EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Hulya Findik	**v**	**The Secretary of State for Justice**

Heard at: Bury St Edmunds (Virtual Region)

On: 8 to 12 January 2024, and on 31 January 2024 and 1 February (in Chambers)

Before: Employment Judge Bedeau
Members: Ms A Buck
Ms L Durrant

Appearances

For the Claimant: Ms C Ibbotson, counsel
For the Respondent: Ms S Cummings, counsel

RESERVED JUDGMENT

1. The claim of discrimination arising in consequence of disability is well-founded.

2. The claim of failure in the duty to make reasonable adjustments is well-founded.

3. The case is listed for a remedy hearing on Thursday 13 June 2024, at 10.00am, by Cloud Video Platform, if not settled.

REASONS

1. By a claim form presented to the tribunal on 20 August 2021, the claimant made claims of disability discrimination and notice pay arising out of her employment with the respondent as an Administration Officer.

2. In the response presented on 20 October 2021, her claims are denied. The respondent averred that the claims were unparticularised and requested further and better particulars. Further and better particulars were served on or around 10 July 2022.

3. At the preliminary hearing held on 21 October 2022, before Employment Judge K Palmer, some of the claimant's amendments were allowed. However, her application to amend by adding the new claim of harassment related to disability, was refused. At that hearing the issues were clarified.

4. There was a further preliminary hearing on 20 January 2023, before Employment Judge Maxwell, when further case management orders were issued.

5. Before us, on the second day of the hearing, the claimant applied to amend her failure to make reasonable adjustments claim by broadening the period during which she alleged she suffered a substantial disadvantage when the respondent applied the provision, criterion or practice of requiring staff to undertake urgent action work. Having considered the submissions by Ms Ibbotson, counsel on behalf of the claimant, and Ms Cummings, counsel on behalf of the respondent, the application was refused, and reasons were given orally.

The issues

6. The issues as agreed between the parties are set out below:

"Jurisdiction (discrimination claims brought under the Equality Act 2010)

1. Were all of the Claimant's complaints presented within the time limits set out in s. 123(1)(a) and (b) EqA 2010? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred?

Disability (s. 6 Equality Act 2020)

2. The Respondent admits that the Claimant was disabled by reason of three slipped disks in the neck.

3. Did the Claimant have the following physical or mental impairments at the material time?

3.1. Misophonia

3.2. Fibromyalgia

4. If so, did the impairment(s) have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

5. If so, was that effect long-term?

Discrimination arising from disability (s. 15 Equality Act 2010)

6. Did the Respondent subject the Claimant to the following unfavourable treatment?

6.1. On 15 March 2021, Theresa Williamson issued the Claimant with a First Written Warning lasting for 12 months;

6.2. On 22 April 2021, Melanie Hill confirmed the decision to issue the First Written Warning when she dismissed the Claimant's appeal.

7. What was the "something" arising in consequence of the Claimant's disabilities (slipped disks and fibromyalgia)?

7.1. The Claimant relies on her disability related sickness absence on 7 August 2020 – 23 August 2020 (back pain), 27 August 2020 – 2 September 2020 (back/neck pain), 25 November 2020 – 27 November 2020 (back/neck pain), 10 December 2020 (back/neck pain).

8. Was the reason for the unfavourable treatment the "something" arising in consequence of the Claimant's disabilities?

9. Can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following legitimate aims:

9.1. The need to ensure the effective running of the Respondent's work obligations and operations by managing employees' absence;

9.2. The need to ensure an effective workforce.

10. Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant had a disability?

Failure to make reasonable adjustments (s. 20 and 21 Equality Act 2010)

Auxiliary aids

11. Did the Respondent fail to provide the following auxiliary aids to the Claimant?

11.1. From 25 May 2020, ergonomic equipment for home working (specifically, an ergonomic chair, an ergonomic keyboard, a separate screen, a tilted document holder, a footrest, and a telephone headset):

a) Keyboard supplied (at home) 29 November 2021;

b) Separate screen, tilted document holder, footrest, telephone headset supplied (at home) 14 January 2021;

11.2. Between July 2020 and 1 December 2020, a private office (i.e., a room., with a door and which the Claimant would not have to share with any colleagues) or a cubical / pod within an open office, (in either case located away from drafts, the tannoy, printers and other noises);

11.3. Between 29 May 2020 and a date before 5 May 2021, ergonomic hardware and software ('dragon') on the Claimant's home working laptop;

11.4. Between 24 November 2020 and a date on or around 5 May 2021 functioning ergonomic software ('dragon') on the Claimant's office PC.

12. Did the lack of the auxiliary aids put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The Claimant relies on the following substantial disadvantage, in turn:

With regards to the ergonomic equipment the Claimant:

12.1. Had to crouch over her laptop which triggered neck, shoulder, arm and back pain;

12.2. Was unable to carry out her role properly or at all due to the pain caused by crouching over her laptop;

12.3. Was absent from work due to flare-ups in her neck pain and fibromyalgia caused by the failure to provide the ergonomic equipment;

12.4. Was issued with a First Written Warning due to the absences caused by the flare-ups.

With regards to the private office or cubical / pod:

12.5. The Claimant's Misophonia is likely to be triggered in an open office which could ultimately result in uncontrollable emotional and physical reflex, involuntary muscle spasms, anxiety, and tightening of the muscles, which can ultimately lead to a panic attack and Sound Therapy Treatment interruption;

12.6. The Claimant was absent from work due to the Respondent's failure to provide a private office or cubical / pod.

12.7. With regards to the ergonomic software, the Claimant was unable to use her office PC, and home lap-top comfortably, even with the ergonomic equipment, without the software, such that she was unable to carry out her role properly.

13. Would it have been reasonable for the Respondent to provide any of the auxiliary aids listed above?

14. Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

<u>PCPs</u>

15. Did the Respondent apply the following provision, criteria and/or practice ("PCP")?

15.1. The requirements of the role of Administrative Officer, namely, undertaking duties which require urgent action;

15.2. Requiring employees to attend the workplace in line with the rota system;

15.3. Requiring that employees maintain a certain level of attendance at work in order to avoid sanctions.

16. Did the application of any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The Claimant relies on the following substantial disadvantage, in turn:

16.1. Between 25 May 2020 and April 2021, urgent tasks caused the Claimant stress which could potentially trigger all of her disabilities**;**

16.2. When the Claimant experienced flare-ups of her fibromyalgia and her Misophonia, commuting to the workplace made her feel unsafe, and commuting to the workplace and attending the workplace made her symptoms worse (pain/dizziness etc), sometimes causing her Sound Therapy Treatment to be interrupted (as she could not wear her hearing aids) so prolonging her recovery.

16.3. The Claimant's disabilities increased her likelihood of absence from work such as to render her more likely to be sanctioned, and she was issued with a First Written Warning on 15 March 2021 due to disability related absence, which was upheld on appeal on 22 April 2021.

17. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie with the Claimant however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

17.1. Removing tasks which required the Claimant to undertake the duties referred to in § 15.1 above;

17.2. Between 25 May 2020 and 4 February 2022 allowing the Claimant to work from home
during flare ups;

17.3. Between 24 November 2020, when the Claimant was told she would be invited to attend an Absence Review Meeting, and 22 April 2021, when her appeal against the First Written Warning was dismissed, increasing the permissible amount of absence from work in circumstances where the absence is disability related and/or discounting disability related absence entirely.

18. Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant had a disability or was likely to be placed at the disadvantage set out above?"

The evidence

7. The tribunal heard evince from the claimant who called Mr Philip Wates, Public and Commercial Services Union representative.

8. On behalf of the respondent evidence was given by: Mr Yomi Akinosho, Team Leader; Ms Theresa Melisia Williamson, Delivery Manager; and by Ms Melanie Jayne Hill, Operations Manager.

9. In addition to the oral evidence the parties produced a joint bundle of documents comprising of 1,848 pages. References will be made to the documents as numbered in the joint bundle.

10. During the hearing the claimant produced, as evidence, a letter dated 5 April 2023, from the Rheumatology Clinic at North Middlesex University Hospital NHS Trust diagnosing her fibromyalgia.

Findings of fact.

11. The respondent is the Secretary of State for Justice, a government department of state.

12. The claimant commenced employment with the respondent on 2 February 1998, and at all material times she worked as an Administration Officer, Band E, based at Highbury Magistrates Court. Her case is about whether the respondent knew or ought reasonably to have known of two of her disabilities and whether the respondent discriminated against her because of her disabilities and failed to make reasonable adjustments? The chronology goes back several years.

13. In 2006 she was assaulted while travelling on the London Underground and, subsequently, on 10 September 2010, had an operation to remove a slipped disc in her neck.

14. In an occupational health report dated 30 Janaury 2015, following a referral due to her Musculo-skeletal symptoms, particularly pain in her neck, the Occupational Health Advisor wrote that her symptoms would improve in three to six months, and that her neck pain would be managed and controlled in the following six to twelve months with appropriate intervention and treatment. The Advisor stated that the neck pain:

> "Is prone to flare ups and I cannot rule out any recurrence but with effective management and reasonable adjustments Miss Findik should be fit for work."

15. The claimant told the Advisor that her neck pain may be aggravated if she served at the counter as that involved repetitive bending of her neck and repetitive stamping of documents. The Advisor recommended that management should arrange an on-site workstation assessment to assess the feasibility of working at the counter. Further, if it was managerially possible, the claimant should be exempted from performing list callers' duties as they may aggravate the pain in her neck and arms. The claimant

was fit to continue doing her full duties and her normal hours with some reasonable adjustments. (pages 114-116 of the joint bundle)

16. In a further occupational health report dated 24 April 2015, the purpose of the referral was to assess the claimant's capabilities and to seek advice on what adjustments were required in the workplace for her to complete her duties at the counter and in opening incoming post.

17. The Occupational Health Advisor wrote, after speaking to the claimant, the following:

> "Overall clinical findings indicate that Mrs Findik is capable of completing the duties of her contracted role with long-term adjustments. On assessment it is indicated that Mrs Findik's reported symptoms are consistent with her documented condition; with increased pain on movement of her neck when bending forward."

18. It was recommended the respondent should provide her with a reading slope for her to put documents on which would reduce the bending of her neck when stamping or looking at documents. Her computer chair was not in good working order. The Advisor also wrote that the claimant's condition meant that she would have variable pain on movement of her neck which may fluctuate but this could not be predicted. Active use of her prescribed pain relief medication would assist with her pain management. Her impairment was likely to be considered a disability because it had lasted longer than 12 months and, without the benefit of treatment, there would be a significant impact on her ability to carry out normal daily activities. (1513-1516)

19. For most of the period which is the subject of this claim, the claimant was line managed by Mr Yomi Akinosho, Team Leader. In a further occupational health report sent to Mr Akinosho, dated 1 February 2018, the Occupational Health Advisor was of the opinion that the claimant was fit for work having regard to her duties at the time. It was stated that she had, "Chronic conditions affecting neck and condition of fibromyalgia which will continue to require ongoing medical support, treatment and management." It was also suggested that the trigger points in the claimant's case in relation to when the respondent's sickness absence management procedure should be invoked, should be considered by Mr Akinosho.

20. As regards whether or not her slipped disc and fibromyalgia were covered under the Equality Act as disabilities, the response was that they were all covered. (123-124)

<u>Increased trigger points</u>

21. At some point after receipt of the occupational health report, the trigger point in the claimant case, was increased by 25%. Action would ordinarily be taken if an employee's absence exceeded 8 days, or 4 spells. A spell is a period of absence. This is assessed within a rolling 12-month period. In the claimant's case, the increase by 25% took into account her disability, it

meant that the trigger was either 10 days or 6 spells within a rolling 12-month period. Whether this was reasonable is an issue in the case.

<u>Misophonia-noise sensitivity</u>

22. In Mr Akinosho's email dated 6 March 2018, sent to Human Resources, he acknowledged that the claimant had chronic conditions affecting her neck and Fibromyalgia. He stated that these two conditions were referred to in the occupation report dated 24 February 2015, and were disabilities under the Equality Act 2010. He, therefore, acknowledged that the claimant was disabled. (480-481)

23. From 3 to 23 June 2019, the claimant was moved to the Hub Office, a private office, to work as she had developed sensitivity to noise. She had suffered a panic attack in the open plan office, where she worked, prior to her move. This move was sanctioned by Ms Jacqui Johnson, Delivery Manager. However, the claimant was moved from the private Hub Office to the Old Resulting Office with another employee from 24 June 2019 until 20 Janaury 2020.

24. We find that the Old Resulting Office was unsuitable for the claimant having regard to her Misophonia. Members of staff were eating, typing, walking through the office to get to the toilets and kitchen, and would use the photocopier. Further, the majority of staff also walked through this area when the fire alarm was activated for fire drills. During her time in the Old Resulting Office she had to recheck her work as she was making mistakes and was finding it very difficult to carry out her day-to-day duties. Her concentration and memory were affected, and in turn, they affected her confidence. She tried to cope by leaving the office when the noise became unbearable, but that did not help. The Tramadol medication she was taking affected her Misophonia as it amplified the noises around her. She reduced her hours from full-time to part-time, working 25 hours a week, Monday to Friday, 9.30am to 2.30pm, from 1 November 2019 due to health reasons and to balance her home life.

25. From 1 December 2019, she again moved to the private office on a temporary basis but was moved from there to the Old Resulting Office following Ms Theresa Williamson's instructions in early January 2020. Ms Williamson was the Delivery Manager, who replaced Ms Johnson.

26. At a meeting held on 17 January 2020, the claimant became aware that Ms Williamson was intending to move additional members of staff into the Old Resulting Office from 20 January 2020. This led her to email Ms Williamson on 17 January 2020, stating that her Misophonia condition was not being taken seriously as Ms Williamson was proposing to have more members of staff work in there. She invited Ms Williamson to review her decision in light of her Misophonia and sent her a leaflet on Misophonia which stated that for a person who suffers from that condition, "Work environments, such as open offices, can be a minefield of triggers" (188, 867).

