Case No: 1301412/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Potter**

Respondent: **National Highways Limited (formerly Highways England Limited)**

Heard at: **Midlands West** **On:** **5 6 7 8 June 2023 and 9 June 2023 (in chambers)**

Before: **Employment Judge Woffenden**
Members: **Ms J Beards**
Mr R White

Representation
Claimant: In Person
Respondent: Mr E Beever

RESERVED JUDGMENT (Liability only)

1 The complaint of unfavourable treatment under section 15 Equality Act 2010 fails and is dismissed.

2 The complaint of a failure to make reasonable adjustments under sections 20 and 21 Equality Act 2010 succeeds only in relation to the failure to take the step set out in 2.10.1 or provide the auxiliary aids referred to by early November 2020 (keyboard and keyboard support and a standard office chair) and laptop stand document holder telephony headset by mid December 2020.

3 The complaint of harassment related to disability under section 26 Equality Act 2010 fails and is dismissed.

REASONS

Introduction

1 The claimant (who the respondent accepted was a disabled person because of chronic long term back pain at the relevant times and that it had actual knowledge of disability from March 2020) was employed by the respondent (a government agency which plans designs builds operates and maintains England's motorways and major A roads) as a fixed term senior case worker in employee relations from 6 January 2020 until 1 April 2021 when she resigned. Early conciliation began 25 March 2021 and ended on 22 April 2021.The claimant presented her claim to the tribunal on 2 May 2021.

Issues

2 The parties had agreed a list of issues (see below) but at the start of the hearing the claimant confirmed she was not claiming that constructive unfair dismissal was an act of unfavourable treatment and withdrew that allegation and her allegations of disability related harassment at 2.12 2 and 2.12.3 .She also confirmed that 'of' should be 'or' in 2.6, the auxiliary aids in question were those set out in 2.10. 1 (first bullet point) and should have been provided by 13 weeks from July 2020 (mid-October 2020).Subject to that the agreed list of issues were as follows:

Section 15 Equality Act 2010

2.1 Did the respondent treat the claimant unfavourably because of something arising in consequence of the claimant's disability?

2.2 The alleged unfavourable treatment was
2.2.1 The respondent's delay in putting the recommended equipment in place.

2.3 The '*something arising* ' from disability was that the claimant's manager Ms Judge and the respondent did not believe that the claimant was genuinely ill as a result of the reasons for her absence and treated her illness as trivial and this is borne out by the lack of any proactive intervention during her absence/s that would have enabled her to return to work sooner and sustain her attendance.

2.4 Can the respondent show that the alleged treatment is a proportionate means of achieving a legitimate aim?

2.5 The legitimate aim for the equipment issue is the need of the business to manage all of the new COVID -19 risks faced ,related delays and increased workload in the relevant departments, alongside the duty to the claimant to provide suitable equipment.

Section 20/21 Equality Act 2010

2.6 Did a provision ,criterion or practice of lack of an auxiliary aid put the claiamnt at a substantial disadvantage in comparison to persons who are not disabled?

2.7 What provision criterion or practices does the claimant rely on?

2.7.1 Failure to offer suitable equipment and aids to enable the claimant to work from home ,sustain attendance and enable a quicker return to work;
2.7.2 Failing to seek physiotherapy through OH (which was a term of her employment) within a reasonable timeframe ;
2.7.3 Management of the claimant's workload.

2.8 What is the substantial disadvantage that the claimant alleges that they were put to as a result of the alleged failures ?

2.8.1 Not being able to return to work and work from home
2.8.2 Her condition deteriorating and causing a second period of absence;
2.8.3 Stress and anxiety.

2.9 Did the respondent know about the alleged substantial disadvantages?

2.10 Did the respondent fail to take such steps as were reasonable in all the circumstances of the case for it to have to take in order to avoid the disadvantages /provide the auxiliary aids from March 2020.

