EMPLOYMENT TRIBUNALS

Claimant: Mr W Cowan

Respondent: Bestway Panacea Holdings Limited

Heard at: Manchester (in person/CVP) **On:** 20-24, 27 and 28 November 2023

Before: Employment Judge Leach
Ms K Fulton
Mr A Gill

REPRESENTATION:

Claimant: Mr Todd of Counsel
Respondent: Ms Quigley of Counsel

JUDGMENT having been announced to the parties on 28 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided. The Tribunal's decision is unanimous.

REASONS

Introduction

1. This case is about the claimant's employment in a warehouse operated by the respondent. The respondent runs a national chain of pharmacies and an online pharmacy business. The warehouse in which the claimant worked, services those businesses.

2. Over the years of his employment with the respondent and its predecessor (the Cooperative) the claimant has had various health issues which he says have impacted on his work. In these proceedings he brings complaints under the Equality Act 2010 complaining of different types of disability discrimination.

The Issues

3. We discussed the issues in this case at the beginning of the hearing, and these were changed (reduced) by the claimant during the course of the hearing. We set out below the final agreed list.

Disability

1. The Respondent accepts that the Claimant was disabled by reference to hearing loss.

2. In respect of the other impairments relied upon namely: Spondylosis, Disc Degeneration and Stress Anxiety and Depression:

(a) As at the time of the alleged discriminatory acts , did the Claimant suffer from a physical or mental impairment as alleged?

(b) As at the time of the alleged discriminatory acts , did said impairments either individually or collectively have a substantial adverse effect on the Claimant's ability to undertake day-to-day activities?

(c) As at the time of the alleged discriminatory acts, had the effect of an impairment lasted 12 months or was likely to last at least 12 months?

3. Further, as at the time of the alleged discriminatory acts did the Respondent know or reasonably ought to have known that the Claimant was suffering from a disability as alleged or not?

Direct Discrimination

(A) Hearing Loss

4. Did the Respondent:

(a) In 2018 (date unspecified) move the Claimant's workstation next to three speakers over which loud music was played or not?

(b) In September 2019 fail to disconnect the speakers near the Claimant's workstation?

(c) From March 2019, fail to implement reasonable adjustments for Meniere's disease?

(d) Fail to carry out the measures and steps identified in the Risk Assessment dated 29 September 2019?

5. If so, did the act(s) amount to less favourable treatment? The Claimant relies on an actual or hypothetical comparator in the same or similar situation without his protected characteristic.

6. If so, was the reason for such less favourable treatment the Claimant's disability or not? In particular, would the Respondent have treated an actual or

hypothetical comparator whose material circumstances were the same as the Claimant's but who did not suffer from the Claimant's disability?

Indirect Discrimination

7. Did the Respondent apply the following provisions, criterions or practices ("PCPs") to the Claimant:

(a) From 2013 to 2015 (after the conversation with Philip Alsop), requiring the Claimant to work in a workplace near to speakers playing loud music.

(b) From April 2017 (the move to HSC) to December 2019, requiring the Claimant to work in a workplace near to speakers playing loud music.

(c) In October/November 2019 requiring employees to lift heavy boxes

(d) In October/November 2019 requiring the Claimant stand statically for long periods of time.

8. Do any, or all, of the above measures amount to a valid PCP?

9. If so, did the PCP(s) apply equally to persons with whom the Claimant does not share the protected characteristic (disability)?

10. If so:

a. would 7a place employees with hearing loss at a particular disadvantage or not;

b. would 7b and/or 7c place employees with Spondylosis and/or disc degeneration at a particular disadvantage or not?

11. If so, was the Claimant placed at said disadvantage or not?

12. If so, can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim ?

Reasonable Adjustments

(A) Hearing loss

13. Did the Respondent apply a PCP to the Claimant, namely requiring the Claimant to work at a workstation close to speakers playing loud music?

14. If so, did said PCP place the Claimant at a substantial disadvantage by reason of his disability in comparison to those who are not disabled?

15. If so, did the Respondent know, or reasonably ought to have known, that the Claimant was placed at said disadvantage?

16. If so, did the Respondent fail to make reasonable adjustments to reduce or remove said disadvantage?

17. Did the following physical features place the Claimant at a substantial disadvantage by reason of his disability in comparison to those who are not disabled:

(a) In 2018 the location of his workstation

(b) In 2019 the location of the speakers

(c) In September 2019 the location of the speakers

18. If so, did the Respondent know, or reasonably ought to have known, that the Claimant was placed at said disadvantage?

19. If so, did the Respondent fail to make reasonable adjustments to reduce or remove said disadvantage?

20. Did the Respondent fail to carry out the recommendations and measures specified in the medical reports, occupational health reports and the risk assessment of 27 September 2019?

B) Spondylosis/disc degeneration

21. Did the Respondent apply the following PCPs to the Claimant:

a. In October/November 2019 requiring employees to lift heavy boxes

b. In October/November 2019 requiring the Claimant stand statically for long periods of time.

22. If so, did said PCPS place the Claimant at a substantial disadvantage by reason of his disability in comparison to those who are not disabled?

23. If so, did the Respondent know, or reasonably ought to have known, that the Claimant was placed at said disadvantage?

24. If so, did the Respondent fail to make reasonable adjustments to reduce or remove said disadvantage?

Harassment

25. Did the Respondent subject the Claimant to the following acts/omissions?

(a) Disconnect the speakers for 1 week in September 2019 only. (The Claimant is unsure who ordered the speakers to be reconnected but believes it to be Andrew Machin)

(b) Refused two hours leave on Christmas eve? (Andrew Millington)

(c) Failing to provide the Claimant with the outcome of the investigation and disciplinary (Andrew Machin)

(d) In 2017 removal of light duties (Andrew Millington)

(e) On the 22nd of September not arranging a welfare meeting (Claimant is unable to identify who in the Respondent's HR would have been responsible for this)

(f) On the 28th of September Shona McKenzie lied to the Claimant about the OH report and failed to arrange a welfare meeting

(g) On the 1st of December 2020 the Respondent gave the Claimant two days to decide if he would accept alternative employment without the Respondent confirming that adjustments would be in place (Shona McKenzie)

26. If so, was said conduct related to the Claimant's disability/disabilities? In relation to this list above:

a. 29 a, b, and c are said to be related to the Claimant's hearing loss;

b. 29 d is said to be related to the Claimant's spondylosis/disc degeneration;

c. 29 e, f and g are related to the Claimant's mental health (anxiety and depression).

27. If so, did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

28. If not, did it have that effect having regard to the Claimant's perception and the other circumstances in the case?

29. If so, was it reasonable for the conduct to have such an effect?

Time Limits

30. Were the discrimination claims made within time pursuant to Section 123 of the Equality Act 2010? In particular:

(i) Was the claim made within three months of the act to which the complaint relates or not?

(ii) Was there conduct extending over a period of time or not?

(iii) If so, was the claim made within three months of the end of that period or not?

(iv) If not, would it be just and equitable to extend time or not?

Remedy

31. If the Claimant is successful in any, or all, of his claims, should the Tribunal make a recommendation that the Respondent take any steps to reduce any adverse effect on the Claimant? If so, what steps should be recommended?

