EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
Mr Donal Kelly		London Underground Limited

Heard at: **London Central Employment Tribunal**

On: **29 September, 2, 3, 4, 6 October 2023**

9 October 2023 (In Chambers)

Before: **EJ Webster**
Mr R Baber
Ms Z Darmas

Appearances
For the Claimant: Mr Devlin (Counsel)
For the Respondent: Mr Salter (Counsel)

RESERVED JUDGMENT

1. The Claimant's claims that the Respondent failed to make reasonable adjustments contrary to s 20 and s21 Equality Act 2010 are partly upheld.

2. The Claimant's claims that he suffered harassment related to disability pursuant to s 26 Equality Act 2010 are partly upheld.

REASONS

The Hearing

1. The hearing was held entirely by CVP. The Tribunal sat on the first 3 days. Day 4 only convened at 3pm due to the availability of the respondent's final witness. Due to Tribunal constraints Day 5 was a non-sitting day. Submissions were heard on Day 6 and the Tribunal sat in Chambers on day 7.

2. The Tribunal received a bundle numbering 555 pages and 6 witness statements for the following:

   (i) Mr Donal Kelly (Claimant)
   (ii) Ms Rebecca Evans (manager but giving evidence for the Claimant)
   (iii) Ms Marcia Williams (Claimant's line manager at the relevant time)
   (iv) Mr Peter Tollington (considered the Claimant's grievance)
   (v) Mr Nick Dent
   (vi) Dr Samantha Phillips

   All gave oral evidence.

3. On the first day the Tribunal determined two applications by the Claimant. The first was an application to amend his claim that had been made in March 2023 but had not been determined due to oversight by the Tribunal administration. The second was an application for specific disclosure. The Claimant's application to amend was allowed. The Claimant's application for specific disclosure was refused. Reasons were given during the hearing and are not repeated here.

4. Both counsel provided helpful written submissions which are referenced where necessary in our conclusions below.

<u>The Issues</u>

Jurisdiction

5. Insofar as any of the matters for which the Claimant seeks a remedy by way of discrimination occurred more than three months prior to the presentation of his claim form, allowing for the effect of early conciliation, can the Claimant show that:

   a. They formed part of conduct extending over a period ending within three months of presentation; or
   b. It would be just and equitable to allow a longer period for bringing the claim?

Section 20/21 Equality Act 2010: Failure to make reasonable adjustments

Section 20(3) EA

6. Did the Respondent apply the following provision, criteria or practice?
   a) Requiring employees and / or Centurion Managers to attend meetings in person; and
   b) Requiring employees and / or Centurion Managers to maintain a high workload.

7. Did the PCP put the Claimant as a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled?

8. The Claimant relies on the following disadvantages:

    a) He cannot hear / pick up on all of the information being presented in meetings which in turn leads to him having to ask people to repeat themselves or him giving the incorrect response, both of which cause him embarrassment and frustration;
    b) The Claimant was required to undertake a high workload which meant he had a higher number of meetings and interactions with others which causes him stress due to his severe hearing loss; and
    c) The Claimant suffered a stressful and upsetting time due to the amount of time that passed, the continuous barriers that he faced and the measures he had to go to in order to eventually receive the funding for the hearing aid.

9. Did the Respondent know, or could it reasonably have known, the Claimant was disabled and likely to be placed at that disadvantage?

10. Did the Respondent take reasonable steps to avoid that disadvantage?

11. The Claimant says the following reasonable adjustments should have been applied:

a) Provision of a quiet office;
b) Management of meetings to ensure he is seated in a suitable position;
c) Sufficient lighting to support him to read visual cues;
d) Encourage others to face him to allow use of lip reading;
e) Use of email and text alerts to support announcements;
f) Consider voice to text software;
g) Provision of a telephone system that can be used with his hearing aid;
h) Allowing him to attend meetings remotely where he can control volume levels;
i) Reduction in workload; and
j) Funding for the hearing aid / funding in a timely manner.

Section 20(5) EA

12. But for the provision of an auxiliary aid (i.e. a hearing aid), was the Claimant put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

13. The Claimant relies on the disadvantages particularised at paragraph 5(a)-(b) above.

14. Did the Respondent take such steps as it was reasonable to take to provide the auxiliary aid (i.e. the hearing aid)?

S26 Equality Act 2010 – Harassment

15. Did the Respondent subject the Claimant to unwanted conduct as follows:

a) failure by Marcia Williams to respond to emails and requests for information between May 2021-May 2022;
b) The delay by Marcia Williams in referring the Claimant to LUOH between May 2021-June 2022;
c) Marcia Williams providing the Claimant with false information regarding who had made the decision to deny the funding, between approximately October 2021-May 2022;
d) Marcia Williams misleading the Claimant in October 2021 about discussions that were had with Nick Dent about the funding;
e) Marcia Williams providing Dr Philips false information in relation to previous funding in an email dated 30 March 2022;
f) Breaking GDPR rules by Marcia Williams and Dr Phillips discussing the Claimant's situation between 30 March 2022-14 April 2022 without his consent;
g) Marcia Williams failing to review the Claimant's situation or partake in discussions to support any reasonable adjustments that could be put in place between May 2021-May 2022;
h) Marcia Williams failing to provide the Claimant with a speaker for his computer when he requested this in 2021;
i) Marcia Williams allocating an increased workload to the Claimant throughout 2021 and on 12 May 2022, despite knowing he was already struggling.
j) Marcia Williams failing to do anything about the Claimant's workload when he raised concerns in September 2020 and on 10 May 2021;
k) Marcia Williams telling the Claimant that they will replace him when he raised concerns about his workload in September 2020, May 2021 and May 2022;
l) Marcia Williams failing to follow TFL Managers guidelines on Disabilities and Reasonable Adjustments between May 2021-May 2022; and
m) Marcia Williams failing to carry out a workplace risk assessment between May 2021-May 2022.

16. If so, was that unwanted conduct related to his disability of hearing loss?

17. If so, did that conduct have the purpose or effect of

i) violating the Claimant's dignity or

18. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

19. Was it reasonable for the Claimant to treat the conduct as having that effect?

The law

20. S136 Equality Act 2010 - The Burden of Proof

S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

21. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

22. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

23. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

24. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice

25. **S 20 Equality Act - Duty to make adjustments**

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

26. S 21 Equality Act - Failure to comply with duty to make reasonable adjustments

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

27. **Schedule 8, Equality Act 2010** states that the duty to make reasonable adjustments arises unless the employer can show that it did not know or "could not reasonably be expected to know" that the employee is disabled or that there was a substantial disadvantage.

28. Case law and the EHRC Code suggest that knowledge will sometimes be imputed to the employer. The EHRC Code advises that employers must "do all they can reasonably be expected to do" to find out this information.

29. An employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question (per paragraph 20(1) Schedule 8, EA 2010)

30. Guidance for a tribunal's approach to reasonable adjustments was given in ***Environment Agency v Rowan*** [2008] ICR 218:

- The PCP must be identified;
- The identity of the non-disabled comparators must be identified (where appropriate);
- The nature and extent of the substantial disadvantage suffered by C must be identified;
- The reasonableness of the adjustment claimed must be analysed.

31. The duty does not arise however unless the employer knows or ought reasonably to know that the employee is disabled *and* that the PCP put him at a substantial

disadvantage. The EHRC *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 5.15.

32. In ***Tarbuck v Sainsbury's Supermarkets*** [2006] IRLR 664**,** the EAT held that the only question is whether the employer has *substantively* complied with its obligations or not.

33. It is for the tribunal to assess for itself the reasonableness of adjustments. The Equality and Human Rights Commission Code of Practice gives useful guidance at paragraphs 6.28 and 6.29 upon potentially relevant factors.

Harassment – s26 Equality Act 2010

S26 (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.

…..

(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.

(5)The relevant protected characteristics are—

….

disability

34. The EHRC code, which we look to for guidance, sets out what is meant by 'related to' in paragraphs 7.9-7.11. It states that related to has a broad meaning and that the conduct under consideration need not be because of the protected characteristic.

