EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs A Oyeusi		The Commissioner of Police of the Metropolis

Heard at: London Central **On**: 14, 15, 16, 17, 20, 21 and 22 March 2023

Before: Employment Judge H Stout
Tribunal Member R Pell
Tribunal Member N Sandler

Representations
For the claimant: In person
For the respondent: Mr R Oulton (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Respondent contravened ss 20, 21 and 39(5) EA 2010 by failing to comply with the duty to make reasonable adjustments for the Claimant by not transferring her special chair to Walworth between April 2020 and June 2020. This claim is upheld.
(2) The Respondent did not contravene ss 20, 21 and 39(5) of the EA 2010 when it failed to provide the Claimant with a laptop after 26 June 2020. This claim is dismissed.
(3) The Respondent did not contravene s 13 and 39(2)(d) of the EA 2010 by directly discriminating against the Claimant because of her disability. That claim is dismissed.
(4) The Respondent contravened ss 15 and 39(2)(d) of the EA 2010 by discriminating against the Claimant because of something arising in consequence of her disability when it issued her with a sickness absence warning on 21 September 2020. This claim is upheld.

REASONS

1. Mrs Oyeusi (the Claimant) has been employed by the Commissioner of Police of the Metropolis (the Respondent) since 16 September 2002, latterly as a Band E witness care officer in the Met Prosecution Team. She remains employed. By a claim form received at the employment tribunal on 3 November 2020, following a period of ACAS early conciliation between 3 October 2020 and 26 October 2020, she brings claims of failure to make reasonable adjustments, direct disability discrimination, and discrimination arising from disability. A public preliminary hearing was held on 14 October 2022 to decide whether the Claimant was suffering from a disability as defined in section 6 of the Equality Act 2010 (CA 2010). In a reserved judgement sent to the parties on 20 October 2022 Employment Judge (EJ) Goodman decided that the claimant by virtue of her back condition was disabled at all times relevant to this claim.

The type of hearing

2. This has been an in-person hearing in a Tribunal room that was open to the public at all times. A video link was provided for part of the hearing to enable some of the Respondent's representatives to access the hearing remotely. The video link was not opened to the public.

The issues

3. At the start of the hearing, we discussed what was labelled as a Draft List of Issues in the bundle (p 85) and the parties agreed that the issues as to liability there listed were the issues for us to determine at this hearing. It was further identified that the Respondent disputes knowledge of disability and (so far as relevant) knowledge of substantial disadvantage. It was agreed that Remedy would not be determined at this hearing as the Claimant brings a personal injury claim and claims for recommendations in addition to a claim for injury to feelings (p 1033). The issues for us to determine at this hearing were therefore as follows:-

   <u>Reasonable adjustments</u>

   (1) But for the provision of the following auxiliary aids, was the Claimant put at a substantial disadvantage in comparison with persons who are not disabled:
      a. Not having an ergonomic chair when she was temporarily allowed to work from Walworth;
      b. Not having a laptop when she rejected the proposal that she should return to work at Holborn in June 2020.

   (2) Did the Respondent know, or should it reasonably have been expected to know, that:

a. the Claimant was disabled at the material time(s)?
b. she was likely to be to be placed at that substantial disadvantage?

(3) If so, did the Respondent take such steps as was reasonable to provide the auxiliary aid, taking into account:
   a. As concerns the ergonomic chair:
      i. The temporary nature of the posting to Walworth?
      ii. The difficulties caused by the Covid 19 pandemic in terms of making arrangements for office furniture to be moved around London?
      iii. The risks inherent in allowing the Claimant to move the ergonomic chair herself?
      iv. All the circumstances of the case?
   b. As concerns the laptop:
      i. The temporary nature of the posting to Walworth and the fact that the Claimant would not have needed a laptop to work there?
      ii. The fact that, even with a laptop, the Claimant would not have been able to work from home full time, since she would still be required to come in to the office in Holborn for a number of days per week to cover late turns etc?
      iii. The fact that a large number of the Respondent's officers/members of the staff (including the Claimant) were on the list for a laptop?
      iv. All the circumstances of the case?

Direct discrimination

(4) In refusing to move her ergonomic chair to Walworth and/or her home address, did the Respondent treat the Claimant less favourably than it treats or would treat someone without the Claimant's disability? (The Claimant relies on Jenn Bailey as an actual comparator and/or a hypothetical comparator.)

(5) If so, was disability the reason for the treatment?

Discrimination arising from disability

(6) Did the Respondent treat the Claimant unfavourably by inviting her to an attendance management meeting on 20 September 2020 and then giving her a first written warning, which would remain live for 12 months, requiring an improvement in her attendance?

(7) If so, was that unfavourable treatment because of "something" arising in consequence of the Claimant's disability? (The Claimant relies on her sickness absence as the "something" arising.)

(8) If the Respondent subjected the Claimant to unfavourable treatment because of something arising in consequence of her disability, was that treatment objectively justified?

(9) The Respondent avers that any such treatment as the Claimant may prove was justified as a proportionate means of achieving the legitimate aims of:

a. Ensuring the proper functioning of the unit in which the Claimant was based;
b. Ensuring so far as reasonably possible the provision of an effective and efficient police service to protect the public;
c. Ensuring so far as reasonably possible the health & safety of the Claimant.

Jurisdiction

(10) The Respondent's case is that any of the Claimant's claims which predate 4 July 2020 are out of time in that they occurred more than 3 months before 3 October 2020 when ACAS received EC notification of this claim.
(11) What is the last act of the Respondent's on which the Claimant relies?
(12) In respect of any of the Claimant's claims which were not presented in time, do they form part of conduct extending over a period which ended within the time limit, for the purposes of EA 2010, s.123(1)(b)?
(13) If any of the Claimant's claims are out of time, is it just and equitable for time to be extended?

The Evidence and Hearing

4. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents from both parties.

5. We explained our reasons for various case management decisions carefully as we went along.

6. We received witness statements from the Claimant and the following witnesses called by her:–

a. Ms Thomas who worked for the Respondent from 1999 to 2006 and again from 2010 to September 2016 in various roles;
b. Mr Cook, who is still employed by the Respondent as an Intelligence Analyst;
c. Mr Johnson, who works for Southwark Council and who helped the Claimant at home when she fell down the stairs in 2020;

d. Ms Philogene who has worked for the Respondent in the Witness Care Unit at Holborn since March 2013, although she is currently on a career break;
e. Ms Mundell who worked at Walworth Police Stateion in April/May 2020.

7. The Respondent only wished to challenge the Claimant and Ms Mundell, so they gave oral evidence. It was agreed that the statements of the Claimant's other witnesses would be taken as read, unchallenged.

8. For the Respondent, we received witness statements and heard oral evidence from:
    a. Ms Eversley, Band D Witness Care Manager, who has worked for the Respondent since 2002 and since October 2019 in the Witness Care Unit with the Claimant;
    b. Ms O'Regan, Band C Manager who has worked for the Respondent for 25 years, since January 2019 based at Holborn;
    c. Ms Brennan, who has worked for the Respondent for 40 years, as a Band D manager in the Witness Care Unit based at Holborn since 27 July 2020;
    d. Mr Milligan, who has worked for the Respondent for 35 years, including since 2020 as Head of Crime Prosecutions.

9. Towards the end of the cross-examination of the Claimant on 16 March 2023, she indicated that she was not ready to cross-examine the Respondent's witnesses as she had not finished reading their statements. She was part way through Mr Milligan's and Ms Brennan's and had not read either of Ms Eversley's or Ms O'Regan's. She explained she had had insufficient time as a result of witness statements only being exchanged the day before the hearing.

10. This had occurred because on the date set for exchange of statements the Claimant had sent to the Respondent only statements for her witnesses and not herself, having mistakenly thought she did not need to provide a statement. The Respondent had then refused to provide its statements to the Claimant until she was ready for exchange. She misunderstood the Respondent's position and sent her statement only to the Tribunal rather than also to the Respondent. Further correspondence ensued and in the end exchange only happened the day before the hearing. Our view of this unfortunate pre-history was that although the Respondent had complied with the letter of the Tribunal's case management orders, and the Claimant even as a litigant in person ought not to have misunderstood the process or correspondence as she did, the Respondent probably ought to have sent her its statements on the date ordered as the Claimant did send statements on that date. The Respondent could then have dealt separately with any complaint it had about the Claimant providing her own statement late.

11. As such, we regarded the parties as both having some responsibility for the unfortunate pre-history, but the effect of it on the Claimant had evidently been more serious than on the Respondent. The Respondent, represented by

experienced counsel, had been able to prepare most of its cross-examination without seeing the Claimant's witness statement and to read and assimilate her statement swiftly once it was received. The Claimant, in contrast, is a litigant-in-person with a disability and we had in the course of her giving evidence observed that she is not a fast reader, and needs time to process the written (and spoken) word. Although she is obviously familiar with her case and ought before receiving statements to have given thought to questions for the Respondent's witnesses, we could see why she would have struggled to read 90 pages of Respondent's witness statements in the time she had had available (which was, essentially, part of the day before the hearing, and part of the first day of the hearing when we were reading, and then the evenings).

12. We had previously agreed that the Claimant's cross-examination of the Respondent's witnesses would take place on the afternoon of Thursday 16 March and the whole day on Friday 17 March, with closing submissions after the weekend on Monday 20 March. After hearing from both parties, and with their consent, we varied that so that we finished early on Thursday 16 March (at about 3.15pm) to enable the Claimant to prepare questions for Mr Milligan and Ms Brennan for Friday 17 March, then allowing her the weekend to prepare questions for the more substantial witnesses, Ms Eversley and Ms O'Regan, on Monday 20 March. Closing submissions were then scheduled for the morning of what was to have been the last day of the hearing. That meant that we had to add an additional day to the listing in order to deliberate.

Adjustments

13. In view of the Claimant being disabled by her back condition, we agreed at the start of the hearing that we would try to remind the Claimant to stand up every 15 minutes and that we would take breaks every hour or so. We also made clear that if the Claimant was uncomfortable and needed a break at any point, she should just ask. In the end, the Claimant set an alarm and every 15 minutes she stood up. She did not ask for additional breaks (other than for additional time to read documents and prepare cross-examination questions). When starting to cross-examine Mr Milligan she forgot to set her alarm and so sat for a whole hour before we reminded her.

The facts

14. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

15. The Claimant commenced employment with the Respondent on 16 September 2002 as a CARM operator in the Finance and Resources Team, based at New Scotland Yard. Her Line Manager at that point was Mr Daniels. The senior manager was Ms Froix.

16. The Claimant first noticed pain in her back in 2002, shortly after commencing work with the Respondent. In 2002 and 2003 the Claimant had to have time off work because of the back condition. It was this condition that was found by EJ Goodman at the preliminary hearing to constitute a disability at the material time for the purposes of these proceedings. An OH report at the time (p 592) indicates that the most likely cause of lower back pain at that point was pregnancy and/or a minor injury sustained in October 2002. The Claimant disputed this on the basis that it was only during her second pregnancy that she suffered back pain. We do not need to decide what the cause was to resolve the issues before us.

17. In 2003 the Claimant was pregnant and found she could no longer cope with the back pain. She requested a chair with back support, providing a doctors note. On 9 September 2003 there is email evidence that a chair with lumbar support was requested for the Claimant (p 591). However, the Claimant's evidence (which we have no reason not to accept) was that no chair was provided and the Claimant decided to start her maternity leave early.

18. The Claimant returned to work after maternity leave and career break in July 2005. On her return, she was based at the Finance and Resources Unit, which was now based in Vauxhall. Her role changed to a Resource Officer.

19. The Claimant began experiencing back pain and felt she did not have a chair with appropriate back support. She informed her manager Yomi Thomas and he referred her to Occupational Health (OH).

20. Following a chair assessment in November 2005, the Claimant was issued with a special chair to provide support for her back (pp 634, 637, 717, 723). The Claimant believes that the chair was custom-made for her, as an email from Stephen Day of 1 November 2005 states that it took 3-4 weeks to manufacture (p 637), but the email also states that Mr Day had *"selected a chair suitable for her back problem"* and the handwritten notes of the assessment (634) show that what happened at the assessment was that she tried an Enigma (Senator) chair and the OH advisor worked out how it should be adjusted to fit her, and then followed up by meeting with her when it arrived on 6 December 2005 and ensuring it was properly adjusted for her at that point. We find that this was not a custom-made chair. It was just that, on assessment, the OH advisor worked out specifically where it should be adjusted to fit her and helped to make sure it was right when it arrived. We will refer to this chair going forward as the Claimant's special chair.

21. In 2007 the Finance and Resources Unit moved from Vauxhall to West Brompton and the Claimant's special chair was moved with her.

22. Between 2007 and 2017, the Claimant changed role several times. On each occasion, the Respondent arranged for her special chair to move with her. These were permanent role changes each time. She found that when there was a delay in moving her chair she would experience back pain from sitting on whatever other chair she was provided with. The Harrow Green Company was used by the Respondent at that time to move furniture around. Once, when Harrow Green delayed in moving her chair from Southwark police station to Walworth police station, she asked the internal courier service to assist as the post holder had a van that her chair could fit in, and he agreed and her chair was moved in that way to her new place of work. On another occasion, when there was going to be a delay of a few days, the Claimant asked Detective Inspector (DI) Pawsey to assist with arranging for her chair to be moved and DI Pawsey made the necessary arrangements.

23. The Claimant has also given evidence that her previous line manager, Mr Cook, had an OH chair which had been with him for a long time and which was moved with him whenever he changed roles. We have also received a witness statement from Ms Philogene in which she explains how she has a special chair, marked with her name, that moved with her when she moved stations.

<u>February 2017 – move to Holborn</u>

24. In February 2017, the Claimant moved to a new role in the Witness Care Unit (WCU) at Holborn police station as a Witness Care Officer (WCO). There were about 30 or 40 people in the WCU at Holborn. The nature of the job was desk-based and involved liaising with victims and witnesses by telephone and email, with police officers, the courts, the CPS and colleagues.

25. The Claimant did not arrange for her special chair to be moved with her to Holborn, because during her first visit to the unit she spoke with Marina, one of the Witness Care Officers, who mentioned that they had a new set of chairs and that she was welcome to use any of those. However, the Claimant later regretted this decision as she considered the chairs did not provide her with the necessary back support and her back was aching and painful as well as getting stiff. The Claimant was initially able to endure the pain as during her first week she was only engaged on training until 2pm and not required to work the whole day.

26. After trying the new chairs, the Claimant sent an email to her line manager Ms Lockwood on 7 March 2017 requesting that her special chair be moved from Blackfriars to Holborn as she was experiencing pain. Ms Lockwood liaised with her line manager Mr Johnson. The chair was eventually delivered after the Claimant chased again. During the period while she was waiting for her chair the Claimant experienced pain in her back.

27. On 28 March 2018 the Claimant had a bad experience on a telephone call with a member of the public. She was in some pain and discomfort during

and after this episode, experienced breathing difficulties and heart palpitations. A colleague called an ambulance and she went to hospital.

28. The Claimant then had a period of sick leave from 29 March to 27 April 2018. When she returned to work her line manager had changed from Ms Lockwood to Mr Wilcock. Her line manager subsequently changed again to Ms Eversley in October 2019.

