



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102204/2023 Hearing Held at Edinburgh by Cloud Video Platform (CVP) on 9, 10, 11, 12 and 13 October 2023, and 17 and 18 January 2024; and Members' Meeting on 23 February 2024

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**Employment Judge: M A Macleod
Tribunal Member: L Brown
Tribunal Member: S Currie**

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James Blair

**Claimant
Represented by
Mr T Rushton
Barrister**

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The Scottish Ministers

**Respondent
Represented by
Ms S Monan
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous Judgment of the Employment Tribunal is that:

- (1) The respondent directly discriminated against the claimant contrary to section 13 of the Equality Act 2010;**
- (2) The respondent failed in its duty to make reasonable adjustments both in respect of section 20(3) and (5), and section 21, of the Equality Act 2010;**
- (3) The claimant's claims are not time-barred and the Tribunal has jurisdiction to hear them in full; and**
- (4) A Hearing to determine Remedy should now be listed on dates suitable to the parties.**

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REASONS

- 5 1. The claimant presented a claim to the Employment Tribunal on 17 March 2023, in which they complained that the respondent had discriminated against them on the grounds of disability.
2. The respondent submitted an ET3 in which they resisted the claimant's claims.
- 10 3. A Hearing was listed to take place by CVP at the Edinburgh Employment Tribunal on 9 to 13 October 2023. As it turned out, the Hearing could not be concluded within the allocated diet and accordingly, the Tribunal reconvened on 17 and 18 January 2024. The Tribunal subsequently met on 23 February 2024 in order to discuss and complete our deliberations.
- 15 4. It was agreed during the course of the Hearing that the Tribunal would only determine issues relating to liability and jurisdiction in this Hearing.
- 20 5. The parties presented a Joint Bundle of Documents to the Tribunal, in electronic form, running to some 1000 pages. While handling such a large set of documents electronically proved challenging, the Tribunal and parties were able to navigate those documents to which reference was made in the course of the Hearing, and where necessary the Employment Judge was able to share the screen to display the relevant document.
- 25 6. The claimant gave evidence on their own account. In addition, the following witnesses were called:
 - Mark Oliver Dorrian, Head of Accessibility within the ED Team;
 - Stuart Renton, HR officer, People Advice and Wellbeing Team;
 - Alison Beckett, Unit Head, Social Care and Fair Work;
 - Lucy Pullar, Policy Officer, Mental Health Directorate; and
 - Anna Kynaston, Principal Private Secretary to the Permanent Secretary.

7. From time to time, interruptions to the quality of sound or to the connection of one or other of the parties or witnesses occurred, but due to vigilance on the part of all participants, the Tribunal was alerted to this so that no further questioning took place until the individual was able to return to the Hearing. The Tribunal was satisfied that the Hearing was able to proceed smoothly, subject to these short interruptions, and that a fair hearing was able to take place.
8. At one point, it is worth noting, the claimant drew to the Tribunal's attention that they were struggling to hear due to background noise which appeared to be emerging from the microphone being used by Ms Monan; as a result, Ms Monan helpfully agreed to move to a quieter location, which proved a significant and satisfactory improvement.
9. Regular breaks were instituted as a reasonable adjustment for the claimant.

The Issues

10. The List of Issues in this case set out the areas for determination by the Tribunal:

Time Limits

1. **Were all of the claimant's complaints presented within the time limits set out in section 123 of the Equality Act 2010?**
2. **If not, were any complaints presented outside that time limit nevertheless part of a course of conduct extending over a period with a complaint presented within the time limit?**
3. **If not, should the Tribunal extend time for bringing the claim because it is just and equitable to do so?**

Disability

4. Was the claimant a disabled person in accordance with section 6 of the Equality Act 2010 at all relevant times because of the following conditions:

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- a. Spondylitis;
 - b. Ehlers-Danlos syndrome;
 - c. Hypermobility;
 - d. Fibromyalgia; and/or
 - e. Dyslexia?

10 5. The Tribunal notes that the respondent accepts that the claimant is disabled in terms of section 6, but only in general terms, and does not concede disability in relation to each of the conditions relied upon by the claimant.

Direct Disability Discrimination

15 6. Did the respondent subject the claimant to the following treatment:

- a. On or around 18 August 2021, not discounting Covid-19-related sickness absence in determining whether the claimant had demonstrated satisfactory attendance;
- 20 b. On or around 8 November 2021, extending the claimant's probationary period;
- c. From April 2022, reducing the claimant's pay to half-pay; and/or
- d. Dismissing them with effect from 21 October 2022?

25 7. Was that treatment "less favourable treatment", that is, did the respondent treat the claimant as alleged less favourably than it

treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on hypothetical comparators only.

- 5 8. If so, was this because of the claimant’s spondylitis, Ehlers-Danlos syndrome, hypermobility, fibromyalgia, dyslexia and/or because of the protected characteristic of disability generally?

Failure to Make Reasonable Adjustments

Auxiliary Aid Claims

- 10 9. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person at the material time?

10. Did the respondent have a requirement to do the following:

- 15 a. To read and work on documents;
- b. To work at a desk;
- c. To correspond by email;
- d. To attend meetings virtually; and/or
- e. To be readily available for work during each working day?

- 20 11. But for the provision of the following auxiliary aids, did the requirement(s) put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The auxiliary aids contended for by the claimant are as follows:

- 25 a. A height-adjustable sit/stand desk;
- b. An ergonomic chair;
- c. A 27-inch monitor;

- d. An ergonomic keyboard and mouse;
- e. A foot rest; and/or
- f. A hot and cold fan.

5 **12. Did the requirement(s), but for the provision of an auxiliary aid, put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?**

10 **13. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?**

14. If so, did the respondent take such steps as were reasonable to have to take to provide the auxiliary aid(s)?

PCP-based Claims

15 **15. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?**

16. A “PCP” is a provision, criterion or practice. Did the respondent apply the following PCPs:

20 a. A practice of deeming more than seven days’ absence as “unsatisfactory attendance” when assessing whether an employee has passed their probation period (or not); and/or

b. A practice of not discounting Covid-19-related days of sickness absence in determining whether probationary employees demonstrated satisfactory attendance?

25 **17. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?**

18.If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

5 **19.If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The steps which the claimant alleges should have been taken were:**

a. Disapplying the PCPs in respect of the claimant;

b. Providing the equipment set out in paragraph 10 above.

10 **20.If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?**

11. We have amended the issues to take account of further particulars submitted by the claimant since the initial Preliminary Hearing in May 2023.

12. We also noted the suggestion made by counsel for the claimant in his submission that the Tribunal should amend the order in which it deals with the issues, by addressing the reasonable adjustments claims first.

Findings in Fact

13. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

20 14. The claimant, whose date of birth is 24 August 1978, was employed by the respondent from 23 November 2020 until 21 October 2022, as a Team Leader within the Social Care Workforce Division of the respondent, the Scottish Government.

25 15. Prior to the claimant's appointment by the respondent, they were employed by the Scottish Legal Aid Board (SLAB), a non-departmental public body, as an Equalities Policy Officer, advising and creating policies to ensure the discharge of SLAB's legal duties.

- 5 16. In March 2020, due to the impact of the Covid-19 pandemic, a national lockdown required the claimant, as with many others, to accept restrictions upon their movement. They had just commenced employment with SLAB, based in Thistle House, Edinburgh, when lockdown was imposed, and the claimant was required to work from home.
- 10 17. The claimant requires a number of items of equipment and other adjustments in recognition of the conditions with which they have to live, and upon which they rely in the assertion that they are a person disabled within the meaning of section 6 of the Equality Act 2010, and were such a person at the material time.
18. The claimant has a number of conditions which affect their day-to-day living.
- 15 19. They suffer from spondylitis, a degenerative disease of the spinal cord, and also spinal arthritis, arising from injuries sustained when hit by a van while working as an Equalities Officer with Fife Police. They have been left with “profound pain” in their spine. The accident took place in 2010, but the effects continue to affect them. While working for the respondent, the effect was that from time to time the claimant required to sit for long periods in meetings (up to 4 hours) with different agencies and groups, and reached a point where the pain was intolerable. They are also susceptible to infection as a result.
- 20 20. The claimant also has Ehlers-Danlos syndrome and hypermobility. They described hypermobility as a condition whereby the joints are loose and prone to dislocation. They encountered particularly severe pain in a partial dislocation of the hip in May 2021. This has made it exceptionally difficult for them to work, and on occasions, they have required to work from their bed in order to relieve the discomfort. This condition causes difficulty in writing, and as a result the claimant requires speech software to allow them to dictate.
- 25 21. The claimant also referred to their condition of fibromyalgia, which has the effect of making them feel like they have walked at least 8 miles without a
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break, and the throbbing muscular pain associated with it. The condition flares up from a baseline level from time to time. The condition also has the effect of causing them fatigue and “brain fog”, an effect on their ability to think and process information immediately. An ergonomic chair,
5 keyboard and mouse have been found to alleviate their symptoms.