2.10.1 Offering the claimant suitable equipment and aids (posturite chair with lumbar support ergonomic keyboard laptop stand document holder telephony headset) sooner
2.10.2 Providing access to OH (physiotherapy) within a reasonable timeframe
2.10.3 Managing or reduction in caseload. The claimant claims that she saw no change or reduction with only one case being taken away from her (at her request).

Disability Related Harassment

2.11 Did the respondent engage in unwanted conduct related to the claimant's disability?

2.12 What was the unwanted conduct?

2.12.1 A discussion between the claimant's line manager (Ms Judge) and a colleague with regards to the claimant's workload, details of which were not discussed with the claimant and without permission from the claimant to share details of her condition or needs.
Alleged harasser Ms Judge .The claimant became aware of this just before November 2020.
2.12.2 An email exchange between the claimant and her second line manager Ms Welch when the claimant was told that she should know better than to raise issues, being a senior manager.
Alleged harasser Ms Welch ,22/23 March 2021.
2.12.3 Ms Welch attempting to bypass the process of arranging external mediation and asking for Ms Judge to have access to the claimant's grievance.
Alleged harasser Ms Welch 23/25 March 2021

2.13 Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant ,taking into account
2.13.1The claimant's perception
2.13.2 The other circumstances of the case
2.13.3 Whether it is reasonable for the conduct to have that effect.

Evidence and Procedure

3 There was a bundle of documents of 517 pages .We have read and taken into account only those documents to which we were referred in witness statements or under cross examination**.**

4 We heard from the claimant who gave evidence on her own account and on behalf of the respondent we heard from Fay Judge (formerly the respondent's Employee Relations Lead and the claimant's manager) ,Rachel Davis (a peer of the claimant and at the material time also a senior case worker and James Greenway (the respondent's Director for Estates ,Facilities and Business Services who heard the claimant's grievance appeal).

5 The claimant was given the opportunity to make submissions but chose not to do so. We reassure her that we drew no inference whatsoever as a result of that choice.

Fact Finding

6 The claimant is an experienced HR professional with over 20 years' experience in interim positions with various employers. She was employed by the respondent as a senior case worker on an 18 month fixed term contract working 4 days a week. She worked in the respondent's premises in the Cube in Birmingham city centre from 6 January 2020 and used one of the respondent's standard office chairs.

7 We accept the evidence of Mr Greenway that such chairs are capable of adjustment in a variety of ways and cater for 95% of individual employee needs. The claimant accepts that the office chair with which she was provided was suitable for her and she had plenty of opportunity to mobilise around the office in the Cube.

8 Lockdown due to the Covid pandemic began on 23 March 2020 and the claimant began to work from home. The respondent's staff were informed that of they needed a chair to work from home it would offer up to £150 for the purchase of the same. It is common ground the claimant did not avail herself of that offer.

9 On 16 July 2020 the claimant informed her manager Fay Judge that she was unwell and commenced a period of absence from work which ended on 21 September 2020.The cause of her absence was her (pre-existing) back condition. In July 2020 Ms Judge asked the claimant's colleague Ms Davis to review the claimant's workload and reallocate the most pressing cases. The claimant has alleged that details of her condition and needs were shared without her permission on an unspecified date and time and that this was harassment related to disability. She was not a participant in the discussion between Ms Judge and Ms Davis so does not know what was said and did not know of the reduction in her workload until November 2020.She invited us to infer from a conversation she said she had with Ms Judge about another employee about that employee's condition which she considers betrays indiscretion on the latter's part that Ms Judge was similarly indiscreet in her discussion with Ms Davis . We found Ms Judge and Ms Davis clear and straightforward witnesses .We accept the evidence of Ms Judge and Ms Davis that the individual in question in the conversation she had with the claimant was content that such information about them was shared. In those circumstances no inference can be drawn from Ms Judge's conversation with the claimant. We found the evidence of Ms Judge and Ms Davis wholly credible that no details of the claimant's condition or needs were discussed when Ms Judge asked Ms Davis to reallocate her work load. We are unable to find on the evidence before us that there was any sharing of details of the claimant's condition or needs as alleged .