32. What financial losses, if any, has the Claimant suffered as a result of any acts of discrimination?

33. What injury to feelings has the Claimant suffered as a consequence of the discrimination?

34. Has the discrimination caused a personal injury? If so, what damages should be awarded?

The Hearing

4. This hearing had been listed as a "hybrid" hearing because some of the witnesses (on both sides) were to provide their evidence remotely. There were times when the CVP connection was poor and it was necessary for the Tribunal and parties to persevere, trying to find solutions to inadequate connections.

5. We are satisfied however that, through patience and perseverance, all evidence was heard.

6. A bundle of documents was prepared for this hearing. References below to page numbers are to this bundle.

Findings of Fact

7. The claimant has various health conditions and the respondent accepts that some but not all of these amount to a disability for the purposes of section 6 of the Equality Act 2010. We refer to the claimant's impairments as (1) hearing impairment, (2) back/spinal impairment and (3) mental impairment.

Hearing Impairment

8. The claimant suffers from tinnitus in his left ear. He also has a loss of hearing in that same ear. He developed that loss of hearing in the left ear in 2019 but has experienced tinnitus for much longer.

9. The medical records indicate that the claimant has had tests and been provided with recommendations to help him with ear-related issues over the years. These date back to 2009.

10. The respondent accepts that the claimant has a hearing loss but disputes knowledge for most of the relevant period.

11. The claimant started work in this employment in June 2009 (then working for the Cooperative Group from whom this respondent acquired the business in 2015/6)

12. In 2013 the claimant told the respondent that he was having hearing issues. These were raised in the context of a disagreement within the warehouse about loud music being played. The claimant said that his existing hearing conditions made that loud music less bearable for him. According to an account provided by the claimant to an occupational health adviser, he had been raising these concerns with the respondent since shortly after the start of his employment (which was June 2009). In his witness statement he says he referenced noise issues from 2011. We have only seen documentary evidence of the claimant raising issues from 2013. That is the version we prefer.

13. The respondent investigated the claimant's medical concerns and referred him to an occupational doctor in September 2013. There were two referrals in that year – one referral was without the benefit of the claimant's GP notes and the other referral was with the benefit of those notes. We are satisfied that the considered reports of those doctors were not such as to give the respondent knowledge that the claimant had a disability, and we apply that to both reports in 2013. The reports expressly state a view that the claimant's issues do not amount to a disability. That is an opinion, but we are satisfied from our review of those reports that it has carefully considered opinion from relevant experts and the respondent was entitled to rely on the opinion to the extent that it needed to.

14. The claimant's hearing condition (referenced in his medical records) took a turn for the worse in early 2019, and probably a little before. His GP referred him for expert medical input in March 2019 (the reference to that is at page 386). By this stage the

claimant was suspected of having Meniere's disease and it is apparent that the tinnitus was then linked with or subsumed into the concerns about the Meniere's disease. We note that the letter from the GP in December 2019 (also at 386) does not list the tinnitus and Meniere's conditions separately even though the intention of that letter of December 2019 appears to be to note all of the claimant's medical complaints at that time.

15. We find that the respondent had knowledge of the claimant's hearing disability from April 2019 but not before. The respondent had details from the claimant's return to work in April 2019. It had knowledge of the claimant's vertigo incident that had occurred at the end of March 2019 but the knowledge of the disability arose on receiving information about the cause of the dizziness incident.

Back/Spinal Impairment

16. The claimant's evidence is that he has suffered from a back condition for many years, but our findings have focussed on more recent years (as these are relevant to the claim). We have considered evidence from March 2016.

17. We are aware of an incident at work when the claimant claimed to have been injured when some boxes on the trolley a colleague was pushing fell from waist high and hit him on the back of the leg. It appears that the injury was from the claimant's movement on realising the boxes were falling rather than the blow from the boxes themselves. Correspondence including physiotherapy reports followed this and we note that an MRI scan was taken in March 2016 which indicated degeneration to some spinal discs, although the specialist doctor stated that surgery was not recommended. Some physiotherapy was and it was also noted that the claimant was coping because he was taking non prescription painkillers. We say "non-prescription" because we note that there is a reference to ibuprofen, paracetamol and co-codamol. No prescription has been seen for these and we have decided that these must have been over the counter strength. In 2020 the claimant did start to be prescribed painkillers though to assist with his back condition.

18. The claimant's impact statement talks about worsening of his back impairments, particularly from January 2017. He does not provide details of the symptoms as they presented in 2017 and we expect this would have been difficult for him particularly where, as he has observed, the conditions became gradually worse. He does provide description of the symptoms from January 2019 – substantial pain and stiffness, restricted movement, unable to carry heavy items at work, unable to carry two fairly heavy bags of shopping home from the shops, unable to run, only able to hold his grandchild for a short time. We have not seen any occupational health or other medical records to confirm these effects but some are mentioned in internal respondent documents (workplace adjustment plans). The effects were not challenged by the respondent at this hearing.

Mental Impairment

19. As for a mental impairment, this is no longer in dispute. The respondent accepts that at the relevant time (the second half of 2020) the claimant had a mental impairment and that amounted to a disability.

The Complaints

20. The complaints go back to 2013. We note the difficulty that witnesses, including the claimant, had recalling the events going back that far, so necessarily our findings are based on the evidence that has been received.

21. As noted later in this judgment, we do not find that there was a continuing course of contact going back to 2013 and we do not find that it would be just and equitable to extend time back to then or even back to 2015. Even so we have heard what evidence we have heard and we have made what findings we can in relation to those earlier issues.

22. In 2013 the claimant was based at a different work location to the one he ended up in. The original workplace was called "Wardles" which was a much smaller warehouse than the one in which the claimant was more recently based. As is common in a warehouse environment, music was played. This is generally welcomed by employees who work in a warehouse environment and the claimant. wanted music to be played. He recognised that playing music was popular with employees and helped with the monotony of the working day.

23. Initially the respondent (or at that time the Cooperative) did not provide its own music/loudspeaker system. Employees brought their own radios in, sometimes with loudspeakers attached. This led to disagreements amongst employees within Wardles. Generally the radio was welcomed (although not universally) and the two main areas of disagreement were about the volume and also about the radio channel being played. The claimant was one of those who complained about both. We find it likely that he did so on and off from 2009 when his employment started. Ultimately (we are not clear when) the respondent took responsibility for the music in the Wardles warehouse and purchased six small radios. A decision was made to require employees to remove their own radios.

24. There is limited evidence about when this change occurred. Mr Richards provided a view and said that it was in or around 2015). We find that those changes had been made by early 2015 latest. This is supported by Mr Richard's evidence and also our review of documents from mid-2015 (for example notes of a welfare meeting held on 15 June 2015) which contain no reference to ongoing noise issues. Whilst at that stage the welfare meeting was about absence for other reasons, we have little doubt (having received the claimant's evidence in this case) that if there was an ongoing issue, he would have raised it.