35. The Claimant must establish first that the conduct is unwanted and then whether, taking into account all of the circumstances of the case it is reasonable for the conduct to have the stated effect. This is an objective test with a subjective factor of hearing in mind the perception of the claimant.

36. The gravity of the conduct is a key part of the objective assessment. Some complaints will fall short of the standard required. Elias LJ in Land Registry v Grant [2011] ICR 1390 CA (para 47):

… even if in fact the [act complained of] was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

Facts

General observations/findings

37. We have only made findings of fact in relation to the maters which assisted us in reaching our conclusions. Where evidence was provided by the parties which is not discussed below that does not mean it was not considered, simply that it was not relevant to our conclusions.

38. All of our findings of fact are reached on the balance of probabilities. Where there has been a dispute of evidence between the parties, we have reached our conclusion based on whose evidence we preferred.

39. The Claimant has been employed by the the Respondent since 1994. At the relevant time he worked as an Area Manager which is a Centurion manager position. He remains employed but at the time of the hearing was on sick leave.

40. Ms Williams, the key respondent witness, was the Claimant's line manager at the relevant time. She has worked for the Respondent for 43 years and remains employed. It is relevant to the conclusions we reach to note that she has dyslexia. In order to support her whilst at work the Respondent provides for her to have an assistant who reads and sometimes responds to her emails. At the time that person was Ms Davey. Ms William's dyslexia also means that she prefers to deal with issues through conversations with people as opposed to via email. The impact of that on this case has been that Ms Williams, to a large extent, is solely reliant upon her memory of events as opposed to having many emails or notes to remind her of what happened and when. It also meant that when asked to put things in writing at the request of the Claimant, she often did not do so. We consider the impact of that issue further below. For these introductory purposes though we want it noted that we recognise that memories without notes or emails to reinforce them are often inaccurate or vague through no fault of the individual. The events in question cover over a year and many people cannot remember the exact sequence of events in a week, never mind a year. We also note that this situation was of far less personal importance to Ms Williams than to the Claimant and therefore she is less likely to have a clear memory of the order of events. That statement is not meant pejoratively but is intended to reflect the reality that Ms Williams manages several people and has a busy job and therefore the events surrounding one person as part of one aspect of her job cannot have the same importance to her as it would to the Claimant at the time.

41. Finally, during her cross examination, Ms Williams frequently tried to circumvent giving straightforward answers to straightforward questions. We understand that

giving evidence can be a difficult process and that Ms Williams was personally accused of various acts of harassment. Nevertheless, her answers were frequently peppered with attempts at self-justification as opposed to trying to clearly explaining the facts behind what had happened.

42. All of these factors combine to mean that, for the most part, where there was a disputed fact with no corroborating written evidence, we preferred the Claimant's evidence over Ms Williams'.

The Safety Critical hearing scheme

43. The Respondent operates a scheme whereby those in safety critical roles receive funding from the Respondent for hearing aids. The purpose of this scheme is to ensure that those who may not have any difficulties with their normal day to day hearing, can nevertheless not hear to a standard high enough to fulfil the requirements for some safety critical roles within the Respondent. This scheme was put into place in 2017. It means that where an individual in a safety critical role requires hearing aids they are not referred to Occupational Health ('OH') and the situation is not considered under a 'normal' (for the respondent) reasonable adjustment process. Instead a different procedure is followed. Provision of hearing aids under this scheme is always funded and the Respondent has a contract with a third party to provide the testing and provision of hearing aids to those who are in safety critical roles.

44. It was not in dispute that where an individual needs hearing aids under this scheme it is of no relevance to the funding decision whether the individual also needs those hearing aids outside work.

45. It was accepted by everyone during these proceedings that the Claimant did not qualify under that scheme because he was not performing a relevant, safety critical role.

The Claimant's hearing

46. The Claimant has reduced hearing capabilities. This was first diagnosed in 2004 at which point he was removed from safety critical roles within the Respondent. He started wearing hearing aids in 2005. This was common knowledge at the Respondent. In 2009 and in 2015, the Claimant's hearing aids were funded by the Respondent following a referral to OH. Other informal adjustments were also in place under the Claimant's previous line manager including xxxx.

47. The Claimant had an external audiology assessment by Specsavers on 5 May 2021 during which he was told that his hearing had deteriorated. In May or June 2021, he notified Ms Williams that his hearing had deteriorated and he was trialing a new set of hearing aids. He asked whether the Respondent would be able to fund those aids in the same way that they had funded his last set in 2015. Ms Williams told the Claimant that she had no problem in approving that in principle and would seek funding.

48. The Claimant therefore had a reasonable expectation that based on the previous provision over the last 15 years or so together with Ms William's affirmation, that funding was likely to be provided.

49. After this conversation, there appeared to be no further communication between the Claimant and Ms Williams about the issue. In early September 2021, at the point when his free hearing aid trial was coming to an end the claimant spoke to Ms Williams again about the funding.

50. We find that Ms Williams had done nothing regarding the situation in the intervening period as there is no evidence to suggest that. We consider that had she taken any steps, there would have been emails about it seeking guidance from colleagues in the way that she did subsequently.

51. Following their conversation, on 20 September 2021, the claimant emailed Ms Williams asking about the process for approving the funding and attaching a copy of the 2015 OH report which had previously led to the funding of his last set of hearing aids. Ms Williams did not respond in writing to that email. The Claimant then sent her the cost of the aids on 28 October 2021 via email. Ms Williams did not respond to that email in writing.

52. Ms Williams told the Tribunal that she spoke to Chris Taggart, Mercillina Adesida and Robert Smith about the Claimant's situation. It is not clear during which time frame she spoke to them. We assume from her witness statement that she is saying that she spoke to them at some time after the conversation with the Claimant in early September. We had no evidence that she made these calls as there is nothing in writing referring to the calls or what they spoke about.

53. On balance, we do not consider that she took any steps to explore the funding situation further until she received the cost information on 28 October. Until then, we believe that she considered that there would be no difficulty in obtaining the funding and in any event did not know the amount for which she was seeking funding. It was therefore not something she felt she needed to explore in any great detail until she had the financial information from the Claimant.

54. Once she had the cost of the hearing aids we find that she then spoke to Mr Smith who probably informed her that the amount exceeded her expenses authority and therefore she should seek the authority of Mr Dent.

55. At the relevant time, because of the Covid pandemic and its impact on the Respondent's finances, an individual manager's authority to incur expenses was reduced to £1,000. This meant that Ms Williams could not approve the funding under this heading. She was mistaken in thinking that it was correct to claim it under 'Expenses' in any event. Expenses are not intended to cover such payments. She could have incurred it under xxxx part of her budget instead but this was not considered by her or Mr Smith.

56. Mr Smith and Ms Williams did not, at this time, approach this as a question of reasonable adjustments. Both viewed this is an expenses/budgetary issue. Mr Smith was the Head of Finance for Network Operations and was not considering that process presumably, at least in part, because that is not what Ms Williams asked him about. Ms Williams, according to her, had no experience of making reasonable adjustments or occupational health referrals and so did not look at

the question of funding the Claimant's hearing aids through this lens. We found this account difficult to believe and understand. She herself had reasonable adjustments in place in that she has an assistant working with her. She said that she has had all the requisite disability awareness training and she has worked for the Respondent for 40 years and been a manager for a considerable proportion of that. We do not accept that she can have managed people for such a significant period of time, in so large and diverse an employer as the Respondent, and not have understood or been cognisant of the steps involved in referring to OH for the purposes of reasonable adjustments.

57. On 11 November (p127) the Claimant again chased Ms Williams about his referral to OH and received no written response.