27. The same leaflet had been given earlier to Mr Akinosho.

28. Ms Williamson responded by email on 21 January 2020, stating the following:

> "Thank you for the attached information which is very informative.
>
> I am sorry that you feel that your condition was not taken seriously which is not the case, I have to consider the office as a whole as well as individual needs and try to find the balance so that everyone is accommodated for. Unfortunately, as you are aware that the business is changing constantly as such we have to adopt and adjust to accommodate these changes. As mentioned in the TIB that a new process for dealing with emails will come in effect as of 3 February 2020. This is a new process that needs a dedicated team to focus, train and process emails away from the main office. Additionally we will have staff moving around and the new people joining the team as such space is required to facilitate business needs.
>
> As you will appreciate that type of work that we do requires team members to work closely together as such its not a quiet environment as you will have the phones ringing, photocopying/printers and general staff discussion happening throughout the day. From your email below, you confirm that you have discussed your condition with Yomi and Jackie, however I have not seen any correspondence on your file from your consultant/GP confirming diagnosis. Can you please provide me with such information so that I can arrange for an OH referral so that we can be advised on the best way to give the support that you require…" (190-191).

29. The claimant complained to Mr Andrew Whaley, Operational Manager, about the impact of having to work in an open plan noisy office. On or around 22 January 2020, she was moved back to a private office. This, we find, was an acknowledgement that the noise was adversely affecting her Misophonia and her performance.

30. In a letter dated 29 January 2020, from Barnet, Enfield and Haringey Mental Health Trust, it stated that the claimant should try Cognitive Behavioural Therapy for her Misophonia and anxiety, and that Misophonia is not always treated with medication. (192)

31. She showed the letter to Me Akinosho and explained that she was not satisfied with the advice from the Mental Health Trust and that her counsellor from MIND advised that she should see a psychiatrist.

32. On 20 March 2020, she emailed Mr Whaley following on from a discussion she had with Ms Williamson on that day. She wrote that Ms Williamson had requested that she should move back to the open plan office from the private office where she had been working. She tried to explain to Ms Williamson that she would find it difficult to work there and that she wanted to be accommodated but felt that this was not achievable. The move to the open office would be a step backwards as she was currently receiving counselling and believed that she had made some progress. Disrupting her routine and structure would have an adverse effect on her health.

33. She had been providing information to the respondent about Misophonia but felt that Ms Williamson did not understand the serious impact it was having on her everyday life and she, the claimant, did not have the energy to speak

to Ms Williamson about it again. It was the third time she had been in that situation with Ms Williamson and was not happy. Ms Williamson was aware that she had been experiencing panic attacks during the week with dizziness and heart palpitations. The claimant then wrote that it was, "not management support, duty of care, but a negative impact on my recovery." As Ms Williamson expected her to move the following Monday, she requested a discussion with Mr Whaley sometime that day. (193)

34. Mr Whaley responded on 23 March 2020, stating that if she felt anxious about moving back to the general office, then she would need to speak to Ms Williamson that morning to discuss the best way forward for her and the team. The claimant responded to his email later in the morning stating that a further conversation with Ms Williamson was not going to resolve the issue as she, the claimant, was not being understood nor was she taken seriously. She stated that references were made about business needs coming first rather than an employee's mental health and well-being. If she was asked again by Ms Williamson to move out of the office, she would be thinking very seriously about taking out a grievance alleging harassment. She did not want a lengthy face-to-face conversation with Mr Whaley as she understood that he was very busy but would appreciate a written response. (196-197)

35. There is no documentary evidence in the bundle that Mr Whaley had replied to the claimant's email. However, we are aware that there was a national lockdown because of the Covid-19 pandemic on 23 March 2020 and dealing with that crisis would have been a major reoccupation.

36. On 23 March 2020, the claimant emailed all staff based at Highbury, a letter issued by the Union, confirming Key worker status. The letter also stipulated an agreement for individuals to work from home.

37. On 25 March 2020, she phoned in sick due to cold symptoms. At that time her sickness absences were 2 spells and 36 days.

38. Later the Prime Minister announced that the country was in lockdown and staff, including the claimant, were not required to work from the office. Following this announcement, the claimant was not carrying out any work either at home or in the office for some time.

39. In May 2020, senior management decided that the courts should put provisions in place for making offices/buildings safe for the public and for staff to return. Staff were expected to work from the office. Regular building assessments were carried out; extra cleaning staff were employed; work stations were rearranged to ensure compliance with the six feet apart restrictions; and the introduction of a one-way waking system. During this time a direction came from the respondent's Human Resources that it should be provided with copies of shielding letters for individuals who fell into the category of "clinically vulnerable". There were no in-person hearings. The evidence given by the respondent was that Cloud Video Platform, "CVP" hosting was rolled out from either April or May 2020. The private hub office was used for CVP training and hosting for a while. CVP was a new

technology by which court hearings were to be conducted virtually by video. It is still in use in courts and tribunals today but not as widespread as before.

40. During this time, we find that Ms Williamson had limited resources as one out of three team leaders was on site, the others were either shielding or caring for someone who was clinically vulnerable which meant that they also had to shield. Internal communications were circulated that staff would need to work from the office if they were not considered to be "extremely clinically vulnerable". If a member of staff had a shielding letter from the National Health Service, the respondent would consider any necessary reasonable adjustments and allow them to continue to work from home.

41. A discussion took place between Mr Whaley and Ms Williamson regarding how staff at Highbury would return to the building. They walked around the office; put posters up; moved workstations; and placed signage on the floor to instruct staff on how they should move around the office. They also planned on how to control the amount of people in the building at any one time. A rota system was implemented as agreed within the London Cluster and, as such, all staff within the Magistrates courts had to comply, including Highbury. The Senior Management Team decided that staff should be on the rota three days a week working from the office and two days from home. In their view this would ensure fairness to all and no one individual would be working five days from the office. Those who did not have a shielding letter were required on site to perform duties, such as, list calling; court coordination; counter duties; answering the phones, as well as undergoing training for Cloud Video Platform. Staff were informed that they would be required to work unless they were able to provide a copy of a shielding letter from the NHS. Those who provided shielding letters had adjustments agreed for them to work from home for five days each week.

42. The claimant commenced home working on 28 May 2020. She had not been working from 23 March to end of May 2020. The respondent's focus was for laptops to be issued to staff at home to enable the business to function.

43. It is the claimant's case that she attended the workplace on 28 May 2020, but Ms Williamson do not recall this and did not believe that she did. If she did, she would have seen restrictions in place at the time. Ms Williamson said that she would have provided the claimant's address for a laptop to be delivered to her home.

44. The claimant's case is that on 28 May 2020, she went to the office to pick up a laptop, an ergonomic keyboard, mouse and mousepad to enable her to work remotely from home. She said that she asked Ms Williamson for other ergonomic equipment for home working, including an ergonomic chair, an ergonomic keyboard and an ergonomic mouse, a separate screen, a tilted document holder, a footrest, and a telephone headset. She was told by Ms Williamson that she had to attend the workplace if she wanted to benefit from using the ergonomic equipment. The claimant told the tribunal that she

attended the office in the company of her husband who had to carry the equipment, keyboard, mouse, and laptop by train to their home.

45. Having considered the conflict in the evidence, we preferred the account given by the claimant as Ms Williamson was not certain that the laptop was delivered to the claimant's home. The claimant gave a detailed account of her collecting the laptop and other equipment in the company of her husband. She stated that Ms Williamson, on 28 May 2020, refused to send the equipment to her home. At the time, she, the claimant, was coughing and had symptoms of asthma.

46. From 29 May 2020, the claimant began working from home. She did not have her complete ergonomic equipment and that meant she had to crouch over her laptop, which triggered neck, shoulder, arm and back pains. She had the ergonomic equipment in the office to alleviate these problems but did not have what she required in order to work at home.

47. As the respondent required more staff to work from the office on a rota system, the claimant was unwilling to attend the office as she believed that she was "clinically vulnerable" to Covid-19 due to her asthma and her doctor's advice was that she should work from home.

48. On 5 June 2020, she emailed Mr Akinosho and Ms Williamson, stating that she had just received a call from her doctor and that she was attaching a shielding letter. In fact it was a fit note with reference to Covid-19 guidance for general practices. The doctor wrote that she had been absent from work and "They are following government advice for high risk patients as they suffer with asthma".

49. Due to the pandemic and pressure on general practice, the doctor stated that the surgery was prioritising the urgent medical needs of the patients and would not be providing a medical certificate for their absence, and that:

> "By law employers may use their discretion around the need for medical evidence. If an employee is absent from work for more than seven days due to sickness. We would ask you to apply this discretion to help support NHS general practice provide care for our population rather than being asked to fulfil unnecessary administrative tasks." (200-201)

50. The respondent had access to specialist occupational health advice, and in the context of the fit note, did not seek clarification from a specialist advisor in relation to high-risk patients.

51. On 5 June 2020, the claimant emailed Ms Williamson and Mr Akinosho notifying them that in light of her asthma, her doctor had advised her to stay at home and that she intended to continue to isolate at home as she had been coughing continuously and had tightness in her chest. (202)

52. Ms Williamson's response, on 6 June 2020, was that the fit note the claimant sent was not a shielding letter.

> "Asthma does not fall within the clinically extremely vulnerable or clinical vulnerable or vulnerable people category, as such you will be expected to work from the office on the days you are rota'ed to work on site."

53. She stated that Highbury was compliant with government guidance on social distancing and that various facilities were available to staff to reduce the possibility of them coming into contact with the virus. (202)

54. On 16 June 2020, the claimant emailed Mr Akinosho copying Mr Whaley, the Union representative, Mr Philip Wates, and others, referring to her union activities, and then:

> "The real purpose of my response to you really is to ask for your support and to allow me some space in order to complete these inspections. I would kindly request a larger screen to work with at home because as you know I have slipped discs in my neck and fibromyalgia, and now experiencing pain in my shoulders and neck". (204)

55. In a letter from Barnet, Enfield and Haringey Mental Health NHS Trust, dated 18 June 2020, sent to the claimant's surgery, it acknowledged that the GP referral was for sensitivity to noises, Misophonia, that the claimant wanted to see a psychiatrist for that condition. She had completed 10 counselling sessions with MIND, but it did not help, and that MIND wanted to refer her for more therapy. It went on:

> "Misophonia is a word to describe hatred of or getting angry at loud noises. In one of the referrals it says she gets angry at the sound of people opening a crisp packet. Its not a psychiatric condition and a psychiatrist wouldn't be the person to give her the specialist opinion on it or medication which is what she told the GP she wants. Some people advocate specialist CBT to help manage the issue.
>
> People with this issue are more usually referred to ENT specialist (or possibly neurologists). The British Tinnitus Association has specific pages on living with it…" (207-208)

56. It is unclear whether the respondent had seen this letter.

57. On 1 July 2020, Mr Whaley replied to the claimant's email regarding her concerns about returning to work, in which he wrote:

> "Further to your recent communications with Theresa and Jacqui, I am writing to confirm return to work details and welcome you back to the office. As you are aware the Court has continued to operate and hold court hearings throughout the coronavirus (covid-19) pandemic. During the coming weeks and months, the Court will increase the number of hearings and court rooms running daily. This increase will require more team members to attend the office. I therefore write to confirm that from 6 July we will be changing the current rota to include all team members who have not provided the appropriate shielding letters for people who are deemed clinical extremely vulnerable.
>
> We have been advised that NHS England has contacted clinically extremely vulnerable people to confirm if they fall within this group and advise them to shield and to stringently follow government advice. If you have not received a

> letter and believe you should have then please contact your hospital clinician or GP who can discuss this further with them as soon as possible."

58. Mr Whaley then dealt with the various measures the respondent put in place to ensure the safety of its staff. The subject-header of his email was "Return to work 6/7/20". (209-210)

59. The claimant replied the following day, 2 July 2020, stating that she would require an individual risk assessment to include her journey to and from work and asked what adjustments Mr Whaley would be making to allow her to avoid travelling during peak hours. She further stated that she had a fit note for asthma and was experiencing episodes of "coughing and temperature and will continue to the GP's advice and work from home." (211)

60. Mr Whaley responded on the same day stating that the plan was for all team members able to return to work to be included in a weekly rota. He was happy to arrange a risk assessment for the claimant covering any issues she wished to raise including her journey. He further stated that the respondent had agreed changes to her working arrangements including hours to assist her and would be "happy" to consider those again. In relation to her statement that she was coughing, her temperature, and the fit note diagnosis of asthma, suggested that she should seek medical advice and apply for a Covid-19 test as soon as possible. As regards following her doctor's advice and that she would be working from home, he wrote that as from 6 July 2020, the rota would include all team members who have not provided the appropriate shielding letters. NHS England had contacted clinically extremely vulnerable people to confirm they fall within that group and advised them to shield following government advice. Her doctor's fit note did not fall within the official guidelines. Unless she provided a letter indicating that she was clinically extremely vulnerable, and/or living with or caring for someone deemed to be clinical extremely vulnerable, she was required to attend the office following HMCTS Guidance.