10 Further as far as the claimant's workload was concerned we accept the evidence of Ms Judge and Ms Davis that during the claimant's absence from work

they discussed her workload and Ms Davis (who was an experienced colleague and the claimant's peer with 16 years' service with the respondent) reallocated her cases as she thought necessary. By the time of the claimant's return to work a problematic suite of interconnected grievances had been removed from the claimant and closed.

11 The claimant had a telephone assessment with her general practitioner ('GP') on 21 July 2021in which they discussed the possibility of some physiotherapy via the NHS. The claimant told Ms Judge about this on that day. On 29 July 2020 Ms Judge telephoned the claimant and told her she would probably be able to get access to physiotherapy via the respondent's Occupational Health services. In the meantime (as the claimant told her GP on 6 August 2020) she sought private physiotherapy because NHS physiotherapy provided at that time was not 'hands on 'due to Coronavirus restrictions and her physiotherapist could provide ' hands on' treatment.

12 On 7 August 2020 the claimant spoke to Ms Judge who told her she would make a referral to the respondent's OH service (which was a complicated process with which she was not familiar) ,and offered to courier to her her office chair. The referral was described by Ms Judge in her witness statement as an 'additional services referral'. By this time the claimant had been absent from work for 21 days. Under the respondent's absence management policy it is at this point that OH advice should be sought because the employee's absence is regarded as long term.

13 Ms Judge told the claimant by email on 11 August 2020 that she had to set up a new account in order to make a referral to OH for the claimant. OH made contact with the claimant (who had been on holiday for the preceding two weeks) on 21 September 2020 by which time the claimant was back at work and had received face to face treatment from her private physiotherapist (of whom she had been a patient for 17 years) on 2 September 2020 .She was unable to attend face to face appointments prior to this due to lockdown restrictions. Further such appointments took place on 24 September 2020 ,13 October 2020 ,24 November 2020 and 22 December 2020.

14 When OH made contact with the claimant on 21 September 2020 she was surprised to learn that the purpose of the referral was for performance and attendance and not to enable her to obtain physiotherapy as she had anticipated. She and Ms Judge had a return to work interview on 22 September 2020 at which point the position was that she was having private physiotherapy pending physiotherapy being provided by the respondent's OH service. She accepted under cross examination that all was as it should be. The claimant did not require a phased return to work ;she worked from home as usual from the date of her return and continued to do so until 24 November 2020,using the chair she had at home. In the meantime on 19 October 2020 Ms Judge contacted OH and cancelled the claimant's existing referral and approved physiotherapy for the claimant. The claimant on 5 November 2020 expressed disappointment about the lack of progress in this regard because she did not want another acute episode which would once again result in her being unwell and unable to work.

15 By 12 November 2020 the claimant was reporting to Ms Judge that her sciatica was bad and she was considering going back to her GP, having been informed on 11 November 2020 that Ms Judge had successfully submitted a further referral to OH. On 13 November 2020 Ms Judge asked the claimant to let her know if no

contact had been made by close of business Tuesday and reminded her to take regular breaks and let her know of any equipment that would support her such as a 'chair etc'.There is no evidence that the claimant pursued either equipment or chair.

