Case Numbers: 2414355/2021
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EMPLOYMENT TRIBUNALS

Claimant: (1) Mrs W Kelly
(2) Mrs M Faulkner

Respondent: Ofsted

Heard at: Manchester Employment Tribunal **On:** 18 -29 January 2024

In chambers:
29 January and
29 February 2024

Before: Employment Judge Barker
Mr D Mockford
Ms V Worthington

Representation
Claimants: in person
Respondent: Mr A Tinnion (counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimants were unfairly dismissed;

2. The claimants were not subjected to unlawful direct discrimination by reason of disability (s13 Equality Act 2010). This claim fails and is dismissed;

3. The claimants were subjected to unlawful discrimination because of something arising in consequence of their disability (s15 Equality Act 2010) by reason of their dismissal. This claim succeeds.

4. The claimants were not subjected to unlawful discrimination because of something arising in consequence of their disability (s15 Equality Act 2010) in connection with redeployment or a failure to provide administrative/alternative work. These claims fail and are dismissed;

5. The claimants withdrew their claim for discrimination because of something arising in consequence of their disability in relation to their sick pay. This

claim is dismissed.

6. The respondent failed to make reasonable adjustments for both claimants (sections 20-22 Equality Act 2010);

7. The compensation to be paid to the claimants will be decided at a remedy hearing listed for 20 and 21 June 2024.

REASONS

Background Matters and issues for the Tribunal to decide.

1. By claim forms dated 3 November 2021 both claimants presented claims to the Tribunal of unfair dismissal and discrimination by reason of disability. ACAS Early Conciliation began for both claimants on 5 October 2021 and ended on 6 October 2021.

2. Both claimants assert before the Tribunal that they are disabled within the meaning in section 6 of the Equality Act 2010 at the relevant time. Initially, the respondent disputed that both claimants were disabled.

3. At a preliminary hearing before EJ Robinson on 15 March 2022, the matter was set down for a final hearing and case management orders were given to the parties.

4. At a subsequent preliminary hearing on 19 July 2023, EJ Dennehy found that Mrs Faulkner was a disabled person by reason of anxiety between the period of 1 March 2020 and 31 September 2021.

5. Mrs Kelly's claim was not dealt with in the same way and the issue of her disability was to be determined at this hearing.

6. At the start of this hearing, the respondent conceded that Mrs Kelly was disabled within the meaning in section 6 of the Equality Act by reason of IBS and rosacea at the material time and that the respondent knew of this by 1 January 2019. The respondent did not concede that Mrs Kelly was disabled by reason of anxiety, as also asserted by her. This remains to be determined by this Tribunal.

7. The issue of when the respondent knew, or ought reasonably to have known of Mrs Faulkner’s disability was also to be determined at this hearing by the Tribunal.

8. At a further preliminary hearing for case management before EJ Cline on 6 November 2023, further case management orders were made, and a list of issues was drawn up for each claimant. The parties confirmed to the Tribunal that they were content that the lists of issues were an accurate reflection of the issues which must be determined by the tribunal at the final hearing.

9. During the final hearing, both claimants withdrew their claims for discrimination arising from disability (s15 Equality Act 2010) in relation to a reduction in their sick pay. Those claims are hereby dismissed.

10. The updated list of issues relating to each claimant is attached to this judgement as an appendix.

11. Mrs Kelly and Mrs Faulkner represented themselves. It is acknowledged by the Tribunal that such disability discrimination as the claimants pursue are technical and contain legally complex issues. On occasions during the final hearing, both Mrs Kelly and Mrs Faulkner told the Tribunal that they were really struggling to understand some of the legal principles in their claims. On each occasion, the judge explained the legal issues with reference to the list of issues and clarified the distinction between direct discrimination, discrimination arising from disability and a failure to make reasonable adjustments.

12. At the conclusion of the evidence on day seven of the hearing, when making arrangements for closing submissions to be presented to the tribunal, the claimants, having still indicated that they were in some difficulties with how to makes admissions about their claims, were provided with a further explanation of the legal principles in their cases and an opportunity to ask further questions, which they did.

13. The Tribunal heard evidence from seven witnesses for the respondent, who were Mr Wallace, who was Mrs Faulkner's team officer (team leader) at the time to which these proceedings relate and who heard her grievance and took the decision to dismiss her. We also heard from Mrs Pye, who heard Mrs Faulkner's appeal against the rejection of her grievance and who also heard Mrs Kelly's grievance. We also heard from Mrs Binks, who heard Mrs Faulkner's appeal against her dismissal, and Mr Fairfield, who was Mrs Kelly's manager, and Miss Squire, who dismissed Mrs Kelly. Finally, we also heard from Ms Harper, who heard Mrs Kelly's appeal against her dismissal and Ms Exton, the respondent's Deputy Director of Operations, who provided evidence to the Tribunal about the respondent's reorganisation in 2018, the claimants' comparators and the pressures on the respondent's service.

14. The claimants both gave evidence on their own accounts. The claimants' union representatives Mr Isik and Ms Glennon gave evidence in support of Mrs Kelly and Mrs Faulkner respectively. We were particularly grateful to Ms Glennon for her participation, which was by video, as she was unwell at the time of the hearing.

15. This was a hearing heard in public and none of the parties requested any form of privacy measures be taken at the outset of the hearing. However, during Mrs Kelly's cross examination about her medical and health issues, the tribunal exercised its case management orders to temporarily remove the respondent's observers and a member of the public from the hearing room. This was done in the interests of facilitating a fair hearing and without such steps, Mrs Kelly was not able to give her evidence. Once that section of her cross examination was finished, the observers were re-admitted to the hearing room. None of the parties objected to this measure.

16. We are also aware that as part of the claimants' claims, seven of the respondent's employees have been named as the claimants' comparators. Having considered whether it was necessary for their identities to be disclosed as part of this judgement and reasons, we conclude that it was not. They are therefore referred to by the coded references C1 to C7 in this judgment.

17. The Tribunal discussed matters of privacy more generally, as it became apparent during the hearing that neither claimant had considered issues of privacy, or that the hearing was a public hearing. Neither claimant wished to apply for any form of privacy order and the Tribunal did not consider that it was necessary or appropriate for any such order to be made.

Undisputed Facts

18. The following facts were not in dispute between the parties and have not been the subject of findings of fact by the Tribunal. However, they are recorded here, as they provide useful background information to the circumstances to which the claimants' complaints relate.

19. The respondent is the Office for Standards in Education, Children's Services and Skills, a non-ministerial department of the UK government. It inspects services which provide education and skills and inspects and regulates services that provide care for children and young people.

20. Both claimants were employed by the respondent as administrative assistants in the respondent's Applications Department. It is the respondent's case that both claimants were fairly dismissed by reason of capability for long term sickness absence. They were both given notice of termination of their employment on 1 July 2021 and the effective date of termination of their employment was at the end of their notice periods, which for both claimants was 30 September 2021.

21. At the time of dismissal, Mrs Faulkner had over 15 years' service for the respondent Mrs Kelly had over 20 years' service for the respondent.

22. The parties have provided the Tribunal with the witness evidence referred to above, and a hearing bundle which ran to over 1490 pages. Not all the evidence presented to the Tribunal is referred to in the following account of the facts. This is because, although the evidence that the parties referred to has been considered, not all of it was sufficiently relevant to the issues that the Tribunal had to decide to be included in our written reasons.

Reorganisation and the ARC Advisor Team

23. It is agreed between the parties that there was a consultation by the respondent in 2018 which was done for the purpose of streamlining certain of the respondent's operations and improving the quality and timeliness of its service to its service users, to enable it to meet its key performance indicators. Prior to 2018, the claimants' team, the Applications team, was entirely separate from the respondent's call centre team.

24. The call centre is the entry point at which the respondent could be contacted by anyone outside the organisation, including members of the public. The respondent was concerned that having a call centre team separate from its other teams increased the administrative burden and increased delays, as call centre operators were unable to process incoming queries themselves and had to hand over to other staff. The consultation proposed that the applications team and the call centre team be amalgamated into the "ARC" team, which was the Applications, Regulatory and Contact Centre team.

25. Ms Exton's evidence, which was not challenged by the claimants, was that the ARC team was supposed to comprise approximately 70 people. However, it was a "feeder" team, meaning that it was an entry level role and so staff frequently joined the respondent as ARC advisors and then moved on, if their career progression was successful. Her evidence was therefore that the team frequently did not run at full capacity. As it takes time for new joiners to complete the training, even those who are in the team are often not trained to take calls.

26. Her evidence was that in 2021, about 45 people were trained in call handling but not all were full time. She also gave evidence that calls did not arrive in a linear or predictable fashion. Her evidence was that removing both claimants from this group of trained call handlers would have placed strain on the team and its ability to cover, for example, annual leave or requests for flexible working.

27. The evidence of Ms Exton to the Tribunal was that a full time ARC advisor was expected to spend two- to two-and-a half days on call centre work each week. She gave evidence to the Tribunal about adjustments to the ARC advisor role that had been made at the time of the reorganisation, or in the period immediately thereafter, for other employees. They had expressed concerns about their ability to do the call handling part of the role at the time of the reorganisation. The Tribunal understands that approximately 7 or 8 ARC team members were given adjustments, including exemptions, from call handling, by the time the claimants were asked to do call training in 2020 and 2021.

28. Her evidence, which the claimants did not challenge, was that three employees, C2, C3 and C6, neither made nor received telephone calls. C1, C5 and C7 did some telephony work but did not receive unfiltered incoming calls from the general public. Only one employee, C4, was reported to take general incoming calls on the respondent's phone line that was a first point of contact for members of the public, and only for an hour a day.

29. It was Ms Exton's evidence that, in essence, the respondent had reached a limit to how many ARC advisors could be exempted from the role's requirement to do telephony work, having made exemptions for C1-C7 at the time of the consultation in 2018/2019. Following further evidence from the respondent's witnesses under cross-examination, the Tribunal was told that Carolyn Purcell made the decision that a limit had been reached on exemptions from call centre work. Ms Purcell did not appear before the Tribunal to assist us with the rationale behind her decision. Nevertheless, Ms Exton's evidence was that, provided the call training could be completed by an ARC team member, the respondent would consider adjustments to the call work, but only adjustments falling short of wholesale exemptions from call work.

30. The respondent's evidence was that, had the claimants completed the call training and found that they could only take calls for an hour at a time, for example, that the respondent would have considered such an adjustment. Alternatively, they may have been given reduced contact time so as to only take calls during quieter times of the week. For example, Mr Crowe from HR is cited in the meeting minutes of Mrs Kelly's formal absence review meeting on 30 June 2021 as saying:

"…*if Wendy attempted calls and down the line, she found it too difficult it could be that she's moved off calls. The expectation in the first instance would be to try it with the adjustments and support in place.*"

31. Ms Exton told the Tribunal that the aim of the reorganisation was to ensure that ARC advisors were trained in several other areas of the business as well as call handling, so that when they were fully trained, they would do part of the week answering calls and then the other part of the week on administrative tasks for a variety of the respondent's different functions. As Mrs Kelly and Mrs Faulkner were applications advisors, had they completed the call training they would have done applications work for the rest of their working week, that is, the time when they were not taking calls until such time as they were trained in other areas of the respondent's business.

32. It was therefore the respondent's undisputed evidence that there were to be no further exemptions from calls per se as of 2021, and that all ARC advisor staff were obliged to be trained to take calls, but that if they completed the training (which could be adjusted so as to be bespoke to their needs), workplace adjustments would be implemented that could either drastically reduce the time they spent on taking calls each day or each week, or that they could be removed from the need to take calls altogether. However, the respondent was not prepared to consider any of these adjustments unless ARC advisors carried out call training in the first place.

33. Both Mrs Faulkner and Mrs Kelly told the respondent at the time of the consultation in 2018 that they did not want to do telephony work. Mrs Faulkner was absent from work due to sickness from 21 January 2021 and did not return to work after that, before being dismissed. Mrs Kelly started her final period of sickness absence on 2 February 2021 and never returned to work thereafter.

The Consultation and ARC Advisor Role 2018 onwards – Mrs Faulkner

34. Mrs Faulkner had told the respondent of her inability to take incoming telephone calls at the time of her recruitment in 2005. In January 2006, the respondent was provided with an occupational health report which noted that Mrs Faulkner had been off sick and had left her previous job due to stress which originated in moving to work in a call centre environment. Mrs Faulkner also informed them that she had left this previous job following a change to her role which required her to field incoming calls from the public on a general contact telephone line.