22. The claimant has dyslexia, which is linked to but separate from scotopic sensitivity. They described the effect of dyslexia as not only related to the way that words come off a page, but visual disturbances on top of that, which tinted glasses have assisted with. Scotopic sensitivity brings with it
10 other effects: blurring, shimmering, flickering, fading and distortion. The claimant stated that both conditions are exacerbated by stress, and that in those circumstances, they become fatigued.

23. The effect of these conditions is that the claimant’s nervous function has been impaired, and that due to difficulties with his gait, they now require
15 to use a wheelchair, which provides support in relation to fatigue. They said that the symptoms have been much worse since November 2020, and attributed to the worsening of conditions to the withdrawal of available auxiliary aids which SLAB had provided to them.

24. The claimant received a number of auxiliary aids from SLAB in their
20 employment with them:

- Ergonomic chair, keyboard and mouse;
- Adjustable desk and standing height stool;
- Footstools, also referred to as footrests;
- A laptop sufficiently powerful to run the necessary software the
25 claimant required to use, such as Dragon, Texthelp and Mindreader (or Mindview 7, or MindPro);
- Flexible hours; and
- A larger monitor.

25. The claimant received an ATW Holistic Workplace Assessment dated 21 July 2020 during their employment with SLAB (944ff). The assessment set out the conditions which affected them, and explained the needs the claimant had in relation to working from home and adjusting to the work accordingly. The assessment set out a number of recommendations, including an ergonomic chair, footrests, height-adjustable sit-stand desks, standing stools, keyboard forearm supports, ergonomic wireless keyboards and mouse, wrist supports, document holder and writing slope and software to assist with his conditions.
26. The claimant was entirely satisfied by SLAB's provision in relation to these recommendations.
27. Prior to their employment with the respondent, the claimant underwent an Occupational Health assessment.
28. The report by Optima Health, the respondent's Occupational Health providers, was dated 1 October 2020, and amended on 12 October 2020 (77ff). The report concluded that the claimant's needs were *"complex, multifactorial and vary considerably over time. Ultimately, it is for the employer to determine which of these recommendations they can accommodate. With assistance, I would hope that Mr Blair would be able to work to a satisfactory standard and to the hours planned."*
29. No additional action was proposed by Optima Health. The recommendations referred to arose out of the DWP recommendations, understood to be a reference to the Workplace Assessment.
30. The claimant's employment with the respondent arose from a recruitment exercise undertaken by the UK government, who allocated the claimant to a Scottish Government role at grade 7 following interview.
31. On 21 October 2020, Peter Morrison, HR Resourcing & Interchange Team Leader, emailed the claimant (81) to confirm that the workplace adjustments team would shortly be in touch to arrange the movement of

equipment, where possible, and the provision of new, where not. He said that the process would run as follows:

“1) Workplace Adjustments contact you and discuss any adjustments and support required.

5 *2) Workplace Adjustments inform us that it is suitable to arrange a start date.*

3) We contact you and propose a date that accommodates your current notice period.

10 *4) Once a date has been agreed we issue formal, written confirmation and your contract. This allows you to hand in your notice.”*

32. A conditional offer of fixed term appointment was made to the claimant as a Civil Servant in the Scottish Government (88), dated 4 November 2020, as Team Leader, Adult Support and Protection and EU Exit Branch, for 23 months from 23 November 2020 until 21 October 2022. The offer confirmed that they would be based at St Andrews House, Edinburgh, but that initially he would be working from home. The pay grade was identified as C1. The claimant having been recruited through a UK Government exercise was referred to as grade 7, but the Scottish Government equivalent was C1. Their line manager was C2, and her line manager C3. Staff in A and B grades were administrative and policy staff, and were at a lower grade than the claimant.

33. The letter went on to confirm that *“You will be on probation for 9 months and expected to remain in the same post for that period from your start date. Your appointment will be confirmed at the end of this period if you have shown that you can meet the normal requirements of the job to an effective standard, and that your attendance and conduct have been satisfactory. Your attendance is likely to give cause for concern if you have more than 7 working days of sick absence, or there are concerns about any pattern of absences, during the probation period.*

If you do not reach the required standard, or your attendance or conduct has been unsatisfactory, your probation period may be extended or your appointment terminated at any time during the probationary period.”

- 5 34. Attached to the offer was a “Schedule of the Principal Terms and Conditions of Appointment” (92)
35. The claimant accepted the offer on 4 November 2020.
- 10 36. Although the appointment was for a fixed term, the claimant did not consider that the contract would end at that point. Their previous experience of working for the respondent meant that they would be permitted to apply for a permanent position, whether in the same area or elsewhere, as an internal candidate. The claimant has a family to support and was keen to progress with their career.
- 15 37. Mark Dorrian, who was at that time the Head of a project team working to improve workplace adjustments for new employees, received an email to the team’s central inbox from the recruitment division advising that a new employee may require workplace adjustments. He decided to take on this case, which related to the claimant, on the basis that it seemed a complex case. He contacted the claimant and spoke to him, and followed up that conversation with an email dated 26 October 2020 (79).
- 20 38. In that email, Mr Dorrian referred to the Optima Health report by Dr Schreiber, and summarised the telephone conversation which he had had with the claimant, referring to dyslexia, eye sensitivity, a back condition, hypermobility (causing weakened joints and fatigue) and fibromyalgia, and the claimant’s need to use a wheelchair and also a walking stick.
- 25 39. He confirmed that the claimant had agreed that they would be helped by a 27 inch monitor. They discussed the fact that the SCOTS network (the Scottish Government internal network) was only accessible from a SCOTS laptop due to IT security, and that any assistive technology would require to be loaded afresh rather than transferred from elsewhere.

40. Mr Dorrian suggested that they should leave any workplace adjustments required for the office until about 6 weeks after the claimant had started, on the basis that there was still considerable uncertainty about staff returning to work in the respondent's offices.
- 5 41. Mr Dorrian advised the claimant that he would arrange for a 27 inch monitor to be delivered to them at home prior to commencing employment.
42. At that point, Covid-19 restrictions were such that very few staff were working in the respondent's offices. Mr Dorrian was aware that the
10 claimant would require not only a parking space at St Andrew's House but also access to a workspace and to the building, and a PEEP (Personal emergency evacuation plan) before they could start working in the office.
43. The claimant's first line manager was Lisa McLean, until approximately April 2021, when Alison Beckett took over.
- 15 44. The claimant understood at the start of their employment that their role was primarily to ensure food supply for the social care sector following Brexit, with emergency systems to be put in place, particularly for private sector care homes. The claimant took the lead on this project, with Lisa McLean. In early 2021, however, Kate Hall, the Director, decided that the
20 claimant and Ms McLean should be deployed to take over the management of the "£500 programme" from Ms Beckett. This programme related to a one-off payment to be made by the respondent to social care workers in Scotland, amounting to £500, as a "thank you" to those workers for their efforts during the Covid-19 pandemic. Mechanisms had
25 been established to make payments to local authority employees, but the respondent could not deal with private companies in the same way as they could with public sector organisations.
45. A political decision had been made that these payments should be made, and the claimant and their team required to implement the decision. The
30 claimant required to work closely with, among others, COSLA (the

representative body for Scottish Local Authorities) and the Cabinet Secretary at that time.

46. On Thursday 19 November 2020, Mr Dorrian wrote to the claimant (105) to advise that *“Your laptop with all the required Assistive Technology was dispatched today at 1.30pm. It will arrive today, tomorrow or Monday. I have tried to get more information on this but I can’t be more precise I’m afraid.*

We have pushed as hard as we could through a number of processes, including asking for special dispensation to have your laptop sent before Monday, and we are still in a slightly precarious position. It appears that work on Coronavirus is creating bottlenecks in different areas of Scottish Government, not least dispatch.

There are four bits of Assistive Technology on your laptop: Dragon, Claro, Read and Write and Mind Genius. Headphones are being provided too for use with the Dragon software.

As discussed earlier today, you are also being sent a 27-inch monitor which has been bought externally and is being delivered separately. There were no 27 inch monitors in the Scottish Government IT stock.

Your wireless mouse and keyboard were tested to make sure they are compatible with SCOTS and they are. I can see your email account in the Address Book for emails and that confirms that your account is at least ready to go...

Please don’t hesitate to contact me by phone on Monday if there are any issues at all...”

47. The claimant said that they received a “standard issue” HP Laptop from the respondent. They maintained that the software installed on it was “very low spec”. They said they also received a mobile phone which was too small to read due to their dyslexia and eye difficulties. The laptop had no power cable attached to it, and was without charge.