61. Mr Whaley then wrote:

> "I accept this is a difficult time for all team members and we are happy to work with everyone to address their concerns, however with the increase of work we do require more individuals on site. Unless, I receive your NHS letter indicating your clinically extremely vulnerable status, or other correspondence, you will be placed on the office rota for next week and will be expected to attend the office." (212)

62. On the same day the claimant replied to Mr Whaley copying her union representative, Mr Wates. Of note, she wrote:

> "I would like to stress that on numerous occasions I've mentioned that I need a larger screen, and laptop rest/stand because as you know I have ergonomic needs but unfortunately no positive outcome from yourselves regarding DSE at home has been achieved. I originally mentioned the laptop rest/stand to Theresa Williamson (DM) and even though I was on site to pick up my laptop and was in lockdown with symptoms (which I now know was the asthma) her response was that she couldn't provide the equipment and in that case I would need to work on

> site, which at the time went against government guidelines and my doctor's advice." (213)

63. On 3 July 2020, she completed a Display Screen Equipment form for her home working. In it she ticked the boxes stating that the chair was unsuitable as the small of her back was not supported fully by the chair; that the keyboard could not be tilted by raising or lowering it; the monitor height could not been set so that the top or the top third of the viewing area is roughly at eye level; she was experiencing headaches while working at her computer; her neck/back/shoulder ached while working at her computer; she suffered from stress and tension while working at her computer; would spend some time away from her computer each hour; she experienced dry/sore eyes while working at her computer; she did not use her laptop/notebook computer riser or a separate screen; and did not use a separate keyboard and mouse/pointing device. The form asked whether there were any other health and safety issues she wished to raise concerning use of her workstation or workplace or, did she have any special needs that should be considered during the assessment but did not mark in the box. She did not experience numbness or pains in her hands and wrists while working on her computer; she did not experience aches or pains in her legs or her feet while working at her computer; and she did not use the telephone extensively. (453-456)

64. The claimant completed the assessment questionnaire stating that, in relation to the chair, the small of her back was not supported; that at the correct seat height her feet were supported on the floor or on a footrest; her keyboard could not be tilted; the monitor height could not be set at eye level; (453-456)

65. Mr Akinosho emailed the claimant on 6 July 20202 stating that he had been informed that she was splitting her time 50/50 with union work and asked her to confirm the days she would like to engage in union duties. She replied later in the morning to formally request full-time working from home as a reasonable adjustment and consented to being contacted by occupational health regarding her Misophonia. Mr Akinosho had already placed her on the listing rota for Tuesday 7 July 2020, and wanted to know the other days she would be working from the office. (1557, 216)

66. He, on the same day, asked the claimant to clarify her request to work from home as she was already working from home. (217)

67. The response came from Mr Philip Wates, the claimant's Union representative, later in the morning, who wrote:

> "As I understand it, Hulya has been asked to go on the rota to work at Highbury on certain days and at home on other days. Hulya is requesting a reasonable adjustment to work solely from home and not be placed on the rota to attend court." (218)

68. In response to the claimant's request, Mr Akinosho emailed her on the same day stating that he had forwarded her application to Mr Whaley and to Ms

Williamson. Mr Whaley emailed the claimant on the same day inviting her to state the grounds upon which she would like him to consider her application to work from home. He reiterated that he did not think that she was covered as clinically extremely vulnerable. (219-220)

69. Mr Wates then replied later in the afternoon to Mr Whaley, copying in Ms Williamson and Mr Akinosho, stating:

> "Hulya is requesting a reasonable adjustment under the Equality Act 2010. The reasonable adjustment that she is requesting is to be able to continue to work from home each day and not be required to physically attend Highbury. Hulya has conditions that are long lasting and have a substantial impact on day to day activities and therefore the protection of the Equality Act would apply to her. The current practice to request staff to attend Highbury has placed Hulya at a disadvantage in comparison with members of staff who do not have a disability and that is the reason for her request for the reasonable adjustment." (221)

70. The claimant had a meeting on 20 July 2020 with Mr Whaley who discussed her request to work full-time from home. She followed up the meeting with an email to him, copying Mr Akinosho as well as Mr Wates. The email explained why she was requesting that she should be allowed to work from home full-time. In addition, she gave her conditions being Asthma, Misophonia, Slipped discs and Fibromyalgia, as her disabilities under the Equality Act, necessitating reasonable adjustments. In addition, she wrote:

> "Could I please ask to see the referral before its sent off to Occupational Health in order to ensure all my concerns are covered." (22l 2)

71. She later in the day emailed Mr Whaley and Mr Akinosho, a screen shot of a text message from her doctor, in which the doctor wrote:

> "Dear Mrs Findik,
>
> Thank you for your eConsult. As per the message sent on 8/6/20 you do not meet the criteria as an extremely vulnerable person. We have provided written confirmation you are clinically vulnerable due to your asthma and that remains unchanged. We cannot give you a sick note for being vulnerable…" (1563)

72. The Ministry of Justice Guidance entitled, Coronavirus (Covid-19) HR Policy Guidance FAQs, issued on 1 June 2020, in relation to "Clinically vulnerable people" states on page 7, the following:

> "The Government, in guidance, has advised those who are clinical vulnerable, to take particular care to minimise contact with others outside your household. If clinically vulnerable (but not extremely clinically vulnerable) employees cannot work from home, they should be offered the option of the safest available onsite roles, enabling them to stay two meters away from others. If they have to spend time within two meters of others, you should carefully assess whether this involves an acceptable level of risk. Priority must be given to facilitate this group in terms of flexible working arrangements, including working from home."

73. It would seem from the Guidance that, in relation to clinically vulnerable people, the employer should discuss flexible working arrangements including working from home.

74. Mr Whaley, on 21 and 22 July 2020, emailed the claimant stating that she was required to attend the office on 23 July 2020 on a rota basis. The claimant contacted Mr Wates on 22 July 2020, inviting him to intervene on her behalf and gave details of the difficulties she was experiencing with her Misophonia and Asthma. (223,226,227)

75. On 24 July 2020, she emailed Mr Whaley, copying Mr Cording and Mr Akinosho, stating that she could not recall whether she had received a response regarding her request for a large screen and that it was pointless plugging in her ergonomic keyboard as it could not be positioned correctly. She asked for an update and wrote that her neck and shoulders were hurting from "cupping" of her shoulders forward over her laptop. She further repeated her earlier request for a copy of the occupational health referral before it was sent off. (230)

76. On 30 July 2020, Mr Terry Cording, Building Manager, arranged for a Display Screen Equipment DSE assessment to be undertaken at the claimant's home.

77. She said in evidence that in late July 2020, she had been told by her work colleagues, Ms Jackie Wade and Mr Cording, that her ergonomic equipment at work had been moved from her private office to an open plan office.

78. Ms Williamson emailed her on 3 August 2020, stating that she was expected to attend the office as she was not clinically extremely vulnerable and that she had not received any confirmation stating that she fell within the category that warranted shielding, and the fit note stated that she was fit to work. The rota system was in place for individuals to work from the office or at home. Those who were working from home were effectively, on call, and were "expected to attend the office within two hours of receiving the call, at short notice." If staff were not able to attend for childcare reasons, then the expectation was that they would apply for annual leave or emergency leave for childcare purposes. (233)

79. Mr Wates replied on the same day referring to the Ministry of Justice and HMCTS's guidance and the return to work of those clinically extremely vulnerable. He stated that individuals who were working from home effectively during their shielding period, where possible, would likely be able to continue with the arrangement. This was with the proviso that it met the needs of both the individual and the organisation. He then repeated what was in the guidance in relation to working in the office and keeping a safe distance. He stated that where some staff were advised by their doctors to continue to work from home, the business should be agreeable to this based on government guidelines. He further stated that the Union had been contacted by seven or eight members at Highbury who were anxious about returning to work, all of whom were working from home. (234)

80. On 4 August 2020, Ms Williamson responded to Mr Wates' email. She wrote that the respondent's expressed commitment to all individuals being able to work part of the week from home but had not specified the number of days individuals could expect to work in the office or from home each week. She explained that if business needs required, the individual may be required to attend the office for a full week. Highbury Corner was Covid secure with an up to date Covid-19 risk assessment. Managers, during their conversations with the claimant, indicated that should she wish to consider alternative arrangements regarding start and finishing times, that would be taken into account. An occupational health assessment for her had been arranged and that the respondent's aim was always to work with all individuals in that difficult period of time to make sure they were supported. The expectation was that the claimant would return to the office on Thursday and Friday of that week, on the same basis as all other team members. Ms Williamson was happy to arrange a risk assessment for the claimant, to cover any issues she wished to raise including her journey, prior to a return. In addition, the respondent would consider any emergency leave applications she would like to make. (235)

81. In her email dated 7 August 2020, to Ms Williamson, Mr Akinosho and two others, the claimant explained that she was suffering from pain in her neck due to poor posture while working on her laptop rather than using a larger screen that she had requested on numerous occasions but was not supplied. She stated that she was taking strong pain killers which had thrown her other symptoms out of balance and that she was, "at my worst state than I've been in ages." (237,1570)

82. She was off work from 7 to 23 August 2020 as a result of neck pain due to her working without Display Screen Equipment since 29 May 2020. The note from her doctor stated that she was unfit for work from 15 to 23 August 2020. (242)

Occupational Health Report – assessment on 17 August 2020

83. She saw the Occupational Health Advisor on 17 August 2020. An account was taken of her medical history which stated that she suffered with Slipped discs and Fibromyalgia and was on prescribed medication. She had been recently diagnosed with Misophonia. She reported that any level of noise would exacerbate her symptoms thus impacting on her concentration and daily functions. She suffered from anxiety, low mood, disturbed sleep pattern and panic attacks due to her underlying health conditions and was due to restart counselling sessions in October 2020. She also suffered from overwhelming fatigue. The Advisor then wrote:

> "In my clinical opinion based on the information gathered today, Mrs Findik remains unfit for work; her current symptoms remain a barrier to return to work. I'm unable to provide you with adjustments that would facilitate a return to work at present or speculate whether she is likely able to provide effective service in attendance into the future as this will depend on how long it takes for her symptoms to be better managed as well as her level of resilience both of which are very personal subjective factors that cannot be measured in any precise

scientific manner. Going forward, she should be guided by specific advice from her GP/hospital consultant and relayed back to you as and when there are any new revelations.

You may decide to re-referral to occupational health once her symptoms have subsided prior to an anticipated return to work, for a reassessment for her fitness for work and further support and advice. When deemed fit by her GP, the details of return to work should be discussed and agreed between Mrs Findik and management in line with the organisation's polices and procedures to support her back into the routine and responsibilities of her role.

Mrs Findik tells me that work station assessment was undertaken in 2009; I suggest that you review and update the DSE assessment to ensure that she continues to be ergonomically set up as well as to ensure ongoing effectiveness and suitability.

In my view of her medical diagnosis, the difficulties with managing amplified noise levels, she will benefit from provision of noise-cancelling headphones which can be purchased from Dell or HP direct to help maximise her levels of concentration. She would also benefit from sitting in a quieter corner within the office environment to help her with varying concentration.

Due to her recent medical diagnosis, Mrs Findik had made many changes to her lifestyle and is working with her treating practitioners to help her manager her conditions. If you are able to provide her with the support she requires, it is likely that she will be able to provide the maximum service possible.

In my opinion it is unlikely that Mrs Findik would qualify for ill-health retirement, as currently there is no evidence to suggest that she is permanently incapable of carrying out her duties in the near future. However I am not in a position to make decisions on IHR. If management wishes to pursue this option, I suggest a referral to IHR is made, and one of our OHPs will provide further advice.

It is difficult to predict Mrs Findik's future capacity for reliable service of attendance because it depends on her recovery and long term management of her symptoms.

Mrs Findik declared underlying health conditions that could lead to impaired performance if not well managed. However she appears proactive into symptoms resolution and is seeking appropriate specialist input.

You may wish to consider flexible working arrangements, so that Mrs Findik can undertake work from home during a flare up; this would likely provide a positive effect on her health in achieving a good work life balance and better management of her current health. While I do not wish to be prescriptive, I would advise that the line manager discusses this option with Mrs Findik during a one to one meeting. This is a management decision if this can be accommodated in line with the organisation's policies and procedures.

Mrs Findik was made aware that the ability to accommodate any adjustment/recommendation made is ultimately a decision for the employer.

Recommendations to manager/HR:

- A supportive management approach is recommended while Mrs Findik remains absent from work with regular contact from management.

- Upon return to work, I would recommend a meeting on return to work with Mrs Findik to discuss her perceived work related concerns, you may wish to progress this meeting in the format of a stress assessment. Regular reviews are recommended of this assessment going forward to ensure there are no further issues or concerns.

- A supportive management approach is recommended while Mrs Findik remains absent from work with regular contact from management."

84. In relation to whether the claimant came under disability provisions in the Equality Act, the occupational health advisor stated that she did based on the information given. (243-246)

85. The claimant told the tribunal that on the day of the assessment she read the Occupational Health Advisor's report before it was sent to the respondent. She said that the Advisor did not know the layout of the building where she worked and was not able to amend the report as she, the claimant, did not agree with the recommendation that she would benefit from working in a "quieter corner within the office environment". She said that she did say to the Advisor that she had worked in a private office which was suitable and would also like to work from home as a reasonable adjustment. The Advisor did not know much about Misophonia and had to look it up. The claimant said that she would have amended the referral had she seen it before it was sent because it referred to her working in an office with five people. There was no reference in the referral to waiting for an appointment to see a psychiatrist. The claimant said that if management had put down that she was working in a private office, the Advisor would have recommended that she should work in a private office.

86. The Advisor who authored the report did not give evidence before us.

87. One of the claimant's concerns about the referral was that it stated that there was no clinical evidence produced in relation to her Misophonia. She stated, in her witness statement, at paragraph 55, that she had provided to Mr Akinosho and to Ms Williamson, medical evidence from her doctor and from the local mental health services, as well as a leaflet on Misophonia. We acknowledge these facts.

88. On 21 August 2020, she emailed Mr Akinosho stating that she was feeling better and wanted to return to work the following week but needed certain things put in place before she was able to return to the office. This was in line with the occupational health report.

89. On 24 August 2020, she emailed Mr Whaley and Mr Akinosho raising a number of outstanding matters arising out of the occupational health report, including:

    (i) an ergonomic chair and larger screen had yet to be provided to her for her to work from home;

(ii) although the occupational health report recommended noise cancelling headphones, following her research, they were not effective in cancelling out continuous noise and would not be effective in the office; and

in light of her Misophonia, she required a plan to be put in place either to allow her to continue to work from home or on-site in a private office in the one that she had previously worked in. (247, 250-251)

90. On 26 August 2020, Ms Williamson said to the claimant in a telephone call that she expected her to attend work in the open plan office and that her ergonomic equipment would be collected from her home on that day. Later in the day her ergonomic keyboard was collected and taken to the office. The claimant, therefore, did not have an ergonomic keyboard for her use at home. She emailed Mr Wates, copying Mr Whaley and Ms Karen Watts, on the same day, referring to the telephone conversation with Ms Williamson. She stated that she would not be returning to work in an open office on 27 August 2020; that her condition was getting worse; and that a proper DSE assessment would need to take place. She asserted that Ms Williamson's "mannerism" during the conversation was neither supportive, as she was not empathetic, nor did she give her any reassurance. There was no reference to reasonable adjustments. She was on Amitriptyline and was putting off lodging a grievance as her health was not 100%. (254)

91. Mr Whaley, on the same day, responded to her email stating that he was sorry to hear that she was upset and unhappy with Ms Williamson's response. He would review and speak to the claimant about it later in the week and would address any of her concerns with Ms Williamson. He stated that he understood that she had confirmed that she was fit to return to work and that the occupational health report recommended that, "She would benefit from sitting in a quieter corner within the office environment." He guaranteed that the desk was suitable having regard to the guidance and that he would arrange for a DSE to be undertaken the following day at court.

92. Ten minutes later, in the afternoon, the claimant responded referring to her Misophonia which had been diagnosed for over a year and that it would get worse when concentrating. She stated that Mr Whaley should not go to the effort of arranging a DSE assessment the following day as she had enough experience to know that working in a quiet part of the office did not work for her. It had already been tried in the past and resulted in her having a full-blown panic attack.