16 On 23 November 2020 the claimant and Ms Judge had a telephone conversation about one of the claimant's cases during which the claimant objected to Ms Judge's intervention in the case and Ms Judge objected to the claimant's tone and approach. The following day the claimant told Ms Judge that she was unwell and would not be at work and Ms Judge sent the claimant an email providing examples of occasions on which she considered the claimant had been rude in telephone conversations and of what she called the claimant's direct style. The claimant was aggrieved at its contents in particular an example cited by Ms Judge which she thought had been 'put to bed' and on 25 November 2020 she resigned by email ,complaining (among other matters) of delay in the provision of physiotherapy. Ms Judge replied to the claimant on the same day in an email in which she agreed there had been a delay and mix up as far as physiotherapy was concerned. The claimant retracted her resignation and on 30 November 2020 a colleague chased the referral of 11 November 2020 and on 1 December 2020 in an email Ms Judge asked the claimant to let her know when OH contacted her and said there would be 3 approved physiotherapy sessions which she had told OH should be face to face not virtual at the claimant's request. That day the claimant provided a fit note the reason for absence being work related stress and sciatica for two weeks .There was a further such sick note which covered the period from 15 December 2020 to 16 January 2021.

17 The claimant attended a telephone triage assessment with OH on 21 December 2020 (by that time the first available date for such an appointment).It recommended a DSE assessment because the claimant's current work station (home) was an aggravating factor and the claimant was referred to physiotherapy.

18 The physiotherapy appointment took place on 9 January 2021 recommending a DSE assessment. It had been confirmed to the claimant on 22 December 2020 that 3 physiotherapy sessions had been approved and a further 3 could be approved. The OH reports dated 21 December 2020 and 9 January 2021 were not received by Ms Judge until 26 January 2021 ,having been sent to and amended by the claimant and returned to OH. Ms Judge was contacted by the claimant on 9 February 2021 who wanted to discuss potential products with her but on 11 February 2021 Ms Judge declined to do so because she did not feel qualified to do so until the claimant had been professionally assessed.

19 On 26 February 2021 a DSE assessment on the claimant's home work station was carried out by telephone, recommending a replacement chair height adjustable desk adjustable height lap top document holder keyboard and the provision of a telephone head set. This report was sent to the claimant first and not released by OH to Ms Judge until 17 March 2021.Ms Judge then contacted the claimant on 18 March 2021 and said she had started to investigate lead times and costs for the recommended equipment and sought a telephone call the following week to discuss with the claimant .That discussion was postponed by Ms Judge (due to what she described as an urgent trade union issue) until 29 March 2021 when Ms Judge told the claimant the keyboard and keyboard support were available and the chair had been ordered .The other items were not in stock. The keyboard and keyboard support and a standard office chair which met the

requirements of the DSE assessment requested on 29 March 2021 were provided to the claimant on 31 March 2021 .The usual turnaround time is 48 hours.

20 On 1 April 2021 the claimant resigned by email to Ms Judge . The email referred to an unacceptable time line for mediation to happen and intimidating and harassing emails from Ms Welch had made her decide she could not return to work with '*matters between us unresolved'* and '*obvious added bias* ' from Ms Welch. She had presented a grievance about Ms Judge on 22 March 2021 and resigned in response to concerns she had about a request made by Ms Welch (the respondent's director of Employee Relations ,Business Partnering and Projects and Ms Judge's line manager) that she agree to sharing a copy of her grievance with Ms Judge , having proposed to the claimant that her grievance be resolved by mediation.

21 In the non-verbatim notes made during a grievance investigation meeting on 24 April 2021 which Ms Bell (the respondent's regional director for the South East who heard the claimant's grievance) held with Ms Judge ,Ms Judge is recorded as having said that '*the only reason she (the claimant) was off was because of her back* ' and later that '*If TP has a back condition and needs something complex'.* It was put to Ms Judge in cross examination that the first remark was flippant and indicated she was not taking the claimant's bad back seriously. Ms Judge denied this and reminded the claimant about the referrals she had made to OH ,the one to one discussions they had had and the get well card sent. The passage of the notes from which the first remark was extracted related to the provision of physiotherapy and was as follows: '*Fay put through normal Occ Health Absence Management review -Tracey didn't want to participate in this as the only reason she was off was because of her back, no need for absence review, she just needed physio*.' The second remark was put to Ms Judge in cross -examination as indicating she doubted the claimant had a back condition. Again Ms Judge denied she disputed the claimant had a back condition or that she was disabled and said the context in which the remark was made was to explain why she had not felt qualified to undertake the DSE assessment herself. The passage of the notes from which the second remark was extracted related to Ms Judge's request for the DSE assessment for the claimant and was as follows:' *Because of the complexity (FJ can do the basics) FJ isn't an expert .If TP has a back condition and needs something complex ,FJ isn't qualified ,so HE was paid to have a proper DSE assessment that FJ arranged.'* We find that when considered in the context of the relevant passage of the notes Ms Judge's first remark was a reference to the claimant's absence having a single cause namely the claimant's back condition. We find that when considered in the context of the relevant passage of the notes her second remark contained her explanation for not having undertaken the DSE assessment herself. Neither bear the negative interpretation put on them by the claimant.