35. Mrs Faulkner was asked by the respondent to attend call centre training in March 2020 and declined, due to her stress and anxiety. She began a period of sickness absence as a consequence of the requirement to begin call training. She

was referred to occupational health by the respondent and was seen on 10 March 2020.

36. The occupational health report noted that she was "temporarily unfit for work" due to a high level of anxiety. It reported that she was suffering from stress-related symptoms, such as chest pain, shaking and vomiting. She was reported as having become so unwell over the weekend before she was required to attend call training that she was unable to attend work. She was reported as having told the respondent of a similar situation in her previous job in where medication to reduce the anxiety was ineffective and she had to leave the role due to a requirement to take calls.

37. The OH advisor concluded as follows:

> *"The unpredictable nature of inbound calls is causing Mrs Faulkner to experience overwhelming anxiety and a barrier to her return to work is likely to be the training and job change and I do not foresee the situation changing even with therapy.*
> *It is my view that an admin based role without unpredictable inbound calls is likely to give her the best prospect of performance and attendance in the future and it is for the employer to decide if they can accommodate this is the long term."*

38. Due to the Covid pandemic, the call training was put on hold until November 2020. However, we find that in March 2020 the respondent knew that Mrs Faulkner was suffering from extremely heightened anxiety which made her physically unwell, including shaking and vomiting, at the prospect of attending the call training, and that she had left her previous employment because of a similar situation and that medication had proven ineffective. The respondent knew that this had happened in her previous role in 2005 as she had told them of this not long after she joined the respondent in late 2005.

39. Despite this, Mrs Faulkner was told by email on 16 October 2020 by Zoe Harper that call training was set to begin again on 2 November 2020. Mrs Faulkner wrote to Carolyn Purcell at the respondent on 28 October 2020 and in very clear and detailed terms, told Ms Purcell that she would not be able to do the call training, on account of her anxiety. She wrote as follows:

> *"In March 2020 when management first stated that I was to undertake call centre training I made my Team Officer at that time Christopher Fairfield & his manager Hayley Squire aware of how this would affect my health having had similar experience in my previous job so an appointment was set up with Health Management, during this appointment health management agreed that Ofsted should support me in my Apps work and not force me to take calls, this was also recommended by my GP when I attended an appointment with them. The report was sent back to management by Health Management and my GP to state this, I feel this report has been totally ignoring by management in their dogged approach to have everyone complete every task within applications and contact,*
> *…….*

> *I have already had lots of sleepless nights & anxiety since receiving the first call from Zoe Harper Team officer ARC a few weeks ago….Ofsted were promoting Mental Health Awareness Week, but where is the support to back it up? …..This is an illness that is not going to go away, it will just be brought to the forefront each time I am asked to do this training."*

40. Mrs Faulkner and her team leader Mr Wallace discussed the issue of call training on 29 October and Mrs Faulkner told him that she would not attend it and that a stress risk assessment would not help, so declined the offer of this. Mr Wallace referred her to OH again on 29 October 2020.

41. Mrs Faulkner then contacted Karen Shepperson, Director of People and Operations, on 30 October 2020 in the same terms as she had written to Ms Purcell on 28 October.

42. Ms Shepperson replied on 4 November 2020. We note that prior to responding, Ms Shepperson had consulted with Emma Exton about the matter. Mr Waters, Head of HR services at the respondent, had responded to both Ms Exton and Mr Crowe with information from the March 2020 OH report for Mrs Faulkner. Mr Waters copied sections from the report into his email and also highlighted that the OH advisor reported that the anxiety was causing physical symptoms and that Mrs Faulkner had a similar situation with a previous employer that had ultimately caused her to leave the role. We note that Mrs Faulkner's circumstances were therefore the subject of discussion by a significant number of senior members of HR and management at the respondent.

43. Despite having this information provided to her, Ms Shepperson's reply was sympathetic but insistent. She reminded Mrs Faulkner that call work was now an essential part of her role following the consultation and reorganisation. She noted the following:

> *"I do not underestimate the worries you have about taking calls. I feel that it would be helpful for you to undertake the training and then see how you are feeling about the situation. I have spoken to Emma* [Exton] *and she is confident we can provide a dedicated support to you through training and build up your confidence in your abilities before taking calls. We can continue with a dedicated support and bespoke plan for taking calls once your training has completed including the amount of time you are doing this for."*

44. We note Mrs Faulkner's letter of 28/30 October indicated that the situation presently was the same as in March 2020. We therefore find that it was at best highly ambitious and optimistic, and at worst entirely inappropriate, that the respondent considered that Mrs Faulkner's issues with call taking could be overcome with bespoke training, given that the prospect of it had induced shaking and vomiting in her in March 2020 and had resulted in an inability to attend work.

45. The telephone training went ahead in November 2020 and Mrs Faulkner did not attend. An email from Mr Wallace dated 18 November 2020 notes that Mrs

Faulkner told him that she had a panic attack after their conversation the previous week when call training was discussed and also the OH referral.

46. Mrs Faulkner raised a grievance on 30 November 2020 about the requirement to do call work and the fact that the respondent was repeatedly ignoring its own OH advice that she should not do it. Ms Binks, team manager in the ARC team, was appointed to deal with the grievance. Mr Crowe of HR was heavily involved in assisting Ms Binks with the grievance and assisted her in drafting the reply to Mrs Faulkner. Ms Binks wrote to Mrs Faulkner that they had discussed Mrs Faulkner's "*previous experience*" and in summary, there was no option not to do the training as it was now part of the role, but that support would be available. She told her that the next training was on 18 January. She said

> *"We discussed a number of resolutions to help you moving forward and you confirmed the only resolution was to take you off the training list. I explained that I am unable to do this due to the role changing as part of the consultation in 2018 when the contact centre and applications department had come together to form one role which involves all aspects with the customer in mind when handling queries.*

47. Mrs Faulkner did not reply. She was chased for a response in January 2021. When Mrs Faulkner did reply, she said "*I don't think the grievance will ever be resolved as we seem to be going round in circles, so we will leave it as resolved*". Mrs Faulkner's response was forwarded to Mr Crowe. Mr Crowe was also kept updated by Mr Wallace about her absences.

48. Mrs Faulkner's next OH report, dated 1 December 2020, noted:

> *"Mrs Faulkner … reports she is happy undertaking her APPS role. She does have a long term anxiety related disorder, this is normally well managed and she copes in work most of the time. However she has found recently that her anxiety disorder is escalating again as she is being advised by management that her role is likely to change and she is going to have to undertake work activity that causes her significant anxiety, as she is not comfortable or confident in undertaking. She is otherwise fit and well."*
> (our emphasis added).

49. Mr Wallace had posed a number of questions about possible adjustments to the OH advisor in the referral document which the OH advisor had not answered, relating to adjustments that may assist in her carrying out the ARC advisor role in full, including the telephone aspects.

50. Mrs Faulkner did not attend the scheduled call training on 18 January 2021. She was off work from 21 January 2021 and did not return to work prior to the termination of her employment.

51. Mrs Faulkner raised a formal grievance on 21 March 2021. The terms of the grievance were similar to those of the informal grievance, but she also complained about being told again that she had to attend training on 18 January and attend another OH appointment in February. She complained that she was off sick unnecessarily as she wanted to return to work to do non-telephone work. Her

grievance hearing, which was conducted by Mr Wallace, took place on 15 April 2021 and the outcome was that the grievance failed. She raised an appeal against her grievance on 30 April 2021 and this appeal, which was heard by Ms Adlard on 9 May 2021, also failed.

52. Mrs Faulkner attended a further OH assessment on 9 June 2021. The OH advisor, Dr Katyal, repeated all of the advice of previous OH assessors and said "*It is recommended that Mrs Margaret Faulkner is restricted from any work related to the call centre, training or making or receiving calls.*" The doctor was asked specifically about what adjustments could be made:

"Q: Given that call handling is central to her role and a decision on her future may be linked to her ability to the job, what can we do to support Margaret taking inbound calls? For example if she worked with a buddy, shadowed colleagues and gradually increased her exposure to live calls (known as a systematic desensitisation approach to reducing anxiety from inbound calls) would this result in her being able to carry out this element of the role? If not, could you explain your reasoning for this please?

A: Unlikely to help in this case and likely to result in a further deterioration in her health."

53. The doctor also wrote "*In my medical opinion, she is unlikely to be able to handle any work related to the call centre, making or receiving calls in the foreseeable future*."

54. The respondent conducted formal absence review meetings with Mrs Faulkner on 24 February and 18 May. Both meetings followed the same pattern, which was that the respondent insisted that the claimant carry out call training and call work, albeit that adjustments were offered, and Mrs Faulkner refused and asked to return to her previous role.

55. The final formal absence review meeting was conducted in three parts on 25 June, 30 June 2021 and 1 July at which she was dismissed. At each meeting she was accompanied by Ms Glennon, her union representative.

56. On 25 June Mrs Faulkner raised the prospect of a return to work, because her sick pay was about to come to an end and she could not afford to stay off. Mr Wallace and Mr Crowe who were at the meeting, expressed concern that she would not be able to manage. Mrs Faulkner, who had not been on medication for her anxiety for a number of years but had gone back on medication during her sick leave, said

> *"I'd prefer not to* [come back to work]*. I'm in a no-win situation. I can't afford a reduction in wages. If I have to come back I'll need a lot of support to try get around it. I want a phased return not straight back into training….I'll give it a try and hope my medication helps…. I feel pressurised into this. There's other people not being forced to do calls"*

57. At the reconvened meeting on 30 June, Mrs Faulkner's return to work plan was discussed. She was asked by Mr Wallace what the main reason was for her

return. She gave the answer she gave on 25 June which was "*Financial – at the end of the day I need a job. You are not supporting my condition and forcing me to do it. Aren't you supposed to find ways I can do my job in line with the Equality Act?"*

58. Mr Crowe said that there were people in the ARC department with an excessive workload "*because we need people answering phones…some colleagues are taking far more calls than they should be*". Ms Glennon noted that 50 staff had left during the pandemic, and Mrs Faulkner said that she could pick up the emails that were backing up and free other people to do calls.

59. The meeting reconvened on 1 July at which Mr Wallace dismissed Mrs Faulkner on the basis that she would be unable to return to work to fulfil the ARC advisor role.

60. Her appeal against her dismissal was heard on 5 August 2021, although the conduct of the appeal is not part of her claim to this Tribunal.

The Consultation and ARC Advisor Role 2018 onwards – Mrs Kelly

61. Mrs Kelly appealed against the consultation decision to place her in the ARC advisor role by email, having been advised of the decision on 16 October 2018. Her appeal was heard by Sue Aldridge and in a letter dated 15 November 2018, Mrs Kelly was informed that the appeal was unsuccessful. The grounds of Mrs Kelly's appeal was "*the decision to match [her] to the ARC advisor post in the new structure on the basis of [her] medical conditions*." Ms Aldridge noted that the Mrs Kelly's grounds of appeal had been that the changes "particularly in the contact centre, will cause you stress",

62. She was, however, told that any reasonable adjustments she had would be taken into account and that "*the change programme will be working closely with colleagues over the next few months to ensure individual needs are considered and appropriately met. The matter of your ongoing and new health needs will be a matter for your and your line manager to consider as you prepare to undertake your new role*."

63. At this time, on 14 November 2018, Mrs Kelly had a sickness absence review meeting with Mr Fairfield, her team manager, and Lauren Hill, team leader. This meeting had been postponed to allow for the receipt of an occupational health report which was carried out on 31 October 2018. The OH advisor reported that Mrs Kelly was "fit to continue in her current role", that is, of applications advisor. However, the report noted that she had been suffering from rosacea which had caused her to take two weeks' sick leave, not just due to the rosacea itself but due to the anxiety that the rosacea had caused her. The report requested that Mrs Kelly be allowed to continue to work two days from home. The OH assessor did not consider that the rosacea would be covered by the Equality Act but wrote

> "*she has had IBS for a number of years and this is likely to be covered*. *Her IBS remains stable at present controlled by diet and medication at times and Wendy reports that it tends to flare up when she is stressed. She did mention that she had some concerns about a change in her role in the New*

Year which may cause her stress so I have advised her to discuss this with management…

…there are no other factors causing Wendy anxiety or stress, although she is concerned about potential job changes as mentioned earlier. I do not believe that she needs a stress risk assessment at present but she may require one if her role changes."