93. Thirteen minutes later, Mr Whaley responded:

> "Hi Hulya
>
> I would really encourage you to attend the office tomorrow and see what has been arranged, currently the suggested office (the old Resulting Department) has had no one working in there all day today. Additionally, if this is not found to be suitable I will arrange for an office to be made available. My concern is that you

> have indicated reasons why your homeworking environment is not appropriate and it is clear that we have the appropriate equipment on site."

94. The tribunal asked the claimant, in evidence, whether that email was in support of her concerns about working in an open plan office. The response was:

> "To me this email wasn't supportive. It was quite upsetting. It is a walkway; fire exits and is continuously used as a walkway. They had said to me a brand new area on the second floor, where I had never worked before, I would have tried it. They were being stubborn and I needed a permanent solution."

95. We find that that after having worked in that area before, she knew that the conditions there would not address her sensitivity to noise, her Misophonia.

96. Mr Wates emailed Mr Whaley and the claimant as well as Ms Watts, later in the afternoon stating that the DSE assessor should also consider that equipment would be required to enable the claimant to work from home. (260)

97. The claimant repeated her concerns in a later email on the day to Mr Whaley and Mr Wates, as well as to Ms Watts, in which she wrote:

> "I'm sorry but your suggestion to work in the old Resulting Department is not a permanent solution. I am no longer willing or able to work on temporary measures that management may or may not take into account. I need reasonable adjustments on a permanent basis. When I spoke of previous experiences, it was that office in particular that I worked in, which resulted in me having a panic attack.
>
> I have indicated since June that working at home is not DSE compliant but the adequate equipment was not sent home. So as this is not my fault, but management's contributing neglect and unreasonable pressure and demands that I'm now in a mess with my health." (261)

98. In the evening of 26 August 2020, she experienced a flare up and attended the Accident and Emergency Department of her local hospital due to chronic pain where she was prescribed Diazepam and Morphine. In a letter from North Middlesex University Hospital NHS Trust to her doctor, dated 27 August 2020, it stated that she presented migraine pain, was dizzy and nauseous. It was a self-referral and that she was taking Amitriptyline and had neck pain, headache, photophobia, pins and needles in both arms, Slipped discs, Asthma, high cholesterol, Fibromyalgia, noise sensitivity and panic attacks and was prescribed Diazepam, 5mg for three days for her Slipped discs. (272-273)

99. On 7 September 2020, she sent a fit note to Mr Akinosho stating that her doctor diagnosed Misophonia and that she may be fit for work with workplace adaptations. The doctor wrote:

> "Patient needs to work in less noisy environment to prevent her mental health symptoms to get worse by noisy surrounding."

100. The claimant was absent from work from 7 September to 6 November 2020, as reasonable adjustments had not been put in place to enable her to attend work rather than working from home. An appointment with a psychiatrist took place on 9 September 2020, during which her Misophonia was discussed and was advised to undertake sound therapy.

101. On 24 September 2020, there was an email exchange between Mr Akinosho and the claimant. In Mr Akinosho's view reasonable adjustments to facilitate her return to work were put in place in accordance with the medical advice and that she was provided with a desk to work in a quiet part of the office. The claimant disagreed. She stated that it was an open plan office where she could not control the noise levels by shutting the door and the noise would be unbearable due to her Misophonia. That conditions had gotten worse over lockdown. She requested that she should work in a private office, the office that she had worked in 2019. She also raised the fact that she did not have her ergonomic equipment to allow her to work pain free from home. (279, 281-282)

102. It is clear that Mr Akinosho did not accept the claimant's position in relation to reasonable adjustments as the fit note made reference to a quiet work place that had been set aside for her, therefore, she was fit to return to work by 9 September 2020.

103. On 2 October 2020, she asked Mr Akinosho why she still had not been provided with her ergonomic equipment to work from home and adjustments were not made to the office for her to return to work notwithstanding the fact that she had a DSE assessment in early July 2020. She stated that it was unreasonable for her to slouch over a small laptop when he had recently been off sick with neck pain. She pointed out that Ms Williamson was quick to send a courier to collect her ergonomic keyboard, but no PC monitor, monitor stand, or chair had been sent to her home. (301)

104. It is clear that the claimant had concerns about her computer equipment and the effects on her mental and physical state.

105. All staff had to complete the DSE Pre-assessment questionnaire if they were working from home. It is believed that Mr Whaley gave instructions for the claimant's equipment to be purchased to enable her to work from home, but this was not done until January 2021.

106. We find that the respondent required more staff in the office as the Highbury Magistrates Court was becoming busier because it was the listing centre for all of the Magistrates Courts in north London. It was responsible for the overnight remand cases which had to be listed in all eight local justice areas before 10am. Highbury and Thames were the busiest Magistrates Courts in London. During that period in time, the Court listings and telephone calls to the other courts and the Contact Centre, for which Mr Whaley had responsibility, increased. The respondent had to balance all possible options, the needs of the staff against the pressure of the business, in a bid to free up resources to alleviate some of the pressures on staff who were working from the office.

Formal Attendance Meeting-5 October 2020

107. On 5 October 2020, the claimant attended a formal attendance meeting with Ms Williamson in the company of Mr Wates, her trade union representative. This was held in accordance with the respondent's Attendance Management Policy in light of her sickness absences. Notes were taken at the meeting.

108. In the respondent's Attendance Management Advice Guide to managers, paragraph 18 states the following:

> "18. Can a manager consider adjusting the Trigger Point as a workplace adjustment for an employee with a disability?
>
> Workplace adjustments are designed to support employees in the workplace and the cumulative effect of adjustments needs to be considered, together with an OH or other relevant information about the nature of the disability. Managers can decide to increase the number of days in the Trigger Point to take account of absences linked directly to a disability. This should be reviewed on a regular basis to ensure it is still appropriate. As spells do not apply to disability related absences there is no requirement to increase the number of spells.
>
> Managers are reminded to review these Trigger Points in a timely fashion (for example every three months) to ensure they remain appropriate.
>
> It is a management responsibility to monitor the increased Trigger Points and consider appropriate action if they are reached." (856)

109. In paragraphs 53, 60 and 61 of the respondent's Attendance Management Procedure, December 2018, it states in relation to disability related absences, the following:

> "53. If the employee has exceeded the Trigger Point because of an illness that may be deemed to be a disability or any illness directly related to a disability, the manager must consider, in consultation with the employee, whether reasonable adjustments would assist them with their attendance. This may include seeking current OH advice and/or reviewing existing arrangements. This should take place before the Formal Attendance Meeting. …..
>
> 60. When absence is related to disability managers must consider and put in place all reasonable workplace adjustments before issuing a warning.
>
> 61. In some circumstances, the manager may use their discretion to decide not to give a Written Improvement Warning. The manager should consider the circumstances of the absence and the employee's absence history. In particular, where an employee reaches the number of spells in the Trigger Point but not the number of days, managers should consider carefully whether the pattern of absence is sufficient by itself to justify a Written Improvement Warning. The purpose of a spells Trigger point is to address patterns of repeated short absence which are giving cause for concern. If they decide not to give a Written Improvement Warning, the manager should record their decision for it… ." (830-831)

110. During the meeting there were three main periods of absence: 10 to 13 December 2019; 7 to 23 August 2020; and from 27 August 2020, which was continuing. The absences fell within he last 12 months rolling period. In relation to the 7 to 23 August, the claimant said that she was having problems with her neck and shoulders. They were painful because she was working from home without any ergonomic equipment. She was on her laptop for five hours or more a day. She referred to the DSE assessment on 3 July and said that she still did not have a stand or a large screen. The only ergonomic equipment she had was the mouse which she returned back to Highbury on 27 August 2020. On 7 August the footstool and keyboard were sent to her home. She said that on 24 August 2020 she returned to work at home. She engaged in her union work but that was later cancelled, and she contacted the respondent saying that she was available to work. Ms Williamson said that the claimant would have to work at Highbury, on site, with her equipment, therefore, her equipment would be couriered back to Highbury. The problem was that the claimant was expected to work in an open plan office notwithstanding her Misophonia. The claimant then discussed her medical conditions, Misophonia, Fibromyalgia, Slipped discs, and the stress encountered as her work conditions aggravated her medical conditions. Ms Williamson said that the respondent had asked the claimant for medical evidence in support of the Misophonia diagnosis, but nothing was received. The leaflet the claimant provided on the condition was not a letter.

111. At that point Mr Wates interjected by saying that the occupational health referral was to consider the claimant's Misophonia and the respondent did not need a diagnosis as the fit note was good enough. The claimant repeated that only the keyboard and mouse were sent to her home following the DSE assessment . The keyboard was taken away in August 2020 as shielding had stopped and staff were being asked to return back to work. Mr Wates asked whether Ms Williamson was preventing the claimant from working from home. Her response was that the occupational health report stated that the claimant could work in the office, in a quiet environment and could, therefore, return to work. Adjustments were in place and that was why the keyboard was taken from her home. Mr Wates responded by saying that the respondent needed to have right equipment at the claimant's home and in the office for her to work at both places. The claimant gave an account of how her Misophonia and said that it was in June 2019 when she suffered a panic attack.

112. Ms Williamson said that the respondent had taken on CVP Hosting. Two rooms with a door were identified as suitable for the CVP. As the occupational health report referred to a quiet area the respondent was able to provide a quiet area for the claimant so her desk could be set up. There was a rota in place which resulted in a limited number of staff being in the office. The respondent had given the claimant the opportunity of returning back to work in the office, to see what had been put in place but she declined. No one had adjusted her workplace chair and that all her equipment was moved to the quiet area. CVP could be done remotely. Use of one of the hub rooms was discussed. Court 5 was not possible as the

respondent would be using that room as the DVLA Court on Mondays. When Mr Wates asked about other possible solutions, at that point the claimant began to cry. Ms Williamson responded by saying that the only solution was the quiet place that had been identified following the recommendations in the occupational health report. Working from home was just a temporary measure during the pandemic. If the room identified was not suitable, the respondent would have to make a further occupational health report referral and to seek further advice from human resources.

113. The claimant complained that the occupational health referral did refer to Misophonia and that she disapproved of the fact that the referral was sent without her seeing it. The occupational health advisor did not know the layout of the building, therefore, could not identify where she could be working in the office. The referral should have stated that she was working in an office on her own previously which would have resulted in the occupational health advisor recommending that she should work in an office on her own. It was Mr Akinosho's practice to let her see the occupational health referral before it was sent but this was not done. Ms Williamson said she did not think it was normal practice but would check the policy. Mr Wates retorted that it was good practice.

114. In response to Mr Wates' questions about other solutions, the claimant said that she wanted the respondent to send her a screen, her old chair, PC stand, keyboard and a headset. She had spoken to Mr Akinosho about what the psychiatric nurse had said that she should go for sound therapy. Going forward, Ms Williamson said that the respondent would be sending the claimant a chair and screen to her home address to enable her to work from home at times when she was not working from the office.

115. In relation to the screen, old chair, PC stand, keyboard and headset, the claimant said that she could set all those up herself at her home. Ms Williamson said that given that the equipment was already available on site and that the respondent was trying to get the claimant to return to the office, she did not see any reason why the claimant would not be able to return to Highbury while the respondent attempted to get things in place. She would not be working five days a week in the office as it would be on a rota basis, three days a week in the office and two days at home. Again, the claimant raised the issue of the noise level. Ms Williamson replied that the respondent was unable to provide a private room for her, and that the room identified by the claimant was being used for CVP hosting. The claimant said that she would be going through the grievance process, and that if the respondent was not able to put her back to work in the Hub Room, on her own, it meant that she was unable to work under those conditions. Ms Williamson queried her response as she had not tried what the respondent was offering in the way of equipment and a quieter area for her to work. Ms Williamson agreed to take further advice from human resources. The claimant declined to have another occupational health report and invited Ms Williamson to check the second floor room which Ms Williamson agreed to do and to revert back to the claimant. She also agreed to liaise with human resources to find out how the respondent could support the claimant while

she attended sound therapy. It was agreed that the claimant would be working from home two days a week and the equipment would be sent to her home to enable her to do so. (308-313)

Civil Service Workplace Adjustment Review Meeting-30 October 2020

116. Following the claimant's suggestion, on 30 October 2020, she and Ms Williamson attended a Civil Service Workplace Adjustment Service Review meeting with Ms Ruth Wylde, Senior Account Manager, Civil Service Workplace Adjustments Service. After the meeting Ms Wylde sent an email to them confirming what had been discussed. She stated that the claimant's ergonomic equipment should be provided to her as soon as possible to allow her to work from home three days a week; that Misophonia sufferers "trying to work in an average office environment will find it vital to have as quiet a workspace as possible. Ideally, wherever possible there should be a quiet room set aside, and all efforts should be made to try and secure or physically create such an environment, (eg utilising rooms not currently in use for other things elsewhere or whose use can be changed, or building a cubicle, using either partition walls or baffle board walls, or adopting a "pod" style unit)"; that Ms Williamson and the claimant should engage in a walkaround of the building together to find some possible creative solutions that the claimant could try out and to help identify where the stresses were.

117. Although not in Ms Wylde's email, in relation to the claimant's Misophonia, Ms Williamson accepted in evidence that she should have taken the claimant's concerns about working in a "quieter" area more seriously. (314-315)

118. The claimant, on 6 November 2020, emailed Ms Williamson to confirm their arrangement to do the walkaround on 9 November 2020, and that the hospital's specialist doctor, who would be conducting sound therapy, had advised that she should not use noise cancelling headphones to manage her Misophonia.

119. On 8 November 2020, the claimant was advised that her son had to self-isolate for 14 days as he had been in contact with someone who had tested positive for Covid-19 at school. She, therefore, had to postpone the arranged walkaround on 9 November as her family had to isolate. (320, 323-324)

120. On 17 December 2020, Mr Adetola Aderemi, Senior Human Resources Business Partner, confirmed to the claimant's union representative that she was entitled to special leave with pay having regard to her circumstances in having to self-isolate. Ms Williamson, however, said that she should take annual leave for that period. (383, 1581-1584)

The walkaround-17 November 2020

121. On 17 November 2020, the claimant attended the office for the walkaround with Ms Williamson to identify a suitable place for her to work. She suggested that she could work in the private office she had previously

worked in which was available, but Ms Williamson told her that that room was being used to host CVP training.