25. In early 2017 the workforce at Wardles (including the claimant) moved to a warehouse called HSC. It is a large modern warehouse. About 650 employees are based there and it is about the size of six football pitches. The operations at the Wardle site became situated together in one location of the HSC warehouse. It seems that the area of the warehouse was still sometimes referred to as "Wardles."

26. Music was piped into the warehouse through a speaker system that the respondent had installed. The speakers were located on the walls of the warehouse. As the Wardles' operation was based on a new mezzanine floor, the speakers were

only about four feet above the floor. Before the floor was built they would have been higher, above the heads of those working at the warehouse.

27. The claimant raised no concerns about noise or noise levels until May 2019 – about two years after the move into HSC. But it is important that we note some other issues before May 2019.

28. Whilst the Wardles team were moved to their location within HSC in early 2017, a year or so later some of the shelving being used by that team (including some shelving used by the claimant) was turned around by 90 degrees to allow another department to move next to the Wardles team. Other shelving used by the claimant was located next to a wall of the HSC warehouse. These changes meant that the Wardles team occupied a shorter stretch of the mezzanine floor so that another department could move next to them.

29. The Wardles team (or some of it) was divided into areas A, B, C, D and E. The claimant was dedicated to area C and that was with good reason; the stock items the claimant needed to replenish (and therefore handle) within area Claimant were generally small. Assigning the claimant to area C meant that he could be on light duties. Assigning the claimant to areas A, B, D or E would have required him to handle heavier stock which would have been inconsistent with a workplace adjustment plan which had by then been agreed with the claimant. According to the claimant's own evidence that was agreed at the end of 2017. These are our findings about an adjustment plan.

30. We have seen an occupational health report dated December 2017 which recommends that *"on those rare occasions when* [the claimant] *does suffer increased symptoms that the previous support of lighter duties for a brief period is put in place as has been given in the past and I consider this will enable him to remain in work and recover successfully at those times."* We recognise the difficulty for both parties in providing evidence about duties assigned to the claimant some 6 years ago. What is apparent from this OH report is that the claimant had been treated sympathetically during 2017 on those "rare" occasions he told the respondent about a temporary "flare up" in his back condition. It also appears that the provision of light duties would be as and when required. In fact, the evidence from both sides indicates that the claimant was placed on light duties on a more permanent basis and complains in 2019 that he was taken off light duties temporarily.

31. We have been provided with floorplans and it is clear to us from these floorplans that the decision to make additional space by moving the shelving used by the claimant by 90 degrees was an obvious solution. It is also clear to us that the move of the XC shelves was for the same reason.

32. Mr Todd in submissions noted that the respondent had not provided a witness who made the decision to undertake the move which causes the respondent difficulty in defending the direct discrimination complaint related to the move, We considered these submissions and note the following findings of fact:-

30.1 Simple common sense explains the relocation of the shelving given the requirement to make room for the new team coming in. We include in that the relocation of the XC shelving.

30.2 The claimant knew full well where the shelving was being relocated to and raised no objection at the time.

30.3 Mr Millington has provided evidence about the move (see paragraph 16 of his statement) – evidence that we do accept – so the respondent did adduce evidence providing an explanation for the move.

30.4 Some of the shelving for the D section and E section was also moved next to the warehouse walls on which the speakers were located, the rationale being the same.

33. Following the relocation of shelving, the claimant continued to spend much of his working time located in the middle of the mezzanine floor but also spent some time locating at the edge of the mezzanine floor, working from shelving (called XC) that was directly underneath a speaker. When giving his evidence, we find that the claimant exaggerated the extent to which he spent time at the XC area. We also note that a handwritten plan provided by the claimant and attached to his statement is misleading as it does not include the C section of shelving that was located away from the wall (and where, we find, he spent much of his working day). We are afraid that we find that plan was drawn to provide an indication that the claimant's whole workstation (and therefore effectively the whole of his working day) was on the wall right next to the speakers. That is what he wanted us to understand but it was not that position at all.

34. The claimant's case is that the respondent deliberately moved his workstation next to the wall so that he would be next to a speaker. We do not find that the claimant's workstation as a whole was moved next to the wall (see above). Further, the last time (before the move around of shelving in mid-2018) that the claimant raised an issue with the volume of the music was years before and in a different workplace. We do not accept that the respondent recalled from years previously the claimant's issues then and deliberately made his working life more difficult by placing him close to the speakers.

35. Had the respondent been motivated for some reason to make the claimant's working life difficult rather than being motivated to put in place arrangements that helped him provide valuable service for them, then they had plenty of opportunity in the intervening period to do this. We have heard evidence of misconduct on the part of the claimant and the respondent's reasonable reaction to this. We have heard evidence of the claimant's attendance record (which was poor at times) and the respondent's reasonable response. Shelving was moved for reasons of improving efficient working within the warehouse. The claimant's hearing impairment was irrelevant to the decision.

36. The evidence has been vague about when the move around of shelving occurred. The best we have was from Mr Tunnicliffe who said it was mid to late 2018.

37. From March 2019 the claimant was absent due to sickness for about five weeks. The trigger for the claimant's absence appears to have been an episode of dizziness and vertigo that occurred in the workplace. At a return-to-work meeting on 29 April 2019 the claimant told the respondent that he was awaiting a diagnosis but it was possible that he had Meniere's disease.

38. The episode of dizziness occurred in or close to the canteen. A seat was found for the claimant in the canteen and he was permitted to remain there for the remainder of the shift. The claimant was not moved to a more private area. This is one of the complaints in this case. There is nothing documented to show that the claimant referred to the episode of dizziness in the context of his complaints against the respondent until:-

> 38.1 an appeal hearing in March 2020. At that stage his complaint was related to the speed at which he was being invited to welfare meeting after commencing absence, not his treatment on the day of the incident. (reference at page 500)
>
> 38.2 a welfare discussion in September 2020 (page 524) but the reference was to explain his condition not (as the claimant now does) to complain about it,

39. The claim form does not make any allegations about discriminatory or otherwise inappropriate behaviour by the respondent in relation to the way he was treated when he experienced this episode of dizziness.

40. On his return from this absence on 7 May 2019, the claimant was told that his absence records overall meant that a formal review meeting under stage one of the respondent's absence management policy would take place. The meeting was on 15 May 2019 following which the respondent decided not to proceed with a formal warning under its absence policy and informed the claimant of this.

<u>Complaints about speaker noise - 2019</u>

41. On 9 May 2019 (shortly after his return to work) the claimant complained about speaker noise. We note that this was the first time the claimant had raised concerns about workplace noise since 2014 or 2015, so for at least four years. Something had changed or triggered this. There is no evidence that in May 2019 the respondent's speakers suddenly became louder. The claimant had by that stage been working with the rearranged shelving for almost a year (certainly more than 6 months) and so there was no change in that location. It might have been a worsening of the claimant's hearing impairment; it might have been a threat of formal action under the processes. That might, in turn, have increased the claimant's anxiety.

42. The claimant raised his concern about noise with Andrew Millington on 9 May 2019 and steps were quickly taken to turn the volume down on the speaker in question. We find that the claimant confirmed to Mr Millington that the issue had been resolved at that stage. We are supported in this finding by the evidence of Mr Millington but also because documentary evidence shows that the claimant did not raise any noise related issues again between 9 May and 28 August.