64. During this meeting, Mrs Kelly and her union representative disclosed details about Mrs Kelly's diagnosis of IBS, which she said was in 2011, and her day to day issues in managing this condition, including how it is triggered by stress. It was agreed by Ms Hill that as Mrs Kelly had only had two flare ups of IBS in the past two years (2016-2018) that she could work from home during flare ups to manage the symptoms. Mrs Kelly asked for these adjustments to be ongoing as she was not able to predict when the condition would flare up and she would then be ill for 3 weeks. She also notified the respondent that during a flare up her sleep would be badly affected. They also discussed Mrs Kelly's more recent diagnosis of rosacea and the fact that it was so severe that she was prescribed oral antibiotics to control it, but that these also impacted on her stomach. Ms Hill gave the view that she did not consider it unreasonable for Mrs Kelly to be allowed to work from home during a rosacea flare-up. However, this meeting did not discuss the changes to the ARC advisor role at all. Mrs Kelly continued to do her applications work during 2019.

Findings of Fact

Disability and the respondent's knowledge – Mrs Kelly

65. The respondent accepts that Mrs Kelly is disabled by reason of IBS and rosacea, but not anxiety. The Tribunal finds that the respondent knew that Mrs Kelly's IBS and rosacea amounted to disabilities in January 2020 when the OH report of 10 January 2020 stated that "*She has been suffering from stress related issues for many years, and anxiety since her diagnosis of rosacea in 2018*"

66. The respondent knew in late 2018 that Mrs Kelly considered that these medical conditions of IBS and rosacea would mean that she would struggle to undertake call centre work, as she appealed on 15 November 2018 against the allocation of her to the ARC advisor role on this basis.

67. On 12 November 2019 Mrs Kelly was referred for an OH assessment by Mr Fairfield due to the forthcoming change in her role to that of ARC advisor. The terms of Mr Fairfield's referral were:

"Wendy currently suffers from anxiety that is brought about by underlying physical conditions. In turn, any additional mental stressors can cause Wendy's physical conditions to "flare up". The physical conditions include rosacea and IBS. … Wendy does have a workplace adjustment in place for both the rosacea and IBS, whereby whenever she experiences episodes of either condition she can …inform her Team Officer that she is working from home".

68. We find that the respondent knew, or ought reasonably to have known, by the OH report on 10 January 2020, that the claimant was disabled by reason of her IBS and rosacea, both of which caused her to suffer from anxiety, which in turn worsened the two underlying conditions. The report of January 2020 states:

> *She has been suffering from stress related issues for many years, and anxiety since her diagnosis of rosacea in 2018*
> *…. due to her issues of chronic and acute anxiety, and even with the appropriate training, I am of the opinion that undertaking this new additional call centre type role would be detrimental to both her mental and physical health."*

Mrs Kelly – Call Training, absence management and dismissal

69. Mrs Kelly's evidence was that she was invited to call training by email in March 2020. She received an occupational health assessment on 10 January 2020 which noted

> "*as detailed in your referral, Ms Kelly informed me that she has been working in her current role of an ARC advisor within the business for 18 years. She has been suffering from stress related issues for many years, and anxiety since her diagnosis of rosacea in 2018*"

70. The OH advisor's recommendations in relation to the ARC advisor role and the call work that it involved, were that "*due to her issues of chronic and acute anxiety, and even with the appropriate training, I am of the opinion that undertaking this new additional call centre type role would be detrimental to both her mental and physical health. This would then have the likelihood of an increase in her sickness absence levels*"

71. Her evidence was that she and Mr Fairfield were therefore confused as to why she had received this invitation and that Mr Fairfield's instructions to her were to continue with her usual work and not attend the call training. Her evidence was that Mr Fairfield's opinion was that the OH report would mean that Mrs Kelly would be taken off any call centre work.

72. She attended the office on the day that the training was due to start and a member of the training team asked her why she was not attending the training. Mrs Kelly asked to speak to a member of senior management about this and her evidence was that Elizabeth Pendlebury, a senior team manager, told her "OK, leave it and continue with your usual work." The respondent's evidence was that the training was paused due the coronavirus pandemic in March 2020 and Mrs Kelly was redeployed to DWP during lockdown. Both she and Mr Fairfield had returned to the respondent in August and September 2020 and at this time the issue of attending call centre training was raised again with Mrs Kelly. Mr Fairfield's evidence was that she was reluctant to undertake the call training.

73. Ms Squire became involved in the claimant's management and her attendance at call training in October 2020. We find that Ms Squire took a more robust attitude to the claimant's occupational health issues than Mr Fairfield had done. She sought to refer Mrs Kelly back to OH for a new report, to see if OH could recommend any

specific adjustments that might help Mrs Kelly undertake the work. Ms Squire also made a referral to the respondent's HR department for support in managing this issue on 15 October 2020 and was assisted by Conor Crowe.

74. The referral to HR provided a summary of Ms Squire's understanding of the history of the issue. What is clear from Ms Squire's summary is that the undertaking of call centre work was not said to be mandatory on its introduction in 2018. Ms Squire wrote to HR *"In 2018 the contact and administration team went through a full consultation in which discussions were held with advisors that they may be trained to complete additional tasks including the possibility of applications processing, emails and contact centre work of which a full training package will be available*." (our emphasis added)

75. Ms Squire also wrote "*A detailed online call training package has now been developed and I held a conversation with Wendy 14/10 to discuss the possibility of Wendy learning this role and advised that I would refer Wendy to HM to discuss limitations and alternative working arrangements such as an hour per day on calls and requested Wendy's permission to complete this*."

76. We note Mrs Kelly's evidence that this "*detailed online call training package*" was not shared with her at the time for her to consider. We also note that the call training was online at this stage. Mrs Kelly's evidence was that the remote nature of the training would have added to her anxiety about completing it, as she would have been doing it at home without any support.

77. Ms Squires also wrote "*Wendy has advised that she feels she needs time to think about whether she will give consent to a HM referral and feels that her original medical report is clear in the suggestions that Wendy should not take calls if operationally feasible. I have explored with Wendy if she can work different working days such as half day calls with breaks in-between or whether Wendy can complete one hour time slots and Wendy advised she does not feel there is any way she can work on calls*."

78. We therefore find that by 15 October 2020, the parties' respective positions were clear. Mrs Kelly had consistently expressed her concern that any call centre work would cause her considerable anxiety and exacerbate her existing medical conditions of IBS and rosacea. The respondent's view was that Mrs Kelly ought to nevertheless undertake call centre training and decided that she should be referred back to OH to determine if any adjustments could be suggested by OH for her to do this work. In the months that followed, as the following facts demonstrate, the parties did not move from these two conflicting positions.

79. On 1 December 2020, Mr Fairfield and Mrs Kelly spoke again. Mr Fairfield attempted to persuade Mrs Kelly to go for another OH assessment. Mrs Kelly refused to give her consent. Mr Fairfield reported the conversation the same day to Mr Crowe. Mr Crowe sought advice on 2 December 2020 from Collette White, an HR business partner. Mr Crowe summarised the situation and the conversations with Mrs Kelly as follows:

> *" - OH report from January 2020 strongly recommends against taking calls ("undertaking this would be detrimental to her mental and physical health").*

- She is refusing to consent to another referral as she feels the previous report is clear in its recommendations.
- I've read the consultation notes [from 2018] *and it doesn't reference such a scenario.*
- Her manager believes there are other duties she can do if she doesn't have to take calls.
- As there are likely to be further cases like this I'm wondering what we need to consider before agreeing other, amended duties with Wendy."

80. We find that in December 2020, the position was clear. A recommendation had been made by OH not to take calls, and the respondent was considering agreeing to provide her with amended, non-call related duties. A further discussion between Mr Crowe and Ms White established that there were four others in a similar situation to Mrs Kelly, one of whom we understand was Mrs Faulkner.

81. In the bundle of evidence before the Tribunal there are a large number of emails between Mr Crowe, Mr Fairfield and Mr Hoult, who was Mr Fairfield's line manager at the time. However, what is apparent is that none of these individuals were authorised to make a decision about Mrs Kelly or Mrs Faulkner. The matter was referred by Mr Crowe to "the HR business partner" in December 2020. We have very little evidence of the email correspondence of the more senior chain of command at the respondent such as Collette White or Karen Sheppersen, although we find that they made the key decisions as to whether or not Mrs Kelly and Mrs Faulkner were obliged to attend call training. None of the key senior decision-makers in relation to the claimants' circumstances appeared before the Tribunal to give evidence, nor have their emails from this period been disclosed to the Tribunal.

82. From the evidence before us in the bundle, by January 2021 the information being passed by Mr Crowe to Mr Fairfield had changed in tone from December 2020 (described above). We find on the balance of probabilities that a senior decision-maker in HR had indicated to Mr Crowe by then that there would be an enforced expectation that Mrs Kelly would attend the training and that her health concerns would be ignored. Mr Crowe wrote on 8 January 2021 to Mr Fairfield "*Has she completed the training yet? If she refuses, it may constitute refusing a reasonable management request and would be dealt with accordingly. If she has completed the training the next touch point would likely come when she'd have to take calls. What we do if she refuses to take calls is still under discussion*".

83. Again, the respondent has not disclosed to the Tribunal what the content of that "discussion" was at the time, or who it involved.

84. Mr Fairfield replied on 12 January 2021 and reminded Mr Crowe that Mrs Kelly "*hasn't explicitly refused to attend the training but wants her medical conditions taken into consideration ahead of training so that she can be provided with a final answer as to whether she will have to do call work or not"*

85. In his reply dated 14 January 2021, Mr Crowe noted "*Regarding the training, has her invite gone out for that yet? If she refuses to partake in the training it may be viewed as rejecting a reasonable management request and could result in disciplinary action*." We note that Mr Crowe was expressly ignoring the issue of

Mrs Kelly's medical conditions and moving into the arena of dealing with the issue as a potential disciplinary issue. It is important to note that the respondent accepts that the claimant was disabled by reason of her IBS and rosacea at this time. It is clear from the extensive discussion by the respondent of these conditions and their effect on Mrs Kelly that they had knowledge of the conditions at this point also.

86. Mr Fairfield noted to Mr Crowe in an email dated 15 January 2021 that a calendar invite had been sent to Mrs Kelly for the training to begin remotely on 2 February 2021. Mr Crowe replied on 22 January 2021 "*If/when Wendy refuses to attend the next training please let us know as employees are expected to attend this regardless."* We find on the balance of probabilities that the use of the word "*regardless*" here meant "regardless of any medical conditions".

87. The claimant visited her GP on 2 February 2021 and was diagnosed with "stress at work". Her GP notes record that she said that she "*feels work is bullying her into accepting this change"*. We note that the respondent was at this stage applying pressure (and Mr Fairfield understood from Mr Crowe that potential disciplinary action could be taken against Mrs Kelly) to her to attend the training, despite clear OH advice that this would be detrimental to her health and despite the respondent having knowledge at this time that Mrs Kelly was disabled.

88. Mrs Kelly was absent from work due to sickness as of 2 February 2021. She did not return to work after this time and her employment was terminated on 1 July 2021, with her notice period expiring on 30 September 2021.

89. Mr Fairfield's evidence is that the call training due to take place for Mrs Kelly on 2 February actually commenced in March 2021. However, she was already absent due to sickness and did not attend.

90. Mr Fairfield subsequently took Mrs Kelly through the respondent's absence management procedure. She attended a meeting on 5 March 2021 with her union representative. During the meeting Mrs Kelly told Mr Fairfield about feeling bullied into taking calls, especially as other staff at the respondent had been granted exemptions from call work. She also re-stated her position that she believed that the respondent's proposed adjustments, such as breaks, taking calls at quieter times or adjusted targets (as raised by Mr Fairfield) would not help and that she should also be exempted from call work. Mrs Kelly also raised the issue that she had been asking for a formal decision from the respondent about the matter. Mr Fairfield's evidence was that he said that call handling was part of her role and the respondent intended to explore how she could undertake the training and explore reasonable adjustments.