122. Following on from the walkaround Ms Williamson emailed the claimant the following day setting out the nine options they had discussed: Option 1 was to us one of the office spaces on the second floor; Option 2, a room on the third floor which a staff member was seeking authorisation to convert into a prayer room; Option 3, use of the space identified on the third floor in the quieter office; Option 4, to look at other areas in the building to see if there was any space the claimant could work in; Option 5, to conduct CVP hosting in either court room 5 or 6; Option 6, to use of the offices on the ground floor; Option 7, a suggestion that the Citizen's Advice Bureau staff use the office space that was currently being used by security at the Youth Court entrance; Option 8, to use the office outside the Operations Manager's office; and Option 9, the use of the office designated to the Building Champion.

123. Although all of the options were discussed, they were rejected by Ms Williamson for various reasons during the walkaround. However, in her email she wrote:

> "As explained to you that, due to the current lockdown and as a short-term measure where staff are rota'ed to work from home where possible. To accommodate this, it has been decided that the CVP Host Training will be postponed temporarily as such the office that is being used for CVP can be used whilst CVP is done remotely. Due to the changes I cannot guarantee that the room will be available after lockdown as such one of the options above will need to be agreed on."

124. The claimant was asked to attend the office on 18 November 2020, along with her laptop, to establish if her laptop was compatible with the screens or monitors on site and, if not, one would need to be ordered. Ms Williamson further stated that, going forward, she would like to have another occupational health referral done to get more guidance on how the respondent could support the claimant. A copy of the referral would be sent to her before it was submitted. As the claimant had expressed the option that the occupational health advisor did not fully understand the condition of Misophonia, Ms Williamson confirmed that she would put in a request for an occupational health report from a clinically trained physician. As the claimant had completed the Workplace Adjustment Passport, Ms Williamson would go over it and agree its content after it had been reviewed by senior managers. (347-348)

125. The claimant said in evidence that on the day of the walkaround, her workstation was already in the open office where Ms Williamson had planned for her to work. Ms Williamson instructed the Digital Support Officer to help set up her workstation. At that point, the claimant told the DSO not to bother and that her workstation would be moved into the private office she had worked in before the lockdown. She then proceeded to move her equipment into the private office.

126. We find that by 18 November 2020, the claimant had moved her equipment into the private office that she had worked in December 2019, and it was agreed that she would be working in the office three days a week and at home two days a week.

127. On the same day, 18 November 2020, Mr Cording informed her that her ergonomic equipment would be delayed because senior management were not allowing her equipment to be sent to her home.

128. On 19 November 2020, Mr Cording emailed Mr Whaley and Ms Williamson after assisting the claimant in setting up her workstation and in reviewing her laptop equipment. He stated that the Dragon software would need to be set up on her laptop as he was unable to connect her laptop to the monitor. An additional mouse and keyboard also had to be ordered for homeworking. He did not recommend getting a virtual DSE assessment for her homeworking until all of the equipment were available and set up in her home. (1572)

129. The claimant had no problem connecting a standard screen to her laptop in order to work remotely.

Return to work meeting-24 November 2020

130. On 24 November 2020, she attended a return to work meeting with Ms Williamson. She explained that she was frustrated at not having been provided with a separate screen for homeworking and it was causing her pain. She had been absent from 7 September to 6 November 2020 due to reasonable adjustments not having been put in place. Ms Williamson said that the claimant should be able to return to work in the office given that the ergonomic equipment had been set up there and that given the level of absence, she would be invited to a further formal attendance review meeting. (349-350)

131. On the same day, the claimant emailed Ms Williamson stating that when she checked her ergonomic equipment, the software was not responding. Her keyboard space bar was stuck and that someone had readjusted her ergonomic chair. She explained that her neck still feeling tender and that working without her ergonomic equipment would aggravate her condition. She was unable to work until all these issues were resolved. She later emailed Ms Williamson to arrange for her keyboard to be cleaned and her chair readjusted. (351)

132. She was on sick leave from 25 to 27 November 2020 as her back was hurting and she experienced a flare up of her Fibromyalgia allegedly caused by the stress of the previous day's meeting and discovering that her ergonomic software which had previously been installed on her equipment at the office, had disappeared as a result of, she stated, Ms Williamson unplugging her PC. (353-354, 1573)

Return to work meeting-1 December 2020

133. There was a return to work meeting held on 1 December 2020 with the claimant and Ms Williamson. The claimant expressed frustration at the fact that she still had not been provided with the ergonomic equipment to work from home. She was told by Ms Williamson that steps were being taken to obtain the correct equipment but in the meantime the equipment was available in the office and that she was expected to attend work in the office in the interim. The claimant asked whether she could work from home three days a week as she had not been in the office since March 2020 and returning to the office full-time was likely to cause her to feel tired and stressed and could trigger a panic attack. Ms Williamson informed her that because her absence had been disability leave, a phased return was not available, but she should use her annual leave instead. She could also apply for flexi leave/special leave with no pay to assist in managing her symptoms. Ms Williamson also said that a stress assessment could be conducted within the first weeks following the claimant's return to work in the office by 7 December 2020. In relation to a phased return to work, working two days in the office and three days at home, as the absence from 7 September to 6 November would be treated as disability leave, such a phased return was not applicable because the absence was not considered as sickness. Ms Williamson wanted clear guidance to be provided by occupational health with an accurate account of the claimant's conditions in order to ensure that the right equipment was recommended and to provide guidance on what support could be provided during treatment. The claimant requested that she should have a sound specialist to provide information on how support could be given to her. Ms Williamson informed her that she should get the consent of the specialist and the information provided could be included in the referral. (364)

134. On 3 December 2020, the claimant emailed Ms Williamson. The subject header being, "Phased return". She wrote:

> "Morning Theresa,
>
> I arrived to work this morning with difficulty. I am exhausted, and feeling dizzy. This is normally an indication that I'm going to have a panic attack. Although yesterday I was more than happy to walk round to do the covid monitoring checks and the assessment tool today with Terry for Highbury, I feel my symptoms will get worse.
>
> When I first had a meeting with Andy and Phil Wates (PCS) it was agreed that I could return to work twice a week. This is also mentioned by Ruth Wylde, from reasonable adjustments. OH also mentioned that on my return to work I should have a stress assessment. This is yet to be done. This would have given me an opportunity to address my concerns and difficulties.
>
> I feel that it's unreasonable to expect me to work the whole week. Its taken the whole week to sort out my ergonomic workstation. As you know IT had to rebuild the system and its still not complete as the Dragon software is yet to be installed. This is not my fault. If I had the proper ergonomic equipment at home, I'd be working two to three times a week on site like everyone else.

> At 11am today I have an urgent HS inspection via Skype with the site that has four members of staff that have tested positive…" (367)

135. The email was forwarded by Ms Williamson to Mr Whaley, who then emailed Ms Williamson on the same day asking her to clarify with the claimant whether she was fit to be at work and the tasks she did which made her symptoms worse. He also suggested that Ms Williamson should ask her what reasonable adjustments she required and to provide information from her doctor regarding her condition to assist in the occupational health referral. Ms Williamson should arrange a Stress Assessment as soon as possible and to ask the claimant why she felt that working a full week was unreasonable, and how was it possible for her to undertake union work but not court work? (368)

136. On 14 December 2020, the claimant emailed Ms Williamson raising concerns about recent events. She stated that she had noticed an improvement in the way they were communicating with each other, but that Ms Williamson still did not fully understand her situation. She wrote that when they first had a return to work meeting, she stated that she was struggling to get into the office. This was a concern because she did not know what she was returning to as her ergonomic workstation had been moved out of the private office she was working in. She explained that feeling tired and anxious had a domino effect on her health. Ms Williamson went on to insist on another occupational health referral as she wanted to find the best way of supporting the claimant. The claimant explained that her Misophonia condition was rare, and that occupational health had limited information on it, therefore, a sound specialist hospital doctor would be better able to assist. The claimant also went on to write that in a later conversation, Ms Williamson mentioned that she was in the process of drafting the occupational health referral stating that she assumed that the claimant no longer had Slipped discs and that she was going to include list calling in the referral. The claimant's response was to say that the occupational health reports stated that she should not be engaged in list calling work. The hospital discharge letter, when she was admitted on 26 August 2020, stated that she was experiencing excruciating pain from her Slipped discs. (375)

137. On 14 January 2021, after a delay of eight months, her ergonomic equipment which she needed to work from home arrived at her home. They were: a computer screen; chair; ergonomic keyboard; ergonomic mouse; power charging cable; monitor riser; multirite document holder; and a screen-laptop USB connecting cable. She sent an email dated 15 January 2021, to Ms Williamson, confirming that she had received the equipment and had managed to connect everything, but she needed assistance with the mouse software as it needed to be installed. To her it seemed that the wireless keyboard did not work if the mouse was not plugged in. She stated that the mouse was not ergonomic. She had to plug in two mouses in order for the keyboard to work. She invited Ms Williamson to arrange for someone to contact her. (380, 388)

138. On 3 February 2021, Mr Cording conducted a pre-DSE assessment by telephone with her. (1586-1589)

Formal Attendance Management Meeting-22 February 2021

139. On 22 February 2021, the claimant attended a Formal Attendance Management meeting with Ms Williamson, in the company of Mr Wates. Ms Jacqui Johnson was notetaker. It was held to discuss the claimant's absences over the previous 12 months. During the meeting the claimant said:

    139.1 With reference to her absence from 7 to 23 August 2020, 11 working days, that it was due to back pain. The three Slipped discs in her neck resulted in work-related pain, and not having the proper equipment caused flare ups.

    139.2 On 26 August 2020, the pain was very bad, so she had to attend the Accident and Emergency department at her local hospital. She was given pain relief for the nerve pain relief medication, Morphine, and Diazepam to relax the muscles.

    139.3 From 27 August to 2 September 2020, 7 working days, it was neck pain.

    139.4 From 25 November to 27 November, 3 days, her neck pain had flared up.

    139.5 On 10 December 2020, neck pain flare up.

    139.6 From 7 September 2020 to 6 November 2020, 67 days, (later amended to 61 days) this was taken as disability leave as she was waiting for the equipment to be delivered to enable her to work from home.

    139.7 She needed the Dragon Software speech recognition software because she was unable to write due to her Slipped discs and Fibromyalgia.

140. The meeting was adjourned and reconvened on 24 February 2021, when, after further questioning of the claimant, Ms Williamson decided to issue her with a formal written warning. This was for all absences referred to apart from the 61, not 67 days disability leave. (410-416)

141. Ms Williamson's decision was confirmed in writing in a letter dated 15 March 2021. She stated that the absences she took into account were mainly for the claimant's back and neck related pain. She further stated that the claimant had confirmed that she suffered from Misophonia, Asthma, Slipped discs and Fibromyalgia and that she was awaiting treatment for Misophonia. She also wrote that the claimant suffered from anxiety and panic attacks which were linked to Misophonia. She now had the correct equipment in place although she was waiting for the Dragon software. She had a room for her use with a door that she could close should the noise become too

much. She was rostered to cover non-face-to-face roles to alleviate her panic and anxiety attacks. To assist with childcare, she would not be covering overnight duties. The respondent would accommodate her start times of between 9.15 and 9.30 in the morning. Ms Williamson then set out the history of the claimant's attendance and absences and the state of the medical information provided. She repeated that the respondent had made available a room in the office for her to work and that it had not received any diagnosis of Misophonia and no indication as to the length of time the treatment for it would last and how the respondent could support her during treatment. The first written warning would last for 12 months effective from 11 December 2020, that being the date of the claimant's return to work following her latest sickness absence. She was warned that she must not exceed the 25% increase in the trigger point set out in the respondent's Attendance Management Procedure. The improvement period would last for three months and that should she have a further two days or four spells of sick absence, she would be the subject of the next stage of the formal process. She was advised of her right of appeal against the decision. (417-419)

<u>Appeal against the written warning-16 April 2021</u>

142. The claimant emailed Ms Williamson on 25 March 2021, challenging the findings and the decision to issue her with a first written warning. (1605-1607)

143. She appealed on 26 March 2021 against the warning on the basis that a procedural error had occurred; the decision was not supported by information/evidence available to the manager or decision maker; and she had new evidence. She explained that she had been disciplined for absences which were caused by flare ups in her back and neck due to her having to work remotely without the appropriate ergonomic equipment which she had repeatedly requested the respondent to provide. She also provided a chronology of the office moves and of events, as well as copies of email correspondence between her, Mr Akinosho, Ms Williamson and Mr Whaley, in support of her appeal. (465-470, 499-500, 732, 736-743, and 1612)

144. On 16 April 2021, she and Mr Wates attended the appeal hearing chaired by Ms Melanie Hill, Operations Manager. Ms Jenny Lockhart was the notetaker. Ms Hill understood that the claimant's first ground of appeal in relation to procedural error, was on the basis that no contact had been made with her from management during her four spells of absence. She asked the claimant if she had made contact with management as she felt that there was an expectation that she should also have made contact. The claimant provided Ms Hill with evidence of the contacts she made with the respondent as she understood that communication worked both ways. She also said that management had not supplied her with any reasonable adjustments to allow her to work from home while she was on sick absence in August 2020, and in August 2020, she had been informed by a work colleague that her workstation and ergonomic equipment had been moved to a different office without prior consultation with her.

145. In relation to the second ground of appeal, the decision was unreasonable because at the attendance meeting on 5 October 2020, she informed Ms Williamson that she felt five working days a week was too much for her. She was told that she should take annual leave rather than being provided with a phased return from long term sick leave which led to a loss of 16 days annual leave.

146. The third ground of appeal was in relation to new evidence. Ms Hill agreed to read what the claimant provided.

147. On 23 April 2021, Ms Hill emailed her outcome decision to the claimant dismissing her appeal. In relation to the first ground, she found that there were some procedural errors. The outcome of the warning stated that the claimant would have received it in five working days, but she received it beyond that period. It was Ms Hill's understanding that the decision maker, Ms Williamson, wanted to wait for the notetaker to return from leave. Ms Hill concluded that it would have been better practice to state that the notes would follow and that other areas of support could have been considered such as reminders ensuring that the deadlines were met. She did not consider that the procedural errors adversely impacted on the decision to issue the first written warning under the Attendance Management Policy and concluded that the warning was appropriate. She provided Mr Whaley with advice for the development of the management team at Highbury.

148. Ms Hill could not find, as the claimant had asserted, that her trigger point had been adjusted. She also did not accept and found to be untrue, that management did not contact her during her four spells of absence. She found that there had been some communication in the form of emails and phone calls. The claimant was also expected to contact management. Ms Hill advised that an occupational health referral needed to be within the last three months in order to provide the management team up-to-date information upon which they could provide continuing support.