43. Unfortunately issues with the fitted speakers did arise at the end of August 2019. We are satisfied from hearing the evidence that the issue arose when the respondent changed from an analogue radio connection to a digital connection which came out at a higher volume. The claimant complained about the volume from the speakers on 28 August 2019.

44. A number of the claimant's claims rely on the extent of the time taken to then resolve the issues and indeed complaining that issues were not resolved at all.

45. We find that the respondent reacted quickly to the claimant's complaint on 28 August 2019 and again turned down the volume.

46. However there were still some technical issues with the digital settings which meant that volume and noise levels were fluctuating. Specialists were called in to look at the system but also to move the physical location of the speakers. At that stage they were only four feet or so from the mezzanine floor and the plan was to move them much higher up the wall – 16 feet or so from the floor.

47. The claimant was also moved from C section to the "Goods In" section as a short-term measure. The claimant was told that there was an option that the respondent would look at (should he wish) to move him to another department, but the claimant declined this.

48. By 11 September 2019 the speaker in question (which was very close to the XC section were the claimant spent some of his working day) had been disconnected. Work was then carried out in relocating the speakers higher up the wall and in resolving the technical issues that had arisen when the respondent's system switched from analogue to digital.

49. The claimant has described the effect on him as "most uncomfortable" (paragraph 105 of the claimant's statement). That is the extent of the disadvantage that the claimant suffered for a short time on 9 May 2029 and again on 28 August 2019.

50. The claimant went on annual leave in early October 2019 and before that the respondent carried out a risk assessment with him on 27 September 2019. One of the outcomes of the risk assessment noted on the completed form is that regular bi-weekly reviews would be carried out with the claimant.

51. By 1 October just before the claimant's holiday the speakers had been relocated much higher up the wall (another outcome of the risk assessment) and the speakers had also been reconnected. The claimant raised concerns about changing noise levels on that day (which is noted in an email at 410B). He was told that some installation work was still being carried out and there was still a need to balance the system.

52. The claimant then went on holiday. Mr Machin spoke with the claimant following his return on or shortly after 14 October. We accept the events noted in a contemporaneous timeline document created by Mr Machin that the claimant told him he was satisfied with the volume level and Mr Machin in turn invited the claimant to

raise any issue going forward with him. We find that the claimant was aware that he could raise issues with Mr Machin, or with other managers. He did not raise any issues again with them from 14 October 2019 until after the claimant was threatened with disciplinary action in late December 2019.

53. In making this finding, we have not accepted the claimant's evidence that he continued to raise issues. In rejecting this evidence we have preferred the respondent's evidence particularly Mr Machin and Mr Millington. That finding is further supported by:-

a. The fact that the claimant's union representative was by that stage involved. We do not accept, had there been ongoing issues, that there would not have been correspondence from the claimant's union about this.

b. The claimant has tried to rely on a minute of a JCC meeting on 10 December 2019 between respondent and its recognised union. Those minutes raise the location and volume of speakers as a concern. However the minutes are in the form of action points and they also report that "All speakers have been refitted. If colleagues feel the radio is too loud they must see GT." In other words, the issue had been raised and fixed.

Complaints relevant to the back impairment

54. The claimant had complained of a back impairment from the time of his workplace accident in 2015. The respondent had in place from November 2017, arrangements for the claimant to carry out light duties. The claimant was intentionally placed on section C in the Wardles team. He also sometimes worked in the "goods in" section of the Wardles team and the claimant knew that he was not required to handle anything heavy. The claimant was able to decide what goods he could (and could not) handle.

55. The claimant's complaint relevant to this impairment was a requirement for him to work downstairs for a shift or (according to the claimant) up to six shifts in November 2019. We need to make findings about these events.

56. We preferred the version of events provided by Mr Millington particularly as this version was largely supported by one of the witnesses called by the claimant (Claire Belfield). This is reflected in our fact finding below.

57. In November 2019, the respondent's operation required a particular product to be packed/distributed urgently. The Wardles team (or a substantial part of it) was tasked to do this for a short time, to ensure this urgent task was done. The team was therefore required to work for this short period of time in a different part of the warehouse. It was light work. It involved lifting medicine bottles about the size of a can of pop from a box into another box or crate called a "tote". About 40 of these bottles were placed in a tote. Generally that tote simply needed to be slid from a pallet lift onto a conveyer belt which was at the same level. Exceptionally, if the conveyer belt became crowded, a full tote would have to be lifted onto the floor. That is one of

the 2 aspects of this work that the claimant complains about. But there is no evidence other than the claimant's account, that he needed to perform this exceptional task. The claimant's own evidence (as it is in relation to other complaints) is exaggerated. In his statement he describes having to stand on a bench and lift heavy bottles. From the evidence of Claire Belfield (in her responses to questions from Ms Quigley) it is clear that the claimant's account is inaccurate. The bottles were not heavy. The claimant does not mention the pallet lift or conveyor belt that were there to help the packing process.

58. The claimant worked as part of a team. If he had found himself in the exceptional position of having to remove a full tote from a table to the floor he could ask a colleague to assist him. The claimant knew this. He knew that he had been placed on light duties some years ago and was still on light duties. We also note that other than the claimant's exaggerated account, there is no evidence that he did find himself in this position. On balance, we find that he did not.

59. The claimant also complains about being required to stand still. We find that the claimant did raise the sedentary nature of the work with Mr Millington and he was told that he could move around rather than just stand.

60. There are other aspects of the claimant's account about this temporary, short-term change to duties, that are untrue. In his account he does not say that the Wardles team as a whole were sent, he tries to give the impression that the claimant was sent alone; he does not describe the light work involved, referring (wrongly) to heavy bottles (paragraph 127 of his statement).

61. Having regard to our findings about the claimant's account on this issue, we are not inclined to believe his account of a discussion between Mr Millington and the claimant. The claimant's evidence is that he spoke with Mr Millington on a one-to-one basis and told him that his back was painful but that he was told by Mr Millington that he had to carry out the work. We prefer the evidence that Mr Millington provided, which was when speaking with the group as a whole the claimant shouted "ow, my back". That was not a serious report of concern; it was more in the nature of a workplace prank when the team was told to work downstairs for a short period.

62. We are also satisfied that the work was carried out on one occasion only not the 6 or more occasions that the claimant told us.

63. Finally, to support our findings, there is no record of a complaint being made. Had the claimant wanted to complain about this work, he would have done, and it would have been documented. He did not complain at the time. We note that the claimant raised a general complaint 2 months later in his grievance in January 2020 that he had not received the support recommend by Occupational health but he did not state what support he has or has not received.

<u>Request for time off work in December 2019 and subsequent disciplinary investigations.</u>

64. A week or so before Christmas in 2019 (around 18 December) the claimant spoke with Mr Millington to ask him if he and a friend could have two hours off on

Christmas Eve. Mr Millington told the claimant that was not possible. He could not let both of them have the time off. The claimant told him that he had a medical appointment and on hearing this, Mr Millington offered him the whole day off. Mr Millington also offered the claimant himself the option of two hours off. Mr Millington offered the day off because he understood that his colleague would have been giving the claimant a lift home from work and of course if he had the day off that would not be needed.

