complete the chain of events by recording that the claimant was later encouraged through her dealings with HR and others to present a formal grievance about her colleagues, which took her some time to put together and she did that in March of 2021, having been off work for some eight months. That grievance was headed workplace bullying by Mrs Sesum, Mrs Bolton and Mrs Manton and over 14 pages the claimant set out, in effect, her witness evidence about it and her perception of bullying treatment by colleagues during her time in the vascular typing team.
47. One short bullet point amongst those 14 pages alleged that on occasions and in team meetings Mrs Bolton had asked her if she had her hearing aid in, or she said, “I’ve told Janet to wear her hearing aid”, as an allegation of bullying. The claimant also recorded in that grievance that there had been no experience of difficulties caused to team members from her not hearing.

48. On receipt of that grievance the respondent initiated a full and formal investigation pulling together a huge amount of documentation, interviewing a great number of relevant people over a relatively swift timeframe, given the nature of the allegations. The respondent also spent time seeking to clarify the allegations with the claimant.
49. All of these papers were sent to her on 12 June 2021, and amongst them were the interviews with Mrs Manton and Mrs Sesum and file notes made by Mrs Bolton.
50. The grievance finding by Miss Hill identified behaviours that were outside the expectation of the Trust to be kind to one's colleagues, but she did not make a finding of bullying. The claimant appealed and by September 2021 that appeal had been successful and Miss Scott had confirmed the conclusion that the behaviour was outside Trust values and confirmed that there was enough evidence to find bullying. That was Miss Scott's evidence to the Tribunal and she then passed the matter to others who were involved in the claimant's application for injury allowance.
51. Injury allowance is the Trust mechanism by which those who have sustained injuries at work are able to claim ongoing remuneration after the expiry of their sick pay. The claimant's employer sick pay had expired after six months at full pay and six months at half pay by the summer of 2021. After her grievance appeal was successful, she was able to receive 85% of her earnings in injury allowance backdated to the end of her employer sick pay for the remainder of her employment, which ended on 20 December 2021.
52. The contents of the written material from Mrs Bolton, Mrs Sensum and Mrs Manton to the grievance investigation was said to be an act of harassment related to disability. In view of the claimant's ACAS certificate, that allegation was the only one clearly presented within the Equality Act three month time limit (section 123 (1)(a)). Section 123(1)(b) permits the Tribunal to determine claims presented within "such other period as the Tribunal thinks just and equitable".
53. A previous Judgment had informed the claimant that the Tribunal considered there was little reasonable prospects of her establishing merit in this harassment allegation. The claimant dealt with this part of her case in only one of a great number of paragraphs of her statement (paragraph 173). In it, she did not identify the precise comment or content of her colleagues' statements that was complained about. We invited Mr Singh to help us with that. Mr Williams had also cross-examined the claimant about this allegation and put to her the only parts of the notes which refer to the claimant's hearing at all.
54. There were five pages of typed notes of a discussion with Mrs Manton on 20 April 2021 concerning the claimant's allegations of bullying, and one short paragraph where hearing was mentioned. The allegations were being investigated by an investigating officer. Questions were asked and replies noted; Mrs Manton and others then had the opportunity to add to those notes in track changes.
55. The interviewer noted that Mrs Manton had said the claimant was happy at first; Mrs Manton said there was a change but, as an additional comment said she did not know when or why. She said that the claimant was absolutely fine for

most of the time, at times she would describe her as moody, and sometimes she would not get an answer to a question; and if after repeating herself she did not get an answer she would go and ask someone else. Mrs Manton remarked that she was aware that the claimant was sensitive about her hearing and she did not regard her [the claimant] as acting deliberately (in not responding to her).

56. As to Mrs Sesum's notes, Mrs Sesum took part in an interview for the grievance on 26 April. Those notes were around six pages. The interviewer had asked if she had witnessed a situation in which the claimant had not responded to Mrs Manton? In response to that question, the first thing said by Mrs Sesum was to note that the claimant had discovered an issue with her hearing. She went on to say that the claimant had a hearing aid, but did not wear them/it and Mrs Bolton had encouraged her to do so. She said she had suggested it would be better for the claimant to move desks next to her, facing the office, rather than facing the wall, and Mrs Bolton and the claimant had agreed to that. Mrs Dear was said by Mrs Sessum to shout if she needed to get the claimant's attention and she also said that Mrs Manton would try and approach her from the side if she could not get her attention.
57. Mr Singh also alerted us to page 462, in which Mrs Bolton had provided written information in a file note of 28 July 2020. At the fourth paragraph of Mrs Bolton's statement she summarised what she'd been told about the equipment ordered for the claimant in a previous post by her previous manager, and that was completely unrelated to her hearing impairment. She also noted in that context her own ordering of specialist over the ear headphones.
58. In addition to that note, the Tribunal has, for completeness, reviewed Mrs Bolton's notes at pages 694 to 700, which again form part of the chronology of her dealings with the claimant over the time in her team. She recounts as a matter of fact, as part of that chronology, the discovery of the claimant's hearing difficulty and how it arose and the help that she provided in connection with it. She was challenged about none of this material - two short paragraphs in the second note - during the course of her evidence.
59. These are the matters alleged by the by the claimant to be acts of harassment or direct discrimination, the last in the 2021 grievance interviews.
60. We apply sections 13 and section 39 (direct discrimination), and sections 40 and section 26, (harassment).
61. As to Mrs Bolton's notes it is absolutely crystal clear that they were a simple record of the onset of the claimant's hearing difficulty as a matter of fact and her actions to assist them and the equipment purchased. She was not challenged at all about those notes, it was not alleged that they contained falsehoods, nor was there anything untoward about those comments in her chronology. Of course these short extracts did relate to the claimant's disability, but that is not in dispute. There must be facts from which, for direct

discrimination, the claimant can establish detriment; and then, that the treatment is less favourable than would be accorded to someone without her disability. For harassment, the claimant's position appears to be that Mrs Bolton should not have mentioned her impairment at all in her timeline and that in doing so her conduct crossed the Section 26 threshold.