58. Ms Williams wrote to Mr Dent about the situation on 22 November 2021. It is clear from her message that she wanted to approve the funding and asks Mr Dent for his approval. Mr Dent's PA read the message and asked if the Claimant fell within the scope of the Safety Critical hearing aid policy (p128). We believe it is more likely than not that this is what prompted Ms Williams to call Mr Taggart to enquire about the parameters and purpose of the safety critical hearing aid policy. Mr Taggart informed her of the parameters of the Safety Critical hearing aids fund. Having spoken to Mr Taggart, we find, on balance, that Ms Williams realised that the Claimant did not qualify for funding under that scheme. We find that at some point, Ms Williams told the Claimant that she had spoken to different people at different times and that they all informed her, for different reasons, that funding was not available. We are not clear whether she said that they had refused to fund the Claimant's hearing aids but we do consider that she interpreted their comments as being indications that the Claimant would not be able to get funding and it was possible that she used this language.

59. At around this time we find that Ms Williams realised that this was not simply a question of straightforward funding from a particular fund or an individual giving permission but that she would need to refer the Claimant to OH as he had been suggesting all along.

60. The Claimant was duly referred to OH on 30 November. Unfortunately, Ms Davey sent the referral to the wrong channel or portal and this was never made good. We accept that Ms Davey did not see the email that rejected the referral and that MW was not made aware of it by Ms Davey. There was therefore a considerable period of time where all parties were just waiting for an OH appointment to be made.

61. The Claimant chased the situation on 8 February and Ms Williams asked Ms Davey to find out what had happened. There is a series of messages in the bundle which show that Ms Davey did that and was finally told on 22/23 February that no referral had ever been made. We find that Ms Williams never told the Claimant that the referral had not been made properly. Her evidence to us was that she assumed Ms Davey had done this. However there were several emails, over a period of months, where the Claimant clearly demonstrated that he was still waiting for the OH appointment despite numerous conversations during this period with Ms Williams. Ms Williams may, at the outset, have believed that Ms

Davey had told him, but by the time he emails on xxxx it should have been clear to her that he did not in fact know that no such referral had been made. She did not clarify this with him until she wrote to him on 22 April. It is not clear to us why she did not clarify the situation with him when she became aware that contrary to her original assumption, Ms Davey had not in fact told him that the original OH referral had not been processed.

62. On 10 March the Claimant chased Ms Williams again for his referral and he was then told during a phone call a week later that the referral had not been made correctly and another one would need to be submitted. As it transpired, no such re-referral was made though Ms Williams never told the Claimant that either.

63. On realising that the OH referral had not been made and that there had by now been a significant delay, we find that Ms Williams sought to try to create a shortcut by speaking to Dr Phillips. She emailed Dr Phillips and told her about the Claimant's hearing and asked whether he fell within the safety critical hearing aid policy. It is not clear why she did that given that she already knew that the policy was relevant to those with safety critical roles and she had already told the Claimant that he was not within that policy so had clearly already been told this by someone else. During her exchanges with Dr Phillips she divulged the name of the Claimant and his condition. It was accepted in evidence that Dr Phillips did not know this information beforehand nor that she needed to know this information to give the advice that she gave.

64. Dr Phillips then explained by email that the Claimant did not fit within the safety critical hearing aid funding policy and that general OH guidance needed to be considered including whether this was a reasonable adjustment. Her opinion was that it may well not be a reasonable adjustment because the Claimant would need the hearing aids in his day to day life as well.

65. The Claimant wrote to Ms Williams on 30 March 2022 and asked whether his OH referral had been sent. Ms Williams told the claimant that she had written to Dr Phillips. It is not clear why she did not inform him that his OH referral had not been submitted correctly nor why she took the step to message Dr Phillips as opposed to referring the claimant to OH as originally intended.

66. The Claimant then had a meeting with Ms Williams at his annual review on 12 April 2022. At that meeting Ms Williams told the claimant that he was not eligible for funding because he did not fit within the policy. We accept his evidence that he was shown the email from Dr Phillips but not for very long. We do not accept that he was told at this meeting that no OH referral would be made because it would not make a difference to the funding situation. Had that been the case then he would not have chased a referral the following month as he does.

67. On 10 May, the Claimant sent a further email to Ms Williams asking for an update on the OH referral. On 20 May, he sent to a further email to Ms Williams asking for an update on the OH referral. We could not find a response to these emails.

68. On 27 May, Ms Williams emailed the Claimant to confirm that the Respondent would not provide funding and there would be no benefit in a re-referral to OH

as there would be no change in their advice that the Claimant was registered to wear hearing aids [175]. We accept that this was the first time Ms Williams informed him that the re-referral to OH had not been made.

69. Ms Williams did then prepare an OH referral following the Claimant's email dated 27 May asking again for an OH referral. We believe that she made this referral because she sought advice from colleagues on receipt of the Claimant's email. This is inconsistent with Ms William's witness statement which clearly states (para 50) that she only referred the Claimant to OH once the Claimant was absent on sick leave. We think it is clear that the OH referral was prepared before the Claimant went off sick and was prompted by his email dated 27 May which copied in others and the advice she must have received in response to that.

70. The Claimant went off sick on 6 June 2021.

71. The Claimant attended an OH appointment on 30 June 2021. A report was prepared and sent to him. It is accepted that the report was sent whilst he was on annual leave and that it was sent to a different mailbox as opposed to his main one.

72. This meant that he was not aware of it and did not review it before the automated OH system stated that he had not given authority for his line manager to read the report because he had not responded within the requisite period of time. There are two such automatic responses in the bundle.

73. Whilst this situation was not the fault of the Claimant, it is clear that Ms Williams subsequently asked the Claimant directly for a copy of the report on 15 August 2022. The Claimant failed to provide it to her. No explanation has been provided for that failure.

<u>The Grievance</u>

74. The Claimant submitted a grievance on 25 August 2022 to Mr Dent. It was reviewed by Ms Dredge and was referred to an external third party to investigate. The report was prepared by PWC. The most relevant parts for our purposes are as follows:

"Findings of fact

19. The evidence suggests that there is no TfL/LU guidance on handling applications for reasonable adjustments for non-safety critical roles. From the interviews with MW, CT and ND it appears to be the general understanding that non-safety critical roles would not qualify for this funding. MW also informed us that MA said that the business had financial constraints and that they would set a precedent if they granted funding for DK.

19.1. Whilst the evidence suggests that MW ultimately had authority to make this decision, it is clear that MW consulted with a number of specialists and stakeholders to get their view before making this decision and therefore did not make this decision in isolation and without the benefit of advice.

19.2. ND was of the view that MW did have the authority to make the decision but given her budget would not cover hearing aids, she may have reached out to him for this approval (the evidence indicates that MW emailed ND on 23 November 2021 and had at least one conversation with him in relation to this).

20. We find that MW's decision was made, following consultation with relevant individuals, on the basis of a reasonable belief that TfL/LU would not approve the funding of the hearing aid because DK was not in a safety critical role. MW informed us that, to this day, she continues to ask what the business is doing for people in non-safety critical roles and who need hearing aids.

21. However, more broadly, the evidence does suggest poor management practices by MW in handling DK's request, particularly the delay in making a decision and the knock-on impact this had on DK:

21.1. The evidence suggests that DK chased MW on a number of occasions for an update on her decision spanning over several months. Although the delay particularly from 23 November 2021 - 27 May 2022 could be attributed to the lack of TfL/LU guidance being in place for MW to follow, the initial delay from June 2021 up until October 2021 does not appear to be accounted for.

21.2. In relation to MW's general handling of the request for funding, the evidence suggests that the information provided to DK was inconsistent and lacked clarity on who the decision maker for this matter would be (DK was initially told it would be ND, then RS and then HR). Additionally, the evidence suggests that DK was informed that there was a policy that covered the funding of hearing aids by MW and ND during separate communications, which could have reasonably led to confusion for DK. There is no indication that any guidance/guidelines dealing with such requests was in existence when DK made his request for funding in 2015, however, this was subsequently granted. We therefore find that there was a lack of consistency and transparency in relation to the decision making process. See findings in section 4 below.

…..