149. In relation to the second ground of appeal, the decision being unreasonable, Ms Hill found that a phased return following disability leave was not required under the policy. The claimant's four spells of sickness absences were not long-term absences, and she was content to take annual leave to ease herself back into her normal work routine, and the respondent accommodated this course of action.

150. The third ground, new evidence, Ms Hill did not find that there was any new evidence which was not available at the formal attendance meeting on 19 February 2021. (499-507, 509)

<u>Urgent tasks</u>

151. It is the claimant's case that during April 2021, she complained to Ms Williamson that she had been allocated urgent actions tasks which were causing her stress, and which could in turn trigger her disabilities. Ms Williamson had carried out a stress risk assessment but Mr Akinosho, was not aware of this and had placed the claimant on duties which were already

covered in her stress assessment causing more stress. According to the claimant, Ms Williamson stated that she was waiting the outcome of the appeal against the first written warning. (496-497)

152. Last minutes entries and overnight issues were dealt with by staff who started work early in the morning before the claimant. The claimant said that she was rostered to do ad-hocs on two occasions. Ad hocs are warrants, instructions from legal advisors and surrenders. She told us in evidence that she tried to do ad-hocs on the first occasion but needed help and had also to speak to others. The stress assessment had covered it. She should not have been rostered to do ad-hoc work. The second time she was rostered she knew that she was likely to have an adverse reaction to it. She found out that Mr Akinosho was unaware of the stress assessment and sent him a copy of it, stating she could not do it. She also informed Mr Whaley that she could not do the ad-hocs. She told the tribunal that the first occasion she was rostered to do ad-hocs was just before 21 April 2021.

153. In Mr Akinosho's evidence he told the tribunal that the claimant would tell him if she found a particular task difficult and he would remove her from it. He said that ad-hocs is not a pressurised job with time limits, but it is more in-depth. Legal advisors would ask to list a particular matter in the court diary. There might have been an oversight if he rostered the claimant to do ad-hocs but once the matter was raised, she was no longer rostered to do that work.

154. We find that there was only the one occasion prior to 21 April 20021, when the claimant was experiencing some difficulties in carrying out ad-hoc work and she sought assistance from her colleagues. Thereafter she was not rostered d to do any ad-hoc work.

<u>Change of line manager</u>

155. On 21 April 2021, she informed Mr Whaley that she no longer wanted to work with Ms Williamson. Mr Akinosho was not at work from August to November 2020 as he had personal family problems. Mr Akinosho, after the claimant's correspondence to Mr Whaley, effectively line managed her. The claimant said in evidence that she had a good relationship with Mr Akinosho as her line manager. The change in line management from Ms Williamson to Mr Akinosho came into effect on 14 May 2021. (549)

156. On 21 April 202, the claimant's on-site ergonomic chair was readjusted .

157. On 21 April 2021, there was a Workplace Adjustment Passport Review with Mr Akinosho. The adjustments the claimant requested were:

- a higher attendance management trigger point;
- to be situated away from drafts and the tannoy system;

- that she should not be asked to do CVP, CSU and list calling duties as she had not done them previously; and

- for a replacement ergonomic keyboard and mouse as hers were nine years old and the keyboard keys were getting stuck.

  (517-520)

158. On 26 May 2021 Mr Akinosho wrote to the claimant stating that she had passed the improvement period following the issue of the first written warning and that her attendance had been satisfactory.

159. On 26 July 2021, the claimant wrote to Ms Wylde, but we were not taken to a reply, stating, amongst other things, the following:

> "On another note, my buttons on my keyboard has become very stiff. It's a very old keyboard. Management are in the process of ordering a new Ergonomic wave keyboard with fixed number pad installed. I have now received the keyboard but the buttons are not light touch. I originally recall when I first received [m]y old ergonomic keyboard the same issue arose, and was assured by H&S Assessor that this was the style of the keyboard which is also meant to help with exercising the hand/fingers. I currently find this strenuous with my ongoing health issues with slipped discs (trapped nerves) and Fibromyalgia (shoulders and arms). Management are unable to find an appropriate keyboard from the normal channels. Have you ever come across this issue, and could you kindly make recommendations?
>
> In order to take the strain off my upper body, I'm tempted to use Dragon Software, but I'm currently wearing hearing aids (white noise background – hospital treatment) for Misophonia. I have been advised this will be long term, so not sure how to proceed." (617)

Summary of the claimant's work history

160. In terms of the claimant's work history, we find that from 1 December 2020, she returned to work working in the private office. From 1 December 2020 to 14 January 2021, she was working full-time at the office as she did not have her ergonomic equipment to work from home. She was absent due to neck pain on 10 December 2020. From 14 Janaury 2021, she was working two days from home with her ergonomic equipment and three days at the office. During the two days at home she would be engaged in trade union work and health and safety issues. She presented her claim form to the Tribunal on 20 August 2021.

161. From 4 February 2022, she worked from home on Mondays engaged in health and safety and trade union work. She told us that she worked 25 hours a week up until 1 December 2022 when she commenced full-time work. She said that from 1 December 2022, everything has been resolved.

Medical report-5 April 2023

162. In a medical report dated 5 April 2023, from the Department of Rheumatology at North Middlesex University Hospital NHS Trust,

addressed to the claimant's surgery, it refers to her being seen on 19 March 2023, and it states the following:

> "Thank you for referring this most pleasant 47 year old lady whom I saw today in Rheumatology Clinic. She came in today with a background of asthma, vitamin D hypovitaminosis, fibromyalgia syndrome diagnosed in 2018, depression and anxiety, panic attacks induced by mysonia for which she has a hearing aid and hyperlipidaemia. Recently she has been diagnosed as having cervical spondylosis and she had made an operation before that. Currently she is taking a combination of bempedolic acid and is ezetimibe, naproxen 250mg TDS PRN, inhalers, CBD oil over shelf. She is allergic to statin. She said her nan has osteoporosis. She lives with her husband and two children and works as a civil servant. She is a non-smoker and drinks alcohol very rarely. Reviews of other systems showed that she had sleep interruption, unrefreshing sleep, brain fog, headaches, feeling exhausted and tired most of the time and these are all symptoms of fibromyalgia syndrome.
>
> On examination, she is in a good general condition, blood pressure 116/68. Heart rate is 88 and she has a restricted cervical spine and reasonable forward hip flection. She is not showing any signs of inflammatory joint disease, she has bilateral patellofemoral crepitus which may reflect underlying osteoarthritis.
>
> There is no doubt that she had fibromyalgia syndrome, osteoarthritis, cervical spondylosis, bilateral knee osteoarthritis…"

163. This report was handed to the tribunal at the start of the hearing.

<u>Credibility</u>

164. She had been working for the respondent since 2 February 1998, and is a long-serving employee. In Mr Akinosho's words, she is very good at carrying out her work. She came across to us as a credible witness who had genuine medical conditions. She is in a better place now as reasonable adjustments have been made to enable her to work effectively full-time. She did not give the impression of someone who could be described as a malingerer in relation to her medical conditions.

165. Mr Akinosho came across to us as a manager who was trying to accommodate all of his direct reports, wherever possible, including the claimant. He described the claimant as assertive and one who would raise concerns with him about carrying out certain tasks and he would make changes to assist her. Where he was unable to recollect events, he made candid admissions to that effect.

166. None of the witnesses sought to mislead the tribunal in their accounts of events.

<u>Disability</u>

<u>Slipped discs</u>

167. We have made findings in respect of the claimant's alleged disabilities which we summarise below.

168. There is no dispute that the claimant's Slipped discs is a disability, and from the evidence we are satisfied that this condition falls within section 6, schedule 1, Equality Act 2010. As a result of her Slipped discs she has been suffering from neck and back pain; has difficulty in looking down; reaching; engaging in repetitive movements and lifting her upper body. She experiences shooting pain, pins and needles, numbness, and weakness in her neck. This condition arose following the assault while commuting in 2006 when she suffered a whiplash type injury. It was later discovered that she had a Slipped disc in her neck and on 10 September 2010, she had surgery to remove it. There is no suggestion that this condition significantly improved. We find that this constitutes a disability within the statutory definition. There is no dispute here because the respondent has acknowledged that it had knowledge of the claimant's Slipped discs at all material times.

Fibromyalgia

169. In relation to her Fibromyalgia, this was diagnosed by the claimant's doctor, Dr Eldon, on or around July 2014. She was, thereafter, prescribed anti-inflammatory medication to help with this condition.

170. In the occupational health report dated 17 August 2020, it records that the claimant reported that she suffered with Slipped discs for 10 years and that her Fibromyalgia was managed with prescription medication.

171. The medical records show that possible Fibromyalgia was discussed on 8 July 2014; that the claimant was known to have Fibromyalgia on 20 November 2017; a further discussion about her Fibromyalgia took place on 9 August 2018; a long history of Fibromyalgia was recorded on 5 March 2020; and that she had Fibromyalgia on 28 July 2021, 16 November 2021 and 5 January 2022. (921-968)

172. Although the letter of 5 April 2023 was produced at the start of the hearing by the claimant, it states that she has Fibromyalgia syndrome. People with Fibromyalgia may have increased sensitivity to pain. Suffer from extreme tiredness, fatigue, muscle stiffness, difficulty sleeping, memory and concentration, headaches and possibly irritable bowel syndrome. The condition is normally treated with antidepressants. Talking therapies, such as cognitive behavioural therapy, may be given. Medical practitioners may recommend lifestyle changes, such as exercise programmes and relaxation techniques. In many cases the condition may be triggered by a physical or emotional stressful event. It is thought to be linked to abnormal levels of certain chemicals in the brain and changes in the way the central nervous system, the brain, spinal cord and nerves, processes pain messages carried around the body.

173. In the claimant's disability impact statement, we find that her sleep is disturbed due to pain, and she finds it difficult to get comfortable and would often wake up in the night to take pain killers. The combination of deep pain, shooting pains, pins and needles, numbness and weakness affects her ability to start and complete tasks, such as, preparing and cooking a

meal. At times she would find it difficult to open cans and jars, chop and peel food, lift and carry pots and pans of hot food or liquids. She also experiences difficulty in bending down to put things in and to take items out of the oven. She has poor dexterity in her arms, wrists and hands. She cannot grip or hold things for long periods of time and would frequently drop or spill things. She may stop half-way through a task or give up altogether and go and lie down or not attempt the task at all. She finds it difficult to grasp the sides of her bath in order to get in and out of it. This is because of pain and weakness in her upper body and hands. Her husband would help her in and out of the bath to protect her from falling. She also finds it difficult to raise her arms for long periods, wash and dry her hair.

174. As a result of the pain, numbness and weakness in her upper body, arms, hands, and fingers, she has difficulty grasping and holding clothing and footwear to pull them off her body. This would include boots, tops and trousers. Sometimes she would have to stop due to the unbearable shooting pains and cramps. She wears loose fitting clothes.

175. Her neck pains make it difficult for her to look down to read as her head feels too heavy for her neck. To compensate, she would place pillows on her lap and would put her reading material on top of them or would lie down with her head supported in order to be able to read.

176. The physical pain she experiences affects her ability to interact and socialise with people. She is uncomfortable in unfamiliar surroundings and is anxious that someone might bump into her. She would experience physical symptoms, such as, agitation and anxiety leading, sometimes, to headaches and panic attacks. She passed out when she was in a high state of anxiety on an overground platform. She gets anxious when on crowded public transport which tenses her neck and increases the pain.

177. She is unable to vacuum the stairs in her home as it would involve lifting the vacuum cleaner which she has difficulty in doing. She also finds it difficult to use the vacuum cleaner as repetitive arm movements would aggravate her condition.

178. We are satisfied that in the occupational health report dated 1 February 2018, sent to Mr Akinosho, clearly states that the claimant had been diagnosed with the painful condition of Fibromyalgia that impacts on her wellbeing. We conclude the respondent had knowledge of that condition on or shortly after that date.

<u>Misophonia</u>

179. Misophonia is the sensitivity to noise. On 9 December 2019, it is recorded that the claimant had noise hypersensitivity. Examples given were “people shouting, opening a crisp packet or chewing”. The claimant would get angry when she “is in a place when there is a lot of noise”. On 20 December 2019, it is recorded that she had started counselling for sensitivity to loud noises. Other references to the claimant’s sensitivity to noise and crowds and getting angry, are on 11 June 2019 and 16 September 2019. (948-949)

180. A further reference to noise sensitivity is on 19 March 2021. (934)

181. The claimant said that she became aware of her sensitivity to noise in June 2019 following her mother's death. This is in her email to Ms Williamson and Mr Akinosho on 10 June 2019. (174)

182. We find that the GP records supports the claimant's statement on noise sensitivity.

183. The occupational health report of 17 August 2020 refers to a recent diagnosis of Misophonia, and that she reported that the condition exacerbates her symptoms impacting on her concentration levels and daily functions. She also emailed Mr Akinosho and Ms Williamson on 26 August and 24 September 2020, stating that she was unable to control the noise in the office where she was working due to her Misophonia.

184. Of note is the record of the discussion on 30 October 2020 with Ms Ruth Wylde, Civil Service Workplace Adjustment Service, Ms Williamson and the claimant. During that meeting it was acknowledged the claimant was suffering from Misophonia and that the condition is rare and would often take doctors time to diagnose. It also stated that Misophonia sufferers found it difficult to work in an average office environment and that it was vital to have a quiet workspace.

185. The claimant also sent to the respondent a leaflet on Misophonia.

186. In the occupational health report dated 17 August 2020, reference is made to the diagnosis of Misophonia, and that the claimant had sensitivity to noise. She had complained, prior to that date, of her noise sensitivity but it was made known in the occupational health report that she suffers from Misophonia. In evidence Ms Williamson said that it was not reasonable to have asked for more medical evidence.

187. On 7 September 2020, the claimant emailed Mr Akinosho requesting that she should work in the private hub office and provided confirmation of an appointment with a psychiatrist for her Misophonia. A fit note from her doctor records that she suffers from Misophonia, and on 29 September 2020, she informed Mr Akinosho that she had been referred to sound therapy at the Ear, Nose and Throat Clinic for treatment of her Misophonia by a psychiatrist. In the Audiology report dated 8 October 2021, she was having hearing therapy for her Misophonia which supports what she had been saying previously to the respondent's managers about her sensitivity to noise. Travelling on public transport when she was experienced flare ups was difficult. In evidence Mr Akinosho described her as being in a state when she arrived for work. (274, 289, 1142)

188. We find that the respondent had knowledge of the claimant's Misophonia upon receipt of the 17 August 2020 occupational health report. It also was aware that the claimant was unable to work in an office environment where there is the presence of noise and that she would need to work in a quiet area. We, therefore, find that the claimant's Misophonia and Fibromyalgia

are disabilities as they substantially, adversely affect normal day-to-day activities and have lasted for 12 months or are expected to do so.