91. We find that Mrs Kelly's request for a "decision" to be made was a reasonable request. It was clear that a decision had been made at some point, by unspecified members of the senior HR function, in late December 2020 or early January 2021 and communicated to Mr Crowe. Mr Crowe's position had changed from the possibility of offering Mrs Kelly non-call centre duties on 2 December 2020 to noting employees were expected to attend training "regardless" and a failure to do so could be a disciplinary matter in January 2021. However, this information was not passed on to Mrs Kelly. This was unreasonable conduct by the respondent. This information has also not been disclosed to the Tribunal by the respondent.

92. Mr Fairfield had, as recently as 14 January 2021, requested that a decision on the issue be communicated to Mrs Kelly. However, HR moved straight into enforcement of the requirement to attend training and thereafter attendance management, hiding behind Mr Fairfield's management role to do so, without anyone from HR having the courtesy to inform him, or more importantly, Mrs Kelly, that a decision had been made and that her OH report of January 2020 would be disregarded, and she would be required to attend training.

93. Mrs Kelly made a Subject Access Request which was fulfilled on 23 April 2021 by Roy Barkley of HR. She requested further information from Mr Barkley on 4 May 2021 and received a response from him. She does not challenge the way in which the respondent handled the SAR in these proceedings but has provided evidence that she was upset by the tone of some of the emails about her between managers and members of the HR function which she received as part of the SAR disclosure.

94. Following this meeting Mrs Kelly consented to a further OH referral in March 2021. The assessment took place in May 2021. Before this, there was a second formal absence review meeting with Mr Fairfield on 27 April 2021. Mrs Kelly requested again that a decision be taken as to whether she could return to work on administrative duties only and Mr Fairfield agreed to pass this request to Mr Hoult. However, we note that Mr Hoult would on the balance of probabilities not have had the authority to make such a decision. This was clearly reserved to the remit of unnamed individuals in senior HR. Mrs Kelly was warned by Mr Fairfield that her continued absence may result in her dismissal.

95. Mrs Kelly raised a grievance on 28 May 2021. Her grievance covered a number of issues that are also the subject of her proceedings before the Tribunal. She complained that the respondent was ignoring OH reports and that she was being bullied into doing call training and call work, that she wished to return to work to carry out admin work only, that the respondent was ignoring its own procedures on attendance and sickness and also about the tone of SAR emails that she received.

96. She attended a grievance meeting with Ms Pye on 16 June 2021. Following the meeting, Ms Pye questioned several people by way of an investigation, including Mr Crowe, Mr Fairfield, Ms Squire, Carolyn Purcell and Roy Barkley (Mr Barkley was asked about the SAR). Mrs Kelly does not raise any particular complaint about the conduct of the grievance. She did not receive the outcome of the grievance until 7 July 2021, after she had received notice of her dismissal. We refer to the outcome of the grievance below.

97. Mrs Kelly underwent a further OH assessment with a doctor on 28 May 2021. No adjustments were recommended that would allow her to carry out call centre work and Dr Edet, the OH physician, noted that the suggested adjustment of systematic desensitisation would be difficult to achieve "*as she reports anxiety even in relation to the training*".

98. Also on 28 May 2021 Mr Fairfield spoke to Mrs Kelly and confirmed to her that the respondent would not accommodate her carrying out solely administrative work in her ARC advisor role. Mrs Kelly wrote to Mr Fairfield on 1 June and asked for

written confirmation of this. She referred to the decision as having been stated by "Carolyn Purcell" who was the respondent's head of Contact and Administration. However, Mr Fairfield's evidence is more circumspect, and his witness statement notes that the decision was made by "*senior management, likely to be Carolyn and Emma Exton, communicated to me through Gavin*".

99. Mrs Kelly's absence continued, and she was therefore invited to a third formal absence review meeting, which Mr Fairfield chaired on 18 June 2021. Having been formally told that there was no alternative to carrying out the ARC advisor role, Mrs Kelly started the meeting by raising this issue and asking what support was available to her. She said "*I wouldn't want to lose any training or support that would enable me to do it. If that's my only option that's what I've got to do. There's no alternative it seems*."

100. We find that once the respondent finally and unequivocally communicated to Mrs Kelly that her requested adjustments would not be made for her (that is, to continue without the call work), at the next opportunity she discussed with Mr Fairfield at length what support could be offered to her. We therefore find that Mrs Kelly did not refuse to do call work or refuse to attend training. Instead, she properly noted that the consistent information in her OH reports was that such work would be detrimental to her health and having understood that others in the ARC advisor role were exempted from call work, asked for a formal decision to be made as to whether such an exemption could be provided to her.

101. Although we find that the respondent had formally decided in January 2021 that such an exemption would not be made available for her, this was not finally communicated to her until 28 May 2021. The delay in effecting her return to work cannot, therefore, be said to be due to Mrs Kelly's refusal to attend training.

102. Mr Fairfield's evidence was that during the meeting on 18 June, Mrs Kelly said that she would "give call training a go" and that he adjourned the meeting to obtain information about a phased return to work for her.

103. Mr Fairfield's evidence was that he had formally ceased to manage Mrs Kelly in April 2021, but that to "retain consistency" he continued to oversee the absence management process for her. However, Ms Squire, a regulatory professional at the respondent, took over from Mr Fairfield in the middle of the third stage of the formal absence review process. The respondent's evidence as to why this happened is somewhat unclear. The respondent's notes of the meeting record that Ms Squire told Mrs Kelly when the meeting was reconvened on 30 June 2021 that this was "*due to operational changes, at this moment in time, Chris is no longer responsible for the day to day management and associated tasks for anybody and will not be managing any cases*." The explanation that this was due to "operational changes" was repeated in Ms Squire's subsequent letter of 14 July confirming Mrs Kelly's dismissal. Mr Fairfield's evidence was that he was on leave at the time of the adjourned meeting.

104. In any event, Ms Squire's conduct of the resumed meeting was in contrast to that of Mr Fairfield. Given that the previous meeting had been adjourned to formulate more detailed plans about Mrs Kelly's phased return to work, Ms Squire on several occasions put the onus on Mrs Kelly to explain how she would sustain

a return to work. She said "*The OH report suggests you shouldn't take calls. From reading the notes I can see that no recommendations have been made in regards to you taking calls and I can see that the report suggests that you should not take calls as part of your role. Can I ask why you now feel you are now able to undertake the call training?*" Mrs Kelly noted "*isn't that for work to offer me the support*?" Ms Squire replied "*we would offer the support but you know your health situation better than anyone. The OH report didn't recommend anything so is there anything that you have explored with Chris that we could have put in place?"*

105. We note that Ms Squire's request for further information from Mrs Kelly suggests that in fact no further detail of a return to work plan was put together by the respondent following the meeting of 18 June. Ms Squire again asked Mrs Kelly "*have you discussed with your GP about a return to work*?" Mrs Kelly replied "*It's all unknown at the moment and I can't make a decision on the unknown*." Mrs Kelly's representative reminded the respondent that they have a duty of care to Mrs Kelly. At that point Mr Crowe of HR said that there was a "*thorough return to work plan which we can discuss on this call. Hayley will share her screen*". We consider that the claimant should have been provided with a copy of the return to work plan in advance, or given a copy during the meeting and allowed the opportunity to consider it. This did not happen. However, the return to work plan was discussed during the meeting, but Mrs Kelly was not given a copy of it. Mrs Kelly was told that a decision about her future, whether she was to be dismissed or not, would be made within 24 hours.

106. The call training was also discussed. Mrs Kelly asked "*with my IBS how can I guarantee I won't lose a call?*" Given that the call could potentially be a safeguarding call, we accept that Mrs Kelly's concern was reasonable. Neither Ms Squire nor Mr Crowe gave Mrs Kelly an answer to her question.

107. Mr Crowe also said "*the OH recommendations – sometimes we can accommodate them and sometimes we can't. With the ARC Adviser role call-taking is a central function of the role. The people there now have a workload far in excess of what it should be which is why management want people on the phones*." Mr Isik noted "*well that's management's issue in terms of recruitment and retention, not Wendy's issues*".

108. Mr Isik also said "*regarding the support and adjustments – it's always been said that the support is there and if Wendy attempted calls and down the line, she found it too difficult it could be that she's moved off calls. The expectation in the first instance would be to try it with the adjustments and support in place. And we seem to be going round in circles*."

109. The meeting adjourned. We note that Mrs Kelly did not, in the latter part of the meeting, refuse to return to work or refuse to attend call training. However, she expressed her concerns about how it would impact on her health and Mr Isik expressed his concerns about Mrs Kelly's disability and the respondent's failures in their duty to her under the Equality Act.

110. When the meeting was resumed the following day, Ms Squire dismissed the claimant. She said "*Thinking about all you have said in our meetings and communications I do not feel that you would be able to return to work and provide*

reliable and sustained attendance. Taking all of this into consideration, I have taken the decision to dismiss you."

111. In her letter of 14 July 2021, Ms Squire states

> "*As I explained in the meeting, call taking is a core element of the ARC Adviser role and you are expected to fulfil this. If this is taken out of your role there is little productive activity remaining with which I can fill your paid time.*"

112. We note that this was not the evidence of Ms Exton to the Tribunal. Ms Exton's evidence was that the call taking would be for approximately 2 days of a full-time advisor's week, possibly more but not more than approximately 2.5 days. Given that the respondent had for some time suggested that adjustments would be available to Mrs Kelly which may have included her only taking calls for an hour at a time, or taking calls during quieter periods, and given that Mrs Kelly's existing work still needed to be completed, we find that Ms Squire's comment about "*little productive activity remaining*" was not correct.

113. Mrs Kelly received a lengthy letter from Ms Pye dated 7 July 2021, informing her of the outcome of her grievance. The outcome was that the grievance was not upheld. We note that Ms Pye provided detailed information about the call centre training in her letter, but that this was received too late for Mrs Kelly to have considered it before her meetings with Ms Squire.

114. Ms Pye notes, in relation to the OH recommendations about Mrs Kelly's participation in call training and call work:

> *"The purpose of the OH reports are to identify any areas where we can better support you in order for you to carry out your role as a whole. OH reports provide recommendations for Ofsted to consider. However, these are only recommendations. Whilst we aim to take on board the recommendations whenever possible, this is not always possible due to current business need."*

115. The claimant appealed against her dismissal, but her appeal forms no part of her complaints to this Tribunal and so no findings of fact are made in that regard. The appeal was not upheld. The claimant's grievance also continued after the termination of her employment but was not upheld. Again, this is not part of the claimant's complaint to this Tribunal and so no findings are made in that regard.

116. The claimants, particularly Mrs Kelly, raised on a number of occasions the fact that the respondent described some members of its staff as "operationally exempt" from the need to carry out telephony or call centre work. Having considered this issue carefully, we find that the reference to "operationally exempt" staff was to those who were yet to be trained on call centre work or those who were short-term members of staff and who would not be trained on call centre work such as university students working in their summer holidays. We accept the respondent's evidence that permanent members of staff were only excused from telephone work if adjustments had been made for them. All permanent members of staff were otherwise expected to complete telephone training and be able to answer incoming calls as part of the ARC advisor role.

Disability and the respondent's knowledge – Mrs Faulkner

117. In March 2020, the respondent knew that Mrs Faulkner was suffering from extremely heightened anxiety which made her physically unwell, including shaking and vomiting, at the prospect of attending the call training, and that she had left her previous employment because of a similar situation and that medication had proven ineffective. The respondent knew that this happened in her previous role in 2005 as she had told them of this in January 2006 not long after she joined the respondent. We find that they therefore knew or ought reasonably to have known in March 2020 that this condition was not new, was long-term and was triggered by the requirement to take phone calls (in various contexts).

118. Furthermore, Mrs Faulkner's email to Ms Shepperson prompted considerable discussion of her mental health between senior members of the respondent's management and HR team in late October and early November 2020.

119. Therefore, by the time of the 1 December 2020 report, we find that it was clear to the respondent that she had a "long-term anxiety related disorder" that was managed by her but was being triggered by the requirement to use the telephone at work and that when triggered, it had a substantial adverse effect on her ability to carry out normal day to day activities.

Mrs Faulkner – Call Training, absence management and dismissal

120. We find that Mrs Faulkner's consistent reports to the respondent that the prospect of any call work, including the training, caused panic attacks, vomiting and shaking in her were not being given due consideration in the respondent's insistence that she attend the training and carry out the call work throughout the period from October 2020 onwards.