Findings of fact

10. Our findings indicate that MW did not distinguish between DK's LUOH referral request and the request for funding and MW may have conflated the issue of funding for hearing aids and the purpose of an OH referral i.e., for assessment of the medical condition and any recommended reasonable adjustments.
10.1. Additionally, MW stated that it is the standard process to be referred to LUOH when an employee is first diagnosed with a disability. MW acknowledges that she did not know the process because it was her first LUOH referral.
10.2. CT informed us that in practice where an employee approaches him with a medical issue, his first port of call would be an LUOH referral. However, he also stated that normally their involvement with LUOH is for members of staff doing safety critical roles. The evidence suggests that MW sought advice from the HR

representative and DSP (LUOH) in relation to the funding for the hearing aids, however, there is no evidence to suggest that she sought advice in relation to the LUOH referral.
10.3. MW also informed us that it was her view that referrals to LUOH should relate to employees with a new diagnosis because "there is usually nothing further to advise" but given DK insisted on this so MW then referred him to LUOH in June 2022. MW did not appear to understand the relevance of an OH referral for someone with a continuing health condition.
10.4 There is evidence to suggest that MW potentially failed to follow TFL's Managers' guidelines on Disabilities and Reasonable Adjustments including failure to: (i) act on the recommendations of Occupational Health through MW's delay to refer DK to LUOH from June 2021 until June 2022; (ii) keep DK updated with progress of his LUOH referral request; and (iii) plan the work for DK while waiting for the reasonable adjustment.

……

11. Overall, we consider this evidence supports a lack of awareness, knowledge and understanding from MW of how to manage and consider reasonable adjustments where the role is not safety critical and also, where an OH referral may be needed to assess a continuing health condition. This in turn led to a lack of judgement and failure to understand the importance of making the LUOH referral and the subsequent delay from June 2021 to June 2022. The evidence therefore points to competency and capability issues, which in part may have also been due to a lack of training and experience in dealing with such matters, noting that MW said this was her first LUOH."

75. The grievance outcome letter from Mr Taggart, following the investigation quoted above, apologises for the way in which the matter was delayed and accepts that the situation was not best practice from Ms Williams. He expresses it as being a matter of regret. However he does not uphold the allegation of bullying and harassment. It is stated that Ms Williams was trying her best to obtain the funding for the Claimant and that it was her inexperience that caused the failures.

Miscellaneous

76. We accept that there was no discussion or request from the Claimant for any other physical adjustments in respect of his working environment apart from the speaker for his desk.

<u>The Speaker</u>

77. On balance we accept the claimant's evidence that he placed an order for speakers and that he had a conversation with MW where she queried the justification for the number of speakers being ordered. We find this because on balance, if this was a conversation that occurred near the beginning of the

pandemic it is less likely that Mr Adabra was set up as being the person to go to for IT equipment in such an organised way – we suspect that such an arrangement came in later. However we had no evidence to suggest that Ms Williams refused this request we just had an explanation from the Claimant that his request was not promptly processed. We accept on balance that this occurred as the Claimant's recollection of matters affecting him during this period is greater than that of Ms Williams.

Workload

78. We accept that as a manager the Claimant had a high workload as did his peers in the same role. It is a well remunerated job with significant responsibilities including elements of public health and safety as well as staff health and safety.

79. Claimant's counsel provided a helpful summary in his submissions of the dates on which the Claimant made Ms Williams aware that he was having difficulties with his workload. Given that most of these occasions are recorded in emails, we accept that it was clear from the Claimant both in these emails and during his discussions with Ms Williams that he was having difficulties with his workload.

"The Claimant first raised concerns with his workload with MW in 2019 [C/19]. C discussed issues with his workload with MW on various occasions, as MW accepts in her witness statement. (para 70)

C has given evidence that he raised concerns about being unable to hear in virtual meetings in 2020 as he did not have the correct equipment [C/20].

Further, the audiologist information which MW asked C to re-send in February 2022 [MW/35] expressly referred to the difficulty C experienced in meetings [133].

MW accepts that C referred to "having to attend a lot of meetings" when he raised concerns about his workload [MW/72].

C emailed MW on 10 May 2022 highlighting the difficulties that increasing numbers of face-to-face meetings were causing him due to his hearing [164]."

80. We agree with the Claimant that the responsibilities regarding injuries was not split as had been agreed in the meeting. As a result the Claimant and a colleague had to share two lead roles as opposed to one and that continued for some time despite the fact that his colleague was off sick for a large part of that time and subsequently only partially returned before retiring – effectively

meaning that the Claimant was responsible for both leads instead of ½ of one lead as had been discussed and agreed at the meeting.

81. The claimant was asked to also take on Hampstead. We find that although Ms Williams requested that he take on Hampstead, she was doing what she had been asked to do by the Directors. Her request had nothing to do with the Claimant's health and it was prompted by someone retiring. When he objected to this because of his health related difficulties, she agreed and did not ask him to take on the additional responsibility. We do not accept that she threatened him with 'replacement'. Firstly it is not clear what that means nor is it clear what that means in this context. Secondly (p279) the Claimant does not raise any threat of replacement with Ms McMann when interviewed as part of his grievance; he simply explains her plan to add to his workload. We find that had he been concerned about being replaced he would have raised it at this stage.

82. We find that as a natural part of a busy role, the Claimant was expected to attend numerous meetings. Ms Williams said that she only required him to attend one meeting a month in person however she could not comment on how many meetings he had to attend to cover all other aspects of his role. We have no doubt that he was expected to attend numerous meetings. We were not given clear evidence on whether the Claimant ever asked to be allowed to attend them remotely once the pandemic had subsided and people returned to in person meetings. However we note that he did raise, as part of his concerns regarding his workload, that he had to attend a lot of meetings in his email to Ms Williams on 10 May (p 164). We believe that this evidence reflects the reality of the situation which was that it was expected that people attend meetings face to face.

Conclusions

83. The way that this case has been pleaded and the period of time over which the situation existed has made a very simple situation unnecessarily complicated. The crux of this case is whether the Respondent ought reasonably to have funded the Claimant's hearing aids and if so, at what point and whether the process of trying to obtain those hearing aids and the mistakes made along the way, amount to harassment.

Jurisdiction

84. Insofar as any of the matters for which the Claimant seeks a remedy by way of discrimination occurred more than three months prior to the presentation of his claim form, allowing for the effect of early conciliation, can the Claimant show that:

a. They formed part of conduct extending over a period ending within three months of presentation; or

b. It would be just and equitable to allow a longer period for bringing the claim?

Section 20/21 Equality Act 2010: Failure to make reasonable adjustments

Section 20(3) EA

85. We accept that there was a general requirement that employees or Centurion Managers attended meetings in person. We did not have any evidence as to the frequency and duration of these meetings but given the variety and extent of the Claimant's management role we conclude that they were relatively frequent and required the Claimant's attention and attendance. This is capable of amounting to a Provision, Criteria or Practice ('PCP').

86. We accept that there was a high workload for Centurion Managers. It was a job with significant responsibilities and we accept that with those responsibilities came a reasonable amount of pressure, particularly during the time of the pandemic.

87. In reaching this conclusion we have considered the Claimant's witness statement (paragraph 17-19) which we accept and whilst we understand that Mr Dent says that Hampstead as a station area was quiet and that the Claimant had a lower workload than other Centurion Managers, we do not accept that this means that there was not a general requirement for Centurion Managers to maintain a high workload. Ms Williams, in her interview with Ms McCann accepted that they worked long days and we therefore conclude that this PCP was in place.

88. We find that any person with the same level of deafness as the Claimant would have been placed at a disadvantage by both of the above PCPs as they would find it harder to follow meetings and process what has been said as well as continuing with a high workload being harder if certain tasks took longer or more concentration than someone without the hearing disadvantage.