65. The claimant did not accept Mr Millington's decision. That same morning the claimant spoke to Mr Millington again, and again. Having received the evidence from the claimant and Mr Millington we are satisfied that this ended up being a discussion in which the claimant was disrespectful towards Mr Millington. We accept that Mr Millington found the claimant's behaviour to be intimidating. We are satisfied that another manager who witnessed this behaviour decided that he needed to intervene and move the claimant away from Mr Millington.

66. The incident was investigated and as a result of that investigation the claimant was invited to a disciplinary hearing. The invite letter is dated 13 January 2020. It is clear from the terms of that letter that it enclosed various witness statements and an investigation report compiled by Mr Machin. We are satisfied that the person reaching the decision to recommend a disciplinary hearing, Mr Machin, genuinely believed that the claimant had a case to answer. In fact, that disciplinary hearing did not take place as the claimant began a period of long-term absence (from which he did not return) and also raised a grievance.

67. The grievance was about the speakers and about the claimant's back condition. He said that he had not received appropriate support from the respondent even though he was aware that he had been placed on light duties from 2016 but the claimant did not provide any more information about not having been given appropriate support (he didn't provide any detail in the grievance meeting of 27 January 2020 either).

68. The respondent took steps to try to advance the grievance and disciplinary processes and remained in contact with the claimant about the grievance and appeal. That involved communications until the end of March 2020. By that stage the Coronavirus pandemic began to affect everyone and every business nationally.

69. The grievance appeal outcome was sent at the end of March and it is apparent from the evidence that there was no contact for a number of weeks that followed. An Occupational Health report followed an appointment on 1 June. Contact must have been made with the claimant before then in order to plan for that appointment and obtain the claimant's consent. The period during which there was no contact was probably 6 or 7 weeks during that unprecedented period in 2020 at the start of the pandemic and national lockdown.

70. In that time we also note that the claimant's own GP was planning for further tests and diagnoses (pages 511 and 512).

71. We find that the respondent's decision to obtain a medical view was the correct order of things – to obtain the opinion and once obtained, to arrange for a welfare meeting or discussion with the claimant.

72. The claimant attended the Occupational Health appointment and the resulting report noted that he was not ready to be contacted by the respondent. There was another Occupational Health review on 14 July which also noted that the claimant was not ready for any sort of meeting. We have no criticism of the respondent's decision not to contact the claimant during this period.

73. One of the members of the HR team, Shona McKenzie, returned from maternity leave in September 2020 and at that stage made attempts to resolve an apparent impasse. She considered herself as a "fresh pair of eyes" to look at the problem and contact the claimant which she did and they spoke on 22 September 2020. We accept that Ms McKenzie was genuine in her attempts to try to resolve matters for the benefit of the claimant and the respondent. The claimant told Ms McKenzie that he did not want to return to work until the conclusion of the Tribunal hearing. He was critical of managers at the warehouse and referred to the managers collectively as "*a bunch of snakes*." Ms McKenzie arranged for another Occupational Health report which is dated 29 October 2020, and having received this she considered it and discussed with colleagues the possibility of alternative employment (not at the HSC warehouse) that might be available for the claimant. She wrote to the claimant on 27 November 2020 and said this:

> *"Hi Will*
>
> *Apologies in the delay in getting to you. I have been waiting for the Occupational Health report since we last spoke. As I now have this report I would like to book a welfare meeting with you to discuss the Occupational Health and run through any updates you have on your health. Are you available on Wednesday for a welfare meeting if I call you? If you'd like to be accompanied by a union rep or workplace colleague on this call, please let me know once you have arranged this."*

74. The claimant is critical of this wording, specifically *"I have been waiting for the OH report since we last spoke".* They had last spoken on 22 September. The claimant was then sent for an Occupational Health appointment. He and Ms McKenzie communicated in early October regarding a consent form. Ms McKenzie sought a referral internally. The appointment took place, and the date of the resulting report is 29 October. The terms were considered by Ms McKenzie. She investigated alternative employment options with other parts of the respondent's organisation. She then wrote to the claimant on 27 November 2020 in the terms noted above. It is difficult to criticise Ms McKenzie in relation to those actions, still more difficult to seriously advance the claimant's case that Ms McKenzie was being untruthful.

75. On 1 December 2020 Ms McKenzie wrote to the claimant about the possibility of a new role. By this stage the claimant had made clear that he would not return to work in the HSC warehouse. It is important that we set out the terms of her email as it is the basis of one of the harassment complaints under section 26 Equality Act 2010.

> *"Hi Will, please find attached the notes from today's discussion, I have also attached the RP for the Customer Service Adviser role; I have spoken to the managers of this team and they are recruiting for this position at the moment and would be happy to support you with*

additional training if you would like to take the role. The role would be predominantly home based with some time in the office at the start to support with induction however we are willing to work with you if this is something you are not comfortable with.

If you could let me know by the end of the week if this is something you would like to consider as the manager will need to start recruiting for this role if not.

If you would like to discuss anything further about this role please give me a call."

76. The claimant was not chased for a response. As it was he did not respond until 8 December to let Ms McKenzie know that the reason he had not been in touch was because his mum was very poorly.

The Law

Disability

77. Section 6 Equality Act 2010 (EQA) provides as follows:-

(1) A person (P) has a disability if-

a. P has a physical or mental impairment, and

b. The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

78. Section 212(1) of the EQA defines "substantial" as meaning *"more than minor or trivial."*

79. We have also considered:-

(i) part one of schedule one to the EQA regarding the definition of disability.

(ii) The Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability. (Guidance)

(iii) The EHRC Employment Code

80. We note from the materials above and from relevant case law:-

a. That we are to apply this definition at around the time that the alleged discrimination took place; **Cruickshank v. VAW Motorcast Limited [2002] ICR 729;** (which I have referred to as the relevant time).

b. That we should apply a sequential decision-making approach to the test (see for example **J v. DLA Piper [2010] WL 2131720 (J v. DLA)**, addressing the following in order:-

- did the claimant have a mental and/or physical impairment? (the 'impairment condition')
- did the impairment affect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition')
- was the adverse condition substantial? (the 'substantial condition'), and
- was the adverse condition long term? (the 'long-term condition').

c. The term "impairment" had to be given its ordinary and natural meaning (**McNicol v. Balfour Beatty Rail Maintenance Limited [2002] EWCA Civ 1074**).

d. Where a person has more than one impairment, account must be taken whether the impairments together have a substantial adverse effect overall on the person's ability to carry out normal day to day activities. (Guidance at Section B6).

e. Section B12 of the Guidance refers to effects of treatment: "*The Act provides that where an impairment is subject to treatment or correction, the impairment is likely to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, likely should be interpreted as meaning "could well happen."*

f. The Guidance includes guidance on what "long term" means – see section C of the Guidance, the meaning of "likely" (C3 and C4) and recurring or fluctuating effects (C5-C8) and likelihood of recurrence (C9) and a requirement to take into account the cumulative effect of related impairments (C2).