121. At Mrs Faulkner's meeting on 25 June 2021, the issue of ill-health retirement was discussed. Mr Crowe confirmed that Mrs Faulkner was not eligible because it was only applicable in situations where "*someone is incapable of doing their role, which isn't the case here*". We find this comment surprising. It indicates the extent to which the respondent was not prepared to consider the overwhelming medical evidence that Mrs Faulkner was simply not able to do the call work, which the respondent insisted was a significant and essential part of her new role. It also suggests that Mr Crowe was not of the opinion that Mrs Faulkner could not genuinely do the call work.

122. In his dismissal letter of 14 July 2021, Mr Wallace states

> "*As I explained in the meeting, call taking is a core element of the ARC Adviser role and you are expected to fulfil this. If this is taken out of your role there is little productive activity remaining with which I can fill your paid time.*"

123. We note that this is identical wording to that used by Ms Squire in Mrs Kelly's dismissal letter. The two dismissal letters contain extensive identical wording in fact. We also note that this was not the evidence of Ms Exton to the Tribunal. Ms Exton's evidence was that the call taking would be for approximately 2 days of a

full-time advisor's week, possibly more but not more than approximately 2.5 days. We therefore find that the comment about "*little productive activity remaining*" which was almost certainly drafted by HR and not Mr Wallace, was not correct.

Both claimants – the feasibility of the adjustments requested

124. The evidence of Ms Exton was that the claimants refused to attend call centre training. In her witness statement, Ms Exton states that the claimants "*declined to trial*" adjustments. It is Mrs Kelly's evidence that she did not decline either to attend the training, or to consider adjustments. She had submitted evidence to the respondent that call work would adversely affect her health but had not received acknowledgement of this. She repeatedly requested that a decision be made on the basis of her OH reports, but she was not given one until shortly before her dismissal. Mrs Faulkner was in receipt of overwhelming and consistent OH evidence that call adjustments would not be effective and would likely cause a deterioration in her health. We do not accept that either claimant can be said to have "declined to trial" adjustments.

125. We also note that Ms Exton's evidence was not that specific adjustments had been offered to the claimants, but that "*it is likely that Ofsted would have sought to consider alternative adjustments to support the claimants in the call training and call taking element of the role."* We note the use of the word "likely" and "consider", which we find shows that the claimants were not provided with any assurances that adjustments would be made after the training ended. Mrs Kelly was not given the call training programme in advance, or to take away and consider. It was shown to her on Ms Squire's screen during her penultimate meeting. This was insufficient. Given the length of time in which Mrs Kelly and the respondent had been discussing this issue, Mrs Kelly should have been given more than a brief period during the meeting to consider the proposals.

126. Mrs Kelly's dismissal letter contains an admission of the respondent operating a limit on people who are entitled to adjustments. Ms Squire writes "*any adjustment to eliminate the taking of incoming calls from your duties is unsustainable and unreasonable given the impact on the service and others in the team and the fact that some already have this adjustment and the service is at a maximum number it can sustain*".

127. The respondent's witnesses were cross-examined on the issue of why a limit had been imposed on the number of the ARC team who were given adjustments on the telephony aspect of the role. Ms Squire told the Tribunal that Carolyn Purcell had taken the decision to limit the number of ARC advisors who were given the benefit of an adjustment or an exemption to their telephony duties. Ms Binks and Ms Harper also gave evidence that Ms Purcell along with other team managers considered the work forecasting information regarding the numbers needed to take calls in the ARC team. Ms Harper told the Tribunal that it was not "*operationally feasible to allow any more exemptions*". Given the importance of this decision to the claimants' claims, it is regrettable that Ms Purcell did not assist the Tribunal by providing witness evidence on the rationale behind this decision.

128. It was put to Ms Harper by a member of the Tribunal panel, that if there are 80 people in the ARC team and 7 have been exempted from calls, there remained

approximately 73 people to take calls. By way of example, if Mrs Kelly worked part-time and was required to answer calls for a pro-rata equivalent of 2 days per week, which in her case would amount to 1.6 days per week, that would mean that she answered calls or 13 hours a week. If these calls were reallocated to the rest of the team, a notional additional burden per person of 13 minutes of call-taking would result. Ms Harper noted that this was an arbitrary figure and that forecasting was more complicated, with a number of work streams to balance. She said that it was not just about calls but about being multi-skilled in the department. However, we note that if upskilling was not just about taking calls, it follows that it ought to be possible to up-skill an advisor without taking calls.

129. Ms Exton's evidence was that the 13-minute supposition put to Ms Harper was not accurate. She told the Tribunal that only about 45 members of the team were trained to take calls at the time the decisions were made about the claimants. Not all of the 45 people were full-time and there would need to be allowances made for sickness absence and annual leave. She also said that calls did not arrive in a linear fashion and there were periods where there were queues of calls and periods which were quiet. She also gave evidence that the respondent struggled with recruitment and retention post-Covid.

130. Ms Exton's evidence was that a full-time ARC advisor would do 2 days "pure" call work and 3 days administration. For a newly trained ARC advisor (as the claimants would have been, had they done the call training) they would have spent the 3 days doing their previous role and upskilling in other areas would have happened gradually over an unspecified future period.

131. Ms Binks, who was an ARC team manager, told Tribunal that on occasion ARC advisors did have to do more than two days per week but no more than 2.5 days. Those with adjustments would be exempted once they had done their set times. Some with adjustments may only answer calls for a short period of time per day and certainly far less than the whole day.

132. Ms Binks told the Tribunal that ARC advisors "*might not do 2 days per week if calls are lower even if scheduled if it was a quiet week such as in the summer holidays. I am not familiar with lots of people doing more than two days calls per* week."

133. We accept the respondent's evidence that calculations such as the 13-minute supposition are theoretical and not closely reflective of the day to day environment of the ARC team and we use them with caution. However, we nevertheless have found such calculations to be instructive even if on a theoretical basis. They are useful in considering the order of magnitude of the pressures on the respondent's resources.

134. Even if we accept that there was only 40 people in the ARC team that were able to take calls, had they had to do Mrs Kelly's calls, for example, this might be said to amount to a notional extra 13 hours per week across the whole team, or an extra 19.5 minutes for each advisor per week. Mrs Kelly would also have been able to relieve the administrative burden on these other ARC advisors by completing more of the written work. The same would have been true for Mrs Faulkner. This would not, we find, amount to an unmanageable additional burden for the call

handlers. Furthermore, given the evidence from Ms Exton of the respondent's ongoing efforts to recruit into the ARC team, that figure ought to reduce as the size of the team increased.

135. As noted above, Mr Crowe said in the final formal absence review meetings that if the call training was completed it was possible that an exemption from call-taking could be considered after that. Equally both claimants were told that, provided they completed the call training (with adjustments) then the handling of "live" calls may be subject to further adjustments, including reducing the length of the call-taking part of their job or reducing the scope and subject-matter of the calls they received. We find that it is clear that the respondent would have been able to manage with both claimants handling only a limited number of calls, below the 2 days per week nominal requirement, possibly including either a total exemption from call work or a minimal requirement such as an hour per day.

136. On the balance of probabilities and considering all of the evidence before the Tribunal on this issue, we find that Mrs Faulkner and Mrs Kelly could not have been considered by the respondent to be a tipping point in their ARC advisors schedule, such that they were obliged to attend call training or be dismissed. It was clear that the respondent could have accommodated further adjustments, including exemptions, to their call handling role.

137. We find that the respondent made an arbitrary decision that the limit had been reached and that no further adjustments were possible, when in fact their own evidence was that this was not the case. We find that a business decision was taken by Ms Purcell at a high level as to what was desirable and those lower down the chain of command were tasked with imposing this decision on the ARC team members, whatever the consequences may have been for those with disabilities, including those such as the claimants with long service with the respondent.

Redeployment for both claimants

138. During this time, Mrs Kelly was provided with a number of emails by Ms Malik, an HR advisor, of vacancies within the respondent and the Civil Service more widely. We note that there is a considerable confusion on the part of the parties about what this entailed and whether the claimants were able to access the respondent's formal "redeployment" process. We accept the respondent's evidence that references to "redeployment" were not a reference to the formal redeployment process followed in a redundancy situation as set out in the respondent's redeployment policy, but was in fact the process of sending Mrs Kelly and Mrs Faulkner a number of emails containing job vacancies, and nothing more. Those job vacancies were also not, we find, filtered or targeted to the claimants in any way.

139. Both Mrs Kelly and Mrs Faulkner expressed interest in a job advertised with HMRC. In the HMRC expressions of interest application form, the claimants were asked the question "Is the applicant undergoing formal action over attendance, performance, or discipline policy?" and was asked to tick "yes" or "no". Mr Crowe informed Mr Wallace to tell Mrs Faulkner that she should tick "no" if the application form asked about attendance issues. However, after both claimants applied for this role at HMRC on 28 June 2021, they were dismissed on 1 July 2021. When Mrs

Faulkner was contacted about the job by HMRC, she notified them that she had been dismissed since she applied. She was then informed by HMRC that she could no longer apply for the role.

140. The claimants assert that the respondent should have waited longer for them to find alternative jobs before dismissing them. In the formal redeployment policy, the claimants state that those being redeployed are usually given six months to find alternative work. They also assert that they should not have been given the instruction to tick "no" when asked about attendance issues. This is the basis on which they assert that their redeployment was "blocked" by the respondent.

The Law - Disability

141. Was the claimant disabled within the definition in s6 Equality Act 2010 at the relevant time? The Tribunal must assess this in accordance with the Equality Act and the associated statutory Guidance ("Guidance on matters to be taken into account in determining questions related to the definition of disability" – 2011) and the EHRC Employment Code of Practice (2011).

142. In order to be a disabled person within the definition in section 6 of the Equality Act 2010, the worker must have:

a. A physical or mental impairment
b. Which has a substantial adverse effect on their ability to carry out normal day to day activities
c. Which is long-term. This means that it has lasted for 12 months already at the date of the alleged discrimination or is likely to last for 12 months from the date of first onset. In assessing whether an impairment is likely to last for 12 months, the Tribunal must assess the information and evidence available at the time of the discrimination and not what has happened to the individual since. "Likely" is said to mean that it "could well happen" (paragraph C3 of the statutory Guidance).

143. The claimant must have been a disabled person at the time of the alleged discrimination.

144. Appendix 1 to the EHRC Employment Code states that '*there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause'* — paragraph 7.

145. ***Ministry of Defence v Hay 2008 ICR 1247, EAT***, an 'impairment' could be an illness or the result of an illness, and that it was not necessary to determine its precise medical cause.

146. ***Rayner v Turning Point [2010] 11 WLUK 156-*** although the question of whether there is a "substantial" adverse effect is a matter of fact for the Tribunal to determine, in circumstances where a claimant was diagnosed with anxiety by his GP and his GP advises him to refrain from work, that is "in itself" evidence of a

substantial effect on day-to-day activities, because were it not for the anxiety the claimant would have been at work, and his day-to-day activities include going to work.

147. It will not always be essential for a tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the claimant's abilities — ***J v DLA Piper UK LLP 2010 ICR 1052, EAT.***

148. ***Fag og Arbejde (FOA) (acting on behalf of Kaltoft) v Kommunernes Landsforening (acting on behalf of the Municipality of Billund) 2015 ICR 322, ECJ***, the effects of an impairment or condition, and not its origin, are the key issue for a court or tribunal when considering disability discrimination.

149. In ***Urso v Department for Work and Pensions 2017 IRLR 304, EAT***, the employer was required to consider the symptoms and effect of the claimant's disability, and that there might well be cases where the specific cause of the disability was not known or had not been identified.

150. The cumulative effects of an impairment should be taken into account when working out whether it is substantial. The Guidance states at B4: "An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, taken together, could result in an overall substantial adverse effect. For example:

> *"A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities*."

151. If, at the date of the alleged discrimination, a condition has not lasted for at least twelve months, the Tribunal must consider whether there is evidence to show that it is likely to last for at least twelve months. The 2011 Guidance defines "likely" as meaning that it "could well happen" (at paragraph C3). The relevant date for assessing the likelihood is at the date of the discriminatory act (***McDougall v Richmond Adult Community College 2008 ICR 431, CA.***) The Guidance states that anything that happens after the date of the discriminatory act will not be relevant (paragraph C4).

152. ***Royal Borough of Greenwich v Syed EAT 0244/14*** - the question which the tribunal has to ask itself is not whether the mental health impairment was likely to last at least 12 months but whether the substantial adverse effect of the impairment was likely to last more than 12 months.