Submissions

189. We have taken into account the detailed submissions in writing and orally by Ms Ibbotson, counsel on behalf of the claimant, and by Ms Cummings, counsel on behalf of the respondent. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have also taken into account the authorities they have referred us to.

The law

Disability

190. Section 6, Equality Act 2010, "EqA 2010", states:

> "(1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

191. Section 212(1) EqA defines substantial as "more than minor or trivial." The effect of any medical treatment is discounted, schedule 1(5)(1) and where a sight impairment is correctable by wearing spectacles or contact lenses, it is not treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities, schedule 1(5)(3).

192. Under section 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

193. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24.

Discrimination arising in consequence of disability

194. In relation to discrimination arising in consequence of disability, section 15 provides,

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

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

195. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

196. In paragraph 4.9 it states:

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

197. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that 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 amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

198. A similar approach was taken in the case of City of York Council v Grosset UKEAT/0015/16 relying on the guidance in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, Langstaff P.

199. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

Failure to make reasonable adjustments

200. Section 20, EqA is on the duty to make reasonable adjustments, and section 21 provides that a failure to comply with a duty in section 20, is a failure to make reasonable adjustments. Section 20 states:

> "(1)Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion of practice of A's put 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 is reasonable to have taken to avoid disadvantage."

201. In relation to the provision of auxiliary aids, section 20 states:

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

202. Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

> "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

203. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20, a judgment of the EAT. An Employment Tribunal in considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment, must identify:

> (1)the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2)the physical feature of premises occupied by the employer;
>
> (3)the identity of a non-disabled comparator (where appropriate), and
>
> (4)the identification of the substantial disadvantage suffered by the claimant may involve consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

204. A tribunal in deciding whether an employer is in breach of its duty under section 20 EqA 2010, must identify, with some particularity, what "step" it is that the employer is said to have failed to take. A failure to comply with the requirements in section 20, is a "failure to comply with a duty to make reasonable adjustments.", section 21(1), and a person discriminates against a disabled person if they fail "to comply with that duty in relation to that person.", section 21(2).

205. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

206. In O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283, [2007 ICR 1359, the Court of Appeal held that increasing the period during which the disabled employee could claim full pay while on sick leave to alleviate financial hardship following a reduction in pay, would not be a reasonable step to expect the employer to take as it would mean that the employer would have to assess the financial means and stress suffered by their disabled employees.

207. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift,

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

208. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

209. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

210. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

211. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

212. The test is an objective one. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

213. Under section 123 EqA a complaint must be presented within three months;

> "…starting with the date of the act to which the complaint relates" (a), "or such other period as the employment tribunal thinks just and equitable," (b) and "conduct extending over a period is to be treated as done at the end of the period," (3)(a).

214. Whether the same or different individuals were involved in the alleged discriminatory treatment is a relevant factor but not a decisive one in determining whether the conduct extended over a period, Jackson LJ, Aziz v FDA [2010] EWCA Civ 304.

215. A useful summary of the relevant legal principles is set out in Thompson v Ark Schools [2019] ICR 292:

> "16. Helpful guidance of a general nature is provided by the judgment of the EAT (Laing J presiding) in Miller and Others v Ministry of Justice and Others UKEAT/0003/15, as follows: "10. There are five points which are relevant to the issues in these appeals. The discretion to extend time is a wide one: Robertson v Bexley Community Centre [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24. ii. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, paragraph 25). In Chief Constable of Lincolnshire v Caston [2010] EWCA Civ 1298; [2010] IRLR 327 Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in Robertson, but did not, in my judgment, overrule it. It follows that I reject Mr Allen's submission that, in Caston, the Court of Appeal "corrected" paragraph 25 of Robertson. Be that as it may, the EJ in any event directed himself, in the first appeal, 242 in accordance with Sedley LJ's gloss (at paragraph 31 of Caston), which is more favourable to the Claimants than the gloss by the majority. iii. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition. iv. What factors are relevant to

the exercise of the discretion, and how they should be balanced, are for the ET (DCA v Jones [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (ibid, paragraph 44). v. The ET may find the checklist of factors in section 33 of the Limitation Act 1980 ("the 1980 Act") helpful (British Coal Corporation v Keeble [1997] IRLR 336 EAT; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then was) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits something significant: Afolabi v Southwark London Borough Council [2003] ICR 800; [2003] EWCA Civ 15, at paragraph 33. 11. DCA v Jones was an unsuccessful appeal against a decision by an ET to extend time in a disability discrimination claim. The Claimant had not made such a claim during the limitation period as he did not want to admit to himself that he had a disability. At paragraph 50, Pill LJ said this: "The guidelines expressed in Keeble are a valuable reminder of factors which may be taken into account. Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found. It is inconceivable in my judgment that when he used the word "pertinent" the Chairman, who had reasoned the whole issue very carefully, was saying that the state of mind of the respondent and the reason for the delay was not a relevant factor in the situation." 12. I should also say a little more about points 10(iii)-(v). There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses. As I understood their arguments, neither Mr Allen nor Mr Sugarman suggested that a lack of forensic prejudice to a Respondent was a decisive factor, by itself, in favour of an extension of time. But both argued, in slightly different ways, that the ET was bound in every case, in Mr Allen's phrase, "to balance off" the relative prejudice to the parties, and that, if the ET did not do so expressly, that was an error of law, even if there was, otherwise, no good reason to extend time." 17. Section 33(3) of the Limitation Act 1980, referenced by Laing J, provides: "(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to – (a) the length of, and the reasons for, the delay on the part of the plaintiff; (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12; (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action; (e) the extent to which the plaintiff acted

promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."
18. Although section 33(3) of the Limitation Act provides a useful reference point, as the Court of Appeal observed in Southwark London Borough Council v Afolabi [2003] ICR 800, an ET is not required in each case to go through the list there set down. The requirement upon it is to have regard to those relevant factors that are significant in the particular case before it; failure to do so may amount to an error of law (see per the EAT, then addressing the equivalent provision under the Sex Discrimination Act 1975, in Hutchison v Westward Television Ltd [1977] ICR 279, and as acknowledged by Laing J in Miller (see above))."

216. On time limits , the EqA provides so far as relevant:

> **"123 Time limits**
>
> (1) [Subject to section 140A] proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> ...
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

217. It should be noted that "time limits in employment cases are, in general, strictly enforced" Robinson v The Post Office [2000] IRLR 804 at paragraph 32, per Lindsay J, who held:

> "It is to be borne in mind that time limits in employment cases are, in general, strictly enforced – see London Underground v Noel [1999] IRLR 621, 624, para 21 CA and see also Aziz v Bethnal Green [2000] IRLR 111, in the Court of Appeal which again illustrates a strict approach to time limits, albeit different time limits, in the employment law field."

218. The time limit is extended if there is an ACAS certificate, section 140B Equality Act 2010.

219. Time limits are to be applied strictly. The Court of Appeal held that the exercise of the discretion on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre [2003] IRLR 434. The factors the tribunal may consider in exercising its discretions are: the reason for and the extent of the delay; whether the claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim to proceed; and the merits of the claim. There is no general rule, and the matter remains one of fact.

220. In the case of Abertawebro Morgannwg University Health Board v Morgan EWCA/Civ/EAT/640, it was held by the Court of Appeal, that the tribunal has a broad discretion to consider factors, such as the length of and reasons for the delay; whether the delay has prejudiced the respondent; and the prejudice to the claimant.

> "When tribunals consider their discretion to consider a claim out of time on just and equitable grounds *there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So the exercise of discretion is the exception rather than the rule*." (para 25 emphasis added).

221. Insofar as continuing act is relevant to any of the claims, the burden of proof is on claimant to establish that there is conduct extending over a period satisfying the test in Hendricks v Commissioner of Police for the Metropolis [2002] EWCA Civ 1686 [2003] IRLR 96 at para 49:

> “At the end of the day Miss Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no 'act extending over a period' for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination. It is, however, too soon to say that the complaints have been brought too late.” And para 52 “...focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.”

222. In relation to section 123(4), and time limits in a failure to make reasonable adjustments claim, the EAT, His Honour Judge Beard, held in the case of Fernandes v Department for Work and Pensions [2023] UKEAT114, that:

> “34. In the absence of a finding that the employer has made a specific decision not to alleviate a disadvantage there must be judicial analysis to identify the notional

date. It appears to me that this analysis must begin with the identification of the feature which causes disadvantage. This could be a PCP but it could also be a physical feature or auxiliary aid. This will be a fact which dates the start of disadvantage. The next element to be considered is when it would be reasonable for the employer to have to take steps to alleviate the disadvantage. This is a factual finding and will vary. For instance, the date by which it would be reasonable to have to provide a chair could depend on whether a chair is already commercially available or the chair in question must be purpose built. The date would also amount to a finding of fact as to when the breach occurred. As it would also assist the judge in identifying a notional date. The ET would then have to ask if there are facts which would allow it to conclude that the employer has acted inconsistently with the duty to make adjustments, if there are, then the notional date would arise at that point. Finally, if there is no inconsistent act, there will come a time when it would be reasonable for the employee, on the facts known to them, to conclude that the employer is not going to comply with the duty."

223. In relation to the justification defence, where there has been unfavourable treatment under section 15, the employer has to show that "the treatment is a proportionate means of achieving a legitimate aim.", section 15(1)(b).

224. Paragraph 5.21 of the Equality and Human Rights Commission's Code of Practice in Employment 2011, states:

"If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to that the treatment was objectively justified."

225. Proportionality requires that the measure in question is both appropriate to achieve its legitimate aim or aims, and necessary in order to do so, Baroness Hale, Seldon v Clarkson Wright and Jakes [2012] ICR 716, paragraph 50, Supreme Court.

Conclusion

Discrimination arising in consequence of disability, section 15 EqA 2010, paragraph 6 of the List of Issues

226. The claim here is that the issue of the first written warning for 12 months, made on 15 March 2021, by Ms Williamson, and dismissing the appeal against the warning on 22 April 2021, by Ms Hill, were unfavourable treatment of the claimant?

227. The warning was issued in respect of the claimant's absences from 7 to 23 August 2020; 27 August to 2 September 2020; 25 to 27 November 2020; and from 10 December 2020. She was absent because of back pain, neck pain and headache. The sickness absences arose because of her Slipped discs and Fibromyalgia. Between 7 to 23 August 2020, she was working from home and had informed the respondent that she did not have the correct equipment. She continued to work from home, but her back pain got worse. Not having the proper equipment caused the pains in her neck, a result of her three Slipped discs. This gave rise to flare ups because of the lack of equipment. There was no evidence to suggest that she was making

things up, was prevaricating, or was malingering. All the evidence pointed to the fact that she was and is, a hard, conscientious, work and was willing to work but for sickness.

228. At the return-to-work meeting held on 24 November 2020, she explained that her 11 days' absence, followed on from her request for a larger screen as her laptop screen was not big enough. She cupped her shoulders over her laptop for long periods which made her back uncomfortable causing her pain. No action had been taken to rectify the problem she had raised. Not having a bigger screen had an impact, adversely, on her neck leading to flare ups in her neck which resulted in her having to take anti-inflammatory medication to ease the pain. She was not fit for work from 15 to 23 August due to neck pain.

229. In relation to her absence from 27 August to 2 September 2020, seven days, she explained what had caused that period of absence during the FARM meeting. She stated that on 26 August 2020, the pain was really bad, so she attended the Accident and Emergency Department of her local hospital where she was given morphine to relieve the nerve pain as well as diazepam to relax the muscles. On 26 August 2020, she emailed Ms Williamson stating that she would not be attending work the following day due to a flare up, and on 7 September 2020, she provided the Accident and Emergency discharge letter.

230. With regard to her absence from 25 to 27 November 2020, three days. At the FARM meeting she explained that she was told to sit in an open plan office which was claimed to be suitable, but that was not the case. Her working environment was not suitable. As a result of her Fibromyalgia, the stress suffered caused her muscles to seize up.

231. In the return to work meeting held on 1 December 2020, she explained why she was absent which was due to her neck flare up and that she was taking diazepam for two days. She was frustrated because of the lack of equipment to assist her in working from home. The inadequate equipment triggered pains in her arms, and she felt it was getting worse.

232. With regard to the absence on 10 December 2020, she had informed the respondent that she would not be in for work due to a flare up. In the FARM meeting notes on 22 February 2021, it is recorded that she was absent on that day due to a flare up.

233. We have concluded that her sickness absences were the "something" arising in consequence of her Slipped discs and Fibromyalgia. The respondent had knowledge of her Fibromyalgia from 1 February 2018, and had knowledge of the adverse effects of her Misophonia on daily activities, from 17 August 2020.

234. Can the respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following legitimate aims:

189.1 The need to ensure the effective running of the respondent's work obligations and operations by managing employees' absences; and

189.2 The need to ensure an effective workforce.

235. It is accepted by the claimant that the above aims are legitimate, and we do agree that they are. The issue here is one of proportionality. Was it reasonable and necessary to have issued the warning and for the appeal to be dismissed?

236. We agree with Ms Ibbotson in her submissions that, given that the flare ups which led to the warning were caused by the respondent's own failure to provide ergonomic equipment and/or a private quiet office, her absences should have been discounted. It was unreasonable for the respondent to expect the claimant to attend the office to use the ergonomic equipment available on site given that she was being required to work from the Old Resulting Office, which was unsuitable, particularly having regard to her Misophonia, Slipped discs and Fibromyalgia.

237. There was no evidence given on behalf of the respondent that the claimant's absence had an adverse impact on its ability to ensure the effective running of its work obligations, operations and workforce. The claimant worked amended duties and undertook trade union activities two days a week. Her non-attendance would have had a reduced impact on the respondent's ability to effectively manage its obligations, operations and workforce.

238. There was nothing stopping the respondent from increasing the trigger point having regard to her absences and the reasons for them. Individual circumstances do vary. In its disability policy it recognises that those suffering with a disability may have more sickness absences than non-disabled people.

239. The provision in the Attendance Management policy, paragraphs 60 and 61, states that if the sickness absence is related to disability, managers must consider and put in place all reasonable workplace adjustments before issuing a warning. In some circumstances the manager may use his or her discretion and not give a written warning.