- 5 48. They also received an HP 27 inch monitor, described as “problematic”. The wireless keyboard and mouse provided did not work with the respondent’s laptop nor with the SCOTS system. The cursor was unclear and the laptop was very slow, although Mr Dorrian had assured the claimant that it had been tested successfully.
49. On 20 November the claimant emailed Mr Dorrian to advise that the laptop had not been sent with a power cable, and asking what they should do. Mr Dorrian confirmed that he would buy a power cable and arrange for it to be sent to the claimant.
- 10 50. The claimant acknowledged receipt of the power cable in an email of 26 November (111), and raised some potential issues about car parking at St Andrews House.
- 15 51. The claimant commenced work on 23 November 2020, and was able to carry out tasks while working from home. They experienced difficulties with the monitor provided, partly due to the need to ensure that the software on the laptop is compatible with the monitor, and partly because the settings on the monitor could not be altered so as to reduce eye strain.
- 20 52. On 14 December 2020, Mr Dorrian had a discussion with the claimant, which he followed up with an email (113). He noted that the claimant preferred to continue to use Read and Write, and said that he would check with position with iTECS (the respondent’s technical support division), but that he believed that the claimant could continue to use the program until the licence needed to be updated; he confirmed that he would “chase the mouse which was ordered for you a few weeks back”; confirmed that the claimant’s workstation and other equipment had been transferred to St Andrew’s House for storage; discussed some arrangements for their return to work, including an evacuation plan meeting and a headset to pick up calls; and noted that the claimant’s laptop was making a whirring noise when it was stretched. In relation to
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- 30 the last point, Mr Dorrian confirmed that he would investigate what was

available in a higher specification, lower weight and better capacity to reduce interference.

53. In March 2021, the claimant notified the respondent that their keyboard was broken, and asking to speak to someone about ordering a new ergonomic keyboard (119). On 14 May 2021, Wilma Anderson forwarded to the claimant an order confirmation of a new ergonomic keyboard and mouse (124), advising that it would take about a week for it to be delivered.
54. In approximately April 2021, Alison Beckett took over as the claimant's line manager. By that time, the claimant was working on the £500 payment project.
55. The claimant became unwell and requested to be absent from work from 26 May until 11 June 2021, due to an infection which, due to the conditions which they have, took longer to overcome. The claimant felt, in addition, that by that stage there had been failures to support them and provide him with suitable adjustments to enable them to work.
56. From June onwards, there were ongoing discussions between the claimant and the respondent, namely Mark Dorrian, about the claimant's possible move to work in the office at St Andrews House. They visited the building with Mr Dorrian in June 2021, and settled on GE15, a room in the east wing of the ground floor of St Andrews House. The room would require to be fitted out with power points and IT sockets, as it had previously been used for storage. From the entrance to the building to the room, there were a number of heavy doors without automatic buttons to press to allow the doors to open. Between June and September 2021, the claimant was asked to attend at the office on 3 occasions to meet with Mr Dorrian to view progress, but they found that nothing had been installed. The claimant understood that the physical equipment they had used at Thistle House, when working with the Scottish Legal Aid Board, had been transferred to St Andrews House, but so far as they were aware, had been stored in a basement.

57. After the claimant had returned to work from sick leave, they were invited to a formal meeting on Attendance During Probation on 4 August 2021. The meeting took place on that date, by Microsoft Teams. The claimant attended with their representative, Allan Sampson, and the meeting was chaired by Lucy Pullar, HR People Advice and Wellbeing Support Officer. Amy Finnigan took notes (149ff). The reason for the meeting was that the claimant had breached the 7 day absence trigger during probation.
58. Ms Pullar confirmed that dismissal was not a consideration at that moment, and would not be an outcome following the formal meeting. The claimant presented a statement (152ff), in which they stated that they had had no monthly conversations about work, discussions on coping during this time, and was not offered support or reassurance with the work or support measures in terms of hours due to caring responsibilities. They also said that there were no team communications to get to know other employees, to build support or positive relationships, and no conversations on workplace adjustments or implementing the OH report.
59. The claimant went on to set out how Covid had affected their personal circumstances. They also pointed out that they believed that the respondent's response to his circumstances fell below the HR guidance on performance management during Covid, such as reassuring colleagues that sickness absence during Covid would not count towards the trigger point for attendance, supporting caring responsibilities and review objectives if colleagues were working reduced hours due to caring responsibilities.
60. The claimant then set out the conditions from which they had suffered, and asked that the recent sickness absence be set aside for the purposes of the probation, as it was caused by circumstances outwith their control.
61. In the meeting, the claimant said that physical adjustments had not been made, such as allowing them to return to the office, and that since adjustments had not been carried out, that was a cause of further anxiety. They said that the only adjustment which had been made to date was that

Dragon software had been installed on their computer, and a licence for Read and Write Gold which was inaccessible on the respondent's network.

- 5 62. It was noted that the claimant neither accepted nor declined a further referral to OH.
63. The claimant's position was essentially that the respondent should use a discretionary ability to discount the absence or rely on the existing medical evidence to put the absence down as disability-related.
- 10 64. The claimant was due to meet with Anna Kynaston, their then manager, on 19 August 2021, for their probation review. She wrote to them (168) on 18 August 2021, to say that HR had confirmed that she should pause the final probation meeting until they had the outcome letter from HR regarding attendance.
- 15 65. The claimant responded (171) on 19 August 2021 to confirm they believed a timeline on how long HR estimated the process would take. They went on: *"Also my probation ends on Sunday, so an indication of what is happening would be helpful."* The probation meeting due to take place on 18 August was cancelled.
- 20 66. The respondent proceeded with a further referral to OH, to which the claimant contributed (156).
- 25 67. On 13 October 2021, the claimant attended at St Andrews House in order to establish for themselves the position with regard to adjustments. On 12 October, Mr Dorrian had emailed the claimant (208/7) to advise: *"Good news. The room is now ready. It was ready last week but I was on leave on Friday and Monday. Let me know how you get on when you go in for the first time..."*
- 30 68. On the following morning, Mr Dorrian emailed the claimant (206) to advise that he had just been informed that none of the doors leading to the claimant's office had been automated yet, advising them that *"there seems to be a miscommunication somewhere along the line in that the*

room is ready but the doors aren't. I am really sorry about this mistake. Please hold off going to St Andrews House today if you haven't already set out. I will find out what the situation is and get back to you asap."

- 5 69. As it turned out, the claimant had arrived at the office by that point, and replied within 10 minutes: *"I am just into the system, as it has taken ½ hour to get access to onScots. The room is not set up. None of the items from storage are in the room. The electron sockets, one works and not monitor access or other IT. I will have to return home to be able to work. This is a disappointment. Who is organising the return of items to the office and electrical sockets IT? These need to be completed before I can*
10 *access the office, as I have quite a journey to get to the office in terms of wheelchair and mobility into the office."* (206)
- 15 70. Mr Dorrian responded later that morning, to apologise for this, and to say that *"The lesson is well and truly learned for my team to go and physically check everything before passing information on..."*
71. On 25 October 2021, OH provided a report to the respondent based on a consultation which took place with the claimant that day (231).
- 20 72. The report stated that the claimant's absences were a direct consequence of their disabilities, and opined that *"it is my clinical opinion that if he had been given the appropriate support and adjustments his absence may not have occurred. Symptoms are likely to have been triggered by additional stress and an impact on his mental health and wellbeing."*
- 25 73. The report went on to state that in the OH Adviser's opinion, the adjustments required would assist with a reliable and effective service, and she went on to make reference to the earlier OHP report setting out the adjustments to be put in place.
- 30 74. She suggested that the claimant would benefit from a meeting with their manager to ensure appropriate equipment was arranged, set up and any additional support or training was discussed.

75. On 1 November 2021, Ms Pullar wrote to the claimant to provide them with an outcome from the Attendance During Probation meeting of 4 August 2021 (250). Ms Pullar decided that no further action would be taken. She took account of the fact the claimant had had one spell of absence which related to their underlying health condition and “could perhaps have been avoided”. In her evidence she explained that the claimant had suffered from avoidable workplace stress, which had a knock-on effect on their underlying condition.
76. She referred to the recommendations of OH, and advised the claimant to ensure that these were carried out, for example, taking regular micro-breaks during the day. She noted that the claimant did not foresee their attendance being a cause for concern in the future.
77. Finally, she confirmed that an adjustments to their sickness absence trigger point would be put in place within the next fortnight.
78. Ms Pullar wrote to the claimant on 1 November 2021, separately, (254) to attach the outcome letter and to apologise for the delay with the letter, due to the OH appointment taking longer than usual.
79. On 10 November 2021, Ms Kynaston met with the claimant in order to carry out their performance appraisal, and produced a Final Probation report (293ff). The report covered the period 1 April 2021 to 10 November 2021.
80. The claimant gave evidence that an interim probation report was carried out by Lisa McLean, with Kate Hall the countersigning officer. No report was produced to the Tribunal, but the claimant’s evidence was that they had passed all the areas on which they were subsequently failed in November.
81. The report graded the claimant’s performance in the course of their probation, under various categories.
82. Under Mandatory People Management Objective, the claimant was marked “Achieved”. Reference was made to the need for the claimant to

expand their team management and leadership skills to build and lead confident and effective teams.

5 83. No grading was applied to Mandatory Diversity Objective, though they discussed the claimant prioritising training courses related to deepening their understanding of the role of the civil service and decision making in central Government.