153. The effect of an impairment does not have to remain the same during the 12-month period. Paragraph C7 of the Guidance acknowledges that some activities may initially be very difficult but become easier. The main adverse effect

may even disappear temporarily or disappear altogether, while another effect may develop into a substantial adverse effect. A condition that does not continually have an adverse effect can still satisfy the "long-term" requirement if it has substantial adverse effects that are likely to recur beyond 12 months after the individual developed the impairment.

154. Paragraph 2(2) of Schedule 1 to the EQA states that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have that effect if the effect is 'likely to recur'. Likely to recur means that 'it could well happen'.

Time Limits

155. Discrimination complaints are subject to the time limits set out in the Equality Act 2010 at s123(1), as follows:

> *Proceedings on a complaint within section 120 may not be brought after the end of –*
> *the period of 3 months starting with the date to which the complaint relates, or such other period as the employment tribunal thinks just and equitable."*

156. The Tribunal must consider a number of factors in deciding whether a claim presented late can still be considered on a "just and equitable" basis.

157. These include, but are not limited to, the prejudice each party would suffer as a result of the decision reached, and the circumstances of the case, such as the length of the delay and the reasons for the delay, the extent to which the evidence might be affected by the delay and the steps taken by the claimant to obtain advice once he knew of the possibility of taking action. The Tribunal must also take into account the merits of the claim.

158. It is not the case that it is never just and equitable to extend time where there is no good explanation for the delay. ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA*** held that any explanation put forward by the claimant is a matter that the Tribunal should consider but is not the deciding issue of whether or not the Tribunal should extend time.

159. In discrimination claims, a claimant must engage with ACAS Early Conciliation before an ET1 can be submitted. The ACAS Early Conciliation must begin within three months of the date of the act complained of.

160. In relation to a claim for a failure to make reasonable adjustments and the relevant time limits in s123(4) EQA 2010, had the respondent been acting reasonably, when would it have made the reasonable adjustments? When would the reasonable employee, based on the facts known to the claimant, conclude that the duty would not be complied with by the respondent?

161. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA***, for the purposes of the time limit, the period within which the employer might reasonably have been expected to comply had to be determined in the light of what the claimant reasonably knew.

162. ***Fernandes v Department for Work and Pensions 2023 EAT 114***, 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. This analysis must begin with the identification of the feature which causes the disadvantage (a PCP, physical feature or auxiliary aid). This will be a fact which dates the start of the disadvantage. The next element is a factual finding to determine when it would be reasonable for the employer to have to take steps to alleviate the disadvantage. This will be a finding of fact which dates when the breach occurred. The tribunal should then ask if there are facts which would allow it to conclude that the employer acted inconsistently with the duty to make adjustments. If there are, then that determines the notional date. If there is no inconsistent act by the employer, then there will come a time when it would be reasonable for the employee, on the facts known to him or her, to conclude that the employer is not going to comply with the duty. In those circumstances, identifying the notional date is a jurisdictional question in which there should be an objective analysis of the facts known to the employee, which is then considered on the basis of what a reasonable person would conclude from those facts about the employer's intention to comply with the duty. However, if the notional date means the claim falls outside the primary time limit, the tribunal would then be entitled to consider the claimant's subjective state of mind when considering the discretionary question of whether time should be extended on a just and equitable basis.

Direct Discrimination

163. Section 13(1) of the Equality Act 2010: A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

164. The Tribunal is to make a comparison with an actual or hypothetical comparator in not materially different circumstances (section 23 EQA 2010). Ultimately, the Tribunal is considering what is the reason why the treatment occurred as it did, if it occurred at all.

165. ***Shamoon v Chief Constable of the RUC [2003] UKHL 11***, paragraphs 7 – 12, sometimes it will not be possible to decide whether there is less favourable treatment without deciding "the reason why".

166. It is possible to use the evidence of comparators in materially different circumstances to construct a hypothetical comparator and determine how such a hypothetical individual would be treated. However, a statutory comparator as per s23 Equality Act 2010 must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class (***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285***).

The Duty to Make Reasonable Adjustments

167. ***Smith v Churchills Stairlifts plc 2006 ICR 524, CA,*** the test of reasonableness is an objective one and it is ultimately the employment tribunal's view of what is reasonable that matters. It is necessary for the tribunal to look at

the proposed adjustment from the point of view of both the claimant and employer and then make an objective determination as to whether the adjustment is or was a reasonable one to make.

168. ***Royal Bank of Scotland v Ashton 2011 ICR 632, EAT***, an employment tribunal had erred by focusing, as would be appropriate in an unfair dismissal claim, on the reasonableness of the process by which the employer reached the decision not to make a proposed adjustment. The tribunal's focus must be on whether the adjustment itself can be considered reasonable.

169. The Code provides (at 6.28) examples of matters that a Tribunal might consider in assessing the reasonableness of an adjustment. They are:

- the extent to which taking the step would prevent the effect in relation to which the duty was imposed (i.e. the effectiveness of the step)
- the extent to which it was practicable for the employer to take the step
- the financial and other costs that would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities
- the extent of the employer's financial and other resources
- the availability to the employer of financial or other assistance in respect of taking the step; and
- the nature of the employer's activities and the size of its undertaking.

170. The purpose the duty to make reasonable adjustments is to make adjustments that are effective in keeping a disabled person in employment, not to enable them to leave employment on favourable terms. An employment tribunal commits an error of law if it fails to engage with how the steps that it finds should have been taken would have been effective to enable the disabled person to continue working or, as the case may be, return to work (***Tameside Hospital NHS Foundation Trust v Mylott EAT 0352/09***).

Discrimination arising from disability

171. **Discrimination arising from disability s15 Equality Act 2010 ("EQA")**

(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.

172. When assessing an employer's defence that the unfavourable treatment was proportionate, a Tribunal must critically evaluate the respondent's evidence, weighing the needs to the employer against the discriminatory impact on the employee. The Tribunal must carry out its own assessment of the matter instead

of asking what might fall within a band of reasonable responses. (***Hardy & Hansons plc v Lax 2005 ICR 1565, CA, Gray v University of Portsmouth EAT 0242/20***)

Unfair Dismissal

173. ***Bolton St Catherine's Academy v O'Brien [2017] EWCA Civ 145*** it was legitimate for an employment tribunal, having found that the dismissal of a teacher on long-term sick leave was disproportionate and therefore unjustified under s.15 of the Equality Act 2010, to decide that it must also be unfair under s.98(4) of the Employment Rights Act 1996. The Court accepted that the language of the two tests is different. However, it is undesirable for tribunals to have to routinely judge the dismissal of an employee by one standard for the purpose of discrimination law and by a different standard for the purpose of an unfair dismissal claim.

174. There are five potentially fair reasons for dismissal set out in S.98(1)(b) and (2) of the Employment Rights Act 1996 (ERA). The reason pleaded by the respondent in these proceedings is ill-health, that is, a reason related to the capability or qualifications of the employee for performing work of the kind which he was employed to do. It is for the employer to show on the balance of probabilities that the principal reason was a potentially fair reason.

175. If the employer establishes a fair reason, the determination of the question of whether the dismissal is fair or unfair (as per s98(4) ERA) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

176. The test of whether or not the employer acted involves a Tribunal determining 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved' (***NC Watling and Co Ltd v Richardson 1978 ICR 1049, EAT***). It is a well-established principle that it is the employer's conduct which the Tribunal must assess, not the unfairness or injustice to the employee. Tribunals are to ask: did the employer's action fall within the band (or range) of reasonable responses open to an employer (***Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT***)?

177. ***Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA***, is authority for the principle that a decision must not be reached by a process of the Tribunal substituting itself for the employer and forming an opinion of what it would have done had they been the employer.

178. A factor for the Tribunal to consider is whether the employer could reasonably have been expected to keep the employee's job open any longer (***Spencer v Paragon Wallpapers Ltd 1977 ICR 301, EAT; Monmouthshire County Council v Harris EAT 0332/14***). This is a question of fact and will turn on the circumstances of each case, including the nature of the employee's job and the nature of their illness or injury.

179. In ***O'Brien v Bolton St Catherine's Academy 2017 ICR 737, CA,*** Underhill LJ noted "a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis' and 'In principle, the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified".

180. The Tribunal must also take into account the likelihood of improvements in the employee's attendance record and the likelihood of good prospects for the future (***Post Office v Stones EAT 390/80***).

Application of the Law to the Facts Found

Unfair dismissal – section 98 ERA 1996

181. We accept on the balance of probabilities that the respondent did have the potentially fair reason of capability for the claimants' dismissals, in the context of long-term absence. The respondent had made a change to the claimants' roles, and the claimants had been on long-term sickness absence as a result.

182. The question for the Tribunal is whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimants?

183. The respondent pleads the impact on its workforce and resources of the claimants' absence. As per ***O'Brien***, the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified.

184. However, we find that no reasonable employer would consider the claimants' sickness absence to be such a justification for their dismissal. The claimants could have returned to work at any moment, and both requested that they be allowed to do so, to do applications or administrative work. The respondent effectively prevented them from doing so by insisting that they complete the call training. Their continued absence was not caused by their inability to attend work. The cause of their absence was a management decision by the respondent.

185. A further factor in the consideration of the reasonableness of the decision to dismiss in the circumstances is that both claimants were long-serving employees who had the change to their duties imposed on them. They were not recruited into the ARC role. They did not voluntarily apply or agree. Mrs Kelly went so far as to formally appeal against being mapped into the ARC advisor role. Both claimants had also understood that, at the time of the role changes being decided in late 2018, that there would be some degree of flexibility on the part of the respondent. Indeed, both claimants knew of others who were ostensibly part of the ARC team but had been exempted from call duties to a greater or lesser extent. (such as comparators C1-C7). Part of the consultation process involved assurances that medical conditions would be taken into account in allocating call centre duties.

186. We find that in these circumstances, no reasonable employer would have then discarded the flexibility that was promised (and had been given to others) and

dismiss employees for refusing to do call centre training when it was imposed on them, and even less so for long-serving employees. Given the size of the respondent (and the size of the ARC advisor team) and the adjustments that may have been given to the claimants had they been able to complete the call centre training, no reasonable employer would have dismissed for their failure to overcome the hurdle of completing the training itself. The claimants' dismissals were outside the range of reasonable responses.

187. The respondent's witnesses, such as Ms Squire and Ms Exton, both spoke of a limit on the number of individuals in the ARC team to be given adjustments. The reason for this was said to be the pressure that would be put on the rest of the team in the circumstances. However, given the size of the team and the relatively high turnover, the size of the team was constantly in flux. Also, the evidence before the Tribunal indicates that the adjustments on offer to the claimants had they been able to do the call training may have included a very minimal amount of call handling, such as an hour a day, or a total exemption from call handling. We do not accept it was a reasonable position to take, to enforce call work on two individuals in the circumstances and to dismiss them when they were not able to comply with the requirement to carry out these duties.

188. We accept that the respondent carried out a reasonable investigation into the claimants' absence, including finding out about the up-to-date medical position, at the time of the dismissal. However, we do not accept that the respondent genuinely believed the claimants were no longer capable of performing all of their duties. Mr Crowe told Mrs Kelly that ill-health retirement was unavailable for that reason. Ms Exton's evidence was that call work was approximately two days out of five for a full-time employee. Mrs Kelly and Mrs Faulkner could not do the call work but they were able to fulfil other duties as they had before.

189. We also do not accept that the respondent adequately consulted Mrs Kelly. She was not provided with a reasonable opportunity to consider the personalised training plan before being dismissed. We find that no reasonable employer would have put together a bespoke training plan, but not provided Mrs Kelly with a reasonable opportunity to consider it and no reasonable employer would have moved to dismiss her so quickly thereafter. Given that the respondent indicated that adjustments to the call work may have been available had Mrs Kelly begun the training and given that she had indicated that she was prepared to begin the training, it was outside the range of reasonable responses for the respondent to dismiss her the next day on the basis that she could not guarantee that she would provide reliable service in the future. The basis on which that future service would be provided, that is, the duties that she may have been required to carry out, were seemingly still up for some degree of variation or adjustment.