240. Ms Hill, in considering the appeal, was of the view that the claimant should have used the ergonomic equipment available in the Old Resulting Office and that to work in there was suitable notwithstanding her Misophonia. We conclude that it was unreasonable to require her to work in the Old Resulting Office. The conditions there did not seriously take into account her Misophonia. Her absences were caused by the failure to make reasonable adjustments. Ms Hill failed to take that into account in her outcome letter.

241. We accept that the respondent has to have an Attendance Management policy, but it has to be flexible as no employee's individual circumstances are the same. The application of its policy allows for disability to be taken

into account. We also accept that the claimant's longer period of leave was discounted because it was disability related. The other periods of absence were also disability related but were not discounted.

242. We accept that the respondent had increased the claimant's trigger point by 25% from 8 days or 4 spells, to 10 days or 6 spells. The increase to 6 spells is by 50%. However, it is acknowledged that a disabled person is likely to be absent on sick leave more than a non-disabled person, Griffiths v Secretary of State for Work and Pension [2016] IRLR 216, Court of Appeal, Elias LJ, who gave the leading judgment. Having regard to the respondent's guidance, a manager can discount disability related sickness absences.

243. It was neither reasonable nor necessary to have issued the claimant with a warning and to dismiss her appeal having regard to the reasons for her sickness absences. They were disability related. Her treatment was unfavourable and disproportionate.

244. The respondent has not established a justification defence and this claim is, therefore, well-founded.

Failure to make reasonable adjustments, section 20 EqA 2010

Did the respondent fail to provide auxiliary aids to the claimant, paragraph 11 List of Issues? - The respondent's case

245. The respondent's case is that, in relation to auxiliary aids, it has admitted that the claimant did not have a complete ergonomic homeworking equipment until 14 January 2021. However, Ms Cummings submitted that the claimant did have a keyboard at home for home-working from 29 May 2020 until 29 November 2021. She later complained about the keys becoming stuck and new keyboards were ordered for her to try. Once satisfied, one was ordered which took matters up to November 2021, after the presentation of the claim form. Her evidence on substantial disadvantage was limited.

246. In relation to those auxiliary aids referred to in paragraph 11.1b, Ms Cummings submitted that the respondent does not accept that the claimant had need for a tilted document holder, a footrest, or a telephone headset to work at home. She did not have any hard copy papers to look at as she worked digitally from her laptop. The DSE assessment of 3 July 2020, records that her feet were supported on the floor, or on a footrest, therefore, there was no need for a footrest to be provided by the respondent. There was also no need for a headset as her work did not involve taking many telephone calls.

247. As regards the provision of a private office, had the claimant attended the office when requested on 27 August 2020, a private office would have been provided for her use.

248. Ms Cummings further submitted that the Dragon Software was available on the claimant's computer in the office prior to Covid and no explanation had been given as to why it would not work following her return to work in the office.

249. It is denied that the claimant was put to a substantial disadvantage in comparison to persons who are not disabled, and it is further submitted that the claimant had a complete suite of ergonomic equipment available to her in the office.

An ergonomic chair

250. We have considered the above points by Ms Cummings, the issues, our findings of fact, and the counter submissions by Ms Ibbotson, in our conclusion. In relation to an ergonomic chair for homeworking, the evidence here as regards substantial disadvantage, is lacking. The claimant had use of a chair at home, but we were not given convincing evidence of her difficulties in carrying out her work without an ergonomic chair. In her completed DSE pre-assessment questionnaire on 3 July 2020, she stated that the small of her back was not supported by the chair and no clarification was given. She did not fill the comments box to explain what she meant by this. This part of her claim is not well-founded.

An ergonomic keyboard

251. With regard to the ergonomic keyboard, she did take home her laptop on or around the 28 May 2020. Her ergonomic keyboard was collected from her home and put in the office on 26 August 2020. On 24 November 2020, she emailed Ms Williamson stating that the space bar on her keyboard was stuck and Dragon Software was not responding. On 30 June 2021, a keyboard was ordered for her use. She wrote to Mr Cording on 28 September 2021, stating that in July 2021 she requested her keyboard in the office be changed due to the keys being stiff and that the one at her home should also be changed as it had the wrong layout. The new keyboard at work was "now perfect". The one at home was difficult to adapt to because it had a different layout and caused confusion as she is "a touch typist". This impacted on her posture as having to look down at the keyboard aggravated her neck.

252. The respondent had to source a suitable keyboard in 2021, not from its normal suppliers and at additional cost. The claimant was provided with it for use at home on 29 November 2021.

253. We find that the respondent knew, in July 2021, that the claimant was experiencing problems with her health, namely her Slipped discs and Fibromyalgia, as having to look down aggravated neck and posture when she used the unsuitable keyboard at home. It is unclear when she was provided with the keyboard for her use in the office, but by 28 September 2021, she was satisfied with it. We have come to the conclusion that by the date of the presentation of the claim form on 20 August 2021, she should have been supplied with a suitable keyboard to work with at home to either

alleviate or minimise the impact on her health. There was no evidence that non-disabled people or those without the claimant's disabilities were also substantially disadvantaged.

254. The delay in providing the keyboard extended the period of the substantial disadvantage longer than reasonably necessary. This part of the claim is well-founded.

A separate larger screen

255. We agree and adopt the chronology set out in Ms Ibbotson's written submissions at paragraphs 33.1-33.16, and 36. The claimant was working from home from 28 May 2020 and had repeatedly requested a larger screen or monitor to avoid having to look down aggravating her neck. These requests were made on 16 June 2020, 2, 3, 24 July 2020, 7, 17, 24 August 2020, 2 and 5 October 2020, 1 and 15 December 2020. No satisfactory reason was given for the delay in providing the screen well before 14 January 2021, and the claimant's managers seemed to be avoiding taking responsibility. We have come to the conclusion that by the end of July 2020 the claimant should have been provided with a larger screen for her to work from home.

256. The same applies in relation to the claimant's repeated requests for her ergonomic workstation to be installed at her home as set out in Ms Ibbotson's chronology. This should have been done when she commenced working from home on 28 May 2020. However, we accept that it would have taken time to do so having regard to the fact that the country and the respondent were dealing with the Covid-19 pandemic. The Occupational Health report dated 17 August 2020, stated that her ongoing neck problems were exacerbated by poor postural arrangement of her workstation at home and the use of her laptop. As the claimant stated during the Formal Attendance Management Meeting on the 22 February 2021, the reasons for her absences in 2020 were causally connected to the failure to set up her ergonomic equipment at home. The rota required staff to work from home two days a week. Due to her Misophonia, it was not a reasonable adjustment to require her to work from the office at the material time prior to 1 December 2020.

257. A tilted document holder would have prevented the claimant from having to bend her head down aggravating her neck.

258. The delay in providing these auxiliary aids meant that her symptoms continued for longer than was reasonable. She needed the aids as she was required to work part of the week at home and, in any event, up until 1 December 2020, she was working from home.

259. Our conclusion is that by the end of July 2020, the claimant should have been provided with a separate screen and a tilted document holder. This part of the claim is well-founded.

A footrest and telephone headset

260. We were not persuaded that the claimant suffered substantial disadvantage in not being provided with a footrest and a telephone headset until 14 January 2021. In the DSE pre-assessment questionnaire she completed on 3 July 2020, she stated that she either rested her feet on the floor or on a footrest. Further, that she did not use the telephone extensively. This aspect of her case is not well-founded.

Not provided with a private office from July to 1 December 2020

261. In relation to a private office not being provided for the claimant's use until 1 December 2020, paragraph 11.2, we find that because of the claimant's Misophonia, she required a quiet space in which she could work. The Old Resulting Office was unsuitable because of the prevalence of noise, the movement of people, fire drills and the tannoy system. The respondent should have relied on and accepted what the claimant was saying she needed rather than on the literal wording in the OH report that the claimant needed a "quieter" part of the office. This was acknowledged in evidence by Ms Williamson who admitted that more attention should have been given to what the claimant said she reasonably required.

262. The substantial disadvantage in not working in a private office meant that because of her Misophonia, the noise would become unbearable, affecting her concentration and, ultimately, her work performance. She had given the respondent a leaflet on the condition, and there was the diagnosis in the 17 August 2020 OH report. Mr Whaley's email dated 26 August 2020, was not an offer of a permanent private office and none was available until 18 November 2020. We have come to the conclusion that from the end of August 2020, the respondent should have made available a permanent room or a room available for the claimant to work in long term as the CVP work was being done remotely. This was a reasonable step to have taken. Accordingly, this claim is well-founded.

Not providing Dragon Software from 29 May 20 to 5 May 2021, at the claimant's home, and from 29 May 2020 to 5 May 2021, at her office, paragraphs 11.3 and 11.4

263. We agree with Ms Cummings in her submissions that the claimant has not demonstrated substantial disadvantage in not having the Dragon Software speech recognition system installed on her computers. She wrote to the respondent and told us that she is a touch typist and was able to use her typing skills. We were not told that the Dragon Software issues put her at a substantial disadvantage as a disabled person when compared with those who were non-disabled or do not have her disabilities. Her disabilities did not affect her speech. In her email to Ms Wylde, on 26 July 2021, she wrote that she was tempted to use Dragon Software but was wearing noise cancelling hearing aids for her Misophonia. We, therefore, do not find this aspect of her claim to be well-founded.

Failure to make reasonable adjustments – provisions, criteria, or practices, "pcps"

264. There is no dispute that the three pcps are valid in this case. The issue is whether the claimant suffered any substantial disadvantages in respect of their application.

265. We have concluded that the pcp requiring Administrative Officers to undertake urgent action tasks did not apply to the claimant, nor was it anticipated to do so. She is of a forceful personality and when she was asked to engage in such tasks she objected, and the matter did not proceed any further. There was no established practice requiring her to engage in such work. This aspect of the claim is not well-founded.

266. In relation to requiring employees to attend the workplace in accordance with the rota system, paragraph 15.2. Travelling on public transport can be difficult for those suffering from Misophonia because of the noise. In the claimant's case it was difficult having to travel to work when she was experiencing flare ups because of her Fibromyalgia and Misophonia. Going to and from the office aggravated her symptoms of pain and dizziness. Mr Akinosho described her as being in a state when she arrived for work. Being required to adhere to the rota and attend work when she was experiencing a flare up, aggravated her Fibromyalgia and Misophonia symptoms.

267. It was reasonable, when the claimant was experiencing flare ups, for her to work from home as recommended by the OH Advisor in the report dated 17 August 2020, as it was "likely to provide a positive effect on her health in achieving a good work life balance and better management of her current health." As a large employer and bearing in mind that most of the claimant's work could be done remotely, we conclude that it was a reasonable step to have allowed her to work from home during a flare up. This aspect of the claim is well-founded.

268. As regards requiring employees to maintain a certain level of attendance at work in order to avoid sanctions, paragraph 15.3, the claimant did suffer a substantial disadvantage because of her disabilities which predisposes her to have a greater amount of sickness absences when compared with a non-disabled person or someone without her disabilities. This was acknowledged by Elias LJ in Griffiths. As a result of her absences she was the subject of a First Written Warning and the dismissal of her appeal. We have already concluded that her absences were disability related.

269. The respondent's policy allows for managers to increase the trigger point or disregard disability related absences. Although the trigger point was increased, it did not allow for the frequency of the claimant's disability related absences caused by the respondent's failure to provide her ergonomic equipment. Moreover, the respondent could have disregarded such absences entirely but did not do so. This aspect of the claim is well-founded.

<u>Out of time points</u>

270. At the preliminary hearing held on 21 October 2022, Employment Judge KJ Palmer, allowed the claimant's application to amend her claim by adding further particulars to the claim of discrimination arising in consequence of disability. The last act being the refusal on 22 April 2022, to allow her appeal against the written warning. ACAS was notified on 9 June 2021, and a certificate was issued on 21 July 2021. The claim form was presented on 20 August 2021. Ms Cummings is of the view that this claim is in time.

271. We agree and do conclude that the discrimination arising in consequence of disability claim is in time.

271. Ms Cummings is further of the view that the respondent is prepared to accept that if the discrimination arising in consequence of disability claim is well-founded, it forms a continuing act with the reasonable adjustments claim should the tribunal conclude that the claimant's periods of sick leave were caused by the respondent's failure to make reasonable adjustments and in so far as the reasonable adjustments claim relate to the delay in providing the ergonomic equipment.

272. In relation to the delay in providing a private office and being required to engage in Urgent duties, these Ms Cummings submitted, do not form a continuing act as to bring them in time.

273. We accept that where there is a failure to act, time starts to run from the end of the period in which the employer might reasonably be expected to comply with the duty, <u>Abertawe Bro Morgannwg University Local Health Board.</u>

274. We have dealt with the unmeritorious urgent duties claim and have concluded that it is not well-founded. To address the time point here would be academic.

275. As regards the delay in providing a private office until 18 November 2020, we accept that the claimant moved into a private office on 1 December 2020. In the Case Management Summary, paragraph 9, it is stated that she instructed solicitors "just before the Hearing", meaning the preliminary hearing before EJ Hyams on 11 July 2022, and an application to amend was made. The issue was determined partially in the claimant's favour by EJ K Palmer on 21 October 2022. The time point in respect of this aspect of the claim was a live issue to be determine by this tribunal.

276. When the claim form was presented on 20 August 2022, the claimant was unrepresented. We accept that in relation to some of the internal matters, and at some of the meetings, she was represented by a trade union official, but there is no indication that the union was involved in drafting the claim form and they do not appear on the form as her representative.

277. There was a considerable delay in presenting this aspect of the reasonable adjustments claim. No good reason has been given for it. The cogency of the evidence, however, has not been affected by the delay as we heard

evidence from the respondent's witnesses in relation to the provision of a private office, principally given by Ms Williamson. The respondent has not been seriously prejudiced by the delay. The failure to provide a private office for the claimant's use, is a very important part of her case against the respondent. Balancing all relevant matters, we have come to the conclusion that it is just and equitable to extend time for this aspect of the claimant's claim to her heard and determine. Thompson v Ark Schools, Fernandes v Department for Work and Pensions, and Abertawebro Morgannwg University Health Board v Morgan, applied.

278. The case is listed for a remedy hearing on **Thursday 13 June 2024**, for one day, by Cloud Video Platform, if not settled.

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Employment Judge Bedeau

26 April 2024
Date: …………………………………..

Sent to the parties on: .29 April 2024..

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For the Tribunal Office

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