29. Ms Eversley was one of four Band D managers within the WCU at that point. The Band D managers were in turn line managed by Ms O'Regan, a Band C manager. Ms O'Regan was line managed by Mr Milligan, who was a Band B manager and Head of Crime Prosecutions. As a result of the departure of one Band D manager around this time, staff were divided between the three remaining managers, so that each manager, including Ms Eversley, was managing a larger team of staff than usual. The missing Band D manager was replaced in July 2020 by Ms Brennan.

Walworth and the chair – November 2019

30. On 18 November 2019 the Claimant experienced a pain in her knee whilst at work, for which Ms Eversley advised her to go to hospital where a *"Baker's cyst"* was diagnosed. The Claimant was then on sick leave from 19 November to 2 December 2019 as she could not walk properly, stand or sit for too long and was in constant pain and her left leg was giving away. The fit note stated the reason for absence as *"knee pain"* (p 473). On 23 November 2019 she was referred back to her GP for physiotherapy. The Claimant eventually saw a physiotherapist on 21 February 2020 who described the injury as a *"random onset of L knee pain for no reason"* (p 764). There is no evidence that the cyst in the knee was related to, or caused by, the back problem that EJ Goodman found constituted the Claimant's disability, and we find that it was an entirely new and unrelated medical issue. We also record here that the Claimant has at times appeared to suggest that because she first noticed the pain in her knee at work that this was a work-related injury. However, there is no medical evidence to support that, and nor can we see that there is any factual basis for the Claimant's suggestion in that respect. The fact that a pain is first noticed at work does not mean it has been caused by work.

31. The Claimant returned to work on 3 December 2019, still having difficulty in walking and with pains in her left knee and back. She was at that point awaiting an x-ray result. She requested a referral to OH and to be transferred to a police station nearer home as the journey to work was too strenuous for her. Ms Eversley had been off work on compassionate leave when the Claimant had the episode of pain. She was updated by Ms Bell who had covered management issues in her absence. Ms Eversley also spoke to the Claimant on 2 December 2019 who said that she would be coming into work the next day, but walking with a limp (p 202). On her return to work on 3 December 2019, Ms Eversley held a return to work interview with her (p 204), noting the problem with her knee, that an x-ray appointment was awaited,

and also: *"she did mention that she would like a new chair as her usual one for back pain is over 15 years old"*. The Claimant disputed asking for a new chair, but we find that her memory of this is not reliable and has been influenced by subsequent events. We find that the conversation went as Ms Eversley recorded it at the time. It is also plausible that the Claimant would have asked for a new chair as her special chair was by this time old and torn. Ms Eversley noted that the Claimant was not otherwise asking her for adjustments and was fine to do her late shifts. This was the first time that the Claimant had told Ms Eversley about her back pain. The marked boxes on the Return to Work form suggest that the Claimant did not consider herself to have a disability, and that temporary workplace adjustments did not need to be considered, but the Claimant's evidence (which we accept as it was unchallenged) was that she was never asked about these sections of the form and did not review the return to work forms either.

32. Ms Eversley made the requested referral to OH (p 231), mentioning that the Claimant was being referred *"due to an ongoing back problem and also has a knee problem that would need a possible chair and footstool".* The Claimant requested to transfer to a station nearer home, preferably Peckham, but this was not thought possible because there is no Crime Prosecution Administration (CPA) presence at Peckham and Ms O'Regan considered that the Claimant needed to be based somewhere under the 'umbrella' of Crime Prosecutions. Ms Eversley permitted the Claimant to work from Walworth police station (where there was a CPA presence), on a temporary basis pending OH referral and x-ray results, as it was nearer to the Claimant's home. By email of 5 December 2019, Ms Eversley asked the Claimant to email her each morning so that she would know she was okay and to make herself known to the CPA manager, Ms Amodio, or any of the staff there if she was not (p 208).

33. The Claimant started work at Walworth police station on 6 December 2019. Ms Amodio was not in the office. Her unchallenged evidence in her witness statement (paragraph 29) was that she was allocated one of the spare desks for that day and thereafter different desks depending on which other employees were not in the office that day.

34. There is a dispute between the parties as to whether the Claimant maintained appropriate contact with Ms Eversley while at Walworth. The Claimant was supposed to email Ms Eversley each morning, and maintains that she did. At one point in the hearing, it was suggested that we may not have all the relevant emails in the bundle, but having reviewed what we have, together with the Claimant's FlexiSheets that she provided at the point of Closing Submissions (and which we admitted without objection from the Respondent), it is apparent that we do have at least all of the Claimant's 'first emails of the day'. It is also apparent that the Claimant arrived at Walworth on a number of days after 10am, which is the latest permitted start under the Respondent's flexible working policy. She did, however, always make up her hours to the required average 7hrs 12 minutes per day.

35. The Claimant according to her FlexiSheet records, which she kept herself, arrived at Walworth at 8:35 on Friday, 6 December. She emailed Ms Eversley at 09:18 to say the computers were slow and she was still trying to get onto WMS (the Witness Management System) (p 208). Ms Eversley (p 207) on 6 December 2019 asked the Claimant to provide her with a telephone number so that calls could be transferred, to which the Claimant replied providing, *"The phone number from the desk I am working **today** is 020 8649…"* (our emphasis). In oral evidence, Ms Eversley maintained that it was the Claimant's responsibility to arrange transfer of her calls, but that is not what she said at the time in this email. In oral evidence, the Claimant was adamant that it was for Ms Eversley to arrange to divert her phone, although in her witness statement (paragraph 35), she said it was for her (i.e. the Claimant) to do so. In her witness statement, the Claimant also states that she moved desk each day. As phones were on desks, so that each change of desk would likely involve a change of phone (unless there were no phone at all on the desk and she had to cross the room to get to a phone), we observe that the onus was obviously on the Claimant to sort out telephone contact as only she would know what desk she was sitting at each day and on what number.

36. On Monday, 9 December 2019 the Claimant recorded her arrival on her flexi sheet at 10:10 and emailed Ms Eversley at 10:32 (p 157) with her flexi sheet for the previous week. On Tuesday, 10 December 2019 (p 159) the Claimant recorded her arrival at 08:55 and emailed Ms Eversley at 09:35 saying that she still had 'over 200' emails to catch up with and an appointment with the GP on Monday.

37. On Wednesday, 11 December 2019 at 09:07 Ms Eversley responded apologising for the delay in replying, but asking the Claimant to return to Holborn on Tuesday *"so that we can review your circumstances and workload"*. At this point, this was on the face of the emails a response to the Claimant having said that she was struggling with her workload, but Ms Eversley's evidence was that she was having difficulty contacting the Claimant, which is likely given the uncertainty created by moving desks and phones. She also asked whether the Claimant had heard from OH. On 11 December 2019, the Claimant clocked in at 10:10 and replied to Ms Eversley at 10:35, *"Ok, No I have not heard from OH"*. The Claimant seems to have taken Ms Eversley's request in this email as a request to return to Holborn permanently, but on the face of the email that was not what it was, and she accepted as much in cross-examination.

38. The Claimant did not email first thing in the morning on Thursday, 12 December 2019, but clocked in at 10:20 and was in contact with Ms Eversley by email at 10:48 (p 987), when Ms Eversley thanked her for dealing with something quickly. On Friday, 13 December 2019 the Claimant emailed a "Good Morning" at 11:10 (p 1041), having clocked in at 10:50 – i.e. very late indeed.

39. On Monday, 16 December 2019, the Claimant attended a GP appointment. The x-ray had not revealed anything of significance, and it was thought that the Claimant required a scan. She was advised to continue with light duties

at work and given a sick note advising *"this patient is fit for light duties only at present. She cannot sit or walk for too long. Please contact me at their any clarifications."* The Claimant sent this to Ms Eversley (p 149).

40. The Claimant suggested in oral evidence that *"light duties"* in the doctor's note was a reference to working at Walworth and that is what the GP had meant, but she did not explain this to the Respondent at the time. *"Light duties"* in our judgment can only reasonably be interpreted as meaning less work or less onerous or arduous work. A recommendation for *"light duties"* says nothing about the journey to work, nor does it even raise a doubt about that which ought to have prompted further inquiry with the GP. The Claimant, however, felt that, having sent the doctor's note, it was obvious she should continue working at Walworth, or possibly she just forgot about the meeting with Ms Eversley. In any event, on the morning of 17 December 2019, the Claimant resumed work at Walworth police station, clocking in at 10:10, rather than going to meet with Ms Eversley at Holborn as she had requested.

41. Ms Eversley was expecting her at Holborn and emailed at 10:16 to ask her to see her when she arrived (222). The Claimant then went to meet with Ms Eversley at Holborn, arriving shortly after 12 noon, which Ms Eversley understandably considered to be bafflingly late.

42. The Claimant's case was that at this meeting Ms Eversley told her that she did not trust her to work at Walworth as she did not consider that she had been attending work every day or reporting properly to her. The Claimant felt that Ms Eversley was also under the impression that she had failed to report to Ms Amodio. The Claimant explained that this was because Ms Amodio had not been there when she arrived, but that she had introduced herself to other colleagues. The Claimant found this meeting stressful and describes Ms Eversley's conduct in her witness statement as *"harassment, bullying and ill-treatment"*.

43. Ms Eversley, for her part, accepts that she raised concerns with the Claimant about what she was doing in Walworth, saying that she needed to make more of an effort to contact her as there were some days when she could not get hold of her. Ms Eversley also says that the Claimant said that she did not have access to a phone at Walworth as she did not have a specific desk. Ms Eversley expressed concern about that as the Claimant's role relies heavily on her making phone calls throughout the day. Ms Eversley said that if she did not have access to a phone at Walworth, she would need to come back to Holborn in order to do her job as her job requires her to have a landline phone and the team do not have work mobiles. Ms Eversley found the Claimant's tone aggressive, and that she was raising her voice, so she told her that the conversation was at an end and would be continued another day.

44. Following the meeting, both Ms Eversley and the Claimant contacted Mr Milligan.

45. Ms Eversley's email was as follows:-

> I have a difficult member of staff, Adesola Oyeusi, who was very aggressive and rude. My self and Marian had agreed for her to work from Walworth Rd CPA for a while to help her knee pain. I asked her to email me every morning when she got in an tell me her phone number but she failed to do this on several occasions, she also fails to turn up for work on time sometimes arriving after 10.30am. I organised for OH to contact her and asked for her to meet with me today to discuss the way forward. She arrived at Holborn after 12. She refuses to come back to Holborn and I have informed her that if she is unable to attend her place of work then she should go sick. I am sorry for the long email but I am not sure of what to do now ? Any advice.

46. The Claimant's email of complaint was longer (p 220). She sent it first to the OH Helpdesk, and then to Mr Milligan. She set out her side of the conversation with Ms Eversley. She referred to her knee problems, without mentioning her back. She wrote as follows about her doctor's report: *"I sent my doctor's report (attached) to my line manager [Ms] Eversley yesterday 16/12/19 but did not receive any response from my call, message and email. I came into work today at Walworth police station and when I called [Ms] Eversley she said she had told me last week to report on Tuesday and I informed her that the doctor's report was received yesterday 16/12/2019 and once I received it, I sent it to her."* She continued, *"She told me to come to Holborn to work from there and I was clearly upset as I was putting my health at risk. I initially said no as I was upset and in pain but later on went to Holborn police station despite the rain and pain."* She then went on to set out her account of the meeting at Holborn, and to make clear that she had done her required hours at Holborn, including two late turns. She concluded by complaining about Ms Eversley's decision to recall her to Holborn, asserting that it was putting her health at risk.

47. Mr Milligan responded to the Claimant on 18 December 2019 (p 218) affirming Ms Eversley's actions, including in relation to refusing the Claimant's request to work at Peckham, and explaining that he considered it was a reasonable request for the Claimant to return to Holborn to discuss work and adjustments and to keep in contact while working at Walworth. (Mr Milligan's understanding was that this was all Ms Eversley had requested – he did not realise that she had at any point asked the Claimant to come back permanently to Holborn.) Mr Milligan in his email stated that Ms Eversley had informed him that she had failed to comply with her request to keep in touch with her and had not sat at a desktop with a landline with the CPA accommodation footprint at Walworth as he knew that one was available. He acknowledged her doctor's note and assured her that reasonable adjustments to support her pending the OH referral would be discussed.

48. The Claimant was upset that Mr Milligan had assumed that Ms Eversley was right that she had failed to keep in contact. She stated in reply (p 217) that she felt there was a personal agenda or vendetta against her. Mr Milligan responded to assure her that there was not. The Claimant replied again, questioning his 'change of tone'. Mr Milligan did not consider it necessary to reply as he believed he had resolved the issue with Ms Eversley and the Claimant would be permitted to work from Walworth.

49. Mr Milligan's firm position in oral evidence was that he was not taking sides regarding what happened at Walworth, he just thought there had been a misunderstanding. We observe that he did in his first email appear to take Ms Eversley's side, but given that this was far from being a disciplinary issue, and the intention was to resolve matters amicably by allowing the Claimant to work at Walworth, we do not consider it was reasonable for the Claimant to get so upset about this. That is especially so given that it is apparent from the evidence we have heard that there were reasonable grounds for Ms Eversley to be concerned about what the Claimant was doing at Walworth. Although the Claimant did work every day, and worked her full hours, on several mornings she arrived after the mandatory core start time of 10am, and did not email Ms Eversley until even later than that, and on her own evidence she was moving desks each day (and thus phones), but only provided Ms Eversley with the number for the phone she was sitting at on 6 December 2019. Whatever the position with diverting of calls, it is clear that the Claimant moving desks at Walworth would have made it difficult to get hold of her, and we find it was reasonable for Ms Eversley to be concerned that the Claimant was not working wholly in accordance with expectations at Walworth. We further find that the way that Ms Eversley raised these concerns with the Claimant was reasonable, and that the Claimant did react in a way that would have appeared aggressive to Ms Eversley as the Claimant was (and still was in this hearing) very upset by being challenged about this, and devoted a lot of time and energy to challenging the Respondent's witnesses about it in cross-examination, despite its very peripheral relevance to the legal issues.

50. While the above email exchange with Mr Milligan was ongoing, on the morning of 18 December 2019 the Claimant went to work at Walworth and provided her phone number for the desk she was using that day to Ms Eversley (214-215). This number was a different number to the one she had provided previously, being 020 7232 …. Ms Eversley replied (214) stating that she needed to return to Holborn to work (apparently permanently) but would do amended duties, starting after rush hour at 10.30am and leaving at 2.30pm. She added *"Also on your return to Holborn I would like to discuss your behaviour towards me in our meeting yesterday"*. Mr Milligan was unaware that Ms Eversley had asked the Claimant to return to Holborn permanently at this point, he thought she was just being asked to come back for another meeting.

51. On Mr Milligan's advice, Ms Eversley on 19 December 2019 then had a further conversation with the Claimant, which she felt resolved things pending the Claimant's OH appointment (1052-1054). At this meeting, Ms Eversley told the Claimant that she needed to act calmly and in accordance with the Respondent's Code of Conduct. She explained the arrangements that were being made for the Claimant to work from Walworth. In the meeting, Ms Eversley said the Claimant would need to work the usual 7.12 hours. There was a discussion about the Claimant's journey to work. The Claimant's position was that she had to get two (or sometimes even three) buses to get to Holborn and that it took over an hour. However, Ms Eversley, who also journeys from the same area, said it was one bus, or alternatively two (p 370).