g. The term likely means that is a real possibility, that it could well happen rather than something that is probable or more likely than not (**Boyle v. SCA Packaging Limited 2009 ICR 1056 (HL)** – and now reflected in the wording at paragraph C3 of the Guidance).

h. The EQA does not define what is meant by "*normal day to day activities."* Section D of the Guidance provides guidance on this term. The appendix to the Guidance provides "*illustrative and non-exhaustive*" lists of factors which it would and would not be reasonable to regard as having a substantial and adverse effect on normal day to day activities.

i. An Employment Tribunal must look at the question of whether an impairment was likely to have lasted 12 months, from the position at the date of the alleged discrimination, not from the date of the hearing/decision. (**All Answers Limited v. W and another [2021] IRLR 612**) *("All Answers").*

Time limits

81. Section 123 EqA provides that complaints may not be brought after the end of 3 months "starting *with* the *date of the act to which the complaint relates"* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

82. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *"such other period as the employment tribunal thinks just and equitable."*

83. Section 123(3)(a) provides that *"conduct extending over a period is to be treated as done at the end of that period."* (We refer to this below as a continuing act).

84. We note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre [2003] IRLR 434**:-

> *"If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so."* (para 23)
>
> *"…the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."* (para 25 of the Judgment)

85. The EqA itself does not set out what Tribunals should take into account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

a. **British Coal v. Keeble EAT 496/96** in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;

- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

b. **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT**. This case noted that the issue of the balance of prejudice and the potential merits of the claim were relevant considerations to whether to grant an extension of time.

86. We have considered whether the complaints (or some of them) amount to a continuing act for the purposes of section123 (3)(a).

87. We note that we must distinguish between a succession of unconnected or isolated specific acts and an ongoing situation or continuing state of affairs such as (but these are examples only) an ongoing discriminatory regime, policy, scheme or regime. **Commissioner of Police of the Metropolis v. Hendrix 2002 EWCA Civ 1686** (see particularly paras 51 and 52).

Direct Discrimination – section 13 EA

88. Section 13 states:

> *"A person (A) discriminates against another if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

89. An important question for us is whether the claimant's sex was an effective cause of the treatment which we find. As was made clear in the case of **O'Neill v. St Thomas More Roman Catholic School [1996] IRLR 372** the relevant protected characteristic need not be the only cause of the treatment in question. We also note the following:-

a. The House of Lords in ***Nagarajan v London Regional Transport 1999 ICR 877, HL,*** held *"discrimination may be on racial grounds even if it is not the sole ground for the decision……..If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."* (judgment of Lord Nicholls)

b. Paragraph 3.11 of the EHRC Employment Code which states that *'the characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause'*

90. We also note the reference by Ms Quigley to paragraph 40 of the EAT's decision in **LB Lewisham v. Ladele** 2009 IRLR 211 which we have considered.

91. Direct discrimination under section 13 is about less favourable treatment. It requires comparison. Where a claimant does not have an actual comparator to rely on, then it is possible to rely on a hypothetical comparator, one who resembles the claimant in all material respects, except for the relevant protected characteristic.

Section 19 – Indirect discrimination

92. This required the application of a PCP – see below.

Objective justification

93. There is a potential defence to a claim under section 19 – where the employer can show that the application of the PCP was a proportionate means of achieving a legitimate aim.

94. The EHRC Code of Practice on Employment 2011 (Code) provides guidance and comment. In short, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration (see para 4.28 of the Code).

95. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (para 4.29).

96. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only viable way of achieving the legitimate aim; it is sufficient that the same aim could not have been achieved by less discriminatory means — para 4.31.

97. The following is stated at paragraph 4.30 of the Code.

> *'Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts.'*

Duty to Make Reasonable Adjustments

98. The claimant raises claims under s20(3) EqA. This imposes a duty on an employer *"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, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

99. We note that, for the duty to make reasonable *adjustments* to apply, a claimant needs to show that s/he has been put to a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled.

PCPs

100. For a provision criterion or practice to be a valid PCP for the purposes of s20, it must be more widely applied (or would be more widely applied).

101. Chapter 4 of the EHRC Code of practice on Employment 2011 at paragraph 4.5 says this in relation to PCPs:-

> *The phrase provision criterion or practice is not defined by the Act but it should be construed widely so as to include for example any formal or informal policies rules practices arrangements criteria conditions prerequisites qualifications or provisions. A provision criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a one off or discretionary decision."*

102. Whilst PCPs should be construed widely, there are limits. The word "practice" indicates some degree of repetition and where a PCP was identified from what happened on a single occasion, there must be some evidence of a more general practice. Paragraph 59 of the judgment in **Gan Menachem Hendon Limited v Ms Zelda De Groen UKEAT/0059/18:-**

> *So, while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred.*

103. We have referred to the decision in **Charles Ishola v. Transport for London [2020] EWCA Civ.112 ("Ishola").** We note particularly the following paragraphs of the judgment:

> *"35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.*

> *36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.*
>
> *37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."*

104. We must decide whether a PCP placed the claimant at a substantial disadvantage. We note the terms of section 212 EQA, that *"substantial means more than minor or trivial."*

105. Where we decide that a PCP puts the claimant at a disadvantage then we need to consider the issue of reasonable adjustments. We note that there is no duty to take measures that would impose a disproportionate burden on the employer.

Burden of Proof

106. We are required to apply the burden of proof provisions under section 136 EqA when considering complaints raised under the EqA.

Section 136 states:

This section applies to any proceedings relating to a contravention of this Act.

(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection 2 does not apply if A shows that A did not contravene the provision."

107. We have also considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. The annex to the judgment sets out guidance. (the amended Barton guidance)

108. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassey v. Nomura International [2007] ICR 867,** where the following was noted in the judgment:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

Discussion and Conclusions

109. We set out below our conclusions against the various issues.

Disability

1. The Respondent accepts that the Claimant was disabled by reference to hearing loss.

2. In respect of the other impairments relied upon namely: Spondylosis, Disc Degeneration and Stress Anxiety and Depression:

(a) As at the time of the alleged discriminatory acts , did the Claimant suffer from a physical or mental impairment as alleged?

(b) As at the time of the alleged discriminatory acts , did said impairments either individually or collectively have a substantial adverse effect on the Claimant's ability to undertake day-to-day activities?

(c) As at the time of the alleged discriminatory acts, had the effect of an impairment lasted 12 months or was likely to last at least 12 months?

3. Further, as at the time of the alleged discriminatory acts did the Respondent know or reasonably ought to have known that the Claimant was suffering from a disability as alleged or not?

Response.

110. As is clear from our findings of fact, at various times each of the 3 categories of impairments (hearing loss, back/spinal impairment and mental impairment) amounted to a disability.

111. We are satisfied that the hearing loss impairment became a disability from early 2019 and the respondent knew or ought reasonably to have known that this amounted to a disability from April 2019 (but not before).