Disability – s6 EQA 2010 - Mrs Kelly

190. It is the respondent's case that Mrs Kelly's symptoms of anxiety are not sufficiently consistent over time to amount to a long-term mental impairment within the scope of s6 Equality Act 2010. It is the respondent's case that Mrs Kelly's anxiety is not reflected in her medical records as being long-term, in that during 2020 between 24 March to 31 December, her records do not show she was suffering from anxiety. In 2021, the respondent's case is that her anxiety only became a consistent issue from 2 February 2021 and so was not "long term" by the time of her dismissal on 1 July 2021. It is also the respondent's case that this

was not likely to last for 12 months in total, because had Mrs Kelly been allowed to return to work to do applications work (and no call work) her anxiety would have subsided and ceased to affect her day-to-day activities.

191. We find, applying Appendix 1 to the EHRC Employment Code and ***Ministry of Defence v Hay 2008 ICR 1247, EAT***, there is no need for Mrs Kelly to establish a medically diagnosed cause for her impairment of "anxiety" or to establish it as a separate impairment. Furthermore, the fact that her anxiety was not continually present from 2018 until 2021 does not preclude the Tribunal making a finding that her anxiety was an underlying condition that was likely to recur.

192. As per ***Fag og Arbejde (FOA) (acting on behalf of Kaltoft) v Kommunernes Landsforening (acting on behalf of the Municipality of Billund) 2015 ICR 322, ECJ***, the effects of an impairment or condition, and not its origin, are the key issue. As per ***Urso v Department for Work and Pensions 2017 IRLR 304, EAT***, the respondent is required to consider the symptoms and effect of the claimant's disability, even when the specific cause of the disability was not known or had not been identified.

193. We find that Mrs Kelly's anxiety was a condition that was present to a greater or lesser extent throughout the period to which these proceedings relate. Mrs Kelly accepted in cross-examination that her anxiety did not have a substantial adverse effect on her normal day to day activities in 2020. However, it is clear from her medical records that she has a history of recurring periods of anxiety which do have a substantial adverse effect on her day-to-day activities and which exacerbate (and are exacerbated by) her existing conditions of IBS and rosacea. For example, in 2018 and 2019 she became highly anxious as a result of her diagnosis of rosacea and made numerous visits to her GP over a period from August 2018 to autumn 2019 where her high anxiety is recorded and treatment was provided not only for her rosacea but also for her associated mental health issues, caused by this anxiety.

194. Therefore, we find that Mrs Kelly's anxiety has lasted at least twelve months such that it can be said to be a long-term condition. It is and was at the time to which these proceedings relate, "likely to recur" in the future. Indeed, as of February 2021 the respondent accepts that anxiety did have a substantial adverse effect on her ability to carry out normal day to day activities (in particular, on her attending work). "Likely" is defined in the 2011 Statutory Guidance at paragraph C3 as meaning "could well happen". Given the respondent's knowledge of her anxiety from her appeal in late 2018, her occupational health referral in late 2019, the occupational health report itself in January 2020, it was likely that her anxiety would recur in the future and it did so in February 2021. As stated in the 2011 Statutory Guidance at paragraph C7,

"*It is not necessary for the effect to be the same throughout the period which is being considered…. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period… The effect might even disappear temporarily."*

195. In relation to the question of whether the respondent had knowledge of this, we find that Mrs Kelly had consistently told the respondent, from November 2018

onwards, that she considered herself unable to carry out call work because of "her medical conditions". This was understood by Mr Fairfield when he referred Mrs Kelly to OH in November 2019 and was confirmed by the OH report in January 2020. The OH report of January 2020 was clear that Mrs Kelly's anxiety was a longstanding condition of its own. This was known, or ought to have been known to the respondent, including Mr Fairfield when managing Mrs Kelly's absence in 2021 and ought to have been known to Ms Squire when Mrs Kelly was dismissed.

196. Even if we accept that the respondent only knew that Mrs Kelly's IBS and rosacea were disabilities in 2020 and 2021, it is clear from the evidence before the Tribunal that anxiety was a key symptom and a key cause of both of these conditions, in that anxiety was a trigger for worsening IBS and rosacea, and worsening rosacea and IBS made Mrs Kelly much more anxious. Even if the Tribunal were to accept that Mrs Kelly's anxiety was not a stand-alone disability that the respondent had knowledge of at the relevant time, but merely a symptom of her other conditions, we do not consider that this makes a material difference to their duty to her under the Equality Act 2010, as per the cases of ***Karltoft (2015)*** and ***Urso (2017)*** referred to above. Her anxiety, however it was caused, was a longstanding condition that had a substantial adverse effect on her ability to carry out normal day to day activities, and was inextricably linked with her IBS and rosacea, and the respondent knew that all three issues together impacted the claimant's day to day activities in accordance with s6 Equality Act 2010 from 10 January 2020.

Knowledge of disability – Mrs Faulkner

197. The Tribunal has already determined that Mrs Faulkner was a disabled person. As we have indicated above, we find that the respondent knew or ought reasonably to have known by 1 December 2020 that Mrs Faulkner was disabled within the meaning set out in s6 Equality Act 2010.

Direct disability discrimination – section 13 EQA 2010

198. The claimants say they were treated worse than the respondent's employees C1-C7 who are their comparators, in that they were dismissed and their comparators were not. They say that the reason why they were treated in this way is because of their disabilities.

199. The comparators for these claims must be in the same material circumstances as the claimants but, according to S.23(2)(a) of the Equality Act 2010, those circumstances must also include the disabled person's abilities. The EHRC Employment Code states: '…*for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself)' (*paragraph 3.29). Therefore, employees C1-C7 are not appropriate statutory comparators but we have considered the evidence about their circumstances in constructing hypothetical comparators for the purposes of these complaints.

200. The claimants have not proven facts from which the Tribunal could conclude that in any of those respects either claimant was treated less favourably than someone in the same material circumstances, including their abilities, was or would have been treated. The Tribunal finds that the respondent has established that the reason why the claimants were dismissed was their non-attendance at work and the respondent's view that they would not attend to complete the call training. Therefore, we do not accept that they were dismissed because they are disabled. Someone without their impairments but with the same abilities or skills would have been dismissed, we find, if they had not shown that they would return to work to attend the call centre training for another reason.

Discrimination arising from disability – section 15 EQA 2010 – both claimants

201. Both claimants were dismissed because of their sickness absence and because the respondent did not consider that they had a prospect of returning to work to sustain regular attendance in the new ARC advisor role. For both claimants this arose in consequence of their disabilities.

202. We find that there was unfavourable treatment in that the claimants were dismissed, but can the respondent show that this unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent says that its aims were ensuring regular attendance at work to ensure the effective running of its operations, the effective control and management of the respondent's finance (being a public sector employer) and ensuring that employees are not disincentivised to return to work.

203. In deciding whether the unfavourable treatment was a proportionate means of achieving those aims, a tribunal must decide was the treatment an appropriate and reasonably necessary way to achieve those aims or could something less discriminatory have been done instead. The Tribunal will also consider how the needs of the claimant and the respondent should be balanced. Could something less discriminatory have been done instead?

204. The culture within the respondent was from 2021 onwards, we find, to have insisted on ARC advisors completing call centre training, irrespective of the individuals' medical needs and the obstacles to this being done. This was something that the respondent wanted and insisted on. However, the respondent has not been able to demonstrate this was appropriate and reasonably necessary. The small amount of call work that both claimants would likely have been required to do had they managed to get through the call training did not, we find, justify the respondent's insistence that the claimants attend the call training. The requirement to attend call training made both claimants ill and prevented their attendance at work. Failure to attend the training resulted in their dismissal. However, the claimants would not have been dismissed had they managed to complete the call training, even though with suggested adjustments, the respondent acknowledged that they may have ended up answering calls for a very limited amount of time each week. The difference to the respondent in terms of the number of live calls answered by the claimants each week would, we find, have likely been minimal. Their dismissal was therefore disproportionate and unnecessary.

205. We find that had the respondent decided to allow both claimants to attend work on the basis of non-call work only, they would have provided effective service as they had done for many previous years. We have already indicated above, but repeat here for the sake of clarity, that we do not consider it was appropriate or reasonably necessary for the respondent to have imposed a limit on the number of ARC advisors who were exempt from call centre work in the circumstances present in 2021, as described in the Findings of Fact above. Indeed, if the ARC team was under considerable pressure and the respondent was struggling to recruit enough team members, we consider it to be an act of self-sabotage on the respondent's part to prevent two willing and capable applications advisors to return to applications work, even if this was in a part-time capacity. The enforced absence of the claimants because the respondent imposed a requirement on them to attend call training before returning to work did not further the respondent's legitimate aims in a way that was appropriate and reasonably necessary.

206. In relation to the issue of redeployment, we do not consider that the claimants' redeployment was "blocked" as they assert. As we have set out above, they were not offered redeployment as would have been afforded as part of a redundancy exercise, they were simply provided with lists of jobs, including from the Civil Service jobs website. They were provided with access to job opportunities within the respondent, but mostly these involved telephone work involved and also the claimants' evidence was that trust and confidence in the respondent had gone by then to the extent that they did not want to apply. Their inability to find work at the respondent was therefore not blocked by the respondent as a result of their sickness absence.

207. In relation to the final issue of discrimination because of something arising from disability, whether the respondent failed to provide alternative or administration work because of the claimant's sickness absence, the claimants have succeeded in establishing that had they attended the call training they may have been provided with adjustments that extended to doing admin work only, but that this was not guaranteed. Therefore, even if they had not been absent due to sickness they would not have been necessarily provided with administrative or alternative work. Indeed, given the respondent's evidence of a limit being placed on further exemptions from call work for ARC advisors, we find that this was unlikely to have happened. Therefore, the claimants have not established a link on the balance of probabilities between their sickness absence and the respondent's refusal to provide alternative, administrative work.

Reasonable Adjustments ss20-22 EQA 2010 – Mrs Faulkner

208. The provisions, criteria or practices (PCPs) relied on by Mrs Faulkner are the requirement to undertake call centre work and undertake the associated training which the respondent accepts was in place from 1 March 2020. The substantial disadvantage to which she has been put by the application of the PCP is that she suffered anxiety, panic attacks, nausea, sleeplessness and pains in her chest. We have accepted that the respondent had these PCPs and also that Mrs Faulkner suffered the disadvantages stated because of the requirements imposed. We find that the respondent knew that Mrs Faulkner was likely to be placed at the disadvantage from March 2020 although they did not know (or ought not reasonably to have known) that Mrs Faulkner was disabled until December 2020.

209. Mrs Faulkner says that the respondent should have made adjustments of her being placed in a non-telephony role and/or being redeployed. We accept that being placed in a non-telephony role was reasonable and feasible for the respondent to do for Mrs Faulkner and they failed in their duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage. Had she been allowed to return to work without call work, she would have been able to provide reliable and consistent service to the ARC team, who were short-staffed. Although we accept that the respondent wanted its ARC team to be multi-skilled in call handling, it was a reasonable adjustment to exempt Mrs Faulkner from this requirement. Although it would have undermined the respondent's managerial and organisational aspirations, it would have assisted in reducing the ARC team's workload and would have allowed Mrs Faulkner to return from sick leave.

210. The Tribunal must consider by what date the respondent should reasonably have taken those steps. The duty only arises once the respondent has knowledge that Mrs Faulkner is disabled. We find that there was considerable disruption to the respondent's workplace during Covid. The training was paused from March 2020 until November 2020. The respondent knew or ought to have known that Mrs Faulkner was disabled from 1 December 2020 and therefore the duty to make adjustments arose from the point of that knowledge. On receipt of further medical evidence and on receipt of the issues raised by the claimant over her requirement to attend training in January 2021, the respondent should reasonably have taken those steps when it became clear to them that Mrs Faulkner would simply not be able to attend the call training without a significant adverse impact on her health and that the requirement to do so was significantly impacting on her attendance. We find that it would have been apparent to Mrs Faulkner by the formal absence review meeting on 24 February 2021 that the respondent would not make such adjustments for her.