52. By way of an aside to this meeting, it was put to the Claimant in cross-examination that a combination of tube and bus might have taken 50 minutes. The Claimant did not disagree, but stated that her preference was to travel to work by bus as it was cheaper and easier, and we observe that the bus journey was not actually much longer (if at all – depending on traffic). The journey by car or taxi would have been shorter (as the Claimant pointed out when arguing later why her special chair should have been moved from Holborn to Walworth), but no one has suggested that the Claimant could or should have travelled to and from Holborn by car or taxi. The Claimant did not give evidence as to how long it took her to travel to Walworth, but Ms O'Regan's oral evidence was that there was only 10-15 minutes difference in journey times for the Claimant as between coming into Holborn and going to Walworth. The Claimant did not dispute this, so we broadly accept Ms O'Regan's evidence in this respect, though we consider she probably underestimated the time in her efforts to demonstrate what she perceived to be the Claimant's unreasonable refusal to travel to Holborn. In the light of the evidence we have heard about the difference in travel times, we accept that the journey for the Claimant to Walworth was shorter than the journey to Holborn by between 15 and 30 minutes each way, depending on traffic.

53. The arrangements for the Claimant working at Walworth going forward were confirmed by email of 19 December 2019 at 14:13, although in slightly different terms. Ms Eversley confirmed what had been agreed pending the OH consultation, specifically that the Claimant could work from Walworth from a dedicated desk and phone line, that she needed to send an email when she started and when she left, and work the usual core hours, but shorter hours 10.30-3pm (p 223). She attached the Flexi Working policy (p 225).

54. The Claimant in her witness statement says that at this point she continued to work at Holborn police station, but found it very difficult because of the longer journey, which was difficult for her knee. However, we find that she is mistaken in her recollection and that she was working from Walworth as Ms Eversley had said she could.

55. The Claimant did not ask to have her chair moved at this point, but later felt that was a mistake.

56. OH provided a report dated 24 December 2019 (p 233). This referred to the Claimant having *"an ongoing back condition and a left knee condition … that she is dealing with constant symptoms of considerable pain in the back and the left knee … she has difficulty standing for long periods, she has worsening pain if she uses stairs … she can walk and sit for long periods but she has worsening pain"*. OH advised maximum 5 hours work per day and noted that *"Her back condition is likely to be considered a disability under the Equality Act 2010 as it has been going on for more than twelve months and it is significantly impacting on her ability to perform daily activities"*. Her knee condition was thought unlikely to amount to a disability. OH referred the

Claimant for a workstation assessment. OH noted that it was a matter for management whether the Claimant continued to work at Walworth or not.

57. The OH report was provided to Ms Eversley, the Claimant and to Ms O'Regan. Neither Ms Eversley or Ms O'Regan took any account of OH's view that the Claimant was likely to be considered disabled. Neither of them even referred to it in their witness statements and the Respondent in these proceedings formally continued to deny knowledge of disability despite the fact that the legal test is one of constructive knowledge (i.e. whether the employer knew or ought to know the matters that in law constitute a disability). We were unimpressed with the Respondent's casual disregard of the OH advice received on 24 December 2019. Given the basis for the OH advice set out in the report that the Claimant's back condition was likely to amount to a disability because she had suffered from it for more than 12 months, coupled with knowledge (that both Ms Eversley and Ms O'Regan had by this point) that the Claimant had a 'special' chair issued to her 15 years ago because of back problems, we cannot see that the Respondent even had a reasonable argument that after this point it did not have the requisite knowledge of her disability.

<u>January 2020</u>

58. On 7 January 2020, Ms Eversley decided in the light of the OH report that the Claimant could work partly from Walworth police station (three days per week) and partly from Holborn police station (two days). This was to be on a temporary basis until 27 January 2020. She would continue working shorter hours (5 hours including a 1 hour lunch break) (p 237).

59. The Claimant replied pointing out that on some days she was scheduled to work lates so that would mean longer days. Ms Eversley agreed to her starting later so that she did not work longer days (p 236). The Claimant did not complain at this point about being required to return to Holborn two days per week.

60. The workplace assessment with Posturite was scheduled for 16 January 2020 and took place (p 239). It is agreed that this report is in error in stating the Claimant was working from home for part of the week as she was not. The report describes the Claimant's primary problem as being her back, with the knee as a secondary issue. Regarding the Claimant's special chair that she had had since 2005, Posturite considered it to be 'not suitable' as the *"seat depth adjustment was broken and the cover on the seat was observed to be worn, exposing the foam layer underneath"*. The seat was assessed as being unsuitable in terms of height, backrest angle, lumbar support and armrest position (p 246). Regarding lumbar support, the report stated: *"[the] chair was observed to lack a suitable adjustable lumbar support and therefore was only noted to provide her with a basic level of lower back support. A lack of lower back support may encourage her to slouch in the chair and this may therefore place increase strain on this area. Her lower back was an area she reported to experience constant pain in."* As a matter of policy, Posturite only

recommends purchase of new equipment where it is felt that *"any existing equipment was either inadequate or contributing to the user's discomfort"*. A new chair was recommended to address all of these issues (p 249), including specifically fitting her measurements and having adjustable lower back support, as well as other equipment including a footstool, keyboard, headset, electric sit/stand desk and various adjustments to the desk set up.

61. The Claimant disagreed with this report as she considered her old special chair was fine and that it could still be adjusted in all respects. It is convenient to address the reasonableness of the Claimant's position in this respect at this point in our judgment, although it involves considering matters that happened only later. The Claimant seems to have been under the impression that Posturite was only assessing her because of her knee and/or that Posturite did not do as thorough an assessment as was done by OH and Mr Day in 2005. However, we find there is no reasonable basis for the Claimant's opinion in this respect. Posturite was clearly considering her back. The Posturite assessment is on its face thorough, much more thorough in fact than what was done in 2005. The Posturite report includes fresh measurements of both the Claimant and her office equipment and makes detailed and specific recommendations on all aspects of her workstation. There is in our judgment no reason to doubt the reasonableness of the Posturite assessment and recommendations. The Claimant does so on the basis that she found the Posturite chair when it was delivered to be uncomfortable. However, unlike in 2005 when OH visited to help her get her special chair set up correctly, the Claimant did not obtain for herself the help that she seems to have needed in getting the Posturite chair set up correctly. The chair, delivered shortly before the pandemic in March 2020, arrived without the recommended footstool and no instructions. After an initial attempt to get some instructions, and watching a video on YouTube for what may have been the wrong chair, she left it at that. Later, in September 2020, Ms Brennan obtained for her a different footstool but not the one recommended by Posturite. The Claimant simply returned to using her old special chair without ever actually trying what Posturite had recommended in the form that it had been recommended, or seeking further advice from Posturite to get it right. While we accept that the Claimant continues to find her old special chair more comfortable than other chairs, she still has constant back trouble, and that suggests that what she is sitting in is not providing the best support for her back. Her habitual sitting position in her special chair may, as Posturite suggests, be contributing to her ongoing back problems. In our judgment, the Posturite assessment was a reasonable one, and the Claimant's view that her special chair is not contributing to her back problem and that the chair Posturite recommended was worse is unreasonable. We cannot, of course, know for sure that the Posturite chair would have alleviated her problems, but neither can the Claimant reasonably conclude that it would not when she has not ever used it with the right foot stool, or obtained further advice from Posturite on setting up and using the chair, or used it for the prolonged period that would be necessary properly to test whether adopting a different (non-slouched) sitting posture would assist her back.

62. However, it does not follow from the above that sitting in her special chair was worse than sitting in an 'ordinary' chair. In that respect, we take into account the expert report of Mr Bhalla (Consultant Orthopaedic Surgeon) on the Claimant, prepared for these proceedings. Having considered the Posturite report, he concluded regarding the Claimant's special chair that: *"whatever function the chair was achieving, whether it be physical support or psychological support to claimant, was in fact helping her overall … One cannot say with certainty what symptoms would be like without having had the support of the ergonomic chair for 15 years, but on balance of probabilities I would consider the claimant to have had worsening of her symptoms had the chair not been provided"*. He also concluded (p 879) that when she did not have a special chair she was at a disadvantage in comparison to people without a back condition.

63. On 17 January 2020 the Claimant's knee gave way when she missed a step on a stair (p 689) as she was walking downstairs on her way to work and she fell. She attended hospital and was diagnosed with an ankle sprain. She was signed off as not fit for work until 30 January 2020 (p 253). She notified Ms Eversley by text (p 260).

64. The Claimant argues that recalling her from what she regarded as light duties at Walworth police station was contrary to her doctor's advice and contributed to further strain to her left knee which caused the fall on 17 January 2020. However, there is no medical evidence to support that assertion at all. No medical practitioner advised at any point that she could not travel to Holborn, even (in the case of OH) when specifically asked to advise on this point. As we have already found, "light duties" can only reasonably be interpreted as meaning less work or less onerous or arduous work, not a change of location. The Claimant had in any event only gone to Holborn a handful of times since hurting her knee (once on 17 December, once on 19 December and then two days per week since 7 January 2020, i.e. perhaps four more trips). We do not therefore accept that the Claimant's fall on her way to work on 17 January 2020 was caused by the Respondent's decision to recall her to Holborn.

65. On 30 January 2020 Ms Eversley received a notification from the company that provides Human Resources support to the Respondent (who we will refer to henceforth simply as 'HR') that the Claimant had had 30 days sickness absence in the last 12 months and that her absence accordingly needed to be reviewed (p 254). The Respondent's absence policy is at p 956. Unsatisfactory attendance is defined as either three absences in a 12-month period or 10 days in a rolling 12-month period. Informal Management Action (IMA) is triggered at the fourth absence or 15 days in a rolling 12 month period. Following the issuing of an IMA letter, consideration must be given to moving to UPP/unsatisfactory attendance process at *"each subsequent absence, or as appropriate to the circumstances of the case"*. The Respondent also has a policy about how disability is to be taken into account in relation to unsatisfactory attendance (p 183). Disability-related absence is supposed to be recorded on the absence record (paragraph 4.2), with medical evidence from a GP being provided to substantiate the link where it is not clear. There should also be a reasonable adjustment to triggers for

absence related to disability, the example of 20-25% increase being given at paragraph 6.3.1 or *"up to 20-25%"* at paragraph 3.5.1. We observe that the Respondent's witnesses only quoted the more restrictive wording at paragraph 3.5.1, but read as a whole (including paragraph 6.3.1) the policy gave more leeway for adjustments to absence triggers. Injuries sustained in the course of duty are excluded from counting (paragraph 6.2.2). The stages of the process are: Informal Management Action (IMA), then first written warning (UPP/unsatisfactory attendance), final written warning and consideration of dismissal.

66. Days absence were recorded by the Respondent in this case as calendar days rather than working days, so that (for eg) absence from 1-26 June 2020 counted as 26 days rather than 20 working days. We have not received any evidence, either way, as to whether this was correct or not as a matter of the Respondent's policy. The policy itself is silent on the subject. We observe that it does not make sense to record as days of sickness absence days when the employee was not required to work, but we accept for the purposes of these proceedings that the Respondent as a matter of policy does count all days sick as sickness absence, including the employee's non-working days.

67. The Claimant returned to work on 30 January 2020 and a return to work meeting was held by Ms Eversley on 31 January 2020 (p 262). Ms Eversley asked the Claimant if she would like to speak to OH and she said she would. Ms Eversley noted that the Claimant was well enough to cover her late shift that day and that she told her, *"She has also previously had work adjustments and DSE assessment"*. Ms Eversley asked for the Posturite report. The Claimant asked if she could work reduced hours and to work from Walworth again pending referral to OH. Ms Eversley informed the Claimant that she had reached an unsatisfactory attendance trigger (30 days in one year) and that this would be managed. Despite the OH report of 24 December 2019, Ms Eversley again ticked (without asking the Claimant) that the Claimant did not consider herself to have a disability.

68. On 31 January 2020, Ms Eversley issued the Claimant with an informal management action (IMA) letter informing her that she would be placed on a six month informal management period during which her sickness would be monitored on a monthly basis (p 265).

69. The Claimant sought to contact OH for advice about the IMA as she considered one period of sickness was attributable to an injury at work (p 266), but she accidentally sent the email to herself so it cannot have been received by OH.

70. The Posturite report was received by Ms Eversley (who shared it with Ms O'Regan) on 31 January 2020. The electric sit/stand desk, chair and footrest were all ordered. Ms Eversley could not remember what happened about the headset or keyboard.

71. The same day, the Claimant was referred by Ms Eversley to OH regarding her knee pain and sprained ankle (pp 271-273). The Claimant had noticed

that her back was also giving her trouble as a result of walking with crutches, twisted ankles and swollen knee. She raised this with her physiotherapist in February 2020, but there was not time to address it at that appointment.

72. On 3 February 2020 Ms Eversley emailed the Claimant to confirm that, further to their conversation at the Return to Work interview, the Claimant could work reduced hours 10am to 3pm that week at Holborn (p 267). The Claimant responded, *"Thank you Amanda".*

73. On 13 February 2020, following a telephone consultation, OH issued a further report (pp 274-276). The Claimant was recorded by OH as not wanting to see a copy of this report so it was not sent to her. This report focused solely on the knee and ankle problems and did not mention the back at all. Reduced hours of 4 hours per day for six weeks were recommended to allow for recovery. It was stated that the Claimant was unlikely to be disabled as the health condition had not lasted longer than 12 months.

74. Ms Eversley agreed to implement this recommendation and emailed on 19 February 2020 to confirm that the reduced hours would apply until 27 March (p 277).

75. In an email exchange of 25 February 2020, the Claimant raised that she had 200 emails she needed to clear, and that she might have to do a full day, but Ms Eversley reminded her that she should not do that, but that she would not allocate her any new cases the next day to enable her to catch up (p 1042).

76. The new chair was delivered at some point at the end of February/beginning of March 2020. The Claimant found it to be unsuitable. Her feet did not reach the floor as the recommended footstool had not come with it. She felt that it did not provide her with back support. It had not come with instructions. A YouTube video she was referred to after calling Posturite was for a different chair. The Claimant did not raise any of these concerns at the time.

<u>March 2020 lockdown</u>

77. In March 2020, the country went into lockdown for the Covid-19 pandemic. The claimant and her colleagues were regarded as key workers and were expected to come into work, unless vulnerable. The Claimant continued to attend work. She was not deemed to be clinically vulnerable.

78. An email from Mr Milligan of 26 March 2020 (p 281), which was to be sent out to all his teams, noted that the Respondent did not have laptops available at this point and so could not offer home working, but did offer the option of opting to work from a station closer to their home address so as to reduce the risk to them of travel on public transport during the pandemic. That was still the position as at 30 March 2020 (p 283). Prior to the pandemic, the Respondent had not permitted homeworking, only working from alternative offices. A blended working policy was introduced much later in November 2020 allowing people to work from home up to three days per week.

79. On being given the option, the Claimant at this point chose to work from Walworth police station. A few of her colleagues (Ms O'Regan said three or four) also chose to work from other stations.

80. The Claimant was already working from Walworth by 24 March 2020, when she emailed (p 1045) to inform Ms Eversley that she was sitting at a desk without a phone due to social distancing but could always make a call from another desk. Ms Eversley responded that she would need a phone to which calls could be transferred. The Claimant indicated that she would sort that out the next day. Her reduced hours of four hours per day ceased on 27 March, so after that she returned to the normal working day of 7 hours 12 minutes per day.