22 On 10 June 2021 Ms Bell wrote to the claimant with the outcome of her grievance .In her letter among other things she acknowledged in relation to the provision of physiotherapy the claimant was not satisfied that ,having first raised it in July 2020 ,it took until January 2021 to take place and that she was absent from work through sickness for 5 months during that time and that '*this timescale was lengthy*.'

Submissions

23 We thank Mr Beever for his oral submissions.

The Law

24 Under Section 15 EqA:

'(1)A person (A) discriminates against a disabled person (B) if—

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability'

25 The meaning of the word 'unfavourable' cannot be equated with the concept of 'detriment' used elsewhere in EqA. It has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability. It is necessary to identify the relevant treatment before deciding if it is unfavourable (**Williams**).

26 In the case of **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305,** Mr Justice Langstaff held that there were two separate causal steps to establishing a claim under section 15. Once a tribunal had identified the treatment complained of, it had to focus on the words "because of something" and identify the "something" and then decide whether that "something" arose in consequence of the claimant's disability.

27 In the case of **Pnaisner v NHS England [2016] IRLR 170** the EAT stated that (a) the tribunal had to identify whether there was unfavourable treatment and by whom; (b) it had to determine what caused the treatment. The focus was on the reason in the mind of the alleged discriminator, and an examination of the conscious or unconscious thought processes of that person might be required; (c) the motive of the alleged discriminator acting as he did was irrelevant; (d) the tribunal had to determine whether the reason was " something arising in consequence of [the claimant's]disability", which could describe a range of causal links; (e) that stage of the causation test involved an objective question and did not depend on the thought processes of the alleged discriminator; (f) the knowledge required was of the disability; it did not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

28 Section 39(5) EqA imposes a duty to make reasonable adjustments upon an employer. Where such a duty is imposed sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that duty comprises three requirements. Insofar as is relevant for us, the first of those requirements is that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, that the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The third requirement under section 20(5) is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in

comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

29 Section 21(1) EqA states that the failure to comply with one of the three requirements is a failure to comply with a duty to make reasonable adjustments. Section 21(2) EqA provides that a failure to comply with a duty to make reasonable adjustments in relation to the disabled person constitutes discrimination by the employer. The duty to make reasonable adjustments begins when the respondent is able to take steps to avoid any relevant disadvantages.

30 As far as knowledge for the purpose of the claimant's claim of a failure to comply with the duty to make reasonable adjustments is concerned in **Secretary of State for the Department of Work and Pensions v Alam [2010]IRLR 283** (EAT) (again a case that preceded EqA) it was held that two questions needed to be determined:
Did the employer know both that the employee was disabled and that his/her disability was liable to affect him/her in the manner set out in section 4A (1) DDA?
Only if that answer to that question is no then ought the employer to have known both that the employee was disabled and that his /her disability was liable to affect him/her in the manner set out in section 4 A(1)?
If the answer to both questions was also negative, then there was no duty to make reasonable adjustments (see also the comments of Underhill P at [37] in **Wilcox v Birmingham CAB Services Ltd [2011]EQLR 810 EAT).**

31 Schedule 8, para 20(1) EqA states that a respondent is not under a duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to .It would seem therefore that the analysis in **Alam** remains good law.