112. As for the back impairment, we are satisfied that this was a worsening condition and by early 2019 it amounted to a disability. We are satisfied that the respondent knew about this impairment. We also note that it is necessary for us to apply the definition without taking account of the medication. We are satisfied that the claimant's back impairments amounted to a disability within the meaning of section 6 and that they did so certainly from January 2019. Given that the relevant period in relation to this disability (having regard to our findings on time limit points) is late 2019, it is sufficient that we find that the claimant's back impairment during that time amounted to a disability.

113. As for the mental health impairment, this was a disability that the respondent knew about at all relevant times (from September 2020) and the respondent knew about the impairment from September 2020.

Time Limits

30. *Were the discrimination claims made within time pursuant to Section 123 of the Equality Act 2010? In particular:*

(v) Was the claim made within three months of the act to which the complaint relates or not?

(vi) Was there conduct extending over a period of time or not?

(vii) If so, was the claim made within three months of the end of that period or not?

(viii) If not, would it be just and equitable to extend time or not?

Response

114. A number of the complaints, in isolation, are outside of the primary time limit, some by many years.

115. We considered whether there was conduct extending over a period of time and decided that there was not. These are our reasons.

a. The allegations, including about the workplace arrangements, relate to 2 workplaces. Different arrangements applied in these 2 workplaces, particularly relating to the playing of music.

b. The allegations span about 8 years (2013 to 2020) but there are considerable gaps within this timeframe.

c. Many of the actions are obviously not in any way connected – for example:

i. the actions of Shona McKenzie, cannot reasonably be seen as a continuing act with the issues about music being played in either workplace;

ii. the issues concerning the speakers are not in any way connected to the claimant's complaints about being made to lift heavy bottles.

iii. There are no complaints about speaker noise between 2015 and May 2019. Further, when complaints arise in 2019 the arrangements are completely different.

d. The different individuals involved over the years.

e. The claimant has not shown that there was any continuing or ongoing situation or state of affairs. Plainly, on the facts, there is not

116. We are satisfied that this claim presents a series of unconnected complaints.

117. Having decided that the complaints as a whole do not amount to a continuing act, we then considered whether it would be just and equitable to extend time at all to allow the claimant to bring complaints predating 25 December 2019 (in relation to the first claim).

118. We decided that it would be just and equitable to extend time so that all those complaints in 2019 are considered and determined, and that is what we have done. There is little or no hardship to the respondent in doing that. The evidence has already been presented. They are relatively recent to the issue of the claim and, unlike so much of the evidence concerning the more historic complaints, we do not have concerns with the reliability of the evidence in relation to events in 2019 and (in relation to the second claim) 2020.

Direct Discrimination

(A) *Hearing Loss*

4. Did the Respondent:

i. In 2018 (date unspecified) move the Claimant's workstation next to three speakers over which loud music was played or not?

ii. In September 2019 fail to disconnect the speakers near the Claimant's workstation?

iii. From March 2019, fail to implement reasonable adjustments for Meniere's disease?

(d) Fail to carry out the measures and steps identified in the Risk Assessment dated 29 September 2019?

5. If so, did the act(s) amount to less favourable treatment? The Claimant relies on an actual or hypothetical comparator in the same or similar situation without his protected characteristic.

6. If so, was the reason for such less favourable treatment the Claimant's disability or not? In particular, would the Respondent have treated an actual or hypothetical comparator whose material circumstances were the same as the Claimant's but who did not suffer from the Claimant's disability?

Response

119. 4(a) This complaint is out of time. However, as noted in our findings of fact, the claimant's workstation was not moved next to 3 speakers. Some of the shelving that the claimant used was moved next to one speaker. The claimant's evidence is exaggerated. Further, the position of the shelving had nothing to do with the claimant's disability. This complaint fails on time limits alone, but even had we allowed the complaint out of time, it would have failed on the merits.

120. 4(b) As noted in our findings of fact, the respondent did disconnect the speaker in question in September 2019. The claimant was also moved to a different workplace for a period of time before being disconnected. The direct discrimination complaint fails on these findings of fact.

121. 4(c) This complaint is about the way that the claimant was treated at the end of March 2019 when he experienced vertigo/dizziness in the workplace. He was allowed to sit and rest in the workplace canteen. He was not hurried back to work. He was not provided with access to a private medical room. We have no criticism of the respondent's treatment of the claimant particularly as this was the first time that the claimant was known to have experienced these symptoms.

122. Further, the claimant was not treated in this way because he had a hearing impairment. At the time the respondent did not know that the claimant had a hearing impairment. The respondent treated the claimant as they did, by providing him an opportunity to sit and rest in the canteen, because the claimant had complained of a dizzy spell in the canteen.

123. 4(d) The respondent carried out the actions in the risk assessment to the extent that was necessary. Changes were made to the position and volume of the speakers,

the respondent (Mr Machin) met with the claimant to review these and provide the claimant with an opportunity to raise any other issues, did not amount to less favourable treatment. To the extent that the decision not to diarise further review meetings amounted to less favourable treatment, that was not done because the claimant had a disability. It was done because (1) the work that had been discussed and it was agreed it had been carried out and (2) at a review meeting in October 2019, the claimant noted that he was satisfied with the speaker position and volume (see our findings at para 52 above).

Indirect Discrimination

7. Did the Respondent apply the following provisions, criteria or practices ("PCPs") to the Claimant:

(a) From 2013 to 2015 (after the conversation with Philip Alsop), requiring the Claimant to work in a workplace near to speakers playing loud music.

(b) From April 2017 (the move to HSC) to December 2019, requiring the Claimant to work in a workplace near to speakers playing loud music.

(c) In October/November 2019 requiring employees to lift heavy boxes

(d) In October/November 2019 requiring the Claimant stand statically for long periods of time.

8. Do any, or all, of the above measures amount to a valid PCP?

9. If so, did the PCP(s) apply equally to persons with whom the Claimant does not share the protected characteristic (disability)?

10. If so:

a. would (a) place employees with hearing loss at a particular disadvantage or not;

b. would (b) and/or (c) place employees with Spondylosis and/or disc degeneration at a particular disadvantage or not?

11. If so, was the Claimant placed at said disadvantage or not?

12. If so, can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim ?

Response.

124. 7(a). From the evidence we have heard, it appears that the PCP was applied until early 2015 latest. The complaint arising out of the application of this PCP is well out of time and we have not considered it further except to note our findings about disability and knowledge.

125. 7(b). There was some discussion in submissions about whether this was a valid PCP for the purposes of section 19. Ms Quigley's stated position is that it is not a valid PCP because it was something that, according to the claimant, was specifically done to him rather than a condition that was applied more widely. We have considered this and decided that, with some tweaks to the wording a valid PCP is made out. It is clear

to us that each member of the warehouse staff is allocated a place to work even where that place of work is near to a loudspeaker.

126. This PCP did not put the claimant at a disadvantage until 9 May 2019. The disadvantage that then arose was quickly removed by the respondent's actions.

127. The claimant was disadvantaged for a short time on 28 August 2019. But he was quickly moved to a different area of the warehouse pending a permanent fix/solution to the erratic volume from the loudspeaker system.

128. Given the short time and the quick actions on the part of the respondent and its limited impact on the claimant, we do not find the disadvantage to have been substantial.