April 2020

81. In an email exchange on 2 April 2020 the Claimant let Ms Eversley know she was working at Walworth (p 286) and that she would be okay, *"if I had my chair (red one)"*. Ms Eversley understood this to be a reference to the old chair she had had prior to the Posturite assessment. She responded, *"Oh dear … I have just got in so am trying to catch up. Just wishing I had a laptop so I can work from home"*. The Claimant replied *"ask Tracie"* because she understood (incorrectly, we find – see below) that Ms Mundell had a laptop at this point. After this exchange, Ms Eversley looked up policy about temporary movement of equipment for non-shielding staff, but found there was no guidance in place about it. Ms Eversley was then away from work between 6 April and 27 April 2020.

82. In oral evidence, Ms Eversley explained that her understanding was that for those vulnerable and shielding, furniture could be moved to people's homes from as early as 2 April, but we find this was a case of her misremembering the timeline in oral evidence and does not reflect the Respondent's position as it was at the time, and which is clear from the documentary evidence.

83. At the end of March or beginning of April 2020 the Claimant and Ms O'Regan had a conversation about moving the Claimant's special chair to Walworth. Their recollections of this conversation are radically different, in that Ms O'Regan says the conversation occurred when she found the Claimant pushing her special chair out of the office with the expressed intention of taking it on a bus to Walworth, while the Claimant denies that ever happened and says that it was a conversation begun when she asked Ms O'Regan about the possibility of moving the chair, and just suggested that she could move it on the bus. There is nothing to assist us in resolving this factual dispute because their subsequent emails on 21 April 2020 (below) are equally consistent with both accounts. Having heard both of them, we are satisfied that both of them now honestly believe that their version of events is correct. There is not therefore a credibility (i.e. honesty) issue here. Nor have we found one witness to be so obviously more reliable on other matters that we should accept their evidence on this point on that basis alone. In

those circumstances, given that it is not necessary to the legal issues we have to decide who is right about what happened on this occasion, we make no finding as to whether the Claimant did try physically to push her chair out of the office. However, we do find as facts that the following core elements of the conversation occurred, which are common to both parties accounts: the Claimant expressed a wish to move her special chair to Walworth; Ms O'Regan said she could not and if she needed the chair she should return to work at Holborn; the Claimant asked whether she could take it herself on a bus; Ms O'Regan refused, mentioning the need for risk assessment, and thinking that it was obviously unsafe, particularly given the Claimant's back difficulties and recent knee problem; Ms O'Regan did not then take any steps to investigate whether the Claimant's chair could be moved by any other means.

84. Ms O'Regan and Mr Milligan gave evidence that their understanding at this time was that the Respondent's furniture-moving contractors were not working because of lockdown, they not being key workers, and Ms O'Regan believed that she was not permitted to arrange furniture to be moved in any way other than via the Respondent's contractors. She was also not aware of any medical evidence that the Claimant could not travel or needed to work closer to home for medical reasons and so was, we find, convinced that it was reasonable for the Claimant to return to work at Holborn if she was not comfortable at Walworth. We find that, although Ms O'Regan now says she understood that furniture contractors were not working at this point, her email of 21 April (p 471) indicates that she was not aware (one way or another) whether furniture contractors were working, and the reason why she concluded (p 470) that moving the Claimant's chair was 'not an option' as at 21 April was not because furniture contractors were not working but because the Smarter Working policy did not allow for the movement of furniture. Mr Milligan (paragraphs 46-47 of his witness statement) also agreed that as a matter of policy furniture could not be moved on a temporary basis at this time and it would not be 'reasonable' to do so. During the hearing, we raised with the Respondent's counsel that the Respondent had not produced evidence that furniture contractors were not working during this period, but no evidence was produced in relation to this. We know on the Respondent's own evidence that furniture contractors were working from 18 May, and there is no evidence that this was because government policy (or anything else) in relation to furniture contractors changed at that point. We therefore find that on the balance of probabilities furniture contractors were working during this period at the start of lockdown and that the Claimant's chair could have been transported in this way if the Respondent had pursued this option. In this respect, we note that the burden was on the Respondent to produce evidence on this point and, not having done so, despite being given the opportunity, we are satisfied that the foregoing conclusion is the proper one on the facts of this case. However, we also took the precaution during deliberations of checking *The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020*, which came into force on 26 March 2020 at 1pm, and sought the parties' submissions regarding those regulations. We note that furniture delivery was not a business that was required by reg 4 of those regulations to cease operating, that delivery services were generally

excluded from restrictions under reg 5(1) and that travel for the purposes of work that could not be done from home was permitted under reg 6(2)(f), so we conclude that those regulations did not prevent furniture contractors from operating.

85. No consideration was given by Mr Milligan or Ms O'Regan or (at the time) the Claimant to putting the chair in a black cab or other taxi for transportation to Walworth. When we raised with the Respondent that we had not received evidence as to whether taxis were operating at the start of the pandemic, the Respondent produced Notice 05/20, published by Transport for London on 30 March 2020. This states that, *"Taxis and private hire vehicles can continue to work. But the advice is absolutely clear – people should stay at home if possible."* It suggested that taxi and private hire drivers were not generally Critical Workers, but could be regarded as Critical Workers if undertaking home-to-school transport or the transport of 'extremely vulnerable people'. However, this Notice does not in our judgment show that taxis were not operating, or that they would only carry those undertaking home to school transport or extremely vulnerable people as the Respondent suggests. Nor has the Respondent produced evidence that only those classified as Critical Workers or Key Workers were permitted to work at this point. We find therefore that taxis were still operating and that a taxi could on the balance of probabilities have been obtained to transport a chair for a disabled person if one had been sought, especially as a chair can travel in a taxi without a person if arrangements are made for it to be met at the other end. However, we also heard evidence from Ms O'Regan, which we accept, that the Respondent's systems mean that only very senior individuals can use taxis. There is no ready process for booking and paying for a taxi. In closing submissions, the Claimant also suggested that her chair could have been moved in the back of a police van as it had been once before as we recount above, but this was not a suggestion that she put to any of the witnesses in cross-examination. Mr Milligan's evidence in his witness statement (paragraph 47), which we accept, was that although this sort of thing had been possible in the past, it was not any more. A process must be followed, with no moves being made in-house, but always outsourced to a contractor. In oral evidence, he also made clear that he considered what happened with moving laptops on a voluntary and exceptional basis during the pandemic was not appropriate for moving furniture.

86. We can see from an email exchange between Ms O'Regan and another individual in late May 2020 (p 1039) that she treated the Claimant regarding her special chair in the same way as another individual who chose to work at Chingford but did not there have access to a special screen she had at Holborn for an eye condition. Indeed, we observe that she treated the Claimant more favourably than this other individual in that by late May 2020 Ms O'Regan was actually trying to get the Claimant's chair moved, but she did not offer to do that for the other individual.

87. We can also see from emails that on around 12 May 2020 Ms O'Regan and Ms Eversley also informed a member of staff (the Claimant's named comparator, Ms Bailey) who was working from home as a vulnerable

individual (and who had been given one of the first laptops accordingly) that they could not transport a chair that had apparently been provided following a Posturite assessment (p 948) as she was struggling to work without it at home as a result of backpain. They said they could not do that even though not having the chair meant that Ms Bailey (who was one of those who had been provided with a laptop) was apparently not able to work effectively at all (pp 327-329). The Claimant's evidence was that Ms Bailey had not been provided with the chair following a Posturite assessment but was sitting on Ms Philogene's chair as Ms Philogene was on maternity leave and it was this chair that was ultimately moved to her home. The Claimant thought Ms Philogene's witness statement dealt with this, but it does not, and we do not accept this evidence from the Claimant because her evidence about Ms Mundell's circumstances turned out to be wrong and we do not consider her to be a reliable narrator in relation to other people's circumstances. In any event, it is immaterial whether Ms Bailey had originally been provided with the chair as a result of a Posturite assessment, it is clear from the emails that she had a long-term back problem that was being exacerbated by not having an appropriate chair at home. Her circumstances were therefore on the face of it the same as the Claimant's so far as her back and need for a chair were concerned.

88. As we can see from an email from Mr Milligan of 2 April 2020, from this point the Respondent set up a rota to reduce everyone's working hours so as to reduce travel and improve social distancing (p 291). Under these arrangements, people were to work alternate days (i.e. 50% of their normal hours). This was because criminal proceedings were being adjourned due to the pandemic and so workload was reduced. From this point on, therefore, the Claimant was working three days one week, two days the next, and spending most of each week at home in accordance with Government advice. When she worked, she went into Walworth. Despite not having her special chair, she did not want to return to Holborn because she wanted to minimise her time on public transport because of her fear of Covid-19 and the risk to her and her family. She perceived the buses as being full to socially-distanced capacity during rush hour, that some passengers were not wearing face masks and during one of her bus journeys to Walworth she observed a passenger spit at other passengers on the bus, but nobody did anything.

89. As noted above, at the start of lockdown, the Respondent did not have laptops available and could not offer homeworking. A batch of 14 laptops were approved for issue on 1 April 2020 to a select group, but not for others (p 284). Witness Care Officers on Special Leave due to a vulnerable condition were allocated six of the laptops as priority (p 289). At that time there were 800 officers in MO10, of whom a proportion were shielding. The 14 laptops were all that were received for all those officers. Mr Milligan's command (Crime Prosecutions) included around 370 people (349 FTE), of whom about 58 were shielding. Laptops could not be allocated until a name for the laptop had been identified because of the need to have them securely configured for the individual. Although Mr Milligan was notified in advance when laptops became available, laptops did not arrive with Mr Milligan and sit around waiting to be allocated. He had to give names and employee numbers for

each laptop, which then arrived specially configured and ready for use by specific people. Priorities were: those who were vulnerable, then those where social distancing was an issue, then those who wanted them and were willing to work to work from home full-time using their own mobiles. Managers made exceptional arrangements to deliver laptops to employees at home. Some (including Mr Milligan) transported laptops in their personal cars and delivered them to staff, at their own expense. Mr Milligan said that he considered this reasonable, but it would not have been reasonable to start moving staff chairs in this way because they were bulkier objects and not appropriate for putting in personal cars. Ms O'Regan arranged for staff in the office to take laptops in bags to staff at home, where they were handed over in a non-contact way, for example, by being left in recycling bins and then calling the staff member to the door by phone.

90. A further 20 laptops were issued on 7 April 2020 (p 294), with approximately 100 more per week due to be delivered for the whole of the Respondent's force (p 294). Two of the 20 went to Witness Care Officers on Special Leave (p 296). A further 20 were issued on 17 April 2020, of which five went to Mr Milligan's command (p 325). As laptops were in short supply, the Respondent made it a requirement of homeworking with a laptop that staff confirmed they were willing to use their own mobiles for calls and to work 100% of the time rather than on a 50% roster as was the case for those coming into the office. The Claimant was (we accept) unaware of this option for home-working, but was aware that those working from home (who at this point were only those shielding) were working 100% full-time. The Claimant did not during this period even enquire about home-working.

91. The Claimant worked from Walworth police station during April 2020, making do with the chairs that were there. She found every day a struggle as her back would go stiff and she would find it difficult to move. Taking more frequent breaks did not help. By 18 – 19 April 2020, the Claimant found she could hardly move and had to lie on her back the whole of the weekend. On her return to work on 21 April 2020, the Claimant emailed Ms O'Regan requesting again for one of the chairs to be moved to Walworth (p 471), explaining that she had been sitting on an inappropriate chair for a month and was stressed by Covid-19 about spending time on public transport. The Claimant characterises Ms O'Regan's reply to this request as being a 'refusal' but what she actually wrote was:

> I am sorry to hear about the below. Can I confirm that you are only working every second day as per the rosta please. My concern is that you mention working on close to a month. Might I also suggest that you return to Holborn where the accommodation/furniture is more suitable. This has been the case for other staff where remote working has not met their needs.
>
> I have made a request on PSOP for the furniture to be moved but I know from experience this is not a fast process, and cannot confirm until they reply if the service is available at present. Based on the guidance in your posturite assessment are you using an adjustable chair locally and has it been adjusted properly. If not let me know and I will speak to the manager who covers that area to try and identify an interim solution
>
> I still would not support you moving a chair on the bus.

> Do you have the details of your OH Adviser please as I would like to contact them and try and obtain some advice to help alleviate this situation for you.

92. The Claimant did not consider returning to Holborn to be an option because of the risk of Covid-19 on public transport. She said so in her email reply, describing her fears, and provided the name of the OH adviser, and confirmed she had been working 7.12 hours on alternate days. Regarding Ms O'Regan's query about whether another chair was available at Walworth, she wrote: *"Due to the disability, I do not need an adjustable chair, I need a special chair which will alleviate some discomfort on my back which an adjustable chair cannot"* (p 470). We observe that it is apparent from this sentence that the Claimant had not understood (or possibly even read) the Posturite report. The sentence makes no sense as her own special chair was an adjustable chair and Posturite had recommended another adjustable chair. We find that the sentence encapsulates the Claimant's blinkered approach to her special chair and unwillingness even to consider what was, as we have found, apparently reasonable advice from Posturite.

93. Ms O'Regan then looked up the Smarter Working policy on the intranet and found that it did not allow for movement of equipment when staff opted to work from alternative locations. This was because such arrangements were intended to be temporary and the cost of moving furniture temporarily was regarded as unreasonable expenditure. That version of the Smarter Working policy is no longer available. The parties at the end of the hearing each provided us with additional documents which refer to Smarter Working, but both the documents provided by the Respondent post-date the Smarter Working policy to which Ms O'Regan refers at paragraph 45 of her witness statement, and the Metropolitan Police Service Travel Plans 2019-2021 that the Claimant provided do not deal with it.

94. Ms O'Regan in her email at the time wrote as follows:

> Since replying to you earlier I have established that Smarter Working does not allow for the movement of furniture therefore it is not an option to move your chair at this time.
>
> When you were last here you said that the chair you were using was broken and could not be adjusted hence the basis for my question, can you confirm if this is still the case please.
>
> We are essential workers and the rosta was designed to minimise the risk to staff, as stated in my earlier response if Walworth cannot accommodate your health needs then I would recommend that you return to Holborn. WCOs with similar health needs have already done so.
>
> I have copied your OH advisor into this response as she may be able to assist or advise.

95. Ms O'Regan's oral evidence was that her recollection was that it was Property Shared Office Partnership (PSOP) who had told her that furniture could not be moved to Walworth under Smarter Working. In answer to questions from the Claimant in cross-examination, Ms O'Regan at one point said that she

had chased PSOP after this, but she appeared at that point to have forgotten that in her last email of 21 April she had written conclusively that moving the chair was 'not an option' at the moment. We find her recollection of what happened regarding contacting PSOP is not reliable. We find she did not pursue the PSOP request or seek alternative options, believing that policy dictated the chair could not be moved and that it was reasonable for the Claimant to return to Holborn. The Claimant, however, continued working at Walworth because of her fear of travelling during the pandemic (p 1043). The Claimant did not ask at this point to work at home as an alternative, and the Respondent did not think of this as an option either.

May 2020

96. On 15 May 2020 a large batch of about 50 further laptops arrived (p 331) and were approved for issue to people other than the Claimant. Mr Milligan did not know whether any of these went to people in his command, but thought that some of them would have done.