10 84. The claimant was marked "Partly Achieved" in relation to the EU Exit work they had been carrying out. It was noted that this work had started well, and that no work was required between May and Autumn. However, it was then observed that *"In the Autumn Ministers became increasingly focused on immigration concerning social care staff shortages. In reaction to the Cabinet Secretary's requests, there was an unhelpful exchange of emails between James and a C1 in another policy area. People on the copy list indicated that they felt uncomfortable, reflecting that the exchange did not embrace civil service values.*

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Related to this was confusion about support for a Ministerial meeting. Whilst colleagues in other parts of Government have an interest in this work the policy and had supported during the pandemic, the lead rests with the Division. James intimated during a discussion that he was content to attend the Ministerial meeting to represent the business area James agreed with others outside the business area that he would not attend the Ministerial meeting. He only informed the B2 and as a result of changes, other team members were left to pick the matter up at short notice. This example demonstrates a lack of the leadership and responsibility traits required at C1 level...

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Concerns about James' approach to this work as SG policy lead was raised at the time. Given James' concerns raised about the pressures of the workforce strategy, this objective was transferred to the C2 as lead. It is very uncommon for individuals operating at C1 only to have a single policy issue to lead as such James needs to work on multiple policy themes concurrently."

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85. With regard to the £500 Payment project, the claimant was awarded a “Partly Achieved” grading.

86. The report commented that the timescales for delivery following the ministerial announcement about the £500 thank you payment were tight, and the claimant was expected to lead a process to identify routes and appropriate assurance arrangements accordingly. It was noted that the Division responded to the pressures by bringing in an additional “C Band led resource”.

87. It was noted: *“The process required close work and liaison with COLSA (sic) and the relationship became strained in the spring of 2021. James sought out ways to resolve this and the Local Government liaison team were brought in to mediate. This ensured that deadlines could be achieved and that the payment could be delivered. This situation however highly unusual in a business area that has a robust and challenging relationship with COSLA to have to seek mediation. Similarly the relationship with SoctExcel (sic) became more challenging towards the end with concerns over levels of assurance and performance. Ultimately senior support was required with the Chief Executive of ScotExcel to ensure delivery of outcomes.*

This was a challenging deliverable with a compressed timescale. James worked to ensure that the £500 payment was delivered across 32 different local authorities by May 2021. In addition, James put in place a robust mop up process to support individuals missed in the initial round of payments.

James indicated his frustration at how the challenges with COSLA were being reflected during the discussion. He indicated that his approach had been praised by both the local government team and the COSLA social care lead.”

88. Under Workforce Strategy, the claimant received a “Not Achieved” mark. Ms Kynaston added detailed comments about feedback which had been provided in relation to the claimant’s performance. Concerns were raised

5 about attendance at workshops, the level of engagement and overall co-ordination of the social care contribution in drafting the strategy, and contributions in front of external stakeholders (COSLA) had the potential to damage the reputation of the policy/strategy project. A B3 member of staff was deployed following feedback to support the claimant, and it was noted that over two working days that B3 was able to co-ordinate and prepare the written contribution required in order to get the strategy document back on track.

10 89. Ms Kynaston further stated: *“Working relations between James and the project team have broken down and it is unlikely James will be able to continue to work on this project. In addition to behaviours evidenced against other objectives, this leaves concerns about James’ ability to lead within and through policy teams to deliver the outcomes needed to support the policy area. Although James recognised that relations had*
15 *broken down, he felt strongly that he had been treated unfairly by the project team by being excluded from meeting invites and being spoken to aggressively and latterly sworn at. At the time of writing the report it has not been possible to review evidence of the concerns raised by James.”*

20 90. The overall performance mark given to the claimant was “Partly Effective”. Ms Kynaston recorded that the claimant needed to work to evidence the full range of skills required to operate at C Band, including confident and productive collaboration across themes and networks. She noted that at times the claimant’s behaviour had been interpreted by others as over-challenging and adversarial. She suggested training and
25 coaching to assist, and recommended that the claimant’s probation be extended for 3 months. She noted that the claimant was understandably disappointed and upset at this recommendation, and disputed that there was any need to extend the probation. The claimant observed that they had concerns about the level of support received in relation to reasonable
30 adjustments since taking up post, and that they had not received any apology about this. They emphasised that they had not received any empathy since their father’s death or their son’s mental health challenges

over the summer of 2021; further, there had been a lack of continuity of line management throughout.

91. Finally, there was no confirmation available that an in-year review had taken place for the claimant.

5 92. The claimant suffered a strong reaction to this meeting and Ms Kynaston's recommendation to extend their probation, suffering what they described as a mental health breakdown in their office. They felt that Ms Kynaston was not personally interested in them, and was reading from a prepared script.

10 93. The claimant received the draft written report following the probation meeting on 9 December 2021 (339).

94. Following the meeting, the claimant was absent on sick leave from 11 November 2021 due to anxiety with depression, and presented fitness to work certificates to this effect (762ff). They never returned to work.

15 95. The claimant wrote to Ms Kynaston on 11 November 2021 (310) to advise that they had now been signed off from work until 30 November 2021, and to make some observations about the manner in which the process had been conducted.

20 96. On 17 November 2021, the claimant submitted a grievance in relation to their probationary period (317). They argued that the probation had been extended without good cause, advance notice or adherence to policy, a matter directly and indirectly linked to their disability. They pointed out that their probation was due to end after 9 months on 22 August 2021, and that during that probation they had experienced a single disability related period of sick leave.

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97. The claimant made reference to an intense period of work which they delivered to a high standard and for which they were praised by colleagues and ministers. They pointed out that the probationary period would have been satisfactorily completed had it not been for the Attendance Procedure which was followed by the respondent, and that

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since then reasonable adjustments had continued to be delayed, ignored or unilaterally reinterpreted by management.

5 98. They raised the concern that at the probationary review meeting, they were confronted with hitherto unmentioned concerns about their behaviour, conduct and performance. They said that they were left with the clear impression that management wished to dismiss them, by extending probation and perpetuating a hostile work environment.

10 99. The claimant asked the respondent to confirm that the probation ended as originally planned on 22 August 2021, and that they would not be prejudiced by the current sickness absence which related directly to the matters in that letter.

100. On 9 February 2022, Margaret Bryce, People Advice and Wellbeing Case Officer, wrote to the claimant (411) to confirm that Lynne McMinn had been appointed as the Investigating Officer.

15 101. In the meantime, a further referral took place to Optima Health, who conducted a consultation by telephone with the claimant on 13 March 2022. A report was sent to Miss Bonnie Fisher, People Advice and Wellbeing Support Officer (435). Ms Joanna Cowan, the OH Adviser, stated that in her clinical opinion the claimant would be able to return to work with the specific adjustments that had been advised to support their complex health needs.

20 102. She went on:

25 *“As the previous OHP report advises, the appropriate reasonable adjustment to support him at work both in the office and at home are furniture and IT equipment which it advises includes: two electric height adjustable sit/stand desks, one for home and one for his office base. Wheel chair access and push buttons for entrance to the office. Previous reports advise that the equipment provided by the DWP were: Wheelchair, ergonomic chair for alternative periods, height adjustable*

desk, 27" monitor, ergonomic keyboard and mouse, foot rest and hot and cold fan."

- 5 103. On 13 May 2022, Stuart Renton, People Advice and Wellbeing Manager, wrote to the claimant to invite them to a meeting on 20 May 2022 to discuss concerns with their performance during probation. They were informed that they could be accompanied by a colleague or trade union representative.
- 10 104. The meeting took place, in fact, on 26 May 2022 via Microsoft Teams. The claimant attended, and was accompanied by Allan Sampson, trade union representative. Stuart Renton chaired the meeting, and Solomon Paul took notes (553ff). The claimant sought to raise concerns about the manner in which the probation process had been handled by the respondent.
- 15 105. Following that meeting, there was an extended period, during which the claimant remained off sick and their grievance was progressed. On 21 July 2022, a fairness at work meeting took place by Microsoft Teams. The claimant attended, and again was accompanied by Allan Sampson. The meeting was chaired by Michael McElhinney, with Elaine McCambridge in attendance as HR Support. Margaret Bryce took minutes (589ff).
- 20 106. On 2 August 2022, Ms McCambridge wrote to the claimant (606) to confirm the outcome of the fairness at work complaint, based on the conclusions reached by Mr McElhinney, the Deciding Officer.
107. The letter attached the Deciding Officer's report, and summarised its findings and recommendations.
- 25 108. The claimant's complaint was upheld in relation to the fact that the process for the completion of the claimant's final probation report was not carried out in line with the respondent's Probation Policy. In particular, there was no evidence that objectives had been agreed with the claimant at the start of the period; continuity of line management was lacking, and this had implications for the claimant in relation to communications and
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support in the working environment. Further, there was a delay in the outcome of the HR meeting about the claimant's level of sickness absence, so that the final probation meeting did not take place when required.

5 109. The complaint was not upheld to the extent that the claimant complained that they had been treated unfairly due to the delays in receiving OH advice; it was not upheld in relation to their complaint that the extension of their probation period was unfair treatment, since there was insufficient confirmation that they had reached the appropriate standards; and it was
10 not upheld in that although some workplace adjustments had not been put in place for the claimant, the evidence demonstrated that significant efforts continued to be made to ensure adaptations were carried out in St Andrews House, providing an accessible workplace.

15 110. The Deciding Officer recommended that there should be exploration of the possibility that a new role or a new line management structure should be granted to the claimant; that HR should consider whether extension of the probation period should be re-commenced; that the claimant should work to engage with the HR People Advice and Wellbeing and Workplace Adjustments teams, to progress the support measures which were not in
20 place or did not work effectively; and that extra support be available to the claimant via the Staff Networks and other routes.

111. The claimant was given the opportunity to appeal against this decision.

112. Following receipt of the report, the claimant wrote to Ms McCambridge to explore moving posts to another part of the Scottish Government, and a
25 phased return to work (612), on 2 August 2022.

113. On 9 August 2022, the claimant wrote to Margaret Bryce to appeal against the Deciding Officer's decision (615). They said that they considered that the Deciding Officer had failed to address their concerns about unfair treatment in relation to disability. They maintained that
30 decisions relating to the claimant's employment did not take consideration of their disability; that this constituted discrimination arising from their

disability; and that the reasons provided were an insufficiently good reason for treating them unfavourably.

5 114. The appeal meeting in relation to the fairness at work process took place on 20 October 2022 by Microsoft Teams. The claimant attended with Allan Sampson. The meeting was chaired by Eddie Turnbull, Head of ARE Information Services, with two panel members, and notes were taken by Douglas Adams (652ff).

115. Mr Renton wrote to the claimant on 20 October 2022 to confirm the outcome of that meeting (660).

10 116. Mr Renton confirmed that the claimant's appointment would end at the end of the fixed term appointment on 21 October 2022.

117. He explained:

15 *"I have determined that the most appropriate outcome in this matter is that your appointment with the Scottish Government ceases on 21 October 2022, in line with your 23 months' Fixed Term Appointment. I have taken this decision as the work that you were employed to undertake has now concluded."*

20 118. He went on to find that in the matter of their probation, the claimant did not demonstrate a satisfactory level of performance during probation. He considered whether or not to extend the claimant's contract of employment to continue the probationary period and to implement the recommendations made by the Deciding Officer in the claimant's fairness at work complaint (grievance), but that he had concluded that it would not be appropriate to do so.

25 119. So far as the recommendations in the fairness at work process were concerned, Mr Renton advised that he was aware that such recommendations had been made. Firstly, it was noted that HR should consider moving them into an alternative role, but Mr Renton rejected this on the basis that the claimant had not achieved a satisfactory level of performance during the probation period in their current role; and that
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their contract of employment was about to terminate in any event. Secondly, he decided not to consider a different line management structure for the claimant, as the evidence did not suggest that their performance would be satisfactory with a different level of line management.

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120. The claimant appealed against the decision to dismiss them, by email dated 24 October 2022 (678), addressed to Ana Martinez. They observed that there was, at that point, an ongoing fairness at work process, and that the dismissal undermined any fair process. They also pointed out that there were recommendations from that fairness at work decision which had not been implemented. Finally, they said that the outcome letter had many inaccuracies, demonstrating bias. They argued that the issues created a scenario in which they were blamed for the actions of managers and HR.

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121. On 3 November 2022, Bonnie Fisher wrote to the claimant to invite them to attend an appeal hearing in relation to dismissal on 15 November 2022 by Microsoft Teams (687). The meeting took place on 24 November 2022, and the claimant attended, with Allan Sampson, his trade union representative. Eddie Turnbull chaired the meeting, and was accompanied by two panel members, and Douglas Adams, who took notes ((732ff).

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122. The claimant considered this meeting to be very positive, and was hopeful that the panel may conclude that his appeal should be upheld. However, when he received the letter of outcome, dated 14 December 2022 (729) he was bitterly disappointed. The panel decided that his appeal should not be upheld. They found that there was no evidence that the Deciding Officer failed to address the claimant's concerns about unfair treatment in relation to their disability. They noted that during the claimant's probation, there were *"significant aspects of your probation where there were failings in management and in the application process. That aspect of your initial complaint was upheld by the DO. The Panel ratifies those points and that decision."*

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123. With regard to the elements of the original grievance not upheld by the Deciding Officer, they found that there was no new or conclusive evidence which would allow them to change that decision. They found that the Deciding Officer had reached the correct decision on reasonable adjustments.

124. That concluded the fairness at work process.

125. On 5 December 2022, the claimant's appeal against dismissal took place. The claimant attended with Allan Sampson, once more, and the hearing was chaired by Roddy Macdonald, Head of Higher Education and Science Division. Claire Fleming of HR was present to provide support, and Danny McAtear took notes (717ff).

126. On 6 January 2023, Mr Macdonald wrote to the claimant to confirm the outcome of the appeal hearing (748). The dismissal was upheld. Mr Macdonald stated that *"Whilst I accept that you feel the dismissal did not address your grievance/complaint regarding management support and bullying/victimisation, you were dismissed as your role concluded as planned after 23 months, and due to poor performance during your probationary period."*

127. He accepted that there were aspects of HR practice which could have been improved, but did not consider that they fundamentally changed the outcome that the claimant's performance was assessed as not meeting the effective standard.

128. Mr Macdonald concluded that the appeal should not be upheld, and that the claimant's dismissal remained effective.

129. There were no further routes by which the claimant could appeal.

130. The claimant's view was that they had made a difference during the Covid-19 pandemic in the work which they had done, and that they had been treated "appallingly" by the respondent.

131. The claimant's salary diminished to half pay in April 2022, and then in due course to nil pay.

Submissions

5 132. Both Mr Rushton and Ms Monan made oral submissions, which are not summarised here but were taken into consideration by the Tribunal and where appropriate referred to in the decision section below.

The Relevant Law

133. Section 13(1) of the 2010 Act provides:

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

15 134. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-sections for the purposes of this case are sub-section (3) and (5). Sub-section (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."*

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Sub-section (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*

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

135. Section 21 of the 2010 Act provides as follows:

30 *"(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..."

List of Issues

5 136. The issues in this case were set out by Employment Judge Smith in his Note following Preliminary Hearing (38ff), as amended by a further Note (54). We have adjusted the numbering from the Notes, simply in order to simplify the order, but we have taken into account the submissions made based on that original numbering. We also set out below the position
10 taken by the respondent in relation to disability status, which has altered since the Preliminary Hearing.

137. It is important to note that at the conclusion of evidence and submissions, the Tribunal agreed with the parties that this Hearing would only deal with the issue of liability, and that the issue of remedy, if required, would be
15 addressed at a separate Hearing.

138. Finally, we have adjusted the terms of the Issues to take into account those aspects which had not been concluded at the point when the Notes were written, based on the submissions of the parties.

139. The List of Issues are as follows:

Time Limits

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- 1. Were all of the claimant's complaints presented within the time limits set out in section 123 of the Equality Act 2010?**
- 2. If not, were any complaints presented outside that time limit nevertheless part of a course of conduct extending over a period
25 with a complaint presented within the time limit?**
- 3. If not, should the Tribunal extend time for bringing the claim because it is just and equitable to do so?**

Based on the date that the claimant presented the claim to the Tribunal and the period of early conciliation, it appears that any complaint about things that happened before 10 October 2022 is out of time and in principle therefore the Tribunal cannot consider it.

Disability

4. Was the claimant' a disabled person in accordance with section 6 of the Equality Act 2010 at all relevant times because of the following conditions:

- a. Spondylitis;
- b. Ehlers-Danlos syndrome hypermobility;
- c. Fibromyalgia;
- d. Dyslexia; and/or
- e. Scotopic sensitivity?

The claimant states that he met the definition of disability by the date of the commencement of his employment (23 November 2020) and that the respondent knew, or ought reasonably to have known, that the claimant was a disabled person from before the date of commencement because it was provided with such information in advance of the employment starting.

Equality Act 2010, section 12: direct discrimination because of disability

5. Did the respondent subject the claimant to the following treatment:

- a. On or around 18 August 2021, not discounting Covid-19-related sickness absence in determining whether the claimant had demonstrated satisfactory attendance;

- b. On or around 8 November 2021, extending the claimant's probationary period;
- c. From April 2022, reducing the claimant's pay to half-pay; and/or
- 5 d. Dismissing him with effect from 21 October 2022?

6. Was that treatment "less favourable treatment", ie did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators and may rely on actual comparators, with particulars to be provided as per the orders above [a reference to the Note by Employment Judge Smith and orders appended thereto].

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7. If so, was this because of the claimant's spondylitis, Ehlers-Danlose syndrome, hypermobility, fibromyalgia, dyslexia, and/or because of the protected characteristic of disability generally?

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Equality Act 2010 sections 20 & 21: failure to make reasonable adjustments

Auxiliary aid claims

8. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

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9. Did the respondent have a requirement? If so, what were they? In particular, did the respondent require:

a. That more than 7 days' sickness absence should be taken into account in determining whether probationary employees demonstrated satisfactory attendance;

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b. That the respondent did not discount Covid-19-related days of sickness absence in determining whether

probationary employees demonstrated satisfactory attendance;

c. That staff on sick leave could not return to a different role and/or a different team; and

5 **d. That the respondent required staff in the claimant's position**

***i.* To read and work on documents;**

***ii.* To work at a desk;**

***iii.* To correspond by email;**

10 ***iv.* To attend meetings virtually;**

***v.* To be readily available for work during each working day.**

15 **10. But for the provision of the following auxiliary aids, did the requirements put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The auxiliary aids contended for by the claimant are as follows:**

a. A height-adjustable sit/stand desk;

b. An ergonomic chair;

20 **c. A 27-inch monitor;**

d. An ergonomic keyboard and mouse;

e. A foot rest; and/or

f. A hot and cold fan.

25 **11. Did the requirements, but for the provision of an auxiliary aid, put the claimant at a substantial disadvantage in relation**

to a relevant matter in comparison with persons who are not disabled at any relevant time?

5 **12.If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?**

13.If so, did the respondent take such steps as were reasonable to have to take to provide the auxiliary aids?

PCP-based claims

10 **14.Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?**

15.A PCP is a provision, criterion or practice. Did the respondent apply the following PCPs:

15 **a. A practice of deeming more than 7 days' absence as "unsatisfactory attendance" when assessing whether an employee had passed their probation period (or not); and/or**

b. A practice of not discounting Covid-19-related days of sickness absence in determining whether probationary employees demonstrated satisfactory attendance?

20 **16.Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?**

25 **17.If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?**

18.If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The

claimant identifies the steps that should have been taken as follows:

- a. Disapplying the PCPs in respect of the claimant'**
- b. Providing the equipment set out in paragraph 10 above.**

5 **19. If so, would it have been reasonable for the respondent to take those steps at any relevant time?**

Discussion and Decision

140. We considered the issues in turn, though not in the order presented to us. We also took account of concessions made in submission or before so as not to take up time on withdrawn or admitted points.

141. We decided that the issue of time bar required proper consideration at the conclusion of our determinations on the other issues in this case, and accordingly have left them to the end.

Disability

15 **4. Was the claimant' a disabled person in accordance with section 6 of the Equality Act 2010 at all relevant times because of the following conditions:**

- a. Spondylitis;**
- b. Ehlers-Danlos syndrome hypermobility;**
- 20 **c. Fibromyalgia;**
- d. Dyslexia; and/or**
- e. Scotopic sensitivity?**

The claimant states that they met the definition of disability by the date of the commencement of his employment (23 November 2020) and that the respondent knew, or ought reasonably to have known, that the claimant was a disabled person from before the date of

commencement because it was provided with such information in advance of the employment starting.

142. The respondent accepted, in further and better particulars provided to the Tribunal (58ff), that the claimant was a person disabled within the meaning of section 6 of the Equality Act 2010. They did not accept that each of the particular conditions relied upon necessarily met the statutory definition, but that the claimant's conditions taken together amounted to a disability under section 6.

143. In her submissions before the Tribunal, Ms Monan also confirmed that the respondent had accepted that they had knowledge of the claimant's conditions as pled at the relevant time.

144. Accordingly, this issue may be answered in the affirmative, on the basis that the Tribunal accepted the respondent's concessions.

Equality Act 2010, section 12: direct discrimination because of disability

5. Did the respondent subject the claimant to the following treatment:

a. On or around 18 August 2021, not discounting Covid-19-related sickness absence in determining whether the claimant had demonstrated satisfactory attendance;

b. On or around 8 November 2021, extending the claimant's probationary period;

c. From April 2022, reducing the claimant's pay to half-pay; and/or

d. Dismissing him with effect from 21 October 2022?

6. Was that treatment "less favourable treatment", ie did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on

hypothetical comparators and may rely on actual comparators, with particulars to be provided as per the orders above [a reference to the Note by Employment Judge Smith and orders appended thereto].

5 **7. If so, was this because of the claimant’s spondylitis, Ehlers-Danlose syndrome, hypermobility, fibromyalgia, dyslexia, and/or because of the protected characteristic of disability generally?**

10 145. In his submissions before this Tribunal, Mr Rushton, for the claimant, confirmed that he was not pursuing the first issue here (originally identified as 10.1, but now as 5(a)).

146. The claimant does continue to pursue the issues under 5(b) to (d).

15 147. Did the respondent extend the claimant’s probationary period on or around 8 November 2021? In our judgment, it is clear that the respondent did so, following the meeting of 10 November 2021 conducted by Ms Kynaston.

148. Did the respondent reduce the claimant’s pay to half-pay in or around April 2022? Again, the evidence demonstrates that they did so.

149. Did the respondent dismiss the claimant with effect from 21 October 2022? There is no dispute about this (660).

20 150. In his submissions, Mr Rushton helpfully clarified – though we would observe that it would have been more helpful had the claimant clarified this matter in writing before the Hearing – that the claimant relied upon a hypothetical comparator. He went on to argue that the hypothetical comparator must be carefully defined, and that it would be an
25 oversimplification to define the comparator as someone who had been in the job for 11 months and acted the way the claimant did, but was not disabled; he argued that the Tribunal must view the whole matter through the lens of what adjustments had been made for the claimant. The claimant was not at a disadvantage solely because they had been
30 disabled but also because of the way their disability was handled

throughout their employment with the respondent. In other words, the claimant should never have been in the position they were in. Mr Rushton therefore argued that the hypothetical comparator should be a non-disabled employee who had to work longer hours and suffered from the same issues.

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151. Ms Monan's submission did not specifically deal with this argument, but addressed the Tribunal on the basis that the less favourable treatment, if that was what it was, was not because of the claimant's disability. We deal with that below.

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152. However, in our judgment, the critical question in this case, as both representatives appeared to accept in the focus in their submissions, is whether or not the treatment at 5(b) to (d) amounted to less favourable treatment on the grounds of disability.

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153. The reason for the extension of the claimant's probation was, according to Ms Monan, that the respondent had a number of concerns about the claimant's performance. Mr Rushton sought to link the decision to extend the claimant's probation to their disabilities. In the probation report produced by Ms Kynaston, the marks given to the claimant were related, in her evidence, to the claimant's performance, and to the difficulties, for example, in relationships between the claimant and a number of other people over the course of his probationary period.

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154. The claimant clearly considered the extension of their probationary period to be an adverse act towards them. They did not accept that the real reason was that there were any issues with regard to their performance.

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155. We found it difficult to assess whether or not there was any proper basis for the respondent's assertion that there were problems with the claimant's performance. Plainly the claimant did not agree, and we did not hear from those directly involved; the evidence we heard was from the decision-makers in relation to the claimant's probation and dismissal.

156. There is no basis upon which we can find that the claimant's probation was extended due to the absence which he required to have due to ill health during the course of the probation. That absence was subject to a separate attendance procedure, from which the respondent did not take any formal action.

157. Ms Kynaston's evidence, which we found generally credible but lacking clarity in some areas, was that it was necessary to give the claimant a greater and longer opportunity to demonstrate the competencies required for the job, which was why the probation was extended. She insisted that no criticism was attached to this, but that the respondent was seeking to help the claimant by extending the probation. We found this evidence slightly contradictory. On the one hand, Ms Kynaston was unwilling to accept that the claimant's performance was being criticised, preferring to describe the extension of the probation as an opportunity for further training and coaching to enable them to demonstrate competence in the post; while on the other hand taking a decision which can only be an expression of concern about the claimant's performance in the role. In our view, there is no doubt that the decision to extend the probation was as a result of concerns which the respondent had about the claimant's performance.

158. Mr Rushton asked us to consider whether this situation would have arisen in the event that the reasonable adjustments which the claimant should have been given had been properly provided to them. His submission on this point was notably brief – he regarded it as plainly less favourable treatment for this reason. We were not persuaded that the evidence demonstrated that had the claimant's reasonable adjustments been put in place, there would have been no decision to extend their probation on the basis of performance concerns. Since those concerns plainly related to relationship issues as well as how the claimant dealt with the tasks required of them, it is not possible, in our judgment, to draw a clear causal line between the question of reasonable adjustments and the decision to extend the claimant's probation.

159. Accordingly, without in any way reaching a determination on whether or not the respondent failed to make reasonable adjustments for the claimant (which we address below), we have been unable to conclude that the decision to extend the claimant's probation amounted to less favourable treatment on the grounds of disability.

160. With regard to the reduction of the claimant's pay to half-pay in April 2022, there is no doubt that the claimant's contract provides that if they were absent for a period of 6 months, their pay would require to be reduced to half-pay. The respondent's position is simply that any employee absent for such a period, whether disabled or not, would require to be paid less due to the contractual provision.

161. The claimant's position is, again, rather different. They complain that they wished, over a period of time, to return to work, but they were unable to do so, and as a result, their continued absence arose as a result of the respondent's failure to make reasonable adjustments for them.

162. There is, in our judgment, ample evidence that the claimant wished to return to work before April 2022, but was unable to do so. In our judgment, the reason why they were unable to return to work was because of the respondent's failure to provide auxiliary aids, and to make the reasonable adjustments which we have found below.

163. With regard to the claimant's dismissal, the reason for dismissal given by the respondent was that the claimant did not demonstrate a satisfactory level of performance during their probation, and that their fixed term contract of employment was due to come to an end in any event. The dismissing officer, Mr Renton, declined to extend the claimant's contract of employment, or consider alternative line management or job role.

164. The claimant's position was simply that had they been accorded the reasonable adjustments which should have been put in place for them, they would not have had their employment terminated at that time. As Mr Rushton put it, the respondent was "timed out" due to the significant delays in the process, which we understand to mean that with the fixed

term coming to an end, the respondent was unable or unwilling to take any further action with regard to the claimant.

5 165. We accept that the claimant was deeply frustrated, and upset, by the process which led to their dismissal, as well as the dismissal itself. Given that the claimant was anxious and keen to return to work, but found themselves unable to do so in the absence of the reasonable adjustments which should have been put in place, we consider that the claimant's dismissal amounted to an act of direct discrimination, that is, that the claimant was treated less favourably as a disabled person than a non-
10 disabled person in these circumstances would have been.

166. Accordingly, the claimant's claim of direct discrimination succeeds.

Equality Act 2010 sections 20 & 21: failure to make reasonable adjustments

Auxiliary aid claims

15 8. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

9. Did the respondent have a requirement? If so, what were they? In particular, did the respondent require:

20 a. That more than 7 days' sickness absence should be taken into account in determining whether probationary employees demonstrated satisfactory attendance;

b. That the respondent did not discount Covid-19-related days of sickness absence in determining whether probationary employees demonstrated satisfactory attendance;

25 c. That staff on sick leave could not return to a different role and/or a different team; and

d. That the respondent required staff in the claimant's position

- i. To read and work on documents;**
- ii. To work at a desk;**
- iii. To correspond by email;**
- iv. To attend meetings virtually;**
- v. To be readily available for work during each working day.**

5

10. But for the provision of the following auxiliary aids, did the requirements put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The auxiliary aids contended for by the claimant are as follows:

10

- a. A height-adjustable sit/stand desk;**
- b. An ergonomic chair;**
- c. A 27-inch monitor;**
- d. An ergonomic keyboard and mouse;**
- e. A foot rest; and/or**
- f. A hot and cold fan.**

15

11. Did the requirements, but for the provision of an auxiliary aid, put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

20

12. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

25

13. If so, did the respondent take such steps as were reasonable to have to take to provide the auxiliary aids?

167. The first of this set of issues has, in our view, already been dealt with, on the basis that the respondent accepts that they knew of the claimant's disabilities at the material time. We accepted Mr Rushton's submission
5 that the first OH report, in October 2020 (77), was provided to the respondent and made clear the claimant's conditions to them, confirming in particular the complexity and serious effects of those conditions upon him.

168. We then considered the PCPs which the claimant has identified, in order
10 to determine whether or not they were applied by the respondent in this case.

169. Firstly, did the respondent have a practice that more than 7 days' sickness absence should be taken into account in determining whether probationary employees demonstrated satisfactory attendance. In our
15 judgment, they did. The claimant was required to attend an Attendance meeting with Ms Pullar after having had an absence spanning 26 May to 11 June 2021, a period of 13 working days. The reason for the claimant being called to the meeting was that they had breached the 7 days' absence threshold for a probationary member of staff.

170. Secondly, did the respondent discount Covid-19-related absences from
20 their calculation of the level of absence by the claimant? There was no evidence that they did. Accordingly, we found that they applied a PCP of not doing so in the claimant's case.

171. Thirdly, did the respondent require the claimant to return to their original
25 role and team at the end of a period of sick leave? In our judgment, they did, in particular at the point of dismissal, whereby Mr Renton considered whether the claimant could be moved to a different line management or to a different role, but discounted both. We considered that this amounted to a PCP.

172. Fourthly, did the respondent require the claimant to carry out the tasks set out in 9(d)(i) to (v) above? The respondent admitted in submission that they did so.
173. We then considered whether, but for the provision of the auxiliary aids contended for by the claimant, the PCPs put the claimant at a substantial disadvantage in comparison with others not suffering from a disability.
174. We accepted the claimant's clear and persuasive evidence on the impact which the auxiliary aids would have had upon their ability to carry out the tasks set for them in their contract with the respondent.
175. The claimant had a height-adjustable sit/stand desk at home, but there was no evidence that the respondent provided such an aid in the office. Without that adjustable desk, the claimant would be unable to fit in their wheelchair and thus sit at the desk to carry out their work. It is plain that the desk was not provided by the respondent, but by the claimant's previous employer.
176. The claimant required an ergonomic chair. Again, without that aid, the claimant would be unable to move flexibly and work with a degree of comfort in the workplace. There was no evidence that an ergonomic chair was provided in the workplace by the respondent to the claimant.
177. But for a large (27-inch) monitor, the claimant would have had difficulty reading documents, which, given that they were working at home, was the only way in which they could do that. The difficulties arose from the visual distortion from which they suffer. Further, the claimant maintained that without such a large screen, they would take much longer to attend to any task involving reading, and accordingly be affected adversely by the need to work longer hours.
178. The ergonomic keyboard and mouse which the claimant required meant that they avoided hypermobility issues, which, like the cognitive issues from which they suffer, would slow the claimant's workrate and necessitate longer hours.

179. A foot rest and hot and cold fans are available to the claimant at home, but have not been provided to the claimant in the office. Mr Rushon submitted that this had an impact on the claimant's ability to work.
180. We accept that without the auxiliary aids sought by the claimant, they would be put at a disadvantage in their work due to their disabilities. The question which we then must address is whether that disadvantage was substantial. In our judgment, it was. These are matters which, due to the claimant's conditions, undoubtedly affected him in a significant way each day they worked, in comparison with a non-disabled employee.
181. The reality of the claimant's working life is that without such aids, they are significantly impaired in their ability to perform to the best of their ability. We were impressed by the claimant's articulacy and intelligence in their evidence. We recognise that their disabilities provide a barrier to their carrying out their duties, in reading and working on documents, working at a desk, corresponding by email, attending virtual meetings and being available to work during each working day.
182. The respondent appeared to accept, at the outset of the claimant's employment, that they required a number of auxiliary aids in order to carry out their day-to-day tasks. Without those aids, it is clear to us that the respondent was, or should have been, well aware that they would be disadvantaged in comparison to another employee not suffering from disabilities.
183. Did the respondent, then, take such steps as were reasonable to provide the claimant with such auxiliary aids?
184. In answering this question, we sought to establish on the evidence what steps they did take to provide the claimant with such aids.
185. It is the claimant's position that the respondent failed to provide the claimant with a suitable keyboard, mouse, laptop and monitor. The laptop provided by the respondent initially arrived without a charging cable, and was unable to accommodate the software necessary to allow the claimant

to carry out their duties while accounting for their disabilities. Access to the respondent's network was limited, and over a significant period of time, they failed to provide the claimant with the equipment necessary to carry out their full range of duties. The monitor which was provided was not suitable as it did not accommodate the assistive software required by the claimant, and eventually the monitor simply failed in October 2021.

186. The claimant regularly emailed the respondent to advise that their keyboard was not working effectively; similarly the mouse the claimant was given was not one which worked with the technology provided by the respondent. We accepted the claimant's evidence about the frustrations they experienced in attempting to ensure that they had the correct equipment with which to carry out the tasks inherent in their role.

187. The episode when the claimant attended at St Andrews House on 13 October 2021 was one which exposed the gulf between what the claimant was being told and the reality of the situation. The claimant was assured by Mark Dorrian that their office was ready, but on that morning, Mr Dorrian emailed to say that he had just discovered that the doors in the building were not automated, and then the claimant emailed him to confirm that the room simply was not ready in the way that had been promised to them. Mr Dorrian's response – that this was a lesson learned to go and check that the work had been done – was indicative that he had relied on assumptions without assuring himself that the matter had been properly attended to.

188. In our judgment, the claimant was justified in their dismay at the sequence of events which had led them to feel disappointed and let down by the respondent. Despite the fact that the respondent has a dedicated Workplace Adjustments team, it is entirely unclear that they had applied themselves effectively to the task of ensuring that the claimant would be able to return to work in St Andrews House. They had, it is clear, failed to ensure that the claimant's equipment from their previous employment at Thistle House had been put into its proper place for the claimant's benefit

in time for their return to the office. No explanation has been provided for this.

5 189. Mr Dorrian emerged in evidence as a sincere and dedicated individual who understands the priority to be given to ensuring that adjustments are in place for people suffering from disabilities. However, his evidence was undermined by the fact that he believed, throughout, that the respondent was doing a good job in making sure that the claimant was receiving the required equipment, when the reality was that nothing, or very little was actually being done to ensure that they could return to the office to work.

10 190. We were bound, therefore, on the evidence, to conclude that the respondent did fail to provide the claimant with the auxiliary aids necessary to obviate the substantial disadvantage from which he suffered as a disabled person due to the PCPs applied by the respondent.

PCP-based claims

15 **14. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?**

15. A PCP is a provision, criterion or practice. Did the respondent apply the following PCPs:

20 **a. A practice of deeming more than 7 days' absence as "unsatisfactory attendance" when assessing whether an employee had passed their probation period (or not); and/or**

b. A practice of not discounting Covid-19-related days of sickness absence in determining whether probationary employees demonstrated satisfactory attendance?

25 **16. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?**

17. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

5 **18. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The claimant identifies the steps that should have been taken as follows:**

a. Disapplying the PCPs in respect of the claimant;

b. Providing the equipment set out in paragraph 10 above.

10 **19. If so, would it have been reasonable for the respondent to take those steps at any relevant time?**

191. We turned then to consider the claimant's complaints that the respondent failed to make reasonable adjustments in relation to the PCPs alleged to have been applied.

15 192. We accept that the respondent did apply a PCP that more than 7 days' absence was regarded as unsatisfactory attendance, and the respondent admitted this in submission. However, they did not accept that this was a matter which affected the question of whether or not the claimant had passed their probation, and further denied that the claimant's absence
20 was deemed to be unsatisfactory, as no action was taken against them.

193. Mr Rushton confirmed that the second PCP (at 15(b) above, previously noted as 20.2) was not pursued in this Hearing.

194. He did, however, identify a "3rd PCP", (which now should be regarded as a 2nd PCP), whereby the respondent required employee on probation to
25 return to the same role upon return from sick leave.

195. Ms Monan objected to this PCP being included, on the basis that the respondent was unaware that it was part of this claim. She submitted that the Tribunal should disregard any claim based on this PCP.

196. She pointed out that in her email dated 14 July 2023, to the Tribunal and the respondent's agent, she observed (57) that the claimant had referred to certain PCPs in the further specification of their claim of failure to make reasonable adjustments, which were not mentioned at the previous Preliminary Hearing. She sought to call upon the claimant to confirm whether or not their inclusion within the further and better particulars amounted to an application to amend the claim. No response was received to that email.

197. The Tribunal has concluded that it would not be in the interests of justice to proceed on the basis that this was included within the claim, given the uncertainty on the part of the professional representative for the respondent, following that email in July 2023, as to whether or not at the conclusion of the Hearing that PCP formed part of the claim.

198. The difficulty arises at least in part because no finalised List of Issues was presented to the Tribunal, but, as will be seen from the List set out above, had parts which were open to be clarified later. On the basis that this PCP has not been clearly identified by the claimant in their claim, other than in the further and better particulars, for which no further explanation was given, the Tribunal does not regard this PCP as forming part of the claim before us, and therefore we do not proceed with it in this regard.

199. We then considered whether the PCP of deeming more than 7 days to be unsatisfactory attendance was applied by the respondent in this case. It is not clear that, in those terms, the respondent considered or conveyed to the claimant expressly that their attendance was regarded as unsatisfactory. However, they invited the claimant to a meeting with Lucy Pullar on 4 August 2021 to give closer examination to the claimant's levels and patterns of attendance (250), using the trigger point of 7 days, and referred to the terms and conditions provided to the claimant at the outset of their employment (88ff), in which it was stated, under Probation, that if the claimant did not reach the required standard of performance, attendance or conduct their appointment would normally be terminated.

200. In our judgment, the invitation to the meeting was an indication to the claimant that their attendance may not be regarded as satisfactory; however, the outcome of the meeting with Lucy Pullar was that no further action would be taken. The outcome, however, was not available until 1
5 November 2021, by which time, as Mr Rushton submitted, the claimant's probation was, de facto, extended. That probation should have ended after 9 months; that would have taken place under normal circumstances on 23 August 2021. We consider that the PCP was in fact applied to the claimant in the circumstances due to the delay between the attendance
10 meeting and the outcome.

201. The effect of extending the claimant's probation was a detrimental one to the claimant, since they had hoped to pass their probation and continue to work for the remainder of their contract. What surprised us was that no decision was positively made to extend the probation, and that the
15 respondent's witnesses continued to deny that any extension of the probation had taken place. Even if no positive decision had been made, the reality is that by not addressing the matter the respondent had effectively continued the claimant's probationary period. The respondent argues that there was no disadvantage as no action was taken against
20 the claimant, but the very process of examining the claimant's absence counted heavily against them because the effect was to extend the probationary period.

202. As a result, we concluded that the PCP did place the claimant at a substantial disadvantage, namely the extension of their probationary
25 period due to the requirement to subject their attendance to closer examination.

203. The respondent had the OH report which the claimant brought with them at the start of their employment; they also had clear notice of the adjustments which they would require to have.

30 204. The Tribunal must consider whether, then, there were reasonable adjustments which could have been made for the claimant in order to

remove the substantial disadvantage to them. The reasonable adjustments proposed were that the respondent disapply the PCP, or provide the auxiliary aids set out above.

5 205. In our judgment, providing the auxiliary aids to the claimant within the probationary period was a reasonable adjustment which would have enabled the claimant to continue with their work and to work either at home or in the office, but those aids were not provided to the claimant within that period. Disapplying the PCP was also a reasonable adjustment in our judgment, on the basis that following a further OH report, Lucy
10 Pullar concluded that no action should be taken as the absence was avoidable. She also confirmed that an adjustment to the sickness absence trigger point would be put in place. However, Mr Rushton submitted that the respondent already had the existing OH report and information which would have enabled them to put in place the
15 adjustments necessary, and to disapply the trigger for action on attendance, before the action was taken in August 2021. That would have enabled the claimant to continue to the conclusion of their probation.

206. The respondent's position appears to be that the claimant would not have passed his probation in August 2021. However, that position is not clearly
20 sustainable. Firstly, they did not address the question of the claimant's probation in August, when they should have, as they were taking steps to investigate their attendance; and secondly, by the time the final probation report was conducted in November 2021, a number of matters were taken into account which could not have been taken into account in August, as
25 they had not taken place.

207. We treat with caution the evidence of Ms Kynaston that the claimant's probation report would have been marked partly effective in August 2021. We do not consider that Ms Kynaston was seeking to be unhelpful or untruthful in giving this evidence – it is clear that she believed it – but we
30 must not allow ourselves to be led into viewing the claimant's position in August as being the same as in November.

208. The reality is that the respondent has not brought any persuasive evidence to demonstrate that the claimant's probation was extended by a conscious decision of any manager in August, other than that it was not signed off due to the actions required to be taken as a result of the trigger leading to examination of the claimant's attendance. We consider that the reason for the extension of the probation was initially related only to the claimant's attendance, on the evidence.

209. Accordingly, we have concluded that the respondent did fail to make reasonable adjustments in respect of the PCPs set out above.

Time Limits

1. Were all of the claimant's complaints presented within the time limits set out in section 123 of the Equality Act 2010?

2. If not, were any complaints presented outside that time limit nevertheless part of a course of conduct extending over a period with a complaint presented within the time limit?

3. If not, should the Tribunal extend time for bringing the claim because it is just and equitable to do so?

Based on the date that the claimant presented the claim to the Tribunal and the period of early conciliation, it appears that any complaint about things that happened before 10 October 2022 is out of time and in principle therefore the Tribunal cannot consider it.

210. We consider these matters together. Essentially, we consider that the actions of the respondent towards the claimant amounted to a single course of conduct extending over a period of time with a complaint presented within the time limit, namely that relating to the claimant's dismissal.

211. While it is clear that there were a number of different managers involved – a matter which does not reflect well upon the respondent, and certainly

should not be taken to have an adverse effect upon the claimant's case – the claimant was consistently dealt with by those different managers in the same manner. The constant theme of the claimant's evidence related to their attempts to have the auxiliary aids put in place to enable them to carry out the duties imposed upon them by their contract of employment. The claimant eventually found themselves in a position where they were sufficiently unwell as to be unable to work, and despite seeking to return to that work, was unable to do so on the basis that the reasonable adjustments sought by them could not be put in place by the respondent.

212. We consider that even if we are wrong, and this did not amount to a course of conduct over a period of time, it would be just and equitable to allow the claimant's claim to proceed, on the basis that the interests of justice demand that the claimant be permitted to present their case to the Tribunal given the substantial and significant issues which arose over time.

213. Accordingly, we find in favour of the claimant in relation to the conclusions above, and now appoint this case to a Hearing on Remedy to determine the remedy to be awarded to them.

Employment Judge: M Macleod
Date of Judgment: 16 April 2024
Entered in register: 16 April 2024
and copied to parties