32 However the employer must do all they can reasonably to find out whether this is the case and what is reasonable will depend on the circumstances. The Equality and Human Rights Commission has prepared a Code of Practice on Employment (2011) ('the Code'). Tribunals and courts must take into account any part of the Code that appears relevant to any questions arising in proceedings.

33 The Code states at paragraph 5.15 and 6.19:

> *" The employer must ,however ,do all they can reasonably be expected to do to find out [whether this is the case].What is reasonable will depend on the circumstances .This is an objective assessment .When making enquiries about disability ,employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."*

34 The burden is on the employer to show that it was unreasonable for it to have the required knowledge.

35 In **Environment Agency v Rowan [2008] IRLR 20** a case concerning the provisions of the DDA the Employment Appeal Tribunal, His Honour Judge Serota QC, presiding stated as follows:-

'27 …..In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant.

It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.' "

It was held that an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters at a) to d) above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person at a substantial disadvantage.

36 Paragraph 6.10 of the Code suggests that *'provision, criterion or practice'* should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications and in line with authorities pre dating the EqA this includes one-off decisions and actions.

37 The EqA states that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact and is assessed on an objective basis.

38 Once the duty is engaged employers are required to take such adjustments as it is reasonable to have to take, in all the circumstances of the case. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

39 Paragraph 6.28 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

whether taking any particular steps would be effective in preventing the substantial disadvantage;
the practicability of the step;
the financial and other costs of making the adjustment and the extent of any disruption caused;
the extent of the employer's financial or other resources;
the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
the type and size of the employer.

40 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

41 Schedule 8, para 20(1) EqA states that a respondent is not under a duty to make reasonable adjustments if he or she does not know,and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to .

42 His Honour Judge Richardson made it clear in **Newcastle City Council v Spires 2011 UKEAT 0334 10 2202** in the context of a reasonable adjustments claim that a tribunal should consider only complaints that were defined at the commencement of the hearing ,following **Sainsbury's Supermarkets Ltd v Tarbuck** and **Chapman v Simon**.

43 Under section 26 (1) EqA

'(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

44 Under section 26 (4) EqA

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

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect. '

The relevant protected characteristics include disability."

45 As far as harassment is concerned Chapter 7 of the Code addresses harassment and says at paragraph 7.7 that "*unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person surroundings or other physical behaviour. The word "unwanted" means essentially the same as "unwelcome" or "uninvited". "Unwanted" does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment* (paragraph 7.8).

46 In the case of **HM Land Registry v Grant** Lord Justice Elias said "*when assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable*."

Conclusions

Section 15 Equality Act 2010

47 We accept Mr Beever's submission that any alleged delay in the putting the recommended equipment in place cannot predate the recommendation which was contained in the DSE assessment dated 26 February 2021.Some but not all the recommended equipment was put in place by 31 March 2021 and the remainder was not thereafter put in place because the claimant resigned the following day. The claimant's resignation email is entirely silent concerning any delay as far as putting equipment in place was concerned and we conclude that the claimant's reasons for resigning were as stated in her email of 1 April 2021:the delay in the mediation so that her issues with Ms Judge remained unresolved and her negative view of Ms Welch's communications about that medication. The DSE assessment was received on 17 March 2021.Two weeks elapsed before the respondent put in place the equipment which was evidently in stock and therefore could be provided within 48 hours. Ms Judge understandably wanted to discuss the provision of equipment with the claimant before making the arrangements but she did not prioritise this (even though she knew of the claimant's concerns about delay in relation to matters concerning her health) so the discussion did not take place until 29 March 2021.We conclude that this particular delay of two weeks (albeit short) in putting in place the recommended equipment would have contributed to those concerns and disadvantaged the claimant who did not get the equipment recommended for her for those two weeks .