97. On 18 May 2020, Mr Milligan informed managers that arrangements were now in place for ergonomic chairs in the workplace provided following OH assessment to be transported to people's home addresses (p 334). On 22 May 2020, Miss O'Regan passed that message onto managers in the Witness Care Unit as follows (p 339):

> "Please see for any staff that have special issue chairs who are WFH Furniture - existing chairs in the workplace. If you have a chair in the workplace that was provided following an OH referral and ergonomic assessment, you can arrange for this chair to be transported to your home address by raising a work order on ….. The chair will remain the property of the MPS and is for work use only. You would need to arrange for the chair to be returned to the workplace when needed"

98. Ms Eversley considered that this process could be used to move the Claimant's chair too and emailed a number of people (not including the Claimant) to that effect, writing *"now that the goalposts have moved we should use this process to move [the Claimant's] chair as well"* (p 335). Her evidence in her witness statement was that she then called to enquire about moving the Claimant's chair and Ms Bailey's. Arrangements were duly made to move Ms Bailey's chair to her home address on 22 May (p 948), and the chair reached her on 9 June. The Claimant contends this should not have happened as the policy was only for chairs provided following OH referral and ergonomic assessment to be used and she believes that Ms Bailey's chair had not been provided following such a process, but we have not accepted her evidence in that regard and in any event it is clear from the emails we do have that as a matter of substance Ms Bailey's circumstances as regards her back and need for a suitable chair were not materially different to the Claimant. The difference was that Ms Bailey was vulnerable and shielding and working at home having been provided with a laptop, whereas the Claimant was none of those things.

99. Ms Eversley gave evidence that she was informed at this point that to move the Claimant's chair would cost £250 with a 3 or 4 week wait, although there is no paper trail of a quote having been obtained at this stage. Ms Eversley decided that by the time that was actioned the Claimant would have had to return to Holborn anyway as her understanding at this point was (we accept) that there was doubt about whether by the time a chair arrived there would still be space for the Claimant to work at Walworth as the manager at Walworth had told Ms Eversley that she would require the Claimant's space back by the end of May because of social distancing restrictions, which meant that desks in all the offices had to be spaced out so there was less room for staff.

30 May 2020 – back pain

100. On 30 May 2020 the Claimant experienced severe pain in her back while at home. Regarding this incident, EJ Goodman at the Public Preliminary Hearing in October 2022 apparently found that this pain was not related to the Claimant's disability as follows at [37] (p 114):

> "…the episode on 31 May 2020 was a sprain, not part of the much lower level of symptoms that have been ongoing for some years. It could not have been predicted that this was a long-term impairment. It does not seem to have been a flareup of her existing symptoms, but a separate event."

101. However, the Respondent accepts that this finding was not necessary to the determination that EJ Goodman made in that judgment as to whether the Claimant was disabled and that it is not binding on us. On the question of whether the back injury on 31 May 2020 was related to her disability, EJ Goodman strayed into an issue which was not an issue listed for that hearing, but is an issue listed for us to determine at this hearing. Neither party regarded EJ Goodman as having in that paragraph disposed of the Claimant's discrimination arising from disability claim in relation to the warning that was issued following the period of absence following the back injury on 30 May 2020. Indeed, the Respondent in closing submissions accepted that this period of absence related to her disability. In those circumstances, we are satisfied that EJ Goodman's finding at [37] of her judgment is not binding on us and we must consider all the evidence in relation to this issue for ourselves.

102. The notes from the specialist who saw the Claimant at the time at King's Hospital state: *"Ligament/muscle sprain of lower back, likely secondary to long hours seated in non ergonomic chair"* (p 822). Mr Bhalla in his report regarded this as an *"acute exacerbation"* or *"acute worsening of lower back pain"*. In the light of these medical opinions, both of which indicate that they consider the flare-up on 30 May was linked to the previous back condition rather than something separate from it, we find (disagreeing with EJ Goodman) that this flare-up was a more acute manifestation of the Claimant's existing disability, rather than anything new.

103. However, we do not accept the Claimant's case that the flare-up on 30 May was wholly caused by not having her special chair at Walworth. We accept, in the light of the King's doctor's diagnosis and Mr Bhalla's report (in which he expresses the opinion that the Claimant was disadvantaged by not having her special chair) that the lack of special chair was on the balance of probabilities a (probably minor) contributory factor, but no more. The opinions of both the King's doctor and Mr Bhalla were based on what the Claimant told the doctor at King's about being required to work at Walworth for three months without her normal ergonomic chair (p 821). The doctor did not note any of the other significant changes in the Claimant's life at this point, which included that she was only working part-time, had generally reduced physical activity as a result of lockdown and had significantly increased time that she was spending at home (to 4 or 5 days every week), sitting on whatever chairs she has at home. It does not appear to have occurred to the Claimant that any of these factors could have been a cause of the pain she suffered on 31 May 2020 (or, indeed, that the deterioration in her back at this point could have been a continuation of the increased back pain she experienced as a result of walking on crutches with her knee earlier in the year), but in our judgment any of those factors may have been contributory causes. As yet, no medical expert has been asked to consider the extent to which any of these other factors contributed to her injury on 31 May.

104. At the time, the Claimant was advised by the doctor at King's that it would take about six months to recover from this flare-up. The Claimant informed Ms Eversley of this. At this time her legs due to the back pain had swollen and were painful when walking sitting or standing for a long time.

105. On 1 June 2020, the Claimant obtained a fit note from her GP which stated she had *"acute back pain"* and asked *"please supply her back support chair which she had before Covid"* (p 150). This signed her off as not fit until 12 June 2020. She texted Ms Eversley to inform her. In oral evidence, the Claimant was adamant that she had not been saying anything about a chair at this point because she was in so much pain and could not even move and could not contemplate working, however she must have mentioned it as she spoke to the doctor at the hospital about it and her GP.

106. Ms Eversley emailed Ms O'Regan to let her know that the Claimant, *"Has gone sick today and she has informed me that it is because she needs access to her chair and as she cannot travel far she is implying that she cannot come back to Holborn"* (p 340). Ms O'Regan recommended another referral to OH as she did not recall there being any reason why the Claimant could not travel to Holborn where the chair was located.

107. On 2 June 2020 a further 25 laptops were received, Mr Milligan emailed to stated that six would be going to WCOs currently on the vulnerable list, leaving 19 laptops to go WCOs who were not vulnerable, which Mr Milligan divided up between areas to try to ensure equitable distribution among offices (p 343).

108. On 4 June 2020 a batch of laptops was issued to Met Prosecution, not to the Claimant's unit (p 344).

109. A doctor's certificate dated 8 June 2020 signed the Claimant off as not fit for work until 26 June 2020 because of sciatica and ankle pain (p 147).

110. Ms Eversley referred the Claimant to OH and following a telephone consultation OH reported on 8 June 2020 (pp 350-352). OH advised that the Claimant was principally off work due to the severity of her back symptoms, with no confirmed return to work date, but likely 2-4 weeks' time. On return, it was recommended that this should be recuperative duties working shorter days for at least 4 weeks 4 hours per day. This report also stated that the Claimant was unlikely to be disabled under the EA 2010 because her condition had not lasted longer than 12 months. (We observe in this respect that OH had evidently failed to look at their own records, in particular the 24 December 2019 report.) OH noted that the Claimant should be considered for home/smarter working, but they could not advise about work location and whether the Claimant could travel to Holborn or not, noting that was a management decision, but that as she requires an ergonomic chair, it would be reasonable to move one of her two ergonomic chairs to Walworth, *"her current work location"*.

111. Ms Eversley shared the report with Ms O'Regan on 9 June, who responded (p 353) that she was not aware there were two chairs, and if that was the case to find out what the lead time for moving the older one to Walworth was and, if it was a reasonable time, to book it. She added, *"Please ensure that [the Claimant] is aware that once the rosta is increased it is unlikely that Cathy will be able to accommodate any extra staff at Walworth due to Social Distancing restrictions so a return to Holborn will be necessary"*.

112. On 9 June 2020 Ms Eversley was informed that Ms Bailey's chair had been delivered to her home address (950-951). She also called the Claimant and told her, as her OH report had requested, she had arranged for her old chair to be moved to Walworth, but also that it may be that Walworth would not be able to accommodate her by that point.

113. On 11 June 2020 Mr Milligan notified Band D managers that the courts were starting to increase listings again to the roster was going to be increased to 70% (p 355). At around the same time, social distancing became a legal requirement which meant that every other desk had to be removed, with a resulting loss of 40-50% of available seating.

114. A large batch of laptops arrived on 11 June (p 358). One of them was approved for issue to Ms Mundell (p 1058). The Claimant believed from a conversation with Ms Mundell that she had got one earlier as a result of being given a laptop that had been offered to someone else, and Ms Mundell had sent the Claimant an email to that effect in September 2021, but in oral evidence Ms Mundell said that she had realised she had got the date wrong in her email and also that the Claimant had misunderstood what she said about the laptop that had been offered to someone else. We accept Ms

Mundell's evidence as her evidence about her circumstances and knowledge is more likely to be correct than the Claimant's second-hand version, and it is also consistent with the documentary evidence. Ms Mundell did not get her laptop until after 11 June, having volunteered to work full time from home and signed an agreement to that effect. By this point, all individuals on the vulnerable list had been allocated a laptop and so laptops were now allocated to non-vulnerable individuals including Ms Mundell. We observe that there would have been no point allocating a laptop to the Claimant at this point as not only had she not offered to work full time from home, but she was off sick with no clear return to work date.

115. Ms O'Regan gave oral evidence that the Claimant's chair had been sitting in the office marked ready to go to Walworth, and this is consistent with an email of 12 June 2020 (p 361) where someone raises with Ms Eversley whether the chair marked to be moved to Walworth (said to be a purple chair and thus possibly not the Claimant's) was correct as there *"is a newer chair by her desk"*.

116. On 16 June 2020 Ms Eversley learned that Walworth may be able to accommodate the Claimant after all, but not long term (1046). Ms Eversley refers in this email to laptops being given out on 15 June. We find these were laptops from the batch authorised on 11 June.

117. On 17 June 2020 a quote was received for moving the Claimant's chair to Walworth (in response to the request that Ms Eversley had made the previous week). The cost was £212.28 (pp 952-955). Ms Eversley says she also called to find out what the lead time would be, but the company was unable to say as they were so busy. Although the quote had been obtained, Ms O'Regan did not at this point provide the necessary cost code to authorise the collection and delivery of the chair. She and Ms Eversley were still hesitating because the Claimant was off sick and they thought that by the time she was back there was unlikely to be space at Walworth.

118. As at 18 June 2020, Mr Milligan was seeking laptops for 79 Witness Care Officers (p 1012) so that the WCO role could be designated as a mobile role. There were already a lot of people on the list at that stage, including the Claimant (p 1013). 18 staff at Holborn were, like the Claimant, on the list for a laptop and still did not have a laptop. The Claimant's laptop was ordered at this time along with others, but no more laptops arrived until November 2020.

119. As of 17 June, Ms Eversley was still uncertain about moving the chair because of the cost and the risk that the Claimant could not be accommodated at Walworth (p 362). By 19 June 2020, Ms O'Regan agreed as she also thought that the Claimant could perhaps now get a laptop and work with her 'real chair' from home and that any spend on a move to Walworth was *"pointless"* now. Ms Eversley's oral evidence was that subsequent to this email further conversation with Walworth established that there was not room for the Claimant.

120. On 24 June 2020, Ms Eversley called the Claimant for a welfare chat (p 370). She emailed Ms O'Regan afterwards with a record of the discussion. Ms Eversley understood the Claimant to have said initially that she was returning to work next week, but the Claimant disputes that, although she accepted that her sick certificate was due to expire on 26 June 2020, so it is not implausible that she said she would be returning to work the following week. Ms Eversley told her that she would not be able work at Walworth and would have to be at Holborn 3 days per week to start with. The Claimant said that she could not put her health at risk by travelling to Holborn and could not return. Ms Eversley recalls the Claimant asking if she could have a laptop, but the Claimant denies she asked about a laptop before 29 June. Ms Eversley's evidence (consistent with her subsequent email) was that she told the Claimant that laptops do not come in every week and they did not have any. Ms Eversley passed the Claimant's request on to Ms O'Regan (p 366) who replied that the Claimant was already on the list for a laptop (p 1013), but that she still needed to explain why her health was at risk from travelling to Holborn because even with a laptop she would still need to come into Holborn some days each week and to cover late turns. The Claimant's oral evidence was that at this point there was no way she could return to work, even at home, so she was not thinking about it. She was clear she was not thinking of working at this point at either Walworth or Holborn. Regarding this conversation, we find that Ms Eversley's evidence represents her genuine understanding and recollection of the conversation, and note it is consistent with the documentary evidence. However, we do accept (in particular in the light of the Claimant's subsequent sick certificate and email of 29 June and her adamant oral evidence) that the Claimant was not well enough to travel at this point and that there was on the balance of probabilities a misunderstanding between her and Ms Eversley as to whether the Claimant would have been well enough to travel to Walworth. However, that misunderstanding is immaterial as the conversation proceeded on the basis that what Ms Eversley said about Walworth not being an option due to social distancing was correct and there is no complaint by the Claimant that she was not permitted to work at Walworth at this point.

121. On 26 June 2020 (p 151) the Claimant emailed in a sick certificate, signing her off to 31 August 2020 with *"sciatica, back pain and ankle pain"*. The certificate this time stated that the Claimant may be fit for work, but needed to *"avoid bus journeys at the moment, she is awaiting specialist assessment, we recommend that she works from home"*. The Claimant in oral evidence said that she had told her GP that she was being asked to come back to work, but she did not consider she was fit for work. She obtained the sick certificate in this form in order to stop her absence levels increasing.

122. On 29 June 2020 Ms Eversley spoke to the Claimant on the phone (p 370). The Claimant was upset that Ms Eversley had not responded to her 26 June email. Ms Eversley had not seen it. Ms Eversley asked the Claimant about her journey to work and the Claimant said it involved three buses, but Ms Eversley said she thought it was one or two buses. The Claimant said she would 'go sick' until she got a laptop. Again, we accept Ms Eversley's account of this conversation as it is reflected in her contemporaneous notes.

123. The Claimant emailed following the call (p 376) reiterating that she had been advised to work from home and asking for a laptop. At this point, she was (as noted above) already on the list for a laptop, but no more were delivered until November 2020. The Claimant in this email stated that she had made clear to Ms Eversley on 24 June 2020 that she was not able physically to return to work at this point and could only work remotely.

124. Mr Milligan was consulted and advised that a referral be made to OH for the Claimant regarding homeworking generally (p 378), to consider whether the Claimant would be able to fulfil her full duties and hours using a laptop at home, and whether there were any other additional reasonable adjustments to be put in place. Ms Eversley advised the Claimant that this would happen (p 390).

125. Ms O'Regan in her witness statement states that laptops were still trickling in as at 29 June, but in oral evidence she accepted that this was incorrect and/or reflected the timing lag between laptops being allocated and actually arriving in the office. We find this to be the explanation for her evidence. We accept that no more laptops became available between 11 June and November 2020 and that as laptops were not issued until they had been securely set up for a specific individual there were no spare laptops sitting around unallocated.