89. The Claimant relied on two specific disadvantages:

a. *He cannot hear / pick up on all of the information being presented in meetings which in turn leads to him having to ask people to repeat themselves or him giving the incorrect response, both of which cause him embarrassment and frustration;*

We agree that the claimant would be at this disadvantage as he described it as such and we have accepted his evidence in that regard. We also accept that he found this embarrassing and frustrating. He articulated those feelings to Ms Williams and in the course of his grievances to the Respondent as well as to OH. We do not consider that he has manufactured those emotions. Whilst Ms Williams may feel that people should be proud of any disabilities, that does not mean that everyone is able to feel that way all of the time particularly if they believe they are being perceived negatively by peers from a performance point of view because of their disability.

b. The Claimant was required to undertake a high workload which meant he had a higher number of meetings and interactions with others which causes him stress due to his severe hearing loss;

We accept that the Claimant was required to undertake a high workload as set out in our PCP findings above. The Occupational Health report from the OH meeting on 30 June 2022 (p240-242) says as follows:

"He tells me that his role requires effective communication taking into consideration the nature of conversations which are often sensitive or formal including investigative or disciplinary in nature. This requires accurate receipt and documentation of conversation. His difficulties can in turn affect the speed of meeting deliverables.
Mr Kelly is finding that the requirement to listen acutely within the work environment together with the difficulties described above led to headaches after long days and symptoms of stress. He reports experiencing sleep disturbance, night sweats and anxiety. This prompted him to consult his GP who prescribed medication to help with these symptoms and recommended absence from work."

90. We accept that the Claimant was placed at this particular disadvantage as evidenced by the OH report above and as set out in the Claimant's witness evidence to us.

91. We consider that the Respondent knew of the disadvantages relied upon above. He explicitly told Ms Williams that he found meetings difficult to follow when in person. It is also clear form the steps taken by the previous line manager that the previous line manager knew about the need to manage meetings for the benefit of the Claimant. We therefore conclude that the respondent did know about the disadvantage that attending meetings placed the Claimant at.

92. The issue of whether he connected his problems with the high workload to his hearing is less clear. Ms Williams considered that the Claimant had done the role for a long period of time and he had hearing aids throughout the time and therefore

she was not aware and could not have been aware that he was struggling with this particular aspect of the job in relation to his hearing. The Respondent's argument is that the stress of whether he was getting the hearing aids was articulated to them but not that he was experiencing day to day difficulties with the role.

93. We find that he did tell them that he was placed at this disadvantage or they could be reasonably expected to know that he was from all the information they had even in circumstances where they did not have the most up to date OH report. In his email to Ms Williams on 10 May 2022 says as follows:

> *"I know I have made you aware of this already but it's important to mention again that this item is causing me a lot of stress. I have to work very hard with my current Hearing Aids to try and focus to hear colleagues and others on meetings within the workplace.*
> *With us now back to BAU and required to engage more with staff and colleague on face to face meetings this is very difficult and stressful and also gets very embarrassing for me also.*
> *The audiologist believes that those new hearing aide will assist me further in improving my hearing ability and aid my ability to complete my job better."*

94. This email clearly distinguishes between the stress of attending meetings and the fact that the hearing aid would aid his ability to complete his job better. We accept that his priority is clearly that he is seeking funding for the hearing aids, but it is from a context that he is struggling and requires steps to be taken to off set those challenges if possible. He indicates that he is struggling to complete his job properly which indicates that the workload is an issue. We find, on balance, that this was part of a continuing conversation with Ms Williams in which the Claimant had raised issues that he was having; yes in the context of seeking funding for his hearing aid, but nevertheless we find on balance he raised the fact that his high workload was harder in all the circumstances because of his hearing.

95. We then have to consider whether the Respondent took reasonable steps to avoid the above disadvantages. During submissions, some of the reasonable adjustments suggested by the Claimant were withdrawn. That is reflected in the list below.

96. Our overarching comment though is that the Respondent failed to consider or make any adjustments whatsoever during this period. Ms Williams made it clear in her evidence to us that she did not consider any adjustments whatsoever as she was not aware of the policy nor how to go about making reasonable adjustments. The question for us as a Tribunal then is to assess whether any reasonable adjustments would have ameliorated the disadvantages which we have found the Claimant was caused by the PCPs relied upon and whether they were reasonable in all the circumstances.

97. The key adjustment which Ms Williams knew the Claimant was seeking and which forms the core of this case is whether it was reasonable for the Respondent to fund the provision of the hearing aids. The Respondent's case was that the Claimant was never at the relevant disadvantage because he had the hearing aids throughout. This therefore meant that the adjustment sought was funding. In our view that cannot be correct. By that argument, the Respondent would be able to avoid its liability through the charitable actions of a third party organisation which was willing to temporarily allow the Claimant use of the hearing aids or by the Claimant himself taking steps to ameliorate the disadvantage by paying for it himself. There has been no suggestion that the third party would not need paying at some point. The question of whether there was alternative funding for the adjustment goes properly to the reasonableness of the adjustment not whether an adjustment ameliorates the disadvantage caused by a PCP in place at work.

98. The PCPs put him at the relied upon disadvantages. He needed the hearing aids to help reduce the disadvantage. The question is whether it was reasonable for the employer to take steps to provide the funding necessary to obtain the hearing aids. The definition of what amounts to a 'step' can include funding. We have considered the EHRC guidance referred to by the Respondent in submissions but we do not accept that the guidance set out there prevents us from finding that funding in this case amounts to a relevant step. The Respondent took no such steps so the Claimant acted to constantly mitigate the disadvantage by reaching an arrangement with a third party. We consider that the question of funding in this case is more appropriately considered when assessing whether it was reasonable in all the circumstances to provide the hearing aids. The funding of and the provision of the hearing aids are part of the same 'step' and we think it is artificial to completely divide the two aspects in this way. The questions is whether it was a reasonable adjustment for the Respondent to facilitate the provision of hearing aids for the Claimant and the cost of that adjustment is part of the consideration of whether it was reasonable.

99. There were a number of arguments put forward by the Respondent as to why it was not reasonable for them to have to fund the hearing aids. They argued that the Claimant could reasonably be expected to fund it because the adjustment benefitted him outside work as well as at work. It is correct that this was the case however, the Claimant provided evidence, which we accept, that at the relevant time the main disadvantages were at work because it was during meetings that he struggled in particular. He says, and we accept, that he did not have to have them at that point in time to cope with his day to day life.

100. There is no bright line between the usage of the hearing aids at home and at work, clearly the Claimant is benefitted in both spheres if he has the hearing aids. However this is distinct from the examples given in the EHRC code and the case

referenced therein where a person who required personal care throughout the day could not expect the employer to recruit a carer who could also provide care at home. We do not consider that the fact that someone may benefit at home from a step taking by the Respondent at work means therefore makes it unreasonable for the Respondent to take steps if the disadvantage is also experienced at work because of a PCP that hinders the employee from performing their role. We accept that it may be a matter that goes to the reasonableness of the adjustment on occasion but on this occasion we do not accept that line of argument applies because the Claimant has established that he did not need the hearing aids in his day to day life in the same way that he needed them at work. The 2015 report clearly outlines why the Claimant needed hearing aids in his work – the fact that his hearing has deteriorated and therefore means he needs more powerful hearing aids does not detract from the points made in that 2015 report about the necessity of the aids for him to perform his role.

101. The other argument put forward by the Respondent was the cost of the hearing aids at a time when the Respondent was in a difficult financial situation due to the pandemic. We accept that spending constraints were placed upon the Respondent at this time and that all payments were scrutinized more than they had been 5 years earlier when the last hearing aids had been funded. We consider that this is the reason that Ms Williams, on realizing that it could not be funded under the safety critical scheme, did not just fund it from her normal budget because it exceeded the £1000 cap that had recently been imposed. We also accept that the decision behind funding the Claimant's hearing aids was a different question from funding hearing aids for those in a safety critical role who qualified under the official scheme.