48 However this unfavourable treatment must be because of something arising in consequence of the claimant's disability. We are concerned here with the reason in the mind of Ms Judge. The claimant says that the 'something arising' in consequence of her disability was Ms Judge did not believe in the genuineness of the claimant's illness as a result of the reasons for her absence and treated her illness as trivial. We are unable to conclude on the evidence before us that Ms Judge did not believe in the genuineness of her illness as a result of the reasons for her absence or treated her illness as trivial as alleged. Even if we are wrong about that we are unable to discern any connection between this alleged 'something arising ' and the claimant's disability such that we could conclude that it arose 'in consequence 'of it. The claim fails and is dismissed.

Section 20/21 Equality Act 2010

49 The claimant's claim of a failure to make reasonable adjustments is brought in relation to the requirements under sections 20 (3) and 20(5) EqA.

50 As far as the provisions criteria or practices (PCPS) set out in 2.7.1 to 2.7.3 are concerned we conclude there is no evidence that any such PCP had or would be applied to the claimant. Any claim based on them must fail. Mr Beever suggested in his submissions as an alternative PCP that when 2.7.1 and 2.7.2 are taken together they amount in effect to a PCP that the respondent required the claimant to work and provide the essential functions of her job at home. The duty to make reasonable adjustments does not arise however if the claimant is not put at any substantial disadvantage. In relation to the provision of the posturite chair we accept Mr Beever's submission that there was no disadvantage to the claimant during the period January to March 2020 because no such chair was needed. From the time she began working from home she used her own chair and did not avail

herself of the offer by the respondent to contribute to the cost of providing a chair or to courier to her her office chair or follow up on the discussion with Ms Judge in December 2020. The claimant's condition was a longstanding one. She did not identify equipment generally or a chair specifically as an issue in her discussions with Ms Judge .What she wanted was physiotherapy and for that to be hands on and provided by the respondent for which a referral to OH was required. She did not want an OH referral to be carried out for any other purpose and Ms Judge followed the claimant's wishes in this regard. In due course the triage appointment followed by the physiotherapy appointment which resulted in the DSE assessment revealed to Ms Judge (and it would appear to the claimant) on 17 March 2021 that a chair and other equipment was recommended.

51 Mr Beever submitted that (with the exception of the chair) there were no facts to help us decide the existence of any substantial disadvantage at all ;the claimant's witness statement only referred to the chair. He submitted that no obligation to provide the rest of the equipment arose until after the DSE report was provided to the respondent.

52 The respondent has accepted knowledge of the claimant's disability from March 2020, but it must also have the requisite actual or constructive knowledge of the substantial disadvantage(s). Although there was no evidence in the claimant's witness statement about substantial disadvantage in relation to equipment (other than the chair) ,it is implicit in the DSE assessment that the equipment was recommended in order to alleviate or avoid the claimant not being able to work from home and/or a deterioration in her condition and further absences from work.

53 We have concluded that if Ms Judge (an HR professional) had followed the respondent's own attendance policy and sought OH advice generally about the claimant (a disabled person) when her absence was regarded as long term and had done so within a reasonable time frame having regard for her unfamiliarity with the system for doing so and making allowances for the tardiness of the OH service provider and time for the claimant to approve release of the requisite reports, by approximately 13 weeks thereafter (early November 2020) the respondent could have reasonably been expected to know the claimant was or was likely to be placed at the substantial disadvantage(s) set out in 2.8.1 and 2.8.2, if not 2.8.3.

54 Mr Beever accepted in submissions that the duty to take reasonable steps to avoid the substantial disadvantage/provide the auxiliary aids incorporates a duty to do so within a reasonable time. The respondent was not subject to the duty to make reasonable adjustments/ provide the auxiliary aids in relation to the auxiliary aids set out in 2.10. 1 until early November 2020 but although the respondent was able to provide the recommended keyboard and keyboard support and a standard office chair (in stock items) within 48 hours, they were not offered to the claimant /provided to her until 31 March 2021 and the other items were not offered /provided at all. As far as items which were not in stock were concerned we conclude that the respondent should have been able to provide them to her within say 6 weeks of early November 2020.