129. The respondent relies on the defence of a proportionate means of achieving a legitimate aim (justification defence). We make findings about the justification defence in case our findings about the disadvantage not being substantial are found to be wrong.

130. The legitimate aim was that music in the workplace enhanced morale and relieved boredom. We accept the legitimate aim relied on. We accept that the playing of music in warehouses is a widespread practice and is beneficial to workplace morale.

131. We also accept that it was proportionately applied. There were rarely issues with the speaker system in the HSC warehouse. On the rare occasions that issues arose and the claimant was disadvantaged, the respondent acted quickly and responsibly. We have taken in to account the rarity of the occasions, the limited and short-term effect on the claimant (see para 49 above) in deciding that the practice of allocating members of staff a place of work, even when near to a loudspeaker, is proportionate.

132. 7(c) and 7(d). As is clear from our findings of fact, these PCPs were not applied to the claimant.

Reasonable Adjustments

(A) Hearing loss

13. Did the Respondent apply a PCP to the Claimant, namely requiring the Claimant to work at a workstation close to speakers playing loud music?

14. If so, did said PCP place the Claimant at a substantial disadvantage by reason of his disability in comparison to those who are not disabled?

15. If so, did the Respondent know, or reasonably ought to have known, that the Claimant was placed at said disadvantage?

16. If so, did the Respondent fail to make reasonable adjustments to reduce or remove said disadvantage?

17. Did the following physical features place the Claimant at a substantial disadvantage by reason of his disability in comparison to those who are not disabled:

(a) In 2018 the location of his workstation

(b) In 2019 the location of the speakers

(c) In September 2019 the location of the speakers

18. If so, did the Respondent know, or reasonably ought to have known, that the Claimant was placed at said disadvantage?

19. If so, did the Respondent fail to make reasonable adjustments to reduce or remove said disadvantage?

20. Did the Respondent fail to carry out the recommendations and measures specified in the medical reports, occupational health reports and the risk assessment of 27 September 2019?

B) Spondylosis/disc degeneration

21. Did the Respondent apply the following PCPs to the Claimant:

a. In October/November 2019 requiring employees to lift heavy boxes

b. In October/November 2019 requiring the Claimant stand statically for long periods of time.

22. If so, did said PCPS place the Claimant at a substantial disadvantage by reason of his disability in comparison to those who are not disabled?

23. If so, did the Respondent know, or reasonably ought to have known, that the Claimant was placed at said disadvantage?

24. If so, did the Respondent fail to make reasonable adjustments to reduce or remove said disadvantage?

Response – complaint relating to Hearing loss.

133. The PCP relied on under section 20 Equality Act 2010 is the same as that under section 19.

134. Until May 2019, the respondent did not know nor was it reasonable for it to have known that the claimant would be placed at any disadvantage. Indeed, this PCP did not place the claimant at any disadvantage before 9 May 2019 When the respondent was made aware of the claimant's disadvantage, changes (reasonable adjustments) were made straight away. The same applied at the end of August 2019.

135. The same conclusions apply to the complaint of a failure to make reasonable adjustments to physical features (the location of the speakers). As for the location of the workstation itself – we have made clear our finding that the claimant's workstation was not moved next to a speaker. Some shelving at which the claimant spent part of his working day was. But it did not place the claimant at any disadvantage – other than the short periods on 9 May 2019 and 28 August 2019 when reasonable adjustments were quickly made.

Response – complaint relating to back impairment.

136. As for the PCPs at 21a and 21b. We refer to our findings of fact. The claimant was not required to lift heavy boxes or stand statically for long periods of time. If those PCPs applied at all within the warehouse, they did not apply to the claimant.

Harassment

25. Did the Respondent subject the Claimant to the following acts/omissions?

- *(a) Disconnect the speakers for 1 week in September 2019 only. (The Claimant is unsure who ordered the speakers to be reconnected but believes it to be Andrew Machin)*
- *(b) Refused two hours leave on Christmas eve? (Andrew Millington)*
- *(c) Failing to provide the Claimant with the outcome of the investigation and disciplinary (Andrew Machin)*
- *(d) In 2017 removal of light duties (Andrew Millington)*
- *(e) On the 22nd of September 2020 not arranging a welfare meeting (Claimant is unable to identify who in the Respondent's HR would have been responsible for this)*
- *(f) On the 28th of September Shona McKenzie lied to the Claimant about the OH report and failed to arrange a welfare meeting*
- *(g) On the 1st of December 2020 the Respondent gave the Claimant two days to decide if he would accept alternative employment without the Respondent confirming that adjustments would be in place (Shona McKenzie)*

26. If so, was said conduct related to the Claimant's disability/disabilities? In relation to this list above:

- *a. 25 a, b, and c are said to be related to the Claimant's hearing loss;*
- *b. 25 d is said to be related to the Claimant's spondylosis/disc degeneration;*
- *c. 25 e, f and g are related to the Claimant's mental health (anxiety and depression).*

27. If so, did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

28. If not, did it have that effect having regard to the Claimant's perception and the other circumstances in the case?

29. If so, was it reasonable for the conduct to have such an effect?

Response

137. 25(a). The speakers were not only disconnected for one week. See our findings of fact. The speakers were disconnected on 11 September 2019 and only reconnected once they had been relocated.

138. Further, the reason they were disconnected was to enable the work to be carried out to update the system and raise the location of the speakers. The reason they were reconnected was to enable music to continue to be played in the warehouse. These actions were wanted (not unwanted) by the claimant.

139. 25(b). The claimant was provided with an option of 2 hours annual leave on 24 December 2019. See our findings of fact at para 64.

140. 25(c). The claimant was provided with the outcome of the disciplinary investigation. The investigation report was sent to the claimant on 13 January 2020 (see our findings at para 66).

141. 25(d). This claim is out of time. We have already made clear our findings that (1) it would not be just and equitable to extend time and (2) there is no continuing act. However, from what little evidence we had about what tasks were or were not provided to the claimant in 2017, we note the claimant's own evidence was that adjustments were made in late 2017 as the claimant was placed on light duties. Although not referred to in our findings of fact, we note here that this is confirmed at paras 75 and 76 of the claimant's witness statement.

142. 25(e). The respondent had received occupational health reports stating that the claimant was not fit to attend meetings. Further, by September 2020 Ms McKenzie was in contact with the claimant. They spoke on 22 September 2020 (the date relevant to the complaint). That discussion may not have been labelled a welfare meeting but it is clear that the claimant's welfare was central to the discussion. Given what happened, this complaint makes no sense at all.

143. 25(f) – see our findings of fact at para 74 which make clear why this complaint fails.

144. 25(g) – At para 75, we have set out the terms of the offending correspondence. it is difficult to see what could be unwanted about this, even less how it could be a violation of the claimant's dignity or creating an intimidating, hostile, degrading or offensive environment for the claimant. The correspondence was part of an ongoing dialogue at that time between the claimant and Ms McKenzie. The claimant had made it clear he would not return to work at the HSC warehouse. Ms McKenzie was trying to find alternative roles for the claimant and therefore help the claimant successfully return to work.

Employment Judge Leach
Date: 19 January 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
25 January 2024

FOR THE TRIBUNAL OFFICE

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