102. However, we consider that the Claimant has successfully established that the cost to the Respondent was relatively low when compared to his seniority, his long service and the benefit to the organization of him remaining in post rather than having to recruit a new person if he had to leave due to inability to perform the role. The Respondent is a large organization with considerable means even during the time of the pandemic. We were shown that the cost of the Claimant's hearing aids were similar to the costs paid by the Respondent for those in safety critical roles. One Respondent witness said that had the matter been referred to him as a reasonable adjustment request at the outset he would probably have funded it. Further, informing our decision as to reasonableness of the cost, we believe that Ms Williams referred the Claimant to OH at the outset of this process, and they had recommended the funding of the hearing aid and explained its necessity to him performing his role, Ms Williams could have funded it from her budget which we heard was a separate pot of funding that she had not realized she could use. This was referred to by Chris Taggart in his interview where he states that he would have had the authority to approve funding but was a grey area. He stated that he did not hold a budget for things like that but had the MAP (Managing Attendance

Positively) scheme which was set up with OH and in “certain circumstances and by way of a business case authorize private medical care. (p 368)”. He went on to explain (p369) that it would come out of his budget and would just be absorbed by his budget but that he would discuss any such expenditure with OH and HR before taking such a step. Our understanding is that the funding freeze referred to by Ms Williams and other respondent witnesses applied to expenses only not to their department budgets. Therefore Ms Williams, had she taken a holistic approach to the situation as opposed to getting stuck in only seeking whether they could be funded under the safety critical scheme, would have had the capacity to approve and fund it herself within her own budget. Whilst that may have taken more thought and caution at a time of austerity, we do not think that this means it would have been unreasonable in all the circumstances.

103. We do not accept that the argument that funding the aids would set a precedent for the Respondent which they could not afford. Each decision to make reasonable adjustments turns on the specific facts of the individuals and what is reasonable for the organisation at the time. Were the Respondent be able to show, at some point in the future, that funding a set of hearing aids was not proportionate or affordable and therefore was not reasonable, then they would not have to make such an adjustment. The question for us is whether it was reasonable in all the circumstances for this Claimant and here we consider that the cost alone, albeit one that the Respondent had to think carefully about, was something that made this adjustment unreasonable.

104. What occurred in this situation was that Ms Williams did not consider it as a reasonable adjustment at all. She only explored whether funding was available under the other scheme which the Claimant was not eligible for. Had she considered it as a reasonable adjustment we consider, on balance, that she would have funded it.

105. We consider that the same arguments apply in relation to the auxiliary aid claim under s 20(5) Equality Act. The Claimant has established that but for the provision of an auxiliary aid (i.e. a hearing aid), he was put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

106. The Respondent did not take such steps as it was reasonable to take to provide the auxiliary aid because it was never considered by Ms Williams as a reasonable adjustment. All that she explored was whether it could be funded under a scheme that the Claimant clearly did not qualify for. She did not take any steps to consider it as a reasonable adjustment. Had she done so we consider that it would have been funded.

107. We consider that the Respondent's attempts to draw a distinction between funding and provision is artificial in these circumstances. The step that the Claimant was asking them to take was the enabling of the provision of the hearing aid through funding. The definition of what amounts to a 'step' can include funding.

108. We therefore uphold this part of the Claimant's claim.

109. Turning then to the remaining adjustments which the Claimant has suggested. We have concluded that the PCPs were in place and both placed the Claimant at a disadvantage.

110. The Claimant says the following reasonable adjustments should have been applied. This is based on the recommendations made in the OH report from June 2022 (p240).

75.1 Provision of a quiet office;
This was withdrawn by the Claimant during submissions.

75.2 Management of meetings to ensure he is seated in a suitable position;

(i) It is not clear to us that this adjustment was not made. We accept that a previous line manager had accommodated the Claimant in this way. However we note that the Claimant was a senior manager, he presumably ran at least some of the meetings that he attended and presumably did ensure that he was seated in a suitable position. In the absence of any evidence from the Claimant that during in person meetings, this adjustment was not made, we do not uphold this claim. The evidence he provided was that Ms Williams on occasion during CVP meetings was patronizing in her tone when repeating things. This was supported by Ms Evans's evidence. However we had nothing to suggest that the Claimant was not able to ensure that he was seated in a suitable position himself. He was a senior manager, he ran many of the meetings himself. The number of meetings he had with Ms Williams running them seem to be relatively few when compared to those where he was the most senior person in the room and it is not clear to us that these steps were not taken. The Claimant has given us little if any evidence of specific meetings where it did not happen. It is therefore a generalised assertion based on the OH report as opposed to being based on the Claimant's actual experience apart from during meetings chaired by Ms Williams.

(ii) It is not the responsibility of the Claimant to identify adjustments, and had the Claimant been referred to OH earlier it is likely that this adjustment would have been recommended by OH as it finally was when he was referred. Nevertheless we are not sure that beyond Ms Williams' meetings there was

any such failure. We accept that Ms Williams did fail to make these adjustments during the meetings she chaired and that there was a failure limited to those meetings.

75.3 Sufficient lighting to support him to read visual cues;

(i) We had no evidence to suggest that the Claimant did not have sufficient lighting in place. He provided no evidence to allow us to reach a finding that this step was not taken. He provided us with no information from which we could determine that there were certain locations or meetings during which he did not have sufficient lighting. We therefore do not uphold this part of the claim.

75.4 Encourage others to face him to allow use of lip reading;

(i) We accept that Ms Williams did not take steps to encourage others to address him face to face. We accept that such steps would have ameliorated any disadvantage and that Ms Williams was aware of those disadvantages. However, as in our findings concerning the seating, we do not accept that such provisions were not put in place in other meetings or that there was a failure per se particularly given that we believe the Claimant would have been one of the most senior if not the most senior person in many of the meetings and he has given us no specific examples of meetings that he attended other than those with Ms Williams, where he struggled.

75.5 Use of email and text alerts to support announcements;

(i) This was withdrawn by the Claimant during the hearing.

75.6 Consider voice to text software;

(i) The Respondent had in place a list of approved technologies which included voice to text software. Ms Williams said she was unaware of the list and unaware of the software. The Claimant asserts that such software would have assisted him by effectively ‘transcribing’ meetings so that he would not have to concentrate so much in a meeting and would be able to easily ‘catch up’ on anything he missed after the meetings. We accept that such a step could ameliorate the disadvantage to some extent and that, as it was on a list of pre-approved software for the Respondent, it would have been reasonable to acquire it for the Claimant.

75.7 Provision of a telephone system that can be used with his hearing aid.

(i) This was withdrawn by the Claimant during the hearing.

75.8 Allowing the Claimant to attend meetings remotely where he can control volume levels.

(i) It is not clear that the Claimant was prevented from attending remotely beyond the monthly meeting operated by Ms Williams. He asserts that many meetings were in person but not that he sought to attend them remotely and it was refused. We appreciate that there does not need to be a refusal per se to amount to a failure to make and adjustment. However it is not clear that the Claimant was in a situation where he was not allowed to attend meetings remotely. We therefore uphold this in relation to the in person meetings with Ms Williams but not in respect of other meetings where he has not demonstrated to us as question of fact that he was not 'allowed' to attend remotely.

75.9 Reduction in workload

(i) We consider that the Claimant clearly raised his concerns regarding the workload to Ms Williams on numerous occasions – sometimes in writing and sometimes orally. Nevertheless, we consider that Ms Williams did, on occasion, listen as she did not expand his workload to include Hampstead after he raised it as a concern. When he raised specific concerns she responded and reduced his workload. We therefore consider that reductions were made to the Claimant's workload and do not find that the Claimant has established that there was a further failure to reduce workload at a time that could or would have ameliorated any disadvantage.

S26 Equality Act 2010 – Harassment

111. For each allegation of harassment we have considered whether the act complained of occurred and if so whether it was unwanted conduct that had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We have also assessed whether the claim is out of time and if it is whether it is just and equitable to extend time. We have limited an analysis of the time point to those that the Respondent asserts are, prima facie out of time as set out in their written submissions (para 25).

a. The failure by Marcia Williams to respond to emails and requests for information between May 2021-May 2022;

112. We accept that the any failures by Ms Williams to respond to requests for information was unwanted by the Claimant. He has demonstrated that he repeatedly chased Ms Williams for responses in respect of several matters during the relevant period. He would not have chased if he did not want a response.