126. By 3 July 2020 there was still no advice from OH. Ms Eversley informed the Claimant and stated that laptops were on order for all WCOs, but would likely take up to 6 weeks to arrive (p 389).

127. From 6 July 2020 Witness Care Units went back to full time rosters from their core locations (p 364).

128. On 10 July 2020 HR notified Ms Eversley that the Claimant had reached 40 days of absence (p 363). On 13 July 2020 HR chased and advised that while the Claimant was absent from work she could not progress to the formal stages of the Unsatisfactory Attendance policy, but should follow the usual process with a contact visit and case conference (p 386).

129. On 17 July 2020, in response to an inquiry from the Claimant, Mr Milligan informed her that the laptops were on order and likely to be at least another four weeks (p 388).

130. On 20 July 2020 OH informed Ms Eversley that they could not advise in relation to the Claimant without a consultation (p 396), but that she could make a referral if she wanted further advice. Ms Eversley did not make a proper referral after this.

131. The same day, the Claimant was notified that she had reached 83 days sickness absence in the last year and 116 days in the last four years, so that her sick pay would reduce to half pay on 1 November 2020 and nil pay on 30 March 2021 (p 400).

132. By letter of 23 July 2020 Ms Eversley invited the Claimant to a case conference under the Sickness Absence Policy (p 407).

133. By email of 27 July 2020 (411) the Claimant confirmed that she would attend the absence management case conference but at a police station nearer to home such as Walworth or Peckham. She reiterated that her doctor's note stated that she should resume work on 29 June 2020 but recommended home-working. The Claimant queried: *"My question is am I being penalised for my inability to attend work or work from home (due to no fault of mine as I do not have a laptop) and hence additional sickness absences?"*.

134. Ms Eversley then rearranged the case conference for a telephone call. She stated that she would need to risk assess, due to Covid-19 social distancing requirements, whether she could work from the Walworth CPA office while recuperating (p 406). The Claimant in reply asserted that the failure to provide her with a laptop was 'detrimental and discriminatory' as it meant she was accruing more sick days than necessary which was not her fault (p 405).

135. Ms O'Regan on 27 July informed the Claimant (p 609) that her laptop had been ordered on 18 June along with those for all WCOs not already in receipt of one, delivery was awaited and she would be allocated one as soon as possible.

136. Ms Brennan was by this time in post and a process of handover of line management from Ms Eversley to Ms Brennan took place. This included Ms Eversley providing Ms Brennan with the emails in which the Claimant had complained that *"not providing me with a laptop is detrimental and discriminatory to me as I have accrued more off sick days, than I should which is not my fault"* (p 412).

137. On 5 August 2020 the Claimant met with Ms Eversley and her new line manager, Ms Brennan, by telephone for an absence management review (p 416). She was warned that she may be subject to unsatisfactory attendance/performance procedures. The Claimant did not comment in response. She had been recorded as having 93 days absence in the last 12 months, including 66 days in the period of absence commencing on 1 June 2020 (p 438). Days were counted as calendar days covered by sick certificates, rather than working days. Her sick certificate by that stage was due to expire on 31 August 2020. The Claimant did not at this meeting ask about a laptop or homeworking. All she mentioned when asked what was needed to get her back to work was a footstool and instructions on how to use her new chair. Ms Eversley had the same chair and said she used a cushion to help.

138. Ms Eversley did not fill Ms Brennan in on the history of the Claimant working at Walworth or wanting her chair moved, and nor did the Claimant.

139. The Claimant then decided to return to work as she felt that if she stayed at home waiting for a laptop she would accrue more sickness absence and be

at risk of a written warning. It is the Claimant's case that most of her colleagues in the WCU had already received laptops, but in fact 18 people out of 30 or 40 in her team had still not received laptops at that point.

140. On 25 August 2020 Ms Brennan completed an OH referral for the Claimant (p 776).

Attendance management meeting

141. On 1 September 2020 the Claimant returned to work at Holborn police station. At a return to work meeting with her new line manager Ms Brennan it was agreed that she would initially be working recuperative duties, 5 hours per day for the first week, 6 for the second, 7 for the third week and thereafter normal full-time duties. She would do one late turn a week from the second week onwards, but starting late so as not to work more than the agreed hours.

142. The Claimant challenged Ms Brennan regarding the increase in hours. She stated she believed that OH's recommendation was usually for four hours on return after sick leave. Ms Brennan said that the increase in hours was a directive from Ms O'Regan and Mr Milligan.

143. By 4 September 2020, due (the Claimant felt) to the long hours of sitting at her desk and her workload, the Claimant found her back pain had increased and that she was becoming stiff and having difficulty walking. She sent an email to Ms Brennan requesting a laptop to work from home at least for part of the week as she could not cope with the back pain, stiffness and painful legs (p 429). She stated that she had tried adjusting the new table and chair but without the footstool it was impossible to have the correct posture and the chair was not suitable. She stated that she had worked her way through a 1000 email backlog and was down to about 400. Ms Brennan forwarded the email to Ms O'Regan and asked for advice. Ms O'Regan told her that laptops were on order, and Ms Brennan confirmed that to the Claimant (p 458). She also referred the Claimant to OH and confirmed the agreed working hours.

144. The Claimant by email of 8 September 2020 complained that she had not agreed to working more than 4 or 5 hours and that this would jeopardise her health (p 457). Ms Brennan forwarded this to Ms O'Regan, who responded direct to the Claimant saying that it was a standard return to work plan but if OH suggested something different they would follow that advice. On 10 September, Ms O'Regan confirmed that the Claimant's hours would not be increased pending the OH referral (p 456).

145. On 10 September 2020 HR prompted Ms Brennan to start Informal Management Action (IMA) regarding the Claimant's sickness absence (p 433). HR explained that policy was to allow 25% additional allowance on existing triggers when absence was related to a disability under the EA 2010.

146. On 11 September 2020, Ms Brennan sent the Claimant a letter inviting her to attend an unsatisfactory work attendance meeting on 21 September 2020.

The Claimant felt the meeting was unjustified because her recent period of absence had in her mind been attributable to the refusal of the Respondent to make the reasonable adjustment providing her with a laptop to work at home.

147. On 12 September 2020 the Claimant saw OH who prepared a report (475). This report records that the Claimant has very limited mobility, was only able to sit, stand and walk for very short periods. She was referred for another workstation assessment and recommended 4 weeks working 4 hours a day, gradually increasing over two weeks after that to full time. This report again considered the Claimant not to be disabled, but did not take account of her past history.

148. By email of 17 September 2020 Mr Ellsbury of HR reminded Ms Brennan that the Claimant was due for an Unsatisfactory Attendance Procedure meeting (p 491) and that she had the option to issue or not issue a warning.

149. The Claimant attended the meeting on 21 September 2020 (pp 487-489). The Claimant's previous line manager Mr Cook accompanied her to the meeting. Ms Laws (an experienced line manager from another department) attended as note taker (the notes have the wrong date at the top). Ms Brennan explained at the start of the meeting that, as a newly promoted Band D, this was her first ever unsatisfactory attendance meeting. The Claimant at the meeting argued that the last three sickness absences had been a consequence of failure by managers to support her with a specialist chair. The Claimant referred to her request for her old special chair to be moved to Walworth which had not been granted. Ms Brennan said she did not know about this and would discuss it with Ms O'Regan. Mr Cook argued that although the number of days' absence was high, there were only three periods of absence, which were linked, that it was unreasonable her chair was not moved and that this aggravated the Claimant's back leading to further sickness. The Claimant also raised that her most recent absence had only occurred because she had not been issued a laptop and that if she had been issued with a laptop her number of sickness days would have been reduced (p 464-5). Ms Brennan announced at the end of the meeting that she had decided to issue a First Written Notification for Unsatisfactory Attendance, and that the Claimant could raise on appeal her views about the failure to move her chair.

150. Ms Brennan then left the meeting and spoke to Ms Laws who advised her that she should not have made a decision immediately at the end of the meeting. Ms Brennan went to speak to Ms O'Regan, acknowledged her mistake, and asked her about her alleged refusal to allow the Claimant to take the chair to Walworth. Ms O'Regan gave her broadly the account that she has given to us. Ms Brennan then went back to explain to the Claimant and Mr Cook what had happened. In her witness statement, she says that the information she got from Ms O'Regan about the chair would not have changed her decision. Orally, she explained that this was because the only thing she thought she was checking with Ms O'Regan was whether she prevented the Claimant taking the chair home on the bus, when it was the

case (she thought) that the Claimant's 'reasonable adjustments' were available for her at all times at Holborn.

151. The conversation with Ms O'Regan was, so far as the Respondent is concerned, after the meeting and was not noted because the meeting had finished, the decision had been made and Ms Laws had left by that stage. We can see why it may have appeared to the Claimant still to be part of the same meeting because she and Mr Cook remained in the room, no doubt discussing the case between the time that Ms Brennan left having (she thought) completed the meeting and the time she got back with Ms O'Regan. The Claimant was sent the notes of the meeting on 30 September 2020 (p 483) but never identified any errors in the minutes, although she does still consider the notes were wrong in not including the conversation with Ms O'Regan in the minutes. The Claimant is adamant that the conversation with Ms O'Regan took place during the main meeting, although when questioned by the judge as to whether she realised that Ms Brennan had given her the warning before leaving the meeting with Ms Laws and then going to speak to Ms O'Regan, she said she was *"not sure"*. As to what happened at this meeting, we accept Ms Brennan's evidence because it is consistent with the minutes, and also because it is contrary to her and the Respondent's interests so it is implausible that she would be wrong about this. Ms Brennan accepts that she made a mistake in giving the warning immediately rather than following further consideration at the end of the meeting, or after having spoken to Ms O'Regan to make the necessary enquiries about the chair.

152. In oral evidence, in answer to questions from the judge, Ms Brennan accepted that she had not understood two of the points that the Claimant was making in this meeting. First, she had not understood that the Claimant was arguing that the failure to provide her with her special chair had *caused* the back injury on 30 May and so was the cause of the period of sickness absence commencing on 1 June that Ms Brennan was considering. Ms Brennan said that if she had understood this she would have investigated the point, but she was not a medical expert, she would have taken it into consideration but could not say her decision would have been different. Secondly, she had not understood that the Claimant was arguing that her sickness absence would have been reduced if she had been provided with a laptop to work from home. She said that if she had understood the Claimant was making this point, she would have taken it more into consideration, but could not say that she would not still have issued the letter bearing in mind the Claimant's absence history and the previous IMA.

153. The Claimant appealed by letter of 23 September 2020 (p 527). The Claimant submitted her appeal before she had received the formal written outcome of the meeting (p 485). She felt that the outcome letter was delayed with a view to preventing her exercising her right to appeal within 14 days in accordance with the Respondent's policy. She maintained in oral evidence that this was unfair. She expressed unhappiness about the timing of the handling of her appeal at the time (p 531). We record that there is no evidence before us that supports this view of the Claimant's.

154. In her appeal letter the Claimant asserted that her back pain/injury was a long-term one and a disability and that she was only off sick in 2020 because management had failed to move her ergonomic chair to Walworth for her. She regarded her initial back injury in 2002 as being an injury incurred at work, and attributed her absence at the end of January 2020 to a *"knee injury which also was incurred at work"*. She maintained that this was as a result of management failing to agree to her working from Walworth in January 2020 when her knee injury meant the longer journey to work was too strenuous, and she identified the period of absence from 1 June 2020 as the *"result of failure to make reasonable adjustments"*.

155. The Claimant also raised a grievance on 25 September 2020. That concerned Ms O'Regan's actions regarding the chair. She alleged there had been a failure to make reasonable adjustments and asked that someone else other than Ms O'Regan deal with her appeal against the warning (pp 467-468). That was put on hold pending the appeal (p 533). She was asked on 28 October to identify whether there were any outstanding issues following the appeal (p 533), but does not appear to have responded to this.

156. Normally, Ms O'Regan would have dealt with the Claimant's appeal but as she was involved in the decision-making, Mr Milligan informed the Claimant on 2 October 2020 (p 514) that he would appoint someone else to hear the appeal. Ms Wilson-Adams was duly appointed on 6 October 2020 (p 531). She commenced investigation on 7 October 2020 by asking for some information from Ms Brennan (502). Ms Brennan responded attaching emails and stating that her decision to issue a first written warning was because the Claimant *"was issued an IMA on 31.1.20 to run for 6 months, ending 30/7/20, her current sickness absence was whilst the IMA was still active"*.

157. Ms Wilson-Adams then had to take emergency annual leave and compassionate leave as a result of a bereavement on 9 October. By 22 October, it was apparent that she would not be back until 2 November so someone else was identified to deal with the appeal (p 530). Mr Davis was then appointed. The Claimant was informed of his appointment on 22 October 2020. He sought on 26 October to make arrangements for a hearing with the Claimant (p 536). The Claimant provided dates of availability. She wanted Mr Cook to attend with her so there was a difficulty identifying a date. By letter of 16 November 2020 the Claimant was notified that an appeal meeting would be held on 25 November 2020 (p 552). The Claimant failed to attend and Mr Davis rejected her appeal by letter dated 30 November 2020 (p 554). The Claimant accepted in oral evidence that she may have overlooked the email inviting her to the appeal meeting.

158. On 3 October 2020 the Claimant contacted ACAS. On 26 October 2020 ACAS issued an early conciliation certificate. On 3 November 2020, the claimant commenced these proceedings. She explained in her witness statement that she turned to the Employment Tribunal at this point because matters had not been resolved through grievance or appeal and she was worried about the threat of dismissal raised as a result of having been issued with an absence management warning.

159. A laptop eventually arrived for the Claimant on 10 November 2020. Mr Milligan's evidence, which we accept for reasons set out earlier, was that this was the first delivery of laptops after 18 June 2020. The Claimant then, along with other colleagues, worked from home during the second lockdown. Since the second lockdown, she has worked from home three days per week, and two days in the office in accordance with the group rota that has been set up. She still experiences pain and stiffness in her back, which she manages by moving every 15 minutes or so.

160. In the unsatisfactory performance meeting on 21 September 2020, Ms Brennan had said that Posturite was scheduled to meet with the Claimant regarding her chair and footstool, and OH had indeed referred the Claimant for a further Posturite assessment, but the Claimant told us this did not happen. She was, as we found above, not interested in pursuing Posturite's recommendations. She disagreed with Posturite's assessment of her old red chair. She had found the new chair immediately uncomfortable and gave up with it after she found a YouTube instructions video unhelpful. She did not chase up getting the right footstool or go back to Posturite for advice about setting up the chair or obtaining an alternative. We have already explained above why we consider the Claimant's failure properly to engage with Posturite's recommendations was unreasonable and may have contributed to her ongoing back problems.

Conclusions

Direct discrimination

The law

161. Under ss 13(1) and 39(2)(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, by subjecting the Claimant to any detriment, discriminated against the Claimant by treating her less favourably than it treats or would treat others because of a protected characteristic. The protected characteristic relied on by the Claimant is her disability.

162. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123) agreed with Lord Hope.)

163. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same

circumstances (s 23(1) EA 2010). However, we may also consider how a hypothetical comparator would have been treated. In some cases construction of a hypothetical comparator may be difficult, and the Tribunal may instead focus on what is called the *"reason why"* question, using any evidence as to how others are treated (whether or not their circumstances are materially the same or not) to inform that assessment: see in particular *Shamoon* at [8] *per* Lord Hope and at [109]-[110] *per* Lord Scott.

164. The Tribunal must determine "what, consciously or unconsciously, was the reason" for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]). It must be remembered that discrimination is often unconscious. The individual may not be aware of their prejudices (cf *Glasgow City Council v Zafar* [1997] 1 WLR 1695, HL at 1664) and the discrimination may not be ill-intentioned but based on an assumption (cf *King v Great Britain-China Centre* [1992] ICR 516, CA at 528).

165. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56]). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38

166. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] per Lord Hope.

Conclusions

167. We accept that the Claimant was subjected to a detriment because her chair was not moved to Walworth in April/May 2020, but we find that the Claimant was not less favourably treated than an actual or hypothetical comparator in relation to her chair. Ms Bailey is not an appropriate actual comparator because her circumstances were different: she was vulnerable, shielding and had therefore been provided with a laptop to work from home. So far as her back problem was concerned, and her need for a special chair, she was in a very similar position to the Claimant, and prior to 22 May 2020 she too was

refused when she asked to have her office chair sent to her home address. The individual based in Chingford was treated less favourably than the Claimant as the Respondent refused to move her screen from Holborn to Chingford even after the option of moving furniture to home addresses became possible after 18 May 2020. What changed after 18 May 2020 was that the Respondent introduced a policy permitting OH-recommended furniture to be moved to home addresses. This meant that Ms Bailey's chair could be moved, and it was. The Claimant's circumstances were materially different to Ms Bailey, however, because she was not shielding and working at home with a laptop. Nonetheless, Ms O'Regan and Ms Eversley considered that they could use the policy change to move the Claimant's chair. In this respect, they were looking to treat the Claimant in the same way as Ms Bailey despite the differences in their situation, and more favourably than the individual in Chingford. The reason that in the end the Claimant's chair was not moved at the end of May 2020 was because of concern that, by the time the chair was delivered to Walworth, social distancing would mean that there was no space for the Claimant to work there, Ms Eversley's understanding at that point being that Walworth needed the Claimant's space back by the end of May. Then, at the beginning of June the Claimant went off sick with no definite return date set. This notwithstanding, as soon as OH recommended that a chair should be moved to Walworth for her, and it was realised by Ms O'Regan and Ms Eversley that she had two chairs (so that even if one was moved to Walworth, there would still be one for her in Holborn), arrangements were made to move the chair, and the point was reached where the (possibly unintentionally wrong) chair was ready and labelled in the office for collection. The move of the chair was only abandoned as being *"pointless"* once it was apparent that social distancing was likely to prevent the Claimant from working at Walworth and it was more likely that a laptop could be obtained for her to work from home and the chair therefore moved there.

168. In all the circumstances, the Claimant was not therefore treated less favourably to any actual comparator whose circumstances were materially similar. She was treated the same as others up until 18 May. Thereafter, the considerations about social distancing as a result of working at Walworth, and then sick leave, applied only to the Claimant and not to Ms Bailey so their circumstances were materially different.

169. Nor do we find that any hypothetical non-disabled comparator in the Claimant's situation would have been treated any differently. In this respect, it is significant that Ms O'Regan and Ms Eversley were both of the opinion (albeit unreasonably in our judgment) that the Claimant was *not* disabled, so there is no basis at all for suggesting that they would have treated someone who was in fact not disabled any differently. In any event, there is absolutely nothing in the facts before us from which it could be inferred that disability played any part in the reasons (conscious or unconscious) why the Claimant was treated as she was.

Failure to make reasonable adjustments

The law

170. The duty to make adjustments under ss 21 and 22 of the EA 2010 comprises three requirements. In this case, the Claimant relies on the third requirement. Under s 20(5) of the EA 2010, read with Schedule 8, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to take to provide the auxiliary aid. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person. By section 212(1), 'substantial' in this section also means 'more than minor or trivial'.

171. A respondent is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know both that the complainant has a disability and that he or she is likely to be placed at the relevant substantial disadvantage (EA 2010, Sch 8, para 20): see further *Wilcox v Birmingham CAB Services Ltd* (UKEAT/02393/10) at [37]. What matters is whether the employer had actual or constructive knowledge of the facts constituting the disability. It is immaterial whether the employer knows those facts amount to a disability in law: *Gallop v Newport City Council* [2014] IRLR 211, CA at [36] *per* Rimer LJ giving the judgment of the court.

172. Most of the case law on the duty to make adjustments concerns the first requirement (which requires a claimant to show first that the employer as applied a provision, criterion or practice, PCP, which has caused the substantial disadvantage). That is not an element of the third requirement, but the guidance in the case law is still relevant to the third requirement. Reading the cases with the third requirement in mind, we take the law to be as follows:-

173. In considering a reasonable adjustments claim, a Tribunal must identify: (a) the relevant matter that is said to disadvantage the claimant; (b) the identity of non-disabled comparators (where appropriate); and (c) the nature and extent of the substantial disadvantage suffered by the claimant: cf *Environment Agency v Rowan* [2008] ICR 218, EAT at [27] *per* Judge Serota QC. The Tribunal must also identify how the auxiliary aid sought would alleviate that disadvantage (*ibid,* at [55]-[56]), although provision of an auxiliary aid may be reasonable even if it is unlikely wholly to avoid the substantial disadvantage: cf *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160 at [29]. The nature of the comparison between disabled and non-disabled people is not like that between claimant and comparator in a direct discrimination claim: it is immaterial that a non-disabled person with all the characteristics of the disabled person but for the disability would be treated equally, what matters is whether *"the [relevant matter] bites harder on the disabled, or a category of them, that it does on the able-bodied"* as a result (for example) of the disabled person being more likely to be disadvantaged in relation to the

relevant matter than a non-disabled person: see *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160 at [58].

174. The duty to make reasonable adjustments may (indeed, frequently does) involve treating disabled people more favourably than those who are not disabled: cf *Redcar and Cleveland Primary Care Trust v Lonsdale* [2013] EqLR 791.

175. What is reasonable is a matter for the objective assessment of the Tribunal: cf *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments, nor with the employer's reasoning: *Royal Bank of Scotland v Ashton* [2011] ICR 632, EAT.

176. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664, EAT.

177. Although the EA 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should generally have regard, including but not limited to:

    b. The extent to which taking the step would prevent the effect in relation to which the duty was imposed;
    c. The extent to which it was practicable for the employer to take the step;
    d. The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities;
    e. The extent of the employer's financial and other resources;
    f. The availability to the employer of financial or other assistance in respect of taking the step;
    g. The nature of the employer's activities and the size of its undertaking;
    h. Where the step would be taken in relation to a private household, the extent to which taking it would: (i) disrupt that household or (ii) disturb any person residing there.

178. Under s 136 EA 2010, the Claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made (or auxiliary aid that could be provided), at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may even be as late as the tribunal hearing itself. Once that threshold has been crossed, the burden shifts to the Respondent to show that the proposed adjustment/provision of the auxiliary aid is not reasonable: *Project Management Institute v Latif* [2007] IRLR 579, EAT.

Conclusions

179. We deal with the chair first. Although in the list of issues this issue is framed by reference to whether the Claimant was put at a substantial disadvantage in not having *"an ergonomic chair"*, in closing submissions the parties agreed that the issue was whether the Claimant was substantially disadvantaged by not having her special chair, rather than a generic ergonomic chair, as all the Respondent's office chairs are described as 'ergonomic'.

180. We find that the Respondent (through Ms O'Regan and Ms Eversley) had actual knowledge that the Claimant was disabled. They were aware of all the facts necessary to constitute a disability in law. They had been given all the necessary information in that respect in the OH report of 24 December 2019 (indeed, that report even told them that the condition was likely to constitute a disability in law), and it was within their knowledge that the Claimant had had a back problem for at least 15 years which had disadvantaged her to the extent that it warranted the provision of a special chair that she still felt she required.

181. We further accept that the Claimant was substantially disadvantaged by not having her special chair at Walworth. We so find even though we consider Posturite's view is reasonable that her special chair may be contributing to her back problem as it provides an insufficient level of lower back support that may encourage her to slouch in the chair and place increased strain on that area. This is because, like Mr Bhalla, we accept that, despite its deficiencies, the Claimant's special chair was still on the balance of probabilities better than an 'ordinary' chair. We also accept that the Claimant was at that time experiencing increased pain and discomfort when sitting at Walworth. In our judgment, this meets the relatively modest threshold of a 'more than minor or trivial' disadvantage. We further find that the fact that the special chair was available for her at Holborn did not mean that there was not a substantial disadvantage because we accept that it was also a more than minor or trivial disadvantage for the Claimant, with her level of fear of the virus (and, in general terms, the actual risks posed by the virus), to have to spend 30-60 minutes longer on public transport each day at that time in the pandemic.

182. We find that Ms Eversley and Ms O'Regan had actual knowledge of the substantial disadvantage. Despite the Posturite report, they both accepted that the Claimant should have her special chair if it was reasonable to arrange it, and the Claimant had by email told them that she was in pain without it. We also find that they knew or ought to have known that requiring the Claimant to come to Holborn was a more than minor or trivial disadvantage in the pandemic. The Respondent had permitted all staff to work closer to home if they wished because it was understood and accepted there may be reasonable fears about travelling longer distances, and the Claimant had made her personal fears known to them, by choosing to work at Walworth and through her emails on 21 April 2020.

183. It follows that the duty to make reasonable adjustments had arisen, and we find that it arose from the point at which the Claimant first seriously raised the issue of having her chair at Walworth, which was when she had her conversation with Ms O'Regan at the end of March or beginning of April 2020 in which reference was made to her taking it on the bus.

184. We now consider whether it would have been reasonable for the Respondent to arrange for her chair to be moved to Walworth. We have found this to be a very difficult decision as we are acutely conscious that the beginning of the first national lockdown was a confusing and worrying time for everyone. However, we have ultimately concluded that it would have been reasonable, and the factors we have considered are as follows:-

    a. The fact that the Claimant's relocation to Walworth was temporary was not in our view of itself a factor that made it unreasonable to move the chair. However, moving furniture through the Respondent's ordinary processes does take time and at the start of lockdown there were many uncertainties about how long it was going to last. In the Respondent's case, it took until 18 May for the organisation as a whole to realise (or accept) that lockdown was likely to be sufficiently long-term for it to be worth making arrangements to move office furniture to people's homes for those working at home. Given the national uncertainty, we find it difficult to say that as a matter of general policy the Respondent took an unreasonably long time to reach that view. However, it does not follow that something different could not or should not have been done in response to the circumstances of an individual case such as the Claimant's.

    b. The Respondent did make exceptional arrangements, outside normal working policies and by way of employees acting voluntarily on a goodwill basis, to get laptops to the homes of employees who were shielding. We accept that moving laptops is very different to moving furniture. Laptops are small, light and easily transported by an individual person, whether by car or on foot. Office chairs are not. They are awkward and heavy. Nonetheless, they can normally be lifted by a single fit adult or, at least, we have not been provided with evidence by the Respondent that the Claimant's special chair could not be moved in this way. And the fact that exceptional arrangements were being made for laptops at this point, suggests that it was generally considered that the pandemic was a situation that in principle merited exceptional action to keep the workforce operating safely.

    c. As a matter of policy (Smarter Working), the Respondent did not generally permit moving of office furniture where someone was temporarily located in a different office. However, we do not accept that the fact that temporary office furniture moves were not permitted as a matter of policy prevented a chair being moved in the exceptional circumstances that applied during the pandemic. There was a process in place, and selected contractors, who could move

office furniture for permanent moves and in principle (pandemic considerations aside) we do not accept that the fact that policy did not permit a temporary move meant that no move could be made. Any policy must admit of exceptions where reasonable, especially as regards the needs of disabled persons. It appears from Ms O'Regan's last email of 21 April 2020 (and we so find) that she regarded the policy as the end of the matter and made no further enquiries. So did Mr Milligan. We do not therefore know for certain what the position would have been if she had pressed for an exception to be made to the policy. However, the burden is on the Respondent to show that it was not possible to make this adjustment.

d. We found as a fact for the reasons set out above (the Respondent not having proved otherwise) that furniture contractors were working at the start of the pandemic. We are not therefore satisfied that the Respondent has shown that a contractor could not have been found to move a chair for a disabled person in April 2020. We find on the balance of probabilities the Claimant's chair could have been moved by the Respondent using one of its established furniture-moving contractors.

e. We further found as a fact that taxis were operating and that if one had been sought, a taxi could have been obtained to move the Claimant's chair. We do accept that the Respondent's policies do not generally allow for booking taxis for something like this, but – again – if a policy substantially disadvantages a disabled person, it may be reasonable to adjust it. No consideration was given to this at the time. We are not satisfied that the Respondent has shown that it would not have been possible to secure payment for a taxi, whether through an expense claim, or as a goodwill gesture in the same way as the laptops, or even that the Claimant could have been offered the chance to pay for it herself (although she could not have been required to do so: see EA 2010, s 20(7)). We are also not satisfied that the Respondent has shown that it would not have been possible for someone to lift a chair into a taxi and out the other end. Although that might have been difficult for the Claimant with her bad back (and could not in our judgment reasonably have been authorised by the Respondent, despite her willingness to lift the chair on and off a bus herself), we do not see why, in an organisation the size of the Respondent, a stronger volunteer could not have been found to assist with this. At least, given that no enquiries were made, we are not satisfied that the Respondent has shown that this was not possible.

f. The Claimant could have avoided the substantial disadvantage caused by the lack of special chair herself by returning to Holborn to work. However, as already noted above, we consider that requiring the Claimant to work from Holborn when colleagues had the option of working from closer to home during the pandemic was itself a substantial disadvantage to her. It does not make any difference to

this that not many of them chose to take up that option – the option was there. It does not, of course, follow that it would not have been reasonable for the Claimant to return to Holborn if it was not reasonably possible to arrange for her chair to be moved to Walworth, but on the evidence before us we find that it was reasonably possible to move the chair. We add that it was, if anything, more consistent with the general Government policy of avoiding unnecessary movement of people to facilitate the Claimant working closer to home than it was to avoid the single (in the Respondent's view) 'unnecessary' movement of her chair from Holborn to Walworth.

g. There was a cost to moving the chair, but even the contractor quote of £212 was not so high as in itself to make it unreasonable to move the chair even if it was only for a few weeks. The Respondent is a public body and must be careful with public funds, but reasonable expenditure to meet the needs of disabled staff is justified. Moving the chair in a taxi would, of course, have been even cheaper. While the Smarter Working policy of not moving furniture on a temporary basis *might* have been justifiable generally on the basis of expense to the organisation as a whole, individual cases would still have had to be considered as otherwise disabled staff requiring additional office equipment could never have benefited from Smarter Working. In any event, the Respondent has not sought to argue in this case that cost alone was a reason for refusal. The circumstances of the pandemic in principle justified an exceptional approach in any event.

h. Ms O'Regan did ask the Claimant whether there might be another chair at Walworth that was suitable, but she did not pursue this in the face of the Claimant's indication that was not an option, so if that was an alternative solution, the Respondent has failed to prove it.

i. It is also relevant that the Claimant was not the only employee in this situation. We have heard evidence of at least two others who wanted furniture moved to alternative work locations at this point. Some of the Claimant's colleagues with similar health needs did return to work at Holborn. Some did not, but continued without the equipment or, we infer, went off sick. Moving the Claimant's chair would have set a precedent. The Respondent is a very large organisation and taking action to move the Claimant's chair may have resulted in a significant number of similar demands across the organisation as a whole. We accept in principle that an organisation the size of the Respondent needs generally to work on an organisation-wide basis and that pandemic response was in principle a matter that needed to be handled in that way, as happened in relation to moving furniture to home addresses on 18 May. However, the Respondent does need to ensure, so far as reasonable, that its policies do not substantially disadvantage the disabled generally, and the specific needs of particular disabled staff may always require exceptional arrangements. The fact that the Respondent may also have also

failed to make reasonable adjustments for other disabled employees at this time does not justify the failure in the Claimant's case.