62. As to Mrs Manton and Mrs Sesum, their position was that they considered the claimant not to have responded at times to Mrs Manton and their first instinct was to consider her conduct was because she may not have heard, because they both knew about her hearing impairment (rather than any rudeness to Mrs Manton).

63. Our conclusion on these allegations is that the claimant has an unjustified sense of grievance about them – she has not established detriment for Section 13 purposes.

64. As to harassment, her case has to be that in making those comments Mrs Manton and Mrs Sesum were lying (because the context and terms in which they expressed themselves could not otherwise possibly amount to harassment). We can see that telling untruths in an investigation about, or in connection with somebody's disability, could in some circumstances amount to less favourable treatment, in circumstances where it can be shown that those untruths would not have been told about a colleague without disability. Similarly, that untruths related to disability could violate the dignity of that person, and reasonably be perceived to have done so.

65. In those circumstances, arguably, these allegations could amount to harassment or less favourable treatment. When one looks at the claimant's position about her impairment, it is clear that she did not consider that her hearing difficulty posed any difficulties at the time. Her evidence was, that on no occasion was it the case that she did not hear Mrs Manton communicating with her such that Mrs Manton had to come to the side of her or otherwise take other measures.

66. In essence she implicitly asks us to find that Mrs Manton made up the "no response from her" and Mrs Sessum corroborated that in her comments. There are several difficulties with that. Firstly, these witnesses were not challenged about it on that basis at all on behalf of the claimant. Secondly it is very unlikely that they are making up a relatively innocuous part of office life when responding in a grievance investigation and questions put to them. Very few of us could say that on no occasion have we not responded to our colleagues, whether by reason of hearing, or concentration or distraction, yet that is the claimant's position. We find that they were not making this up at all. It was their ordinary perception based on working with the claimant that on occasions Mrs Manton was not heard, and that that may have had something to do with the claimant's hearing difficulty. Their responses to that grievance investigation were simply their honest recollections. There was nothing untoward about them.

67. These are not facts then from which we could conclude direct discrimination or harassment and this last in time allegation (2.8) is dismissed.
68. As to the allegations of harassment and direct discrimination (2.1 to 2.7) it will be apparent that on our findings of fact, they are almost all without merit. The only arguable allegations on our findings are 2.4 and 2.5 above. 2.4 is Mrs Bolton's encouragement to the claimant to wear her hearing aids in meetings in February and March 2020, if put as harassment, and telling a consultant of hearing impairment in January 2020, similarly. Mrs Bolton's purpose in this conduct was clear – to enable colleagues to work effectively. Mrs Sessum and Mrs Manton allegedly talking in a corner, their purpose and the context are matters about which we have made limited findings. On our findings on these allegations, if supplemented, it is possible that there are facts from which we could conclude harassment, in theory, because we would make findings and take account of the claimant's reasonable perception at the time, as well as all the other circumstances.
69. The claimant asks us to fix a different time limit under Section 123(1)(b). To do so would involve extending time by at least 10 months or so, taking into account the effects of ACAS conciliation. Complaints about events from 13 April 2021 were in time applying Section 123(1)(a) but not before that. (For completeness, we cannot conclude conduct extending over a period, having dismissed allegation 2.8 and all others apart from possibly 2.4 and 2.5 being without merit on the facts we have found).
70. Our exercise discretion takes place in the context of the claimant having sought advice much earlier, such that a timely complaint about these matters could have been presented in time. It also takes into account that the claimant did present a very lengthy bullying complaint to the respondent, about which it did a very lengthy and timely investigation and reached conclusions. The claimant has further been able to supplement her complaint on appeal by further witness statements and further evidence. That has resulted in a finding in favour of the claimant in relation to bullying and an effective remedy in injury benefit.
71. In those circumstances the claimant has had a remedy from her employer for the real substance of the conduct about which she complains, albeit that did not include compensation for injury to her feelings. If we do not fix a different time limit, she loses the chance of a declaration of harassment and a potential injury to feelings award on those two matters. Against that loss of a chance, we also weigh that the employer has exhaustively trodden this territory, but the claimant did not then allege discrimination.
72. In truth the complaints 2.4 and 2.5 are very unlikely to succeed because of the background findings, context and other conclusions we have reached. We also

bear in mind that tardy complaints which would otherwise have succeeded are frequently dismissed by this Tribunal because there are no compelling reasons in the interests of justice to fix a 123(1)(b) time limit. That is a different way of saying that different time limits are the exception, and there must be good reason to depart from 123(1)(a).

73. There is no good reason in this case given the findings already made: in this case the Tribunal does not think a time limit of a further 10 months is just and equitable to enable it to decide the earlier allegations. The unanimous Judgment of the Tribunal therefore is that the claimant's Equality Act complaints are dismissed for the reasons we have announced. The judgment will be signed by me possibly today or possibly on Monday and it will come to the parties relatively quickly we would hope. Written reasons are not provided unless requested by parties within 14 days thereafter, copying any request to the other side.

Employment Judge JM Wade

Date 15 February 2023

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