113. It is difficult to assess whether a failure to do something is an act related to a protected characteristic. We have reminded ourselves that 'related to' is not the same as 'because of'. Here, the entirety of the correspondence on this topic was clearly related to the Claimant's need for hearing aids and his hearing difficulties. We therefore consider that any failure to respond to his assertions about the difficulties he was experiencing and his requests for assistance including a referral to OH, must relate to his disability.

114. We have also found it difficult to assess whether, in this case, the failure to respond to emails was capable of having the proscribed effect. The Claimant knew that Ms Williams has dyslexia and she chose to conduct most of her work via telephone or meetings as a result. The claimant knew this and therefore could reasonably be expected not to infer as many negatives into her failure to respond in writing as he might with a manager who did not have dyslexia. Nevertheless we were taken to repeated occasions where he specifically asks her to respond in writing because he has not had any concrete updates or answers over a long period of time. As time progresses he clearly explains that the delay and uncertainty is causing him stress and anxiety yet she still fails to respond in writing and, at times, we have found she does not respond at all. She had someone supporting her with reading and responding to emails and therefore we consider that it was reasonable for the Claimant to infer that there was more to her silence than a difficulty in responding to emails. .

115. We also had evidence from Rebecca Evans that Ms Williams was dismissive towards the Claimant in meetings. Ms Williams also accepted that she considered that the Claimant had sufficient money as an individual to finance the hearing aids himself and in evidence to us kept repeating that she felt that the Claimant should be proud of his disability and no embarrassed. The combination of these factors mean that we consider that Ms Williams approached this matter in a manner that suggested to the Claimant that he was making a fuss about nothing and this meant it was reasonable for the Claimant to consider that her silence amounted to her not caring about the situation he found himself in.

116. We do not believe that she intended to or that her actions had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant or violating his dignity. We believe that she was thoughtless and had her own interpretation of the importance of the situation.

117. We accept that it did have the proscribed impact on the Claimant and that subjectively, from a position of increasing anxiety as the time passed and he continued to get no responses despite stating exactly what he was experiencing, the Claimant began to find the situation humiliating and hostile. We think that this was subjectively reasonable in circumstances where an

individual has clearly asked for help and his manager has not responded to that request. Against a backdrop where his requests for help during meetings had been responded to somewhat negatively or in such a way that it displayed a lack of understanding of the difficulties the Claimant faced, we think the repeated silences were objectively capable of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

118. We uphold this element of the Claimant's harassment claim.

b. The delay by Marcia Williams in referring the Claimant to LUOH between May 2021-June 2022

119. We accept that this was unwanted conduct. The Claimant repeatedly asked to be referred to OH and when there was a delay he repeatedly chased to see why he had not had an appointment.

120. Ms Williams and Ms Davey did submit an OH referral on 30 November 2021. However, both Ms Williams and Ms Davey knew that the referral had not been effective from February 2022**.** From shortly after this date we find that Ms Williams knew that the Claimant thought that the referral had been made but did not re-refer him and took no steps to rectify that situation until much later. The Claimant asked for an OH referral on 9 occasions and yet Ms Williams failed to even consider this as an option once the original referral in October 2021 was found to have been defective.

121. This referral (and subsequent lack of) is related to the Claimant's disability. Its purpose was to assess him solely in relation to his hearing impairment and its impact on his working life. We believe Ms Williams' purpose was not to create the proscribed effect, but came instead from a lack of insight into how it might affect the situation or perhaps a genuine belief that it would make no difference because he had the hearing aids, could pay for them himself and she had been told that funding under a different scheme was not available by this time. Nevertheless, against the same backdrop outlined above for allegation (a) above, we find that it was reasonable for it to have this impact on the Claimant and that it did have this impact on him.

c. Marcia Williams providing the Claimant with false information regarding who had made the decision to deny the funding, between approximately October 2021-May 2022

122. We accept that if it occurred, this would amount to unwanted conduct as the Claimant is alleging that he was lied to. We do not agree that Ms Williams provided false information. Ms Williams provided various accounts to the Claimant of who had said what in relation to the funding of the hearing aids

because she had sought information and advice from various people within the organization. We accept that she provided that information in a somewhat piecemeal fashion to the Claimant and some of it would have occurred in phone calls. We also accept that some of it may have been confused and confusing. However we do not accept that it was false or that she was deliberately misleading the Claimant. She considered that she had been told by various individuals that the funding was not available under the relevant scheme for various reasons. She believed that this was correct and was therefore not giving the Claimant false information. We therefore do not uphold this complaint.

d. Marcia Williams misleading the Claimant in October 2021 about discussions that were had with Nick Dent about the funding

123. The Claimant's submissions on this point are that the following events occurred:

i. In approximately October 2021 Marcia Williams informed the Claimant that Nick Dent, Director of Customer Operations, had declined the Claimant's request for funding

ii. On 7 September 2022 Nick Dent informed the Claimant that neither himself nor the Finance Director had knowledge of the Claimant's request for funding. Therefore, he had not made a decision regarding the Claimant's request for funding

iii. On 27 March 2023 Peter Tollington, Customer Operations, wrote to the Claimant regarding the outcome of his harassment and bullying Complaint. Tollington wrote that "it was not until 23 November 2021 that she [Marcia Williams] formally approached Nick Dent for approval in light of the financial controls";

124. We do not consider that Ms Williams misled the Claimant. She had sent an email asking him for funding and his assistant had responded. The fact that the assistant had pushed back may not have been interpreted by some as being a refusal but we consider that Ms Williams did think it meant that the Claimant was not eligible for funding. Mr Dent was then wrong during his telephone call in saying that he had never heard about the situation. He accepted that in evidence. He was unintentionally misleading, not Ms Williams. With regard to the grievance outcome, we consider that this was incorrect. Ms Williams had sought funding permission or guidance before 23 November 2021. Therefore Ms Williams had not misled anyone. The situation of who had spoken to whom about what simply became confusing. We do not uphold this claim.

125. As we have found that this did not occur as alleged, we have not considered whether the claim is in time or whether it would be just and equitable to extend time.

e. Marcia Williams providing Dr Sam Philips false information in relation to previous funding in an email dated 30 March 2022

126. We do not consider that Ms Williams provided Dr Phillips with false information. The parties confirmed that by false they meant deliberately wrong. Looking at the email dated 30 March 2022 Ms Williams- she makes a mistake with respect to the safety critical nature of the Claimant's previous roles. This is not false information – it is incorrect and a mistake. We do not uphold this part of the Claimant's claim.

127. As we have found that this did not occur as alleged, we have not considered whether the claim is in time or whether it would be just and equitable to extend time.

f. Breaking GDPR rules by Marcia Williams and Dr Sam Phillips discussing the Claimant's situation between 30 March 2022-14 April 2022 without his consent

128. Ms Williams was speaking to a doctor, she was not gossiping about a colleague. Dr Phillips accepts that by the end of the discussion she was aware of the Claimant's deafness and she did not need to know his name to provide the advice she did. Nevertheless, it is also clear that the Claimant's impairment was common knowledge. He provided no evidence to suggest that he kept this matter 'secret' or on a need to know basis. Even if this was a breach of the GDPR (which we do not consider it was) we do not consider that it was reasonable for the Claimant to find that this behaviour satisfies the definition of harassment. He can see from the email exchange that Ms Williams was not gossiping about him, she was seeking medical advice and expertise. That does not reasonably create the proscribed environment in all the circumstances and we do not consider that he either felt that it did nor that it was reasonable for him to do so.

129. As we have found that this did not occur as alleged, we have not considered whether the claim is in time or whether it would be just and equitable to extend time.

g. Marcia Williams failing to review the Claimant's situation or partake in discussions to support any reasonable adjustments that could be put in place between May 2021-May 2022;

130. We consider, for the same reasons that are discussed under (a) above (paragraphs 112-116) that this claim succeeds. Ms Williams' continued, and at times deliberate, avoidance of having a discussion regarding an OH referral and what adjustments could be made other than the hearing aids seems astonishing over such a period of time for such a senior manager who had had all the relevant training and had her own adjustments in place to accommodate her disability. It was the logical and normal course of action and yet she appeared to go to great lengths not to discuss other options with the Claimant or refer him to OH for those options to be suggested. Then when she did make a referral to OH and it did not work out, she failed to re-refer him or have a discussion with him about adjustments when she realised it had not worked. We can understand that in the circumstances that the Claimant found himself in that this had the effect on the Claimant discussed above and that it was objectively reasonable for it do so in all the circumstances.

h. Marcia Williams failing to provide the Claimant with a speaker for his computer when he requested this in 2021;

131. We do not consider that this incident occurred as the Claimant describes nor that it related to his disability. We consider that this was by and large, an administrative error. It occurred mid pandemic during a scramble to get equipment. Even if taken at its highest Ms Williams is just asking why he needs the speaker – she is not hostile and at this point, the Claimant has not spent a long period of time chasing his OH report. When the speaker does not arrive, we consider that it was not reasonable for the Claimant to interpret this as creating a hostile environment. He was a very senior manager and he knew how to obtain equipment for the station and that it was not always readily available. He does not raise this as a problem for a considerable period of time so we do not consider that it had the effect on him of creating the proscribed environment nor that in the circumstances it was reasonable for it to do so.

132. Further, even if it did occur this was a one off incident and is out of time. It is not part of an ongoing situation or set of events. We do not consider that it is just and equitable to extend time as we do not have evidence as to why the Claimant did not raise this as an issue earlier despite being such a senior manager nor do we have any evidence as to why it had a serious negative impact on him at the time. We consider that had it occurred the Claimant was able to raise it as an issue earlier than he did and that he is more likely than not to have done so given its potential operational effect on him and the fact that

there was another manager to whom he could have requested equipment as the pandemic progressed and he has given us no evidence of doing so.

133. This part of the claim is not upheld.

i. Marcia Williams allocating an increased workload to the Claimant throughout 2021 and on 12 May 2022, despite knowing he was already struggling.

134. We do not accept that this action by Ms Williams is related to his disability. Ms Williams was allocating workloads across her team. She behaved in this way to all the people she managed during a pandemic when working life was not 'normal' and she had other members of the team either retiring or being off sick. We do not consider that her decision making regarding allocation of work related to the Claimant's disability. She was just managing her team of whom he was part. The work was not given to him despite his disability and his concerns about workload. It was given to him as part of her team. This is reinforced by the fact that as soon as he objected, she removed it. We accept that there does not need to be 'intention' behind harassment nor that treatment has to be 'because of' the protected characteristic - but an individual's motive can be a helpful determinative of whether something is related to disability. Here we do not accept that it was.

135. If we are wrong in that, we do not consider that it was reasonable for the Claimant to consider that this action created the proscribed environment. He knew that she was responding to the staffing situation she had and had to allocate the work. Further, when he raised his concerns she acted upon it and removed the work. It is not reasonable for him to consider that this was a hostile or intimidating environment.

136. As we have found that this did not occur as alleged, we have not considered whether the claim is in time or whether it would be just and equitable to extend time.

j. Marcia Williams failing to do anything about the Claimant's workload when he raised concerns in September 2020 and on 10 May 2021;

137. We do not accept that this related to the Claimant's disability as set out in paragraph 134 above. The decision to assign the lead roles to the Claimant was not done in relation to his disability. Ms Williams was assigning the work across the team. We accept that she may have been mistaken as to what she had agreed to within the meeting on this matter. However we consider that this was a mistake and a misunderstanding. We do not accept that it created the proscribed environment for the Claimant. He felt able to raise his concerns and

she responded. It did not have the impact on the Claimant that he is now alleging. This claim is not upheld.

138. As we have found that this did not occur as alleged, we have not considered whether the claim is in time or whether it would be just and equitable to extend time.

k. Marcia Williams telling the Claimant that they will replace him when he raised concerns about his workload in September 2020, May 2021 and May 2022;

139. We do not accept that this occurred. Ms Williams was in need of staff and was trying to manage limited staffing resources. We do not consider, on balance, that she would have said that he would be replaced. We consider that if she said anything along these lines she would have said, in order to assuage his concerns regarding workload, that if, after attempting to do the work, he could not manage to complete the responsibilities she had assigned him e.g. the joint lead on staff/customer safety, then it would be removed from him. That is very different from a threat to remove him from role altogether which is what this allegation implies.

140. As we have found that this did not occur as alleged, we have not considered whether the claim is in time or whether it would be just and equitable to extend time.

l. Marcia Williams failing to follow TFL Managers guidelines on Disabilities and Reasonable Adjustments between May 2021-May 2022;

141. We conclude, for the same reasons that are discussed under (a) above (paragraphs 112-116) that this claim succeeds. In essence, this is the same claim as the failure to make a referral to OH as it was her failure to consider the above policy that meant that she did not refer the Claimant to OH in the first place and then continued not to do so after a failed referral.

142. We uphold this part of the claim.

m. Marcia Williams failing to carry out a workplace risk assessment between May 2021-May 2022.

143. This could be seen to be part and parcel (Claimant's written submissions) of the failure to follow the correct procedures with regard to reasonable adjustments. However, we do not accept that this failure had the

proscribed effect. The Claimant's concerns surrounded a referral to OH and whether adjustments could be made. He did not feel 'unsafe' and he was, himself, an expert in health and safety issues. Any failure to carry out a workplace risk assessment had no impact on the Claimant. The proscribed impact was caused by the other matters which are detailed above. This claim is therefore not upheld.

144. A remedy hearing will now be listed to determine any appropriate compensation payable to the Claimant as a result of our conclusions.

Employment Judge Webster

Date: 15 December 2023

JUDGMENT and SUMMARY SENT to the PARTIES ON

22/12/2023

FOR THE TRIBUNAL OFFICE

It should be noted that, in respect of each of the three requirements, the employer's duty is to 'take such *steps* as it is reasonable to have to take' (our stress) to alleviate the substantial disadvantage to which the disabled person is put. The word 'steps' in this context is not to be unduly restricted, as the Court of Appeal made clear in *Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA*. In that case the Court was specifically concerned with the first requirement — the application of a PCP putting the disabled claimant at a substantial disadvantage — but the following remarks of Lord Justice Elias apply equally to the other two requirements: 'In my judgment, there is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of S.20(3). Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.' His Lordship went on to make it clear that the proposed steps in the case before him — namely, modifications to the employer's attendance management policy — would, if taken, have been capable of ameliorating the disadvantage suffered by the claimant resulting from the operation of the policy. However, in the event, these steps were found not to be reasonable ones for the employer to have to take and the claimant's reasonable adjustments claim was dismissed.

3.17

It is clear from S.20 that, in determining a reasonable adjustments claim, a tribunal must consider the nature and extent of the substantial disadvantage relied on by the claimant, make positive findings as to the state of the respondent's knowledge of the nature and extent of that disadvantage, and assess the reasonableness of the adjustment (i.e. 'step') that it is asserted could and should have been taken in that context. We consider these key components of the statutory duty separately below (see '"Substantial disadvantage"', 'Employer's knowledge of disability' and 'Reasonableness of adjustments'). Nevertheless, as Lord Justice Laws observed in *Newham Sixth Form College v Sanders 2004 EWCA Civ 734, CA*, in practice, these three aspects of the duty necessarily run together. An employer cannot make an objective assessment of the reasonableness of proposed adjustments/steps unless it appreciates the nature and extent of the substantial disadvantage imposed on the employee by the PCP, physical feature or lack of access to an auxiliary aid, and an adjustment to a work practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage — *Lamb v Business Academy Bexley EAT 0226/15*.