185. In the circumstances, weighing up all the factors, we find that the Respondent has not shown that it would not have been reasonable to make arrangements to move the Claimant's special chair when she first asked at the end of March/beginning of April 2020, whether using its normal furniture contractors or a taxi. There was accordingly a failure to comply with the duty to make reasonable adjustments at that point. That failure continued in our judgment up until the point at which it became clear that the Claimant was not going to be able to continue working at Walworth because of the social distancing requirements. By that point in June 2020, the Claimant was already off sick.

186. We now consider the position regarding the laptop.

187. We have already found as a fact above that the back injury that the Claimant suffered on 30 May was an acute exacerbation of her existing disability. Accordingly, when by 26 June she was regarded by her GP as fit to work but only from home and no laptop was provided so that she in fact remained off sick, this was a substantial disadvantage that arose because of her disability.

188. The duty to make reasonable adjustments therefore arose on 26 June 2020. From that point on, the Respondent came under a duty to make a reasonable adjustment by providing her with a laptop. However, no laptops were available between 26 June 2020 and November 2020. They had all already been allocated to other employees. A great deal of time was spent at the hearing on whether the Respondent's prior allocation decisions about laptops were reasonable. The Claimant even sought to argue that the Respondent should have kept laptops in reserve just in case a situation like hers arose and someone needed to work from home temporarily because of a disability. However, although the duty to make reasonable adjustments can be an anticipatory duty, we do not consider that would have been reasonable in this case. The evidence before us was that there was a great shortage of laptops. It was only at the beginning of June that the Respondent had finally managed to get laptops to all those shielding. It was reasonable in our judgment for the next priority to have been those who were willing and able to work 100% from home, using their own mobiles. The Respondent is providing an important public service that needed to be kept operating through a pandemic. It was in our judgment reasonable for the Respondent to allocate all laptops as they became available to staff who were able to use them. The Respondent could not keep laptops in reserve as laptops were not authorised for issue until a name had been given. Nor would it have been reasonable in our judgment for the Respondent to keep laptops in reserve even if there had not been this practical difficulty, given the mismatch between demand and supply at this point. Nor could the Respondent reasonably have been expected to take laptops off other employees in order to give them to the Claimant once her need for one arose. Laptops are configured to specific employees, and all of them had been allocated based on what we consider to be reasonable priority criteria.

189. It follows that although a duty to make reasonable adjustments arose on 26 June, the Respondent did not fail to comply with that duty because there were no reasonable steps it could have taken, but failed to take, to supply the Claimant with a laptop.

Discrimination arising from disability

The law

190. In a claim under s 15 of the EA 2010, the Tribunal must consider:
    a. Whether the claimant has been treated unfavourably;
    b. The reason for the unfavourable treatment;
    c. Whether that reason is something arising in consequence of the employee's disability;
    d. Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on;
    e. If so, whether the alleged discriminator has shown that the treatment is a proportionate means of achieving a legitimate aim.

191. The question of whether something arises in consequence of disability is an objective question and does not involve consideration of the mental processes of the alleged discriminator: *Pnaiser v NHS England and anor* [2016] IRLR 170, EAT at [31]. Whether something arises 'in consequence of' is a looser connection than 'because of' and might involve more than one link in the chain of consequences: *Sheikholeslami v University of Edinburgh* (UKEATS/0014/17/JW) at [66].

192. Then the Tribunal must consider what the reason was for the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator. The test is the same as for direct discrimination, i.e. the 'something' must be the conscious or unconscious reason for the treatment, in the sense of having a more than minor or trivial influence on the unfavourable treatment, even if it is not the main or sole reason: *Pnaiser* (ibid) at [31].

193. While it is a necessary element of liability for the employer to have knowledge (or constructive knowledge) of the disability, it is not necessary that the employer should know that the relevant 'something' arose in consequence of the Claimant's disability when subjecting the Claimant to unfavourable treatment: *York City Council v Grosset* [2018] ICR 1492 at [39].

194. An employer also has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. If the aim is legitimate, the Tribunal must consider whether the means used to achieve it correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end: *Stott v Ralli Ltd* (EA-2019-000772-VP) at [79]. Assessing proportionality involves an objective balancing of the discriminatory effect of

the treatment on the employee and the reasonable needs of the party responsible for the treatment: *Hampson v Department of Education and Science* [1989] ICR 179, CA and other cases summarized recently in *Department of Work and Pensions v Boyers* (UKEAT/0282/19/AT) at [29] *per* Matthew Gullick (sitting as Deputy High Court Judge). The test is an objective one for the Tribunal to make, not a range of reasonable responses test (*Stott*, ibid, at [80]).

195. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification' and it is unlikely that a disadvantage that could be alleviated by a reasonable adjustment will be justified: *Dominique v Toll Global Forwarding Ltd* (UKEAT/0308/13/LA) at [51] *per* Simler J.

196. The burden of proof is on the Claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation or defence, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not unlawful. The burden is on the Respondent in relation to both the knowledge defence and the justification defence.

Conclusions

197. We find that the Claimant was treated unfavourably by being issued with a warning in relation to unsatisfactory attendance on 21 September 2020. The reason for the treatment was the Claimant's absence, specifically the period of absence between 1 June and 31 August 2020, which was the only period of absence she had had since the IMA was issued on 31 January 2020. That period of absence was as a result of the flare-up of her disability, so the absence was 'something arising in consequence of her disability' for the purposes of s 15.

198. We have already found that the Respondent knew or ought to have known that the Claimant was disabled. Knowledge is imputed to the Respondent whatever Ms Brennan's personal knowledge. However, we further observe that Ms O'Regan and Ms Eversley had all the requisite actual knowledge of the facts constituting the Claimant's disability and they ought reasonably to have informed Ms Brennan. As the Claimant's new line manager, especially a line manager tasked with considering unsatisfactory attendance who has been alerted to the Claimant having a back condition, informed (at least at the meeting on 21 September) about her need for reasonable adjustments in the form of a special chair for a long-term back condition and reminded by HR of the need to make adjustments for those with a disability, we find that Ms Brennan ought to have known the Claimant was disabled.

199. We now consider whether the issuing of the warning was justified. There is no doubt that absence management procedures in principle pursue a legitimate aim, and that the threat of absence management procedures did

in the Claimant's case secure her earlier return to work than might otherwise have been the case. However, it is for us to decide whether the warning was justified in all the circumstances. We take into account the following matters:-

a. We found there was a failure to make reasonable adjustments in not providing the Claimant with her special chair while she was at Walworth. We also found that the failure to provide her with her special chair was a contributory factor in her suffering the flare-up on 30 May 2020. Accordingly, on our analysis, part of the reason why the Claimant was absent from 26 June 2020 was because of the Respondent's prior failure to make reasonable adjustments. Ms Brennan failed to consider this before issuing the warning, or indeed afterwards or until this hearing because she had not appreciated that the Claimant was making this point about causation. Had she properly considered this point, in our judgment she would have had to make significant allowance for it.

b. We found that the Respondent did not fail to comply with the duty to make reasonable adjustments in relation to provision of a laptop after 26 June 2020. Nonetheless, the fact is that a duty to make reasonable adjustments had arisen and, not having been able to provide the Claimant with a laptop, in our view it would have been a reasonable adjustment to discount at least part of the sickness absence. It was in any event not the Claimant's 'fault' that she was off sick after 26 June 2020. Had she been provided with a laptop, she could have been doing some work after this point and would not have accrued as much sickness absence. That was a highly relevant factor to the exercise of discretion that Ms Brennan undertook. She failed to consider this at the time, or at all until this hearing.

c. Ms Brennan appears to have considered that the Respondent's policy was only to allow 'up to 25%' additional sickness absence for employees with disabilities, but although that is what the Respondent's policy says at paragraph 3.5.1, paragraph 6.3.1 indicates more flexibility and, in any event, as we have already observed, the law requires reasonable adjustments, and what is reasonable depends on the circumstances of each particular case. The policy can only ever be a guide. In the Claimant's case, if the period after 26 June 2020 is discounted, she had only had an additional 26 calendar days absence, or 20 days if what is counted is working days (which appears to us to make more sense). An uplift of 25% on a 15-day trigger point is 18.75, so it would not have taken a much higher uplift in order for the period 1-26 June 2020 to have been discounted altogether (even apart from the issue of the causation of the injury on 30 May).

200. Putting all those points together, we find that the warning that the Claimant was given for unsatisfactory attendance on 21 September 2020 was not justified. The whole of the absence period was caused in part by a prior failure to make reasonable adjustments in relation to the chair, and the period from

26 June 2020 onwards was as a result of the non-availability of a laptop, for which neither party is to blame, but in respect of which the Respondent ought to have made an adjustment by not penalising the Claimant for the consequent sickness absence. It follows that in issuing the warning Respondent unlawfully discriminated against her contrary to s 15 of the EA 2010.

201. We should add here that the Claimant sought in the course of cross-examining Ms O'Regan at 4.10pm on the last day allocated for evidence to question Ms O'Regan and/or to introduce new evidence about the individual who required a special screen (and who is the subject of the email chain at p 1039). The Claimant says that after being refused the screen she needed to work, that individual remained off work but was not issued with a warning. After short adjournments we decided not to permit her either to pursue this line of cross-examination or to adduce additional evidence regarding it, explaining our reasons orally. In closing submissions, the Claimant raised this evidence again, now saying that there were two colleagues in that position. We refused the Claimant permission to adduce this evidence. We had already extended the time allowed for the Claimant to cross-examine by stopping early on Day 3 to allow her additional time to read the Respondent's statements and prepare cross-examination. While we accepted that what happened with others in potentially similar circumstances could possibly be relevant to justification for the warning in the Claimant's case, it could not be a complete answer as a s 15 claim does not require a comparator and we did not consider that it would be of any assistance to hear about these individuals without receiving full disclosure of their circumstances, which would have required additional documents and evidence. Although witness statements were exchanged late, we did not consider that there was any good reason for the Claimant not having raised this point earlier. She is still working with these colleagues and obtained statements from the witnesses she has used as long ago as 2021. In any event, even if she could not have raised the point earlier because she did not know about it, we considered it was too late in the hearing to pursue further disclosure and evidence at that point. A proportionate approach needed to be taken, and we did not consider the additional evidence was necessary to enable us fairly to determine the issues.

Jurisdiction

The law

202. The general rule under s 123(1)(a) EA 2010 is that a claim concerning work-related discrimination under Part 5 of the EA 2010 (other than an equal pay claim) must be presented to the employment tribunal within the period of three months beginning with the date of the act complained. For this purpose: conduct extending over a period is to be treated as done at the end of that period (s123(3)(a)); failure to do something is to be treated as done when the person in question decided on it (s123(3)(b)); in the absence of evidence to

the contrary, a person is taken to decide on failure to do something either when the person does an act inconsistent with deciding to do something or, if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it (s123(4)).

203. The primary time limit is subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 140B of the EA 2010, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period. The early conciliation period does not extend time where the time limit has already expired: *Pearce v Bank of America Merrill Lynch and ors* (UKEAT/0067/19/IA) at [23].

204. If a claim is not brought within the primary time limit, the Tribunal has a discretion under s 123(1)(b) to extend time if it considers it is just and equitable to do so.

Conclusions

205. Any of the Claimant's claims which predate 4 July 2020 are in principle out of time in that they occurred more than 3 months before 3 October 2020 when ACAS received early conciliation notification of her claim.

206. In the light of our findings above, the Claimant's claim in relation to the warning on 21 September 2020 is in time, but the claim in relation to the failure to make reasonable adjustments in relation to the chair is in principle out of time because that failure ceased some time in June 2020. In this respect, we consider that although it could be argued that time stopped running in relation to that complaint as at 21 April 2020 when Ms O'Regan informed the Claimant that it was 'not an option' to move her chair, the reality is that this was not an outright refusal to move the chair, and once the 'goalposts' moved on 18 May, the Respondent was again looking to move the Claimant's chair, but failed to do so. In the circumstances, we consider that this claim is properly regarded as one of 'continuing omission' up until June 2020 when social distancing requirements at Walworth, and the Claimant's ongoing sick leave, meant that there was no longer a duty to make reasonable adjustments by moving the chair to Walworth.

207. We therefore have to consider whether there was a continuing act as between that continuing omission to make reasonable adjustments and the warning on 21 September 2020. Although the warning was a decision made by a different manager (Ms Brennan) who was new to the situation, we consider that there are sufficient links between the prior failure to make reasonable adjustments and the warning that this should properly be regarded as a continuing state of affairs. We have in mind in particular that the failure to make reasonable adjustments was, we find, in part a cause of the sickness absence for which the Claimant subsequently received the warning. Further links are provided by the fact that Ms Eversley and Ms

O'Regan bear some responsibility for Ms Brennan's failings as a result of their failure to recognise the Claimant's disability, or to pass on to Ms Brennan the information relevant to that (in particular the OH report of 24 December 2019), or to convey to her full information about the chair and the Claimant's requests for that to be moved to Walworth. All this means that the acts of discrimination we have found established can properly in our judgment be described as amounting to a 'continuing state of affairs'.

208. In any event, even if we had not found there to be a continuing act, we would have found that it was just and equitable to extend time in respect of the failure to make reasonable adjustments claim. This is because we have, after final hearing, found the claim to be meritorious. Further, although the claim was brought out of time, it was not brought a long way out of time and it has been possible to have a fair trial of the matter. The Claimant explained why she brought the claim late, and it was because it was not until she got the warning that she considered matters were serious enough to warrant pursuing external remedies. We consider that is a reasonable explanation. The prejudice to the Claimant of not granting an extension in our judgment outweighs the prejudice to the Respondent of granting it. The Claimant would lose out on a remedy for an established wrong, whereas the Respondent would escape liability for that on effectively a 'windfall' basis. The Respondent has not otherwise identified any prejudice. In the circumstances, a just and equitable extension is appropriate.

Overall conclusion

209. The unanimous judgment of the Tribunal is:

    (1) The Respondent contravened ss 20, 21 and 39(5) EA 2010 by failing to comply with the duty to make reasonable adjustments for the Claimant by not transferring her special chair to Walworth between April 2020 and June 2020.
    (2) The Respondent did not contravene ss 20, 21 and 39(5) of the EA 2010 when it failed to provide the Claimant with a laptop after 26 June 2020.
    (3) The Respondent did not contravene s 13 and 39(2)(d) of the EA 2010 by directly discriminating against the Claimant because of her disability. That claim is dismissed.
    (4) The Respondent contravened ss 15 and 39(2)(d) of the EA 2010 by discriminating against the Claimant because of something arising in consequence of her disability when it issued her with a sickness absence warning on 21 September 2020.

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Employment Judge Stout
28 March 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
29/03/2023