211. It is the claimants' case that they were not afforded adjustments when colleagues were. However, a respondent's obligations are to take into account each individual's circumstances and consider what is reasonable and so what others have is not directly relevant. However, it can provide context for the reasonableness of the adjustments sought and their availability, and it does so for both claimants. It certainly shows that the respondent had been prepared to do this for others and there was a suggestion that it was not impossible for this to have been offered to the claimants, indeed there is suggestion in the evidence of Ms Exton that "*it is likely that Ofsted would have sought to consider alternative adjustments to support the claimants in the call training and call taking element of the role.*"

Reasonable Adjustments ss20-22 EQA 2010 – Mrs Kelly

212. The provisions, criteria or practices (PCPs) relied on by Mrs Kelly are the requirement to undertake call centre working and undertake the associated training. The substantial disadvantage to which she has been put by the application of the PCP is that her rosacea and IBS were triggered by her anxiety, and that she suffered with face pain. We have accepted that the respondent had these PCPs and that Mrs Kelly suffered the disadvantages stated because of the requirements

imposed. We find that the respondent knew that Mrs Kelly was disabled within the definition in s6 EQA from 10 January 2020.

213. Mrs Kelly says that the respondent should have made adjustments of her being placed in a non-telephony role and/or being redeployed. We accept that being placed in a non-telephony role was reasonable and feasible for the respondent to do for Mrs Kelly and they failed in their duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage. As with Mrs Faulkner, although allowing Mrs Kelly to return to applications or administrative work would have undermined the respondent's managerial and organisational aspirations, it would have assisted in reducing the ARC team's workload and allowed her to be productive.

214. The Tribunal must consider by what date the respondent should reasonably have taken those steps. As with Mrs Faulkner, we find that there was considerable disruption to the respondent's workplace during Covid. The training was paused from March 2020 until November 2020. The respondent should reasonably have taken those steps when it became clear to them that Mrs Kelly would simply not be able to attend the call training without a significant adverse impact on her health and that the requirement to do so was significantly impacting on her attendance. This date was 2 February 2021. We find that it would have been apparent to Mrs Kelly by the formal absence review meeting on 27 April 2021 that the respondent would not make such adjustments for her.

Time issues and jurisdiction

215. It is the respondent's case that the claims issued under s15 are out of time, as the unfavourable treatment relied on is dismissal, which occurred on 1 July 2021 for both claimants. Both claimants did not approach ACAS for Early Conciliation until 5 October, but the last day for them to do so was 30 September 2021 so they are 5 days late. They then submitted their ET1 forms on 3 November 2021.

216. The respondent also submits that the claimants' claims for reasonable adjustments are out of time. Time starts to run from the date on which the claimants ought reasonably to have known that the respondent would not make the adjustments requested. For Mrs Kelly we have identified this date as 27 April 2021 and for Mrs Faulkner as 24 February 2021. Neither claimant approached ACAS within three months of this date. Mrs Kelly was required to go to ACAS on our calculations by 26 July and Mrs Faulkner by 23 May 2021. They are therefore over 2 months and over 4 months late respectively.

217. We heard evidence that although the claimants were members of a union and had the support of Mr Isik and Ms Glennon, they did not have access to any legal advice or support from the union at the time and so were trying to discern for themselves when they needed to submit the claim forms. We consider it just and equitable to extend time to allow these claims to be submitted late as the balance of prejudice to the parties is in favour of doing so. The delays do not unduly prejudice the respondent in terms of the practical consequences of extending time, in that the claimants' appeals (which were not the subject of any complaint before the Tribunal) were ongoing until mid-August and it is therefore not accepted that the cogency of the evidence would be affected by the delay. It is also taken into

account that the claimants did not have the benefit of legal advice, and particularly for the reasonable adjustments time limits, identifying when time starts to run is not a straightforward exercise. Denying the claimants a remedy in claims that are well-founded but a short period of time late is not in the interests of justice. Time is therefore extended on a just and equitable basis to allow these claims to proceed.

Conclusion

218. We find that not enough flexibility or consideration was given to the claimants as individuals. The respondent demanded compliance with the requirement to attend call training, in the face of an overwhelming amount of medical evidence that this would be highly detrimental to both claimants. The respondent was not able to persuade the Tribunal that their actions were proportionate or within the range of reasonable responses. The claimants' claims of unfair dismissal, discrimination arising from disability and a failure to make reasonable adjustments succeed.

Employment Judge Barker

Date__ 29 April 2024
JUDGMENT SENT TO THE PARTIES ON
30 April 2024

FOR THE TRIBUNAL OFFICE

Complaints and Issues Relating to Mrs Kelly

1 Jurisdiction

1.1 What was the date of the Claimant's effective date of termination (EDT)?

1.2 What was the last act of discrimination relied upon?

1.3 When did this alleged last act of discrimination take place?

1.4 On what date did the Claimant contact ACAS in order to commence Early Conciliation

1.5 When was the ACAS Early Conciliation certificate issued?

1.6 What was the last date on which the Claimant was required to lodge their claim with the Employment Tribunal in order to present their claim within the prescribed time limit?

1.7 On what date was the Claimant's claim lodged?

2 Unfair Dismissal

2.1 Does the Respondent concede that the Claimant was dismissed?

2.2 What was the effective date of termination (EDT)?

2.3 What does the Respondent assert was the potentially fair reason or principle potentially fair reason for dismissal? Capability?

2.4 What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence)

2.5 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.5.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;

2.5.2 The respondent adequately consulted the claimant;

2.5.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.5.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

2.5.5 Dismissal was within the range of reasonable responses.

3 Disability

3.1 The Respondent concedes that the Claimant was disabled within the meaning in section 6(1) of the Equality Act 2010 at the material time by reason of rosacea; and IBS, but not anxiety.

3.2 In terms of the claimant's anxiety, does the impairment have an adverse effect on the Claimant's ability to carry out normal day to day activities?

3.3 Is that effect on the Claimant substantial?

3.4 Is the effect on the Claimant long-term, so that it has lasted at least 12 months, or likely to last 12 months or longer?

3.5 What are the normal day-to-day activities relied on upon by the Claimant in asserting that they are disabled within the meaning in section 6(1) of the Equality Act 2010?

3.6 Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was disabled as at the date of the Respondent's act or failure to act?

4 Direct Discrimination – Equality Act 2010 (disability)

4.1 What is the protected characteristic relied upon by the Claimant? Disability (anxiety, IBS and rosacea)

4.2 Who is the actual or hypothetical comparator relied on? The hypothetical comparator is a person not materially dissimilar to the Claimant but who did not have the Claimant's disability.

4.3 The Claimant relies upon the actual comparators identified as C1-C8

4.4 Which alleged incidents of direct disability discrimination does the Claimant rely upon? The Claimant relies upon her dismissal on 1 July 2021.

4.5 Did the Claimant suffer the treatment in the manner alleged?

4.6 If so, did the Respondent treat the Claimant less favourably than it treated or would treat a real or hypothetical comparator in circumstances that were the same or not materially different including their abilities?

4.7 If so, did the Respondent treat the Claimant less favourably because of the Claimant's disability or for another reason?

4.8 If the Respondent treated the Claimant less favourably because of another reason, unconnected with the specified protected characteristic, what was the reason for the Claimant's treatment?

5 Discrimination arising from disability – section 15 Equality

Act 2010

5.1 The Claimant relies on the following alleged acts as incidents of discrimination arising from disability:

5.1.1 The Claimant's dismissal on 1 July 2021

5.1.2 The Claimant's alleged "redeployment blocked"

5.1.3 Failure to provide admin/alternative work

~~5.1.4 The reduction of the Claimant's sick pay~~

5.2 Did the alleged unfavourable treatment occur in the manner alleged?

5.3 If so, did it arise in consequence of the Claimant's disability? The Claimant relies on her long-term sickness absence as the "something" that arose as a result of her disability

5.4 If so, was the treatment a proportionate means of achieving a legitimate aim?

5.5 What is the legitimate aim relied on by the Respondent?

a. Ensuring regular attendance at work to ensure the effective running of its operations.

b. The effective control and management of the Respondent's finance (being a public sector employer)

c. Ensuring that employees are not disincentivised to return to work.

5.6 What were the proportionate means of achieving the legitimate aim relied on by the Respondent?

5.7 Were there any other means by which the Respondent could have achieved the legitimate aim on which they rely?

6 Failure to make reasonable adjustments – section 20 Equality Act 2010

6.1 What is the provision, criterion or practice (PCP) relied on by the Claimant? The Claimant relies upon (1) the requirement to take inbound calls; and (2) attend the associated training.

6.2 What is the substantial disadvantage to which the Claimant has been put by the application of the PCP? The Claimant relies upon her Rosacea and IBS being triggered by her anxiety and face pain.

6.3 What adjustments does the Claimant asserts the Respondent should have made? The Claimant relies on being placed in a non-telephony role and being redeployed.

6.4 What is the disadvantage to which the Claimant has been put as a result of the alleged failure by the Respondent to make reasonable adjustments?

6.5 Was such disadvantage substantial?

6.6 If so, did the Respondent know that the Claimant was disabled?

6.7 If not, could the Respondent reasonably be expected to know that the Claimant was disabled?

6.8 Did the Respondent know of the substantial disadvantage which the Claimant claims to have suffered?

6.9 Could the Respondent reasonably be expected to know that the Claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled?

6.10 If the Respondent knew, or could reasonably be expected to know, that the Claimant was disabled and that the Claimant was likely to be placed at a substantial disadvantage in comparison with persons who are not disabled, did the Respondent take such steps as were reasonable to avoid the alleged disadvantage?

7 Remedy

7.1 What is the Claimant's basic award?

7.2 What is the Claimant's compensatory award?

7.3 Is the Claimant entitled to an award for injury to feelings in accordance with the guidelines set out in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*?

7.4 Should the Claimant's compensation be reduced or limited to reflect the chance that the Claimant would be been dismissed in any event and that any procedural errors made by the Respondent made no difference to the outcome (*Polkey v AE Dayton Services Ltd [1997] IRLR 503*)?

7.5 Should the Claimant's basic award be reduced because the Claimant's conduct before the dismissal was such that it would be just and equitable to reduce the award?

7.6 Should the Claimant's compensatory award be reduced because the dismissal was to any extent caused or contributed to by any action of the Claimant (section 123(6) ERA)?

7.7 Did the Respondent comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

7.8 If the Respondent did not comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, was that failure reasonable?

7.9 Did the Claimant comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

7.10 If the Claimant did not comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, was that failure reasonable?

7.11 What element of the award constitutes loss of earnings to which the Recoupment Regulations apply?

7.12 Has the Claimant taken reasonable steps to mitigate their loss?

Revised 19 January 2024

Complaints and Issues Relating to Mrs Faulkner

1 Jurisdiction

1.1. What was the date of the Claimant's effective date of termination (EDT)?

1.2. What was the last act of discrimination relied upon?

1.3. When did this alleged last act of discrimination take place?

1.4. On what date did the Claimant contact ACAS in order to commence Early Conciliation

1.5. When was the ACAS Early Conciliation certificate issued?

1.6. What was the last date on which the Claimant was required to lodge their claim with the Employment Tribunal in order to present their claim within the prescribed time limit?

1.7. On what date was the Claimant's claim lodged?

2 Unfair Dismissal

2.1 Does the Respondent concede that the Claimant was dismissed?

2.2 What was the effective date of termination (EDT)?

2.3 What does the Respondent assert was the potentially fair reason or principle potentially fair reason for dismissal? Capability?

2.4 What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence)

2.5 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.5.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;

2.5.2 The respondent adequately consulted the claimant;

2.5.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.5.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

2.5.5 Dismissal was within the range of reasonable responses.

3 Disability

3.1. The Tribunal's judgment of 24 July 2023 determined that the Claimant had a disability as defined by section 6 of the Equality Act 2010, as a result of anxiety.

3.2. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was disabled as at the date of the Respondent's act or failure to act?

4 Direct Discrimination – Equality Act 2010 (disability)

4.1. What is the protected characteristic relied upon by the Claimant? Disability (anxiety)

4.2. Who is the actual or hypothetical comparator relied on? The hypothetical comparator is a person not materially dissimilar to the Claimant but who did not have the Claimant's disability.

4.3. The Claimant relies upon actual comparators identified as "C1 – C8"

4.4 Which alleged incidents of direct disability discrimination does the Claimant rely upon? The Claimant relies upon her dismissal on 1 July 2021.

4.5 Did the Claimant suffer the treatment in the manner alleged?

4.6. If so, did the Respondent treat the Claimant less favourably than it treated or would treat a real or hypothetical comparator in circumstances that were the same or not materially different including their abilities?

4.7 If so, did the Respondent treat the Claimant less favourably because of the Claimant's disability or for another reason?

4.8 If the Respondent treated the Claimant less favourably because of another reason, