EMPLOYMENT TRIBUNALS

Claimant: Ms Ashley Walsh

Respondents: British Telecommunications PLC (BT)

HELD AT: Liverpool (by in person) **ON:** 2, 3, 4 & 5 April 2024

BEFORE: Employment Judge Shotter

Members: Mr G Pennie
Mr P Dodd

REPRESENTATION:

Claimant: In person
Respondent: Ms R Page, solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claims of discrimination brought under section 15 and 26 of the Equality act 2010 set out in allegations 3.1.1, 3.1.2, 4.7.1 and 4.7.2 are dismissed on withdrawal by the claimant.

2. The claimant's claim of disability discrimination brought under section 15 and 26 of the Equality Act 2010 set out in allegations 3.1.3, 3.1.4, 4.7.3 and 4.7.4 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) the last date being the 28 September 2021. ACAS early conciliation commenced on the 15 January 2023, the certificate was issued on the 8 February 2023 and claim form presented on the 18 February 2023. The complaints are out of time and in all the circumstances of the case it is not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complains which are dismissed.

3. In the alternative, the claimant's claims of unlawful direct discrimination brought under section 15 and section 26 of the Equality Act 2010 and set out in set out in allegations 3.1.3, 3.1.4, 4.7.3 and 4.7.4 are dismissed. The claimant was not

treated less favourably because of something arising in consequence of her disability and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed. The respondent's conduct did not have the proscribed affect under section 26 of the Equality Act 2010, the claimant's claims of harassment fail and are dismissed.

4. The claimant's claims of disability discrimination brought under section 15 and section 26 of the Equality Act 2010 and set out in set out in allegations 3.1.5 and 4.7.5 are dismissed. The claimant was not treated unfavourably because of something arising in consequence of her disability and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed. The respondent's conduct did not have the proscribed affect under section 26 of the Equality Act 2010, the claimant's claims of harassment fail and are dismissed.

5. The respondent was not in breach of its duty to make reasonable adjustments and the claimant's claim brought under section 20-21 of the Equality Act 2010 is dismissed.

6. The claim for "other payments" is dismissed.

REASONS

Preamble

The hearing

1. This is a remote hearing at the claimant's request as a reasonable adjustment. The claimant, who is disabled was invited to take as many breaks as she wanted, walk around and stretch to alleviate her bad back (which she did throughout the hearing).

2. Throughout the hearing the Tribunal took into account the guidance set out within the Equal Treatment Bench Book. In addition, the claimant as a litigant in person was given time (as was the respondent) to prepare written submissions. These were exchanged before oral submissions and the claimant was given additional time to read them and prepare her written submissions (which she chose to do). The claimant took a break between oral submissions given on behalf of the respondent before giving her oral submissions to assist her in preparing her arguments.

3. The documents the Tribunal was referred to are in a bundle totalling 656 pages together with additional documents produced by the parties, the contents of which the Tribunal has referred to where relevant below. The claimant had difficulty with her bundle which she had re-arranged and numbered in part. Some of the claimant's re-numbering did not align with the documents bundle that had been agreed between the parties and was before the Tribunal, and we adjourned in order that the respondent could courier a hard copy paginated bundle in time to start the second day of the hearing. In the meantime the claimant accessed the final hearing bundle on her old laptop. The Tribunal expressed its gratitude to both parties for the efforts made to ensure this trial took place over the allocated hearing time, bearing in mind the IT difficulties and the fact that the hearing was taking place remotely as a reasonable

adjustment to the claimant, who confirmed she also required written reasons as an adjustment rather than judgment and reasons being given orally on the fourth day.

4. On the second day of the hearing the claimant withdrew four allegations of discrimination brought under section 15 and 26 of the Equality act 2010 as set out in allegations 3.1.1, 3.1.2, 4.7.1 and 4.7.2 which were dismissed on the third day of the hearing in order to give the claimant time to think about her position and discuss her claims with others, for example, her son who lived with her. As a consequence of the withdrawals and the parties agreeing that the Tribunal should only deal with a limited period of time (September 2021 to 29 March 2023 with the exception of an invite to the claimant to attend a first tier review meeting in 2016) the respondent confirmed that a number of paragraphs set out in the respondent's witness statements were not being relied upon.

Witnesses

5. The Tribunal was provided with a six witness statements in total, consisting of a written statement prepared by the claimant signed and dated 4 March 2024, and on behalf of the respondent the Tribunal had before it signed and dated written statements from Bryony Jackson-Doward, the operations manager based in Blackburn who heard the claimant's grievance appeal, Emma Whitty, operations manager and grievance officer investigating the grievance, Tarryn Buck, operations manager at Lancaster Contact Centre and line manager to Tracy Ford and Mathew Armstrong, Tracy Ford, sales advisor and the claimant's line manager until 31 October 2022 and Mathew Armstrong, sales advisor and the claimant's line manager from 1 November 2022 to September 2023,

6. There were a number of conflicts in the evidence between that given by the claimant and the respondent's witnesses which the Tribunal resolved largely through the contemporaneous documents and notes taken at the time, which it was satisfied reflected the true position. The Tribunal spent a lot of time listening to the phone recording between the claimant and occupational health which it has dealt with below, and on the balance of probabilities it preferred the evidence of Tracy Ford that she had not in the capacity of the claimant's line manager instructing occupational health or asked occupational health to raise questions with the claimant about her working in a separate business owned by the claimant when she was signed off unfit for work with the respondent. The Tribunal had no issue with the respondent exploring the reasons why the claimant felt well enough to work in her own business and not for the respondent, however, there was a possibility that the recording could give rise to credibility issues in respect of Tracy Ford and an adverse inference being raised, hence the time the Tribunal took to listen and resolve this issue. It is notable the claimant stated "I wouldn't say she [Tracy Ford} was part of the harassment at all" in cross-examination of Tracy Ford and told her "You did everything including a cushion to alleviate…went above and beyond." When cross-examining Tracy Ford on allegations 3.1.3 and 4.7.3 the claimant stated "I'm not saying that it was Tracy."

7. In the well-known case of Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) [16] – [22] a number of principles relevant to this case before the Tribunal are set out. The key principles are::

a. "We are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are;

b. **Memories are fluid and malleable, being constantly rewritten whenever they are retrieved**;

c. External information can intrude into a witness's memory as can his or her own thoughts and beliefs; both can cause dramatic changes in recollection;

d. **Memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions** about an event in circumstances where his or her memory is already weak due to the passage of time;

e. e. **The best approach for a judge to adopt is to base factual findings on inferences drawn from the documentary evidence and known or probable facts**" [the Tribunal's emphasis].

8. In short, when it came to the conflicts in the evidence, the Tribunal noted the claimant's responses given to questions asked on cross-examination on occasion lacked detail and could not be relied upon. The Tribunal noted that when the claimant gave evidence she was unable to remember dates and misremembered what happened on certain dates including the causes of action, and part of the reason for this was the delay in the claimant bringing the claims. It is inevitable that memories fade with the passage of time, especially if no notes are taken and/or proceedings issued well outside the limitation period. The Tribunal concluded that the evidence given on behalf of the respondent supported by contemporaneous documents was truthful, straightforward and honest.

Claimant's disability

9. The respondent concedes the claimant is disabled with multi skeletal problems of which it had knowledge, Knowledge is not an issue in this case. The relevant period is September 2021 to 29 March 2023 during which the claimant remained an employee until her resignation after these proceedings were issued due to ill-health. The claimant explained that as a result of her eyesight problems she could no longer carry out her duties. With reference to the claim for reasonable adjustments there is no issue with the numerous adjustments carried out by the respondent save for the provision of a chair, and the Tribunal's finding of facts deals with the chair only and not the other reasonable adjustments provided other than to record the fact that adjustments were made throughout.

List of issues

10. A list of issues was included in the Record of Preliminary Hearing held on the 26 May 2023 which were extracted and amended on the first day of the liability hearing following discussions and agreement with the parties. The same numbering has been followed.

Time limits

1.1 There are potential time limit issues in relation to the complaints of harassment/discrimination arising from disability, except for the complaint in relation to referral for the occupational health assessment on 10 March 2023, which was added by amendment, within the relevant time limit. There do not appear to be any time limit issues in relation to the complaint of failure to make reasonable adjustments.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

Disability

2.1 It is conceded by the Respondent that the Claimant was disabled by way of multi-skeletal problems affecting her neck and back from September 2021 to 29 March 2023 (the relevant period).

2.2 It is conceded by the Respondent that they had knowledge of the Claimant's disability at the material time.

Harassment related to Disability (s26)

3.1 Did the respondent do the following alleged things:

3.1.1 On 23 September 2021, Umar Patel, an employee of the Respondent, stood outside the Claimant's shop for around 10 minutes, looking up at the shop name and looking at his phone (withdrawn).

3.1.2 Around 27-28 September 2021, the Claimant's team leader, Tracy, saying to the claimant when she took in her MRI paperwork whilst on sick leave, words to the effect that the Claimant should be at her desk working, rather than in her shop (withdrawn).

3.1.3 The Claimant's team leader asking the occupational health advisor, when the claimant went for an appointment on 17 January 2022, to ask the claimant about her shop.

3.1.4 Requiring the claimant, by a letter dated 28 September 2021, to attend a first tier 2 review meeting, at a stage earlier than usual.

3.1.5 Being sent for unnecessary occupational health referrals on 23 February 2023 and 10 March 2023 (added by amendment, following application made on 26 May 2023).

3.2 If so, was that unwanted conduct?

3.3 Was it related to disability?

3.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.5 If not, did it have that effect? The Tribunal will take into account that Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Discrimination Arising from Disability (s15)

4.1 In relation to the matters set out at 3.1.1 to 3.1.5, if the factual allegation is proven, but the statutory test for harassment is not made out, the tribunal will then consider whether that allegation amounts to discrimination arising from disability.

4.2 If so, did the respondent treat the claimant unfavourably in any of the respects set out at 3.1.1 to 3.1.5? Namely:

4.7.1 On 23 September 2021, Umar Patel, an employee of the Respondent, stood outside the Claimant's shop for a round 10 minutes, looking up at the shop name and looking at his phone (withdrawn).

4.7.2 Around 27-28 September 2021, the Claimant's team leader, Tracy, saying to the claimant when she took in her MRI paperwork whilst on sick leave, words to the effect that the Claimant should be at her desk working, rather than in her shop (withdrawn).

4.7.3 The Claimant's team leader asking the occupational health advisor, when the claimant went for an appointment on 17 January 2022, to ask the claimant about her shop.

4.7.4 Requiring the claimant, by a letter dated 28 September 2021, to attend a first tier 2 review meeting, at a stage earlier than usual.

4.7.5 Being sent for unnecessary occupational health referrals on 23 February 2023 and 10 March 2023 (added by amendment, following application made on 26 May 2023).

4.3 It is conceded by the Respondent that the following things arose in consequence of the Claimant's disability:

4.4.1 The Claimant's sickness absence between 24 August 2021 and 4 March 2022?

4.4.2 The Claimant's need for a chair adapted for her disability from 4 March 2022 to 29 March 2023?

4.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

4.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

4.6 If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

4.6.1 Meeting the need to have (and seeking to have) fully operational staff working in the workplace and/or the need to meet and deliver the required level of customer service and meet business priorities.

4.6.2 Maintaining proper attendance at work.

4.6 The Tribunal will decide in particular:

4.7.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.7.2 could something less discriminatory have been done instead;

4.7.3 how should the needs of the claimant and the respondent be balanced?

Reasonable Adjustments (s20/s21)

5.1 Did the lack of an auxiliary aid, namely a chair which was suitable for her back and neck problems, put the claimant at a substantial disadvantage, without such a chair, the claimant was unable to do a normal days work?

5.2 If the Claimant was placed at a disadvantage, then it is accepted by the Respondent would be reasonably expected to know that the Claimant would be placed at the disadvantage for failure to provide a suitable chair.

5.3 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the respondent should have provided her with a suitable chair.

5.4 By what date should the respondent reasonably have taken those steps?

Remedy for discrimination or victimisation

6.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

6.2 The claimant does not claim any financial loss.

6.3 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.4 Should interest be awarded? How much?

The pleadings

11. In a claim form received on 18 February 2023 following ACAS early conciliation undertaken between the 15 January and 8 February 2023 the claimant brings claims of disability discrimination and for other payments. In short, the claimant claimed that there were health and safety failings and she had been bullied. The claimant referred to a successful grievance appeal and a "deliberate attempt to put me out of time" in respect of the claims that were presented out of time. The claimant did not make reference to this at the final hearing when she was invited to explain why she had lodged a number of her claims out of time, and there was no evidence that the respondent used the grievance procedure as a mechanism to delay these proceedings being issued and the Tribunal found that it had not for the reasons set out below, concluding that there was nothing to stop the claimant issuing proceedings in time.

12. The claimant's claims were further clarified at a case management hearing held on the 26 May 2023. There is no claim for "other payments" which is dismissed, the claimant having confirmed she had suffered no financial loss. A list of issues were agreed and set out in the Annex.

Facts

13. The respondent provides telephone, internet and TV services nationwide. It has call offices in various parts of the United Kingdom including the North West and Lancaster office where the claimant worked as a sales advisor from 2006 initially as an agency worker and then as a direct employee from 8 August 2010. The claimant remained an employee when she issued these proceedings, but resigned in 2023 due to health problems. She worked 30 hours a week during the relevant period covered by this litigation; September 2021 to 29 March 2023.

14. The claimant was line managed by Tracy Ford, sales advisor, until 31 October 2022 followed by Mathew Armstrong, sales advisor, from 1 November 2022 to September 2023. Emma Whitty, operations manager and grievance officer investigating the claimant's grievance, and Tarryn Buck, operations manager at Lancaster Contact Centre, line managed Tracy Ford and Mathew Armstrong.

15. The claimant had a history of back pain and related musculoskeletal difficulties going back to 2004 for which she had been undergoing treatment with an osteopath in 2021. The respondent had made a number of adjustments in the workplace which enabled the claimant to continue with her work, and the claimant raises no complaint about the way she was treated until the she took umbrage when a work colleague discovered she was working in her own business at the same time as being on long-term sickness absence from the respondent's business when a "Speak up" and grievance was raised on the 3 December 2022.

16. The claimant was absent due to sickness between the 25 August 2021 to 5 March 2022 and she was dealt with under the respondent's Absence Policy that applied to all employees aimed at ensuring that there was sufficient fully operational staff working in the workplace, deliver the required level of customer service and meet business priorities, maintaining proper attendance at work and understanding absences including setting in place any adjustments that were necessary. The claimant did not dispute the fact that her long-term absence would affect her colleagues and there was a financial cost to the respondent. These facts were taken into account by the Tribunal when they concluded that managing the claimant's sickness absence was objectively justified as set out below.

<u>The Attendance Policy</u>

17. The respondent operated an Attendance Procedure during the relevant period. The Policy before the Tribunal is dated 27 January 2023. The claimant raised no issue with the date or content. First and second line managers have different responsibilities under the Policy and the Tribunal is concerned with the first tier 2 review meeting. In the bundle a document dated 7 March 2016 "Using BT's attendance Procedure" references a "Second Line Manager Review (SLMR") which the Tribunal was not taken to by the parties. A second line manager review is an absence review meeting undertaken by a second line manager. The aim of the meeting is to understand the absence and set in hand actions, for example, making adjustments and/or instructing occupational health. It forms part of the management of employees who are absent from work due to sickness, and gives managers a certain amount of discretion, not least when to invite an employee to a SLMR "**when there is no (or imminent") return to work.**" The guidance to managers provides that "in most cases the Second Line Manager meeting will be completed within 90 days of the start of the absence…**There aren't any fixed time limits because every case is different. Factors that might indicate the need for a meeting include; "when it's clear the person is unlikely to return to work, someone's not engaging** with any support services…" [the Tribunal's emphasis].

18. The claimant argued that the SLMR was the means by which employees could be dismissed from the business. The Tribunal did not agree, and concluded that it is a return to work meeting at which adjustments and a return to work plan can be agreed. It concluded the claimant's evidence in this regard was disingenuous and ignored the fact that she had taken part in a SLMR in 2016 with no suggestion of managing her to dismissal and she was well aware that the meeting was a mechanism to assist her return to the workplace.

19. The claimant was issued with a Disability Passport had been provided with a number of specific aids and equipment including a specialist chair with arm supports and a headrest through Access to Work and the respondent which included regular reviews.

20. The respondent tried as best as it could to accommodate and assist the claimant, who management found challenging to manage as recorded below, particularly with regard to the claimant's reaction when she was reported to be working elsewhere during the sickness absence meeting which gave rise to allegation 3.1.3 onwards duplicated in 4.7.3 onwards.

<u>The 22 June 2016 invite letter.</u>

21. The claimant had a poor attendance record. The claimant had been absent from 25 May 2016 and in a letter dated 22 June 2016 the claimant was invited to a meeting on the 30 June 2016 to discuss her health and absence. The letter confirmed; " You should be aware that if your Current absence is likely to last for much longer, I will need to re-consider the arrangements for covering your own job and your own future with BT because of the potentially significant impact on service." The respondent was putting down a marker for the claimant well before the 90-day period had expired, the claimant understood that this was the process and it did not mean that the respondent was preparing the grounds to dismiss her, as argued during this hearing in relation to the letter dated 28 September 2021.

22. The claimant could recall the 30 June 2016 letter and ensuing meeting, following which she was not subjected to any other process that could result in termination of her employment on the grounds of ill-health. The claimant referred to the "Bradford factor" without taking the Tribunal to any supporting documents, arguing that the respondent was only entitled to take a pro-rata absence into account because she worked part-time (30 hours a week). There is no reference to the "Bradford factor" in any of the contemporaneous documents referred to the Tribunal, and the Tribunal prefers the evidence given on behalf of the respondent that the "Bradford factor" was irrelevant as the claimant was nowhere near being issued with a warning. The factual matrix supports the respondent's position given the claimant was never issued with a warning over her poor attendance.

<u>The claimant's absence 24 August 2021 to 5 March 2022</u>

23. The claimant was absent from work between the 24 August 2021 to 5 March 2022. It is undisputed the claimant provided MED3 statement of Fitness for Work confirming she was not fit for work with low back pain and there were no workplace adjustments, amended duties, amended hours or a phased return that could be carried out as the GP had put a line through possible adjustments. This is relevant because it is undisputed that the claimant, without the respondent's consent or knowledge, whilst she was absent signed off by her GP as unfit for work, worked in her own business where she remains to date. The shop owned by the claimant is called "Rapture" and the claimant was actively working in it during the relevant period. When this was brought to the respondent's attention, the claimant was not forthcoming about what work she carried out in the shop, and reacted aggressively when she was questioned and reported the matter to the police. Tracy Ford described the claimant as "secretive" and seeking a settlement agreement, and it is clear from the contemporaneous documents that this was the case.

24. The claimant's colleague Umar Patel witnessed the claimant working in "Rapture" located near the respondent's business and train station, and on the 23 September 2021 Umar Patel raised it with Tracy Ford, the claimant's line manager, who had various informal discussions with the claimant concerning her health and absence leading to the SLMR meeting with Tarryn Buck. Tracy Ford asked the claimant about working in the shop and it is undisputed the claimant was defensive, not forthcoming about what she did and told Tracy ford to "get it out of your head, it is not a job it is a hobby" explaining her doctor had told her to continue with hobbies for her physical and mental health. The claimant explained that when she worked in the

shop she could lie down on the floor when needed and the toilet was on the same level. Tracy Ford did not question the legitimacy of the claimant's responses, however, she was not happy with the claimant's sharp and defensive attitude, as she wanted to understand what adjustments the respondent could put in place to replicate the working conditions in the claimant's shop that enabled the claimant to work there but not for the respondent during the first 2 weeks of her sickness absence and beyond. It was apparent to Tracy Ford that further information was required from the claimant who had given no indication of a foreseeable return to work and nor had she clarified how the respondent could duplicate adjustments that enabled the claimant to work in her own business.

25. The claimant was due to have an MRI scan on the 3 October 2021 and wrote to the CEO Philip Jansen informing him of this, complaining about being harassed by staff about "my shop" and confirming she had reported the matter to the police. The claimant explained she was unable to return to work for BT due to the "stress I would incur physically due to BT process and systems not designed for purpose…two calls from my team leader, her number was blocked on my phone." The claimant referred to a number of other health problems she had and there was no hint of any imminent return to work for BT. The claimant's email resulted in a number of emails being exchanged which culminated in a letter dated 28 September 2021 inviting her to a meeting with Tarryn Buck to discuss her health issues.

Allegation 3.1.4 & 4.7.4: Requiring the claimant, by a letter dated 28 September 2021, to attend a first tier 2 review meeting, at a stage earlier than usual.

26. In a letter dated 28 September 2021 Tarryn Buck, Tracy Ford's line manager, invited the claimant to a meeting to "**discuss your situation and explore any support I can provide which will assist your to return to work or address issues which prevent you from doing so**. **The aim of the meeting is to facilitate a return to work**" [the Tribunal's emphasis].

27. The letter continued "I understand that this must be a difficult time for you and as a business **we will do all we can to support you. However, I must also make you aware that if your current absence is likely to last for much longer we may need to consider making arrangements to cover your job, or if necessary seek alternative options regarding your future within BT.**" The terminology was identical to that set out in the 2016 invite letter. The Tribunal concluded that the use of the word "if" is very important, and contrary to the claimant's suggestion that the letter was precursor to her dismissal found that it was not and she had no reasonable basis to interpret it in that way. The claimant had been given no warnings on her sickness record, as conceded by the claimant, who had taken part in a similar meeting in 2016 referenced above. The respondent sent out template letters which managers were unable to change, and the Tribunal took the view that it was not discriminatory to warn employees, including the claimant, of the possible alternatives if the absence is "likely to last for much longer" and the claimant understood that this meeting was aimed at discussing adjustments and support to facilitate a return to work.

28. The claimant's allegation in respect of the 28 September 2021 letter has changed with her evidence. Originally, it clearly concerned being required to attend sickness absence meeting "earlier than usual." At the liability hearing the claimant argued that her complaint also lay with the terminology used in the letter and her belief

that the respondent would eventually dismiss her. The Tribunal accepted the evidence given on behalf of the respondent by Tarryn Buck that “we were nowhere near that. We were trying to get her back to work” and this was borne out by the meeting that took place on the 7 October 2021 after the claimant had been absent for over a 43 day period from 24 August 2021. Had the respondent wanted to dismiss the claimant it was open to it to conduct an investigation into the fact that she was running a business having been signed off unfit for work with no adjustments, and yet it did not and nor was the claimant under any threat of misconduct proceedings for her behaviour, including the aggressive way she responded to questions about her working in the shop, not least threatening to lose people their jobs and reporting individuals to the police for breaching her privacy and “harassing her” by reporting the fact that she was working in a shop to the respondent.

29. By the 28 September 2021 the claimant had been absent over a 5-week period, and the Tribunal accepts that it was the policy in Lancaster to invite employees to a first tier 2 review meeting after a sickness absence between 30-40 days, and as the claimant had been absent for 5 weeks with no foreseeable return she was called to a meeting, as she had been in the past in 2016.

MED3 29 September 2021

30. The claimant submitted a further MED3 for the period 29 September 2021 to 29 October 2021 confirming she was not fit to work with “low back pain” and the possible adjustments were deleted by the GP. The MED3 made no reference to the work the claimant was carrying out in her own business. The claimant’s position is that the respondent should have waited before requiring her to attend a SLMR referred to also as a first tier 2 review meeting, and it was both an act of harassment and disability related discrimination.

The SLMR meeting

31. The 7 October 2021 “SLMR” meeting held between Tarryn Buck and the claimant involved a discussion about the claimant’s health, absence and “What’s specifically preventing a return to work?” The claimant explained she was in “constant pain and fatigue,” awaiting results of a MRI scan and unable to take part in physiotherapy exercises. Adjustments were discussed including the claimant’s rise and fall desk and specialist chair she had been using before she went off. The claimant was provided with a list of “services” ranging from “rehab”, Occupational Health to a specialist workplace assessment all of which she was invited to take up.

32. Tarryn Buck raised with the claimant the fact that she was working in her shop, which the claimant explained the GP was “happy with,” it was a hobby and she had been advised to avoid stress which was why she could not return to work for the respondent. The claimant “skirted over the subject” and did not clarify why she felt able to work in a shop and what similar adjustments could be put in place in order that she could return to work from the respondent taking into account the MED3 referred to a “low back pain” and not stress.

33. Tarryn Buck decided that the claimant should be referred to occupational health via a written referral. The referral made no mention of the occupational health asking the claimant questions about working in her shop during the sickness absence, and

contrary to the claimant’s suspicions, there was no evidence of a second referral being sent to occupational health by someone other than Tracy Ford.

34. Tracy Ford completed the occupational health referral in or around 21 December 2022 for a workplace assessment and advice on support as the claimant was experiencing a number of other health problems including the muscular skeletal condition that has given rise to this disability discrimination claim. There is no reference in the referral to occupational health being asked to discuss the claimant working in her shop. The Tribunal preferred the respondent’s evidence, particularly that given by Tracy Ford and Mathew Armstrong, that once the referral had been made that was the end of the matter, until the claimant authorised the release of the occupational health report to the respondent. The claimant in her evidence confirmed that Tracy Ford was her team leader, but she was not the person referenced in issue 3.1.3. The claimant did not know who the person was that made contact with occupational health beyond the occupational health referral when requesting a conversation about the claimant working in her business, and yet she alleged that the occupational health referral produced by Tracy Ford had somehow been changed and additional information had been sent, with no evidence of this.

<u>The transcript of the conversation between the claimant and occupational health.</u>

35. The Tribunal has been provided with a reasonably accurate transcript of the conversation between the claimant and occupational health recorded by the claimant. The Tribunal also listened to the relevant recording during deliberations and considered the transcript in detail concluding that there was confusion as to whether occupational health was following up on the claimant’s comment that she was friends with managers in shops and working in her own shop. The exchange between occupational health and the claimant over the phone was rapid, and it was not always easy to understand what was being said by occupational health who did not have the benefit of a transcript before her at the time.

36. A Occupational Health Report followed the telephone consultation held on the 17 January 2022. The report confirmed the claimant’s condition was improving and it dealt with a number of proforma “Specific Questions” that included no reference to the claimant working in the shop during her sickness absence. Various adjustments were suggested when the claimant was well enough to return to work on a phased return. No foreseeable date for a return to work was set out and the claimant continued to remain remained unfit at the time of the report.

37. On the balance of probabilities the Tribunal found that had the occupational health physician been asked by the respondent to explore and comment on the claimant working in her business, there would have been a reference in this report. It is notable the claimant received a copy of the report before she authorised its release to the respondent and she did not raise the issue of being asked about her business with either the respondent or occupational health.

<u>The second SLMR meeting between the claimant AND David Clingain held on the 11 February 2022</u>

38. At the outset of the meeting David Clingain read out the “mandatory statement” informing her “I am concerned about the length (or continued periods) of your absence

and future ability to provide regular and effective service. If your absence (or your level of absence) is likely to continue, I will need to reconsider the arrangements for covering your role and own future within BT due to the impact on the service." A list of impacts were set out including on team and colleagues, customer service and cost. The information provided was very similar to that set out in the 28 September 2021 letter, however, on this occasion the claimant took no issue with it.

39. The claimant raised a grievance on the 9 March 2022 which concerned the employees who alleged informed the respondent of the claimant working in her shop and a police report she made as a result.

The claimant's return to work.

40. On the 5 March 2022 the claimant returned to work and complained about her original bespoke chair being uncomfortable.

41. The respondent commissioned a new chair following receipt of a report from AbilityNet who had assessed the claimant's requirements on the 20 April 2022 and recommended a specific chair as suitable for her disability. The claimant in an email sent on the 4 May 2022 report complained that she had not had a discussion about the chair ordered on the 4 May 2022 with the line manager before the order was placed. The claimant pointed out "if the neck isn't correct, as discussed on the referral, I won't be sitting in the chair." The claimant was informed that the chair recommended by the AbilityNet assessor had been ordered, and she was provided with an image of the chair. The claimant responded she required a neck support in an email sent on the 4 May, and on the 20 May that "I am unable to sit on this chair and have discussed with a specialist **and the seat is completely incorrect…since trying the chair for 30 minutes once delivered, I have severe aches**…**I am not sitting on this seat as it stands and won't**" [the Tribunal's emphasis].

42. The seat was not off the shelf and it was a bespoke chair specifically built for the claimant by a third party, Shape Seating, to the requirement set by AbilityNet after discussion and an in person meeting with the claimant. The Tribunal found AbilityNet had assessed the claimant's needs with the claimant's input, advised the respondent and the respondent placed an order for the specialist chair advised, the claimant having agreed to delivery. Both the claimant and respondent assumed the correct seat would be prepared. According to the claimant's witness statement (para 113) there was an agreement between the claimant and Tracy Ford before the delivery. The claimant criticises the respondent for the first bespoke chair, and referred to a "rushed process Tarryn advising quicker delivery so" I "'resume my full duties' to show that is all the concern the respondent's employees are more concerned about statistics and not the person." The claimant's criticism of the respondent had no basis and reflects her perception of this litigation rather than the correct position at the time, when the respondent was doing all that it could to reasonably access a bespoke chair to a specification set by experts, namely AbilityNet, and the claimant herself.

43. The chair required building which took time, approximately 4- 6 weeks or so as advised in the 4 May 2022 email sent to the claimant at 18.10, and the Tribunal found the respondent was proactive in ordering the chair, and once ordered it was out of its hands even if they did try and speed up the process.

44. During this period the claimant took part in a 1:1 meeting with Tracy Ford at which she requested a specialised cushion, which was put on order. When it arrived for the claimant it is not disputed that she did not try it and according to Tracy Ford it was not even taken out of its wrapping and left by the claimant under her desk. As conceded by the claimant during this liability hearing Tracy Ford did all she could for the claimant, she "did everything, went above and beyond" and that appears to have been the case.

Provision of a second chair on 27 July 2022.

45. On the 7 June 2022 a further assessment took place and a second chair was ordered and expedited. The Tribunal has read the copy correspondence and emails in the bundle referencing this exchange which culminated in Shape Seating rebuilding the chair, approved by the claimant, delivered and installed on the 27 July 2022. By the 27 July 2022 the claimant confirmed the chair was "**exact to her specification**" and the "**correct chair she needed for her condition**" [the Tribunal's emphasis] as confirmed in an email from Tracy Ford to Tarryn Buck. Despite the reasonable adjustment being provided by 27 July 2022 and the clock stopping on limitation, the claimant did not issues proceedings. The Tribunal was satisfied that the respondent could not have provided the second bespoke chair any earlier than it did.

Grievance meeting investigation

46. The investigation grievance meeting took place on the 29 June 2022 with Tarryn Buck which only dealt with the claimant's complaint about Umar Patel and team leader allegations at 3.1.1. 3.1.2, 4.7.1 and 4.7.2, dismissed on withdrawal by the claimant on day 3 of this liability hearing. The claimant's grievance largely concerned being "stalked and harassed" by three managers regarding her working in "my shop" when it had nothing to do with the respondent business and was private to the claimant. It is notable that nowhere either in the original grievance or numerous emails exchanged with HR and others about her grievance, does the claimant raise a specific issue regarding Tracy Ford asking the occupational health advisor, when the claimant went for an appointment on 17 January 2022, to ask the claimant about her shop, or Tarryn Buck requiring the claimant, by a letter dated 28 September 2021, to attend a first tier 2 review meeting, at a stage earlier than usual.

Grievance hearing and outcome 7 July 2022

47. Following an investigation the claimant's grievance was not upheld. The claimant had by this point raised the issue of feeling bullied as the SLMR had been done at 30 days outside standard practice in addition to being harassed by colleagues "spying on her" working in her shop together with other allegations that did not concern this Tribunal, all of the grievance officer, Emma Whitty, found no basis for concluding it was not unreasonable or out of the ordinary for Umar Patel to report what he had seen to his manager, and the review meeting was in line with process having been conducted 42 days after the claimant's absence commenced.

48. The grievance outcome letter is dated 7 July 2022 and runs to 5-pages including mediation offered which was not taken up by the claimant. The claimant had access to a union representative, and yet she chose not to issue proceedings following the outcome, despite the fact that the allegations she relied on had taken place in 2021.

The claimant's grievance and the grievance outcome make no mention of Tracy Ford allegedly around 27-28 September 2021, saying to the claimant when she took in her MRI paperwork whilst on sick leave, words to the effect that the Claimant should be at her desk working, rather than in her shop, and asking the occupational health advisor, when the claimant went for an appointment on 17 January 2022, to ask the claimant about her shop.

49. The claimant appealed the outcome.

Grievance appeal meeting 5 September 2022

50. The grievance appeal meeting took place before Bryony Jackson-Doward who concentrated on procedure as opposed to merits and concluded it had not been properly followed in relation to investigating the health and safety complaint and whether the SLMR meeting, which can be held at different points depending on circumstances, was held when it was, concluding "based on the limited information before me I could not validate the lack of contact by Ashley or understand why the SLMR meeting had been held sooner…the site appeared to hold SMRL meetings at 30 to 40 day point. This was not necessarily wrong as there is no hard and fast rule and the policy is clear that the timelines are a guidance.

Complaints about the first chair 21 November 2022

51. Nothing more was said to the respondent about the second bespoke chair until November 2022 when Mathew Armstrong replaced Tracy Ford as the claimant's new team lead manager, who was in turn line managed by Tarryn Buck.

52. In an email sent to Mathew Armstrong the claimant wrote "This email is largely for the record and also to raise the following issues I have with my awful chair…**the seating company have, in their words, given me the 'best' they can…it's neck support I need…Tracy Ford must not have any input whatsoever with anything to do with me**". Mathew Armstrong responded immediately and there followed an exchange of emails. The claimant confirmed "**This chair is the only one that can be supplied as close to my requirements, this is the difficulty**…" Mathew Armstrong made it clear "We can't have you feeling discomfort at work and if the chair is unsuitable we need to meet in a 1:1 to complete a referral to Enable to get them to recommend a more suitable chair for you. **I also think a referral to OH would benefit too, just in case your condition has altered or worsened since the last one was completed**." The claimant responded to this as follows "**Enable have already advised that this chair is the best option and have advised there is no other chair available…I can deal with the OHS**" [the Tribunal's emphasis].

53. Mathew Armstrong offered to look at the options around headrests and the claimant responded "It's not the headrest, its neck support that can't be added…the seat has been built around measurement **but a chair can't be provided due to the work I've had done on my spine…it's been reasonable requests not expecting miracles. So I'll go with OHS initially**" [the Tribunal's emphasis]. It is clear the claimant agreed to an occupational health assessment contrary to allegation 3.1.5 and 4.7.5 which raises credibility issues over the claimant's evidence and her claims.

54. Mathew Armstrong acted promptly once the claimant had raised her complaint, and the bundle reflects a series of email exchanges setting things in motion before lunch on the day the claimant complained. In the claimant's email sent at 12.03 a number of observations were made, and the claimant agreed to the occupational health referral. Mathew Armstrong emailed the claimant on the 25 November 2022 at 10.49 confirming the OHS referral form was "sent off last week."

55. The claimant did not attend the occupational health referral due to personal problems, and occupational health emailed Mathew Armstrong who was informed the claimant had emailed occupational health and she was "not available for an appointment at any time." This is supported by the facts as the claimant continued to refuse occupational health intervention until 10 February 2022, a period of approximately two and a half months.

56. Between late November 2022 until 10 February 2023 the claimant did not make herself available for any occupational health appointment date, and in the email sent to Mathew Armstrong sent 10 February 2023 at 11.57 the claimant wrote "Can you put forward a new date for OHS…I need this sorting…" The Tribunal found delays were all down to the claimant and no blame could be attached to the respondent, who was attempting to obtain the occupational health report in order to resolve the chair issue as agreed with the claimant immediately she raised the problems she was experiencing with the chair.

57. The appeal outcome was sent to the claimant on the 2 December 2022. Bryony Jackson Doward came to a number of conclusions which do not concern the Tribunal, however she found the "SLMR review process" was not followed and "whilst the process does allow for timescales to differ dependent on a number of factor….I cannot find any reason for the SLMR in this case to have happened prior to the process guidelines. Although there has not bene a breach of our process I do not find a justification for holding your SLMR after 42 days – **upheld.**" Despite the claimant alleging that the respondent had deliberately attempted to "put me out of time" in respect of issuing her claim, the claimant took no step to issue proceedings until ACAS early conciliation commenced on the 15 January 2023, despite the allegations going back to 2021. The claimant has not given a satisfactory explanation for this, and her assertion that she did "not want to point the finger" lacked credibility because the claimant had already reported individuals to the police, raised a grievance and appealed the outcome with references to individuals, making it clear that certain managers (Tracy Ford) should have no dealings with her. There was nothing to prevent the claimant from issuing proceedings at any stage.

58. The claimant had not raised any issue concerning the allegation before this Tribunal, namely, on 27-28 September 2021, Tracy Ford, saying to the claimant when she took in her MRI paperwork whilst on sick leave, and asking the occupational health advisor, when the claimant went for an appointment on 17 January 2022, to ask the claimant about her shop at any stage during the appeal process. The claimant had access to a union representative and her evidence before this Tribunal was that she had consulted with ACAS before the 15 January 2023, the date on the early ACAS certificate, and ACAS had not advised her about time limits. The Tribunal did not find the claimant's evidence credible, concluding there was nothing to stop the claimant undertaking ACAS early conciliation earlier and there was no evidence that she had, and nothing to prevent her from issuing proceedings immediately after the grievance

appeal outcome. For no good reason the claimant delayed a further 6 weeks before undergoing ACAS early conciliation on the 15 January 2023 (the date of receipt of the certificate) and over 10 weeks before lodging her claim despite the fact allegations went back to September 2021, approximately 2 years and 4 months before proceedings were issued. As can be evidenced from the claimant's written submissions she was and remains capable of searching the internet on the time limit issue, discussing her case with the union (the claimant remained in employment during this period) and the Tribunal does not accept ACAS did not inform the claimant of time limits.

Allegations 3.1.5 & 4.7.5: Being sent for unnecessary occupational health referrals on 23 February 2023 and 10 March 2023.

2nd occupational health report 21 February 2023

59. The claimant attended a telephone referral with occupational health on the 23 February 2023, the report is incorrectly dated 21 February 2023.

60. The occupational health advisor referred to "a rather complex medical history" and 4 absences with the claimant's back in 2021, she "struggles with prolonged sitting and standing…most of her concerns are regarding the new chair…**as this is a telephone assessment I cannot confirm exactly the issues nor perception…I suggest a physiotherapist (from Vitaheath) look at her posture in her chair to see what the issue are. If the chair remains unsuitable they may wish to consider a suitable alternative…I suggest she does have the opinion of our PH physicians**" [the Tribunal's emphasis]. In oral evidence the claimant's position was that Occupational Health was suggesting the physiotherapist treated her i.e. manipulated her back, and this is why she did not agree to a physiotherapist assessing her at work in the chair. The claimant's evidence was disingenuous and found not to be credible, and it is clear from the contemporaneous documents that what occupational health advised was assessing the claimant in her chair at a face to face meeting as opposed to discussing the difficulties she was experiencing in a telephone consultation. The claimant informed the respondent that what she needed was a chair with a neck rest and not a head rest, and she refused the face to face assessment with a physiotherapist.

61. Occupational health proceeded to arrange a face to face meeting with the claimant which took place on the 10 March 2023.

3rd Occupational health report dated 21 March 2023

62. An accredited specialist in occupational medicine met the claimant face-to-face, recommended that the claimant was fit to continue in her post and she had a reassessment of the chair, with the reasonable adjustments already in place continuing i.e. rest breaks and moving about. It was confirmed that "it may be helpful for a physiotherapist to review her posture in the chair to see what the issues are."

63. On the 22 March 2022 a meeting took place between the claimant and Tarryn Buck to discuss the report and Tarryn Buck arranged with Shape Seating for a further assessment to take place. In an email confirming the position sent to the claimant at 17.04 Tarryn Buck suggested a number of adjustments including a reduction of hours

and annual leave overrides. The claimant confirmed that the "main issue" was a "more supportive neck rest" was needed. An on site assessment was offered to the claimant on the 20 March 2023 by Shape Seating based in Bakewell Derbyshire. The claimant told Shape Seating that she "would much prefer BT to arrange another company due to ongoing difficulties with Shape Seating."

64. The claimant submitted her claim to the Employment Tribunal on 29 March 2023, and she does not raise any allegations of discrimination after the 10 March 2022 Occupational Health referral.

Law

Law: Disability discrimination arising from disability

65. Section 15(1) of the EqA provides-

> (1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B less favourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

66. Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. The EHRC Employment Code indicates that unfavourable treatment should 15 be construed synonymously with 'disadvantage'. It states: 'Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that 20 they are acting in the best interests of a disabled person, they may still treat that person unfavourably' — para 5.7. Taking into account the EHRC guidance the Tribunal concluded as set out below that the claimant was not subjected to unfavourable treatment, and nor could she reasonably consider that she had been taking into account the clear indication given to her by Tracy Ford and Mathew Armstrong that they were trying to assist a return to the workplace, which the Tribunal found was the only conscious and unconscious thought in their minds at the time.

67. Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

1. "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

2. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. The Tribunal examined closely the conscious and unconscious thought process of the respondent's witnesses, particularly Tracy Ford and Mathew Armstrong, who gave evidence before it, concluding the explanations they gave were untainted by disability discrimination.

3. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

4. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. …the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

5. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

68. Whether or not treatment is "unfavourable" is largely question of fact **but this does not depend just on the disabled person's view that he should have been treated better.** In Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65. The Court referenced passages in the Equality and Human Rights Commission's Code of Practice (2011) which provided helpful guidance as to the relatively low threshold of disadvantage ("unfavourable treatment") sufficient to

trigger the requirement to justify the treatment as a proportionate means of achieving a legitimate aim, under the Equality Act 2010, s 15(1).

69. The distinction between conscious/unconscious thought processes (which are relevant to a tribunal's enquiry on a S.15 claim) and the employer's motives for subjecting the claimant to unfavourable treatment (which are not) as described by Simler J in Secretary of State for Justice and anor v 10 Dunn EAT 0234/16 in the following: "…We agree…that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability… [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative 20 discriminator is likely to be necessary'. The enquiry into such thought processes is required to ascertain whether the 'something' that is identified as having arisen as a consequence of that claimant's disability formed any part of the reason why the unfavourable treatment was meted out.

70. In the well-known case of Sheikholeslami v University of Edinburgh [2018] IRLR 1090, the EAT held that the approach to this issue requires :An investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment, then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.

71. The actual disability does not need to be the cause of the unfavourable treatment under s.15 but it needs to be "a significant influence" or "an effective cause of the unfavourable treatment" The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact – Pnaiser cited above.

72. It is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably. The unfavourable treatment must be because of the something which arises out of the disability - Robinson v Department of Work and Pensions [2020] EWCA Civ. 859.

73. Ms Page referred to the case of British Telecommunications plc v Robertson UKEAT/0229/20 where the EAT recognised that the Tribunal findings must be specific that when it comes to the causative link, rather than a broad brush. The Respondent would argue that this causation could not be established.

Objective justification

74. A legitimate aim for the purposes of S.15 of the EqA should not be discriminatory in itself and should represent a real, objective consideration. Case law has recognised a range of legitimate aims, including health and safety and the operational needs of the business.

75. The test of justification in S.15(1)(b) requires that the treatment complained of amounts to a proportionate means of achieving a legitimate aim. weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end.

76. The EHRC Employment Code sets out guidance on objective justification that largely reflects existing case law in this area. In short, the aim pursued should be legal, should not be discriminatory in itself, and should represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31). In short, the aim pursued should be legal, should not be discriminatory in itself, and must represent a real, objective consideration — para 4.28.

77. Ms Page referred to Land Registry v Houghton and others UKEAT/0149/14) and Kelly v Royal Mail Group Ltd EAT 0262/18) on the issue of less severe alternatives and proportionality. In Houghton HHJ Peter Clark referred to the "classic test propounded by Balcombe LJ in Hampson v DES [1989] ICR 179 at 191E: "… "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition" [para.8]. In Kelly (above) the EAT held that "ensuring that there is a reliable pattern of attendance on the part of the Respondent's employees. The Tribunal correctly considered that to be a legitimate aim. It also considered that the Claimant's dismissal was in furtherance of that aim because the Respondent did not have confidence that he would provide reliable attendance" [para.67B].

78. The Tribunal was also referred to Hardy & Hansons plc v Lax [2005] ICR 1565 when considering the question of justification of the discrimination arising from disability it is incumbent upon an Employment Tribunal to make a proper and clear assessment of the proportionality between the discriminatory effect of the challenged provision and the need of the employer to proceed in the way that that employer has. The Court of Appeal emphasised the importance of that critical evaluation. In paras. 28 to 34 Pill LJ referred to the appraisal of the competing requirements of the employer and the employee as being an appraisal requiring considerable skill and insight: "33. … As this court has recognised in Allonby [2001] ICR 1189 and in Cadman [2005] ICR 1546, a critical evaluation is required…the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification. 34….a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."

79. The claimant referred to Hensman v Ministry of Defence UKEAT/0067/14/DM [2014] EqLR 670, the EAT applied the justification test as described in Hardy to a claim of discrimination under s.15 EqA. Singh J. held that when assessing proportionality, while an ET must reach its own judgment, which must in turn be based on a fair and detailed analysis of the working practices and business considerations involved,

having particular regard to the business needs of the employer. This was subsequently applied in Monmouthshire County Council v Harris UKEAT/0010/15 (23 October 2015, unreported)).

80. On the question of proportionality the claimant referred to MacCulloch v ICI plc [2008] IRLR 846 [2008] ICR 1334 and Hampson v Department of Education and Science [1989] IRLR 69, [1990] ICR 511. Tribunal notes that para.10 summarised the legal principles, namely, that the burden is on the respondent to establish justification and the measures "must 'correspond to a real need that are appropriate with a view to achieving the objectives pursued and are necessary to that end…necessary means 'reasonably necessary. The principle of proportionality requires an objective balance struck between the discriminatory effect of the measure and the needs of the undertaking." Hardys above was referenced.

81. The claimant also referred to Allonby v Accrington and Rossendale College [2001] IRLR 364, [2001] ICR 1189 and Ladele v London Borough of Islington [2009] EWCA Civ 1357, [2010] IRLR 211, [2010] ICR 532, (para 45)), but did not explain how this was relevant to her claims.

82. The claimant referred to the EAT judgment in Chief Constable of West Midlands Police v Harrod [2015] IRLR 790. It is notable that in the EAT judgment UKEAT/0189/14/DA at para. 40 and 41 it was held that the Tribunal should not "impermissibly focus" on the respondent's decision making process "…What has to be shown to be justified is the outcome, not the process by which it is achieved. For just the same reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. The Court of Appeal in Harrod & Ors v Chief Constable of West Midlands Police & Ors, Court of Appeal, 24 March 201 in deciding whether a measure is legitimate and proportionate, referred to the decision in Land Registry v Benson that highlighted that the test should be whether the measure was *reasonably necessary* and not whether it was one of *absolute necessity*. The analysis in that case, which the Court of Appeal agreed with, was that an employer's decision about how to allocate its resources, and specifically its financial resources, can still constitute a legitimate aim, even when shown that a different allocation with a lesser impact on the class of employee in question could have been made.

Disability discrimination – failure to make reasonable adjustments.

18 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first 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. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA.

19 In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

20 In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA, the Court of Appeal held that the duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.

21 The claimant referred a number of cases relating to her arguments about PCP's including the Court of Appeal decision Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 referencing Elias J. without providing a copy of the case submitting this was relevant to the tier 2 review when it was not included as a failure to make reasonable adjustments claim by the claimant who exclusively relied on the failure to provide a chair as an auxiliary aid reflected in the agreed list of issues. The claimant's submission that "the proper investigation of an employee's grievances and provision of an outcome to enable the employee to return to a safe and discrimination free environment at work amount to a reasonable adjustment? Yes, said the EAT in Lamb v The Business Academy Bexley UKEAT/0226/15/JOJ" was not a claim she was bringing as reflected in the list of issues and her grounds of complaint.

Lack of auxiliary aid: a specialist chair built for the claimant.

22 In submissions the claimant has referred to PCP's and makes reference to a number of allegations that have not been included in her claims or the agreed list of issues. As discussed with the parties a PCP is not required in this case given the claimant's section 20-21 claim is limited to the specialist chair issue which comes under the definition of auxiliary aid. The duty arises where the lack of auxiliary aid puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled – ss.20(3) & (5) EA 2010.

23 A substantial disadvantage is one which is more than minor or trivial – s.212(1) EqA 2010. The ET must be satisfied that the PCP has placed the disabled person not simply at some disadvantage viewed generally, but at a disadvantage which is substantial - Royal Bank of Scotland v Ashton [2011] ICR 632.

24 The claimant submitted that an auxiliary aid can be a chair to rest and the Tribunal agreed with her.

25 The claimant also referred to a non-binding first instance decision Barrow v Kellogg Brown & Root (UK) Ltd [2021] 2303683/2018 decided on different facts.

Reasonableness of adjustments

26 The statutory duty is for R to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" imports an objective standard - Smith v Churchills Stairlifts plc [2005] EWCA 1220. It is important to identify precisely the step which could remove the substantial disadvantage complained of. In the Tribunal's view this one a key issue in Ms Walsh's case, and as can be seen from the conclusions below, it was satisfied on the balance of probabilities that the respondent took all reasonable steps open to it at the time.

Harassment

83. The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

84. Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and the conduct has the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B — S.26(1)(b).

85. The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

86. S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had. This test is relevant to Ms Walsh who did not want to take part in a first tier 2 review meeting to discuss her health, working in her business and reasonable adjustments that could be put in place by the respondent, but it was not objectively reasonable for her to allege the invite to a first tier 2 review meeting had the proscribed effect under section 26.

87. In order to decide whether any conduct has either of the proscribed effects under s.26 (1)(b) EA 2010, the ET must consider both (by reason of s. 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of s.4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). All the other circumstances must also be taken into account (s.4(b)) - Pemberton v Inwood [2018] EWCA Civ 564.

88. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended - **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336. A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. Three essential elements for a claim of harassment to be proved as follows:

a. unwanted conduct

b. that has the prescribed purpose or effect, and

c. which relates to a relevant protected characteristic.

89. It is accepted by the Respondent that a one off event can lead to harassment, although it must be sufficiently serious in order to do so: Henderson v General Municipal and Boilermakers Union [2017] IRLR 340, CA and Insitu Cleaning Co v Heads [1995] IRLR 4.

90. The claimant referred to the Supreme Court decision in Hayes v Willoughby [2013] UKSC 17. Which deals with the Protection from Harassment Act 1997 and not the Equality Act 2010 submitting that harassment requires a "rational belief."

Related to a protected characteristic.

91. This is a very broad test, but some guidance about how the Tribunal should approach the issue was provided in UNITE the Union v Nailard [2018] EWCA Civ. 1203. It should make findings as to the mental processes of the alleged harassers.

92. Whilst the view of a claimant might be that the conduct related to the protected characteristic is relevant, it is not determinative - Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 *EAT.* The ET has to apply an objective test in determining whether the conduct was related to the protected characteristic in issue. The intention of the actors concerned might form part of the relevant circumstances, but it is not the only factor.

Burden of proof

93. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

94. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v

CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

95. Ms Page referred to Project Management Institute v Latif [2007] IRLR 579 and Madarassy v Normura International Plc [2007] EWCA 33, at para 56, the Court of Appeal made it clear that:

> "the bare facts of the a difference in status and a difference in treatment indicate only a possibility of discrimination. They are not, without more, sufficient material, from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination." At para 58 the Court of Appeal emphasised that "The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the Respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant."

Conclusion – applying the law to the facts.

96. The Tribunal discussed the claimant's written submissions with her before oral submissions were made, acknowledging that she had worked hard at producing the written submission with numerous references to case law and arguments concerning difficult legal principles that were not easy to understand by employment practitioners. The claimant has done her very best as a litigant in person. The Tribunal discussed with the claimant that a number of the points she raised and cases referred to are irrelevant to the issues in this case, for example, there is no issue with vicarious liability, employment status, knowledge was not in dispute, indirect discrimination (which is also referenced in the claimant's statement) was not a claim before the Tribunal, disability status is not in issue, the duty to make adjustments does not include the definition of a provision, criterion or practice as the claimant is relying on a lack of auxiliary aid only, namely, a suitable chair and the case law she refers to in written submissions on these matters is not relevant.

97. In written submissions the claimant also refers to a claim that in June (no year was given) she had requested early ill-health retirement and the respondent's "duty of care" to avoid causing injury to employees" a claim that was new, had not been pleaded and was not included in the agreed list of issues, as a consequence the Tribunal cannot resolve this issue.

98. Finally, the claimant referred to the legal test involving a fundamental breach of the implied term of trust and confidence and repudiation of the employment contract including a constructive unfair dismissal when the claimant had not been expressly dismissed and nor had she resigned and claimed constructive unfair dismissal at the time these proceedings were issued. The relevant period referenced in the agreed list of issues was insisted on by the claimant at the outset of this liability hearing as the correct period in which the alleged acts of discrimination occurred, and as can be seen in the agreed list of issues dismissal, whether actual or constructive, was not and could not be an issue taking into account the agreed position between the parties that the claimant continued in her employment after the relevant period.

Time limits

99. With reference to the first issue, namely, has the claimant brought her discrimination claims within the time limit set by Section 123(1) of the Equality Act 2010, it was not accepted by the claimant that she had failed to issue proceedings in time, relying on her argument that there was a continuing act on the part of the respondent. The claimant explained that it had failed in its duty to make reasonable adjustments beyond the 29 March 2023 right up to the time she resigned. She submitted that the earlier allegations were part of a continuous act because it went on for so long, and when asked on more than one occasion by the Tribunal to explain why she believed it was just and equitable to extend time for allegations 3.1.3, 3.1.4, 4.7.3 and 4.7.4 the claimant repeated that as they were part of a continuous act it was just and equitable to extend time, and she was unable to offer the Tribunal a coherent explanation for why the claims were not issued in time other than she did not want to point the finger at anyone and ACAS had not informed her of the time limits. The reference to ACAS not advising on time limits was not credible, and the Tribunal concluded that there was nothing to prevent the claimant, who was aware of her employment rights at the time, had access to union representation and was more than capable of carrying out her own research, from issuing proceedings within the statutory limitation period.

100. With reference to the agreed issues, namely,

3.1.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates, the only claim that was made in time was the allegation that the claimant was sent unnecessary occupational health referrals on 23 February 2023 and 10 March 2023 (added by amendment, following application made on 26 May 2023). The claimant commenced ACAS conciliation on 15 January 2023 and a certificate was presented on 8 February 2023. The ET1 was presented on 18 February 2023. Allegation 3.1.4 is over one year out of time, and 3.1.3 is 10 months out of time.

1.2.1 If not, was there conduct extending over a period? The claimant confirmed that she was relying on conduct extending over a period of time, and the Tribunal found there was no such conduct based on its findings of facts above. Ms Page referred the Tribunal to a number of cases including Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, *CA*. It set out that Tribunals should look at the substance of the complaints and determine whether they can be said to be part of one

continuing act by the employer. Ms Page submitted that the substance of the acts is distinct and cannot be said to be a continuing act. The Tribunal agreed, taking into account a number of factors, not least, that the alleged discrimination was carried out by different people, including Mathew Armstrong, who took over management of the team (and claimant) on 1 November 2022 with no evidence of any previous dealings or conspiracy on the part of managers: Aziz v FDA 2010 EWCA Civ 304, CA. The Tribunal agreed with Ms Page that the allegation at 3.1.3 was a "one-off comment" allegedly made on 17 January 2021 with no repeat, and the requirement to attend a first tier review meeting on the 28 September 2021 at a stage earlier than usual was one incident, and as submitted by Ms Page, the claimant was not taken down the absence route.

1.2.2 With reference to the issue why were the complaints not made to the Tribunal in time, the claimant, who was aware of her legal rights and the statutory time limits, explained she chose not to issue proceedings in time because she did not want to "point the finger." There are credibility issues with this explanation given the claimant raised a grievance and reported individuals to the police at the time, and the Tribunal concluded the claimant had no intention of issuing proceedings until much later when it became clear that the settlement she was seeking (as evidenced in the contemporaneous documents) was not forthcoming and the respondent was doing everything it could to get her back into work, even to the extent of accepting the claimant was working in her own business when absent on certified sick leave when the MED3 made no mention of any adjustments despite the fact that the claimant was capable of working on her own account.

1.2.3 The key issue in this case is whether it was just and equitable in all the circumstances to extend time, and the Tribunal found that it was not having assessed all the relevant factors including the length of, and the reasons for, the delay: Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 per Underhill LJ at [37]. He referred to the decision made by the Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 .

1.2.4 There has been recent judgments confirming the Tribunal should not "slavishly" follow the checklist derived from British Coal Corporation v Keeble. The Tribunal has not, although it has taken into account a number of factors, for example, at paragraph 10, the reason for and the extent of the delay and the balance of prejudice to the parties. Reasons for the delay have to be capable of being established by the evidence. They need not, as the authorities show us, be direct evidence from the claimant but may be inferred, but some evidence there must be. Given that the claimant took the decision not to issue proceedings until much later, which included allegations that had been omitted from the claimant's grievance, for example, allegation 3.1.3. the Tribunal concluded that the reasons given were unsatisfactory. The Tribunal took into account in its assessment the fact the claimant had raised a grievance complaining about a number of matters that went to an appeal, before deciding that given the time lapse

and the claimant's confusion about whether the team leader had asked occupational health to question the claimant about her shop, and its assessment of the strength of claimant's claims given its conclusion that the claimant had not discharged the burden of proof (see below), it was not just and equitable to extend the time limit. The balance of hardship fell in favour of the respondent having to defend an unmeritorious weak claim where on the face of it the claimant cannot even establish that an unknown person (previously described as her team leader who was Tracy ford at the time) asked occupational health to raise questions about the claimant's business, and even had she established this, it was difficulty to discern any link to her protected characteristic of disability.

101. In Bexley Community Centre v Robertson [2003] IRLR 434 at paragraph 25: it is for the applicant to make that case, and the Tribunal concluded the claimant has failed to make a case that it should use its wide discretion to extend the time limits in the specific circumstances of this case given the finality and certainty of the time bar and the lack of a credible explanation especially in relation to ACAS advice concerning time limits against a background of the claimant being aware of her legal rights and having access to union assistance.

102. With reference to the issue, namely, in any event, is it just and equitable in all the circumstances to extend time, the Tribunal found that it was not and allegations numbered 3.1.3, 3.1.4, 4.7.3 and 4.7.4 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done)and are dismissed on the basis that it had not jurisdiction to consider the complaint.

103. In the event of the Tribunal being wrong in respect of time limits it has considered the substantive claims as recorded below, which in the alternative would have been dismissed on their merits.

104. Having found the disability discrimination complaints numbered 3.1.3, 3.1.4, 4.7.3 and 4.7.4 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) were received out of time and dismissed, in the alternative, the Tribunal proceeded to consider the allegations of discrimination including those that were in time, namely, 3.1.5 and 4.7.5. In relation to all allegations that Tribunal found the claimant had not discharged the burden of proof.

Burden of proof

105. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The claimant has failed to prove primary facts from which inferences of unlawful discrimination can be drawn in the section 15 and section 26 complaints to shift the burden of proof to the respondent to provide an explanation untainted by disability. The bare facts relied on by the claimant, i.e. being asked to attend an first tier review meeting early, being asked questions by occupational health about the business she was working in whilst signed off too ill to work for the respondent and being asked to attend two referrals to occupational health, the first she had agreed to

and actively sought, and the second suggested by occupational health who wanted to see her in person as opposed to a telephone assessment, did not even indicate the possibility of discrimination: Madarassy (above).

106. If the Tribunal is wrong in its assessment of the burden of proof it would have found, in the alternative, that had the burden shifted (which it did not) the respondent's explanation was untainted by disability discrimination and in respect of the section 15 complaint, that if there was unfavourable treatment because of something arising in consequence of the disability, the respondent has satisfied the burden of proving that the claimant's treatment was a proportionate means of achieving a legitimate aim for the reasons set out below.

107. The claimant has shifted the burden of proof in relation to the section 20-21 complaint, establishing that a duty to make reasonable adjustments had arisen in connection with the provision of a specialist chair, and there are facts from which it could be reasonably be inferred, in the absence of an explanation, that the respondent's duty of care had been breached. The Tribunal, rejecting Ms Page's argument that the burden of proof had not shifted, accepted that providing a specialised chair was a reasonable adjustment and on the face of it there was a period when the claimant did not have a suitable specialised chair, consequently, the burden of proof is reversed and the Tribunal considered the respondent's explanation in order that it could assess whether the provision of the chair *could reasonably be achieved or not in the specific circumstances of this case;* Project Management Institute v Latif (above) concluding the respondent's explanation was not tainted by disability discrimination.

108. The Tribunal's starting point is the concessions made by the respondent that the Claimant's sickness absence between 24 August 2021 and 4 March 2022? arose in consequence of the Claimant's disability: (relevant to the section 15 complaint) and also the Claimant's need for a chair adapted for her disability from 4 March 2022 to 29 March 2023 (relevant to the section 20-21 complaint). Turning to the individual complaints:

108.1 The Claimant's team leader asking the occupational health advisor, when the claimant went for an appointment on 17 January 2022, to ask the claimant about her shop. That event did not take place. The claimant accepted during the liability hearing that her team leader had not asked occupational health this question. It was not in the referral form, it was not in the report and the claimant did not object to the report when it made no reference to it to the claimant working in her own business, and nor did the claimant raise any issue at the time with the respondent.

108.2 Requiring the claimant, by a letter dated 28 September 2021, to attend a first tier 2 review meeting, at a stage earlier than usual, the Tribunal found that it was not at a stage earlier than usual and the claimant was aware of the possibility that she could be invited to a health review meeting earlier than 90-days from the start of her absence on the basis that she had attended a meeting to discuss her health and return to the workplace in 2016. On the balance of probabilities the Tribunal found, taking into account the undisputed evidence that the claimant had attended a health review meeting earlier than 90-days from the start of her absence previously, that the process was

flexible and the North West/Lancaster office held such meetings within 30 to 40 days of absence. The Tribunal accepted as credible Tracy Ford's evidence given on cross-examination that she invited the claimant to the meeting because she had missed calls from the claimant. The Tribunal also found that Tracy Ford became aware of the fact the claimant was working in her own business, which she wanted to explore with the claimant and further information was required. It is notable that the 7 October "SLMR" meeting entailed a discussion about the claimant's health and how she could work in her shop but not in the respondent's business with a view to replicating similar adjustments. It is also notable that the claimant was antagonistic about discussing working practices in her own business, making threats and reporting individuals to the police when the respondent was entitled to explore the issue with her, not with any disciplinary investigation in mind, but with the intention of duplicating the adjustments she needed enabling her to successfully work in her shop within the respondent's business. The fact that Ms Jackson-Doward's opinion was that the claimant was invited to the meeting a stage earlier than she would have invited her and found in favour on this issue at appeal, was taken into account when the Tribunal reached the decision on the balance of probabilities the claimant was not invited to a first tier review meeting at a stage earlier than usual.

108.3 Being sent for unnecessary occupational health referrals on 23 February 2023 and 10 March 2023, the Tribunal found that the claimant had agreed to an occupational health referral when she complained about the new chair to Mathew Armstrong on the 21 November 2022 as set out in the findings of facts. It is notable that the occupational health referral did not take place until the 23 February 2023 due to the claimant refusing to take part in the process for personal issues, and there was a period of approximately 3-months before the claimant asked Mathew Armstrong for "a new date for OHS…I need this sorting…" The claimant recognised that she needed OHS input, and following the appointment on the 23 February 2023 occupational health and not Mathew Armstrong decided to schedule the second appointment for 10 March 2023 as a follow up from the first referral that originated as far back as November 2022. The referral was necessary and continued to be necessary given the claimant's objections to the specialist chair and the complexity of her medical conditions evidenced by the numerous emails she sent complaining about the effects of her disability and specialist chair.

108.4 With reference to issue 3.2, namely, was that unwanted conduct, the Tribunal found the claimant did not want to attend a first tier review meeting and asked questions about her health against a background of her continuing to work in her own business. She was aware from past experience that it was not at a stage earlier than usual and the meeting was to discuss her health and not an exit from the business, in contrast to the less than credible evidence given by the claimant that it was a percussor to her dismissal and she was upset over the contents of the invite letter. This was not how the claimant initially put her claim, which was she was invited to a first tier 2 review meeting at a stage earlier than usual, and not that the invite letter included an oblique reference to dismissal. In short, objectively assessed, it was not reasonable for the claimant to allege the act of inviting her to a

meeting to discuss reasonable adjustments and her health had the proscribed effect under section 26 taking into account her perception which included the fact that she was working in her own business at the time and the clear message in the letter of invite that it was to be a supportive meeting, which it transpired to be as a matter of fact given Mathew Armstrong's motivation and mental processes reveal his purpose and effect was to support and find a way of meeting the claimant's needs for adjustments which enabled her to work elsewhere.

Purpose/effect of conduct

108.5 S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had. The Tribunal did not accept as credible the claimant's evidence that the proscribed effects under s.26(1)(b) had been met, and it was not reasonable for the conduct to be regarded as having that effect objectively assessed, given the factual matrix– Pemberton (above). Mathew Armstrong's intention was to support the claimant and this would have been clear to the claimant at the time - Richmond Pharmacology v Dhaliwal (above).

108.6 The invite to the meeting followed the respondent's processes known to the claimant, and the Tribunal did not accept at the time the claimant felt she was being threatened by dismissal. It was made clear to the claimant that the meeting was to discuss adjustments and support/facilitate a return to work and neither the letter nor the meeting held on the 7 October 2021 (after the claimant had been absent for approximately 5-weeks) had the proscribed effect required to satisfy a section 26 complaint.

108.7 In relation to allegation 3.5 the claimant agreed to this course of action, acknowledging that occupational report was needed. This allegation raised a credibility issue with the claimant, who was prepared to argue any point to further her claim, when it was clear from contemporaneous documents that she understand and agreed the course of action, supported by occupational health advice in what was described as "complex medical case."

Discrimination arising from disability: Equality Act 2010 s15.

109. With reference to the issue 4.7.3, the Tribunal found referring to its findings of facts above in relation to the matters set out at para. 4.7.3 the factual allegation was not proven.

110. With reference to issue 4.2.4 requiring the claimant, by a letter dated 28 September 2021, to attend a first tier 2 review meeting, at a stage earlier than usual, for the reasons already given the Tribunal did not accept the review meeting was a stage earlier than usual. However, the Tribunal does accept that the claimant was

invited to the first tier review meeting as a result of her sickness absence pre-dating the invite letter coupled with the fact that during that absence she was working elsewhere whilst signed off by a GP in a MED3 with all adjustments struck out. Given the respondent's concession that her disability caused the absence, the Tribunal was satisfied that the claimant was invited to the first tier 2 review meeting because of her absence and the fact that she was working elsewhere at the time. It was not satisfied the claimant was invited to occupational health referrals on 23 February 2023 and 10 March 2023 because of her absence, the reason for the referrals was due to her informing the respondent of the changes to her health and chair requirements after treatment and the problems she was experiencing with the specialist chair provided to her.

111. With reference to the issue, namely, has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things, the Tribunal concluded that she had not, and there is nothing to suggest any disadvantage to the claimant in being asked to attend a meeting to discuss her health conditions and reasonable adjustments, and being referred to occupational health for a report which the claimant disregarded in any event, as she refused the suggestion that a physiotherapist viewed her using the chair supplied in order to advise further. In the alternative, the Tribunal considered in the alternative, whether the treatment was a proportionate means of achieving a legitimate aim, concluding that it was.

112. With reference to the issue was the treatment a proportionate means of achieving a legitimate aim the aims of the respondent were managing sickness absence in the workplace as this impacted on other people the claimant's team (accepted by the claimant) that could in turn directly impact on delivering the required level of customer service given the claimant was in a customer services role. Taking into It was particularly proportionate bearing in mind the claimant was working in her own business whilst absent with no reasonable adjustments suggested by her GP, and she refused to provide information about the work she actually carried out in order that the respondent could assess what adjustments were working for the claimant in her business with a view to adopting similar to claimant's role in its business. The claimant's response to the request for information was to threaten, report the matter to the police and raise a grievance making it clear she would seek redress in some way.

113. The Tribunal found that the respondent's treatment of the claimant was an appropriate and reasonably necessary way to achieve those aims; there was nothing less discriminatory that could have been done instead and needs of the claimant and the respondent were balanced taking into account the risk to the claimant's health, the reasonable adjustments made and the attempt to leave no stone unturn to support her with the specialist chair evidenced by the attempts to get to the bottom of what adjustments the claimant needed including the build the specialist chair should take as advised by experts. The legitimate aim was also meeting the duty of care owed by the respondent to the claimant not to exacerbate her medical conditions by putting in place a myriad of other adjustments including paid time off work, managing absence which had an impact on other employees and the operational needs of the business, coupled with the adverse effect of the claimant's contractual role on her disability, and the problems she reported experiencing.

114. If so, with reference to the issue, namely, was it a proportionate means of achieving that aim, the Tribunal found that it was. As indicated above, the test of justification in S.15(1)(b) requires that the treatment complained of amounts to a proportionate means of achieving a legitimate aim, the Tribunal weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end. Taking into account the EHRC guidance and the need for the Tribunal to carry out a balancing exercise, the Tribunal concluded the respondent had acted proportionately against a background of making a raft of reasonable adjustments for the claimant, seeking occupational health advice, undertaking absence meetings to understand and make suggestions to the claimant of support that included, had the claimant chosen to share her experience of working in her own business, what she did to manage her condition then. There were no less discriminatory measures available to the respondent in the circumstances of this case, and it was not proportionate given the legitimate aims, for the claimant not to have been managed, especially given the impact of the specialist chair, the need for the respondent to understand this and set in hand measures to protect the claimant, which it did albeit she rejected a number of positive steps going forward, such as meeting up in situ with a physiotherapist to discuss the chair and her posture. The aim pursued was legal, not discriminatory in itself, represented a real, objective consideration and the means were proportionate.

<u>Failure to make reasonable adjustments.</u>

115. With reference to the issue, did the lack of an auxiliary aid, namely a chair which was suitable for the claimant's back and neck problems, put the claimant at a substantial disadvantage, without such a chair, the claimant was unable to do a normal days work, the Tribunal found that the claimant was put at a substantial disadvantage whilst she had no appropriate chair as she found it difficult to carry out her role without feeling pain and discomfort. The Tribunal as indicated above is aware of the raft of adjustments put in place for the claimant, such as breaks and so on, which are not in dispute in this case. It is accepted by the Respondent would be reasonably expected to know that the Claimant would be placed at the disadvantage in the event of a suitable chair not being provided.

116. The statutory duty is for the respondent to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" imports an objective standard – <u>Smith</u> (above). The key issue is did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage. The claimant says that the respondent should have provided her with a suitable chair earlier than it did although she has not specified when by. The Tribunal did not agree with the claimant. It found on the balance of probabilities that the respondent made every reasonable attempt to do so. It does not intend to repeat the findings of facts above which sets out some of the steps taken by the respondent, including instructing specialists to build the chair experts had deemed suitable. A chair takes time to build, and before the respondent even gets to that stage input is required from experts and the claimant to establish the suitability of a particular chair. Once the matter has been

referred to the experts and chair producer it is to a large extent out of the respondent 's hands. The Tribunal found the respondent acted quickly and was reactive, as demonstrated in all of the emails. It was the claimant who was putting obstacles up and causing delay even to the extent of refusing to follow occupational health advice including being reviewed in her chair by a physiotherapist. The respondent once they had the information they needed from the claimant acted urgently at every stage. The Tribunal concluded that the respondent could not be faulted given the steps they took in relation to the specialist chairs taking into account the factual matrix including the fact that they had little control over the external provider and the assessor despite chasing, for example, on 19 July 2022 when priority was requested.

117. The claimant offered up no evidence for her "claim for other payments" and confirmed she had received all payments. This claim was not included as an issue in the agreed list, and has been dismissed.

118. In conclusion, the claimant's claims of discrimination brought under section 15 and 26 of the Equality act 2010 set out in allegations 3.1.1, 3.1.2, 4.7.1 and 4.7.2 are dismissed on withdrawal by the claimant. The claimant's claim of disability discrimination brought under section 15 and 26 of the Equality Act 2010 set out in allegations 3.1.3, 3.1.4, 4.7.3 and 4.7.4 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) the last date being the 28 September 2021. ACAS early conciliation commenced on the 15 January 2023, the certificate was issued on the 8 February 2023 and claim form presented on the 18 February 2023. The complaints are out of time and in all the circumstances of the case it is not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complains which are dismissed.

119. In the alternative, the claimant's claims of unlawful direct discrimination brought under section 15 and section 26 of the Equality Act 2010 and set out in set out in allegations 3.1.3, 3.1.4, 4.7.3 and 4.7.4 are dismissed. The claimant was not treated less favourably because of something arising in consequence of her disability and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed. The respondent's conduct did not have the proscribed affect under section 26 of the Equality Act 2010, the claimant's claims of harassment fail and are dismissed.

120. The claimant's claims of disability discrimination brought under section 15 and section 26 of the Equality Act 2010 and set out in set out in allegations 3.1.5 and 4.7.5 are dismissed. The claimant was not treated unfavourably because of something arising in consequence of her disability and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed. The respondent's conduct did not have the proscribed affect under section 26 of the Equality Act 2010, the claimant's claims of harassment fail and are dismissed.

121. The respondent was not in breach of its duty to make reasonable adjustments and the claimant's claim brought under section 20-21 of the Equality Act 2010 is dismissed.

122. The claim for "other payments" is dismissed.

Employment Judge Shotter
19.4.24

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

24 April 2024

FOR THE SECRETARY OF THE TRIBUNALS