55 It was accepted by the respondent that the provision of physiotherapy could facilitate a return to work. Mr Beever submitted that after 21 days absence OH would 'kick in' and thereafter there would be a 13 week period to 'mesh' the evidence together (mid November 2020) and the OH triage appointment took place on 21 December 2021 and then a further 4 week period elapsed before she had a physiotherapy appointment on 9 January 2021 and that it was a question of

fact for the tribunal to determine whether this was a failure to provide access to physiotherapy within a reasonable time. He submitted however that there was one overriding feature and reminded us that the duty on the respondent is to take to take such steps as it is reasonable to have to take to avoid the disadvantage in all the circumstances of the case. He submitted the claimant had had physiotherapy from July 2020 until December 2020 which stopped when physiotherapy was provided by the respondent. An alleged failure to provide access to physiotherapy could not be sustained when she did have physiotherapy to assist her return to work. What the claimant was really saying was not that she wanted physiotherapy but that she wanted the respondent to pay for her physiotherapy and payment did not remove the disadvantage because that step (the provision of physiotherapy) had already been taken. If he was wrong about that he submitted that the delay to provide the step in question from December had been minimal and the claimant accepted that a period of 13 weeks would have been reasonable.

56 We have found that 'hands on' physiotherapy (which was what the claimant wanted) could not be provided by the claimant's private physiotherapist due to lockdown restrictions until 2 September 2020.The respondent's OH provider was subject to similar restrictions . Access to OH (physiotherapy) was not therefore a reasonable step for the respondent to have to take prior to September 2020 because the only access the claimant wanted was to face to face physiotherapy (she would have rejected anything else) and that could not be provided by any provider before September 2020.However Ms Judge was aware in July 2020 that access to physiotherapy was potentially available to the claimant via OH .There was no reason for her to wait 21 days before making an additional services referral referral to OH in relation to access to physiotherapy. The delays in doing so were occasioned by her unfamiliarity with the system for doing so and the tardiness of the OH service provider. We have found that by 21 September 2020 OH had made telephone contact with the claimant .In our judgment had the appropriate referral been made by Ms Judge in relation to access to physiotherapy without first waiting 21 days , a telephone OH triage assessment would have taken place by the latest by 21 September 2020 and a physiotherapy appointment would have happened in mid-October 2020. In this case the physiotherapy appointment did not happen until 9 January 2021.

57 However, since 2 September 2020 the claimant had been in receipt of private physiotherapy treatment and had also returned to work on 21 September 2020 (without the need for a phased return). The claimant was no longer put to the substantial disadvantage complained of at 2.8.1.If she was put to the substantial disadvantage complained of at 2.8.1 and 2.8.2 the physiotherapy she continued to receive from her private physiotherapist until December 2020 was ineffective in avoiding or preventing the disadvantage(s). As far as the third substantial disadvantage (stress and anxiety) complained of is concerned, although the claimant's second period of absence was occasioned by work related stress and sciatica the claimant continued to be in receipt of private physiotherapy so the reasonable adjustment contended for would not have avoided or prevented that disadvantage.

58 The claimant has failed to establish any facts from which we could conclude that her case load (or its management) resulted in any substantial disadvantage . If we are wrong about that we conclude that the step contended for at 2.10.3 was taken by the respondent (see paragraph 10 above).

Disability Related Harassment

59 We have not found that the discussion alleged by the claimant took place (see paragraph 9 above). The claim fails and is dismissed.

60 The case will be listed for a remedy hearing in due course but not before 28 days from the date this judgment is sent to them to enable them to settle the issue of remedy if they so wish.

Employment Judge Woffenden

Date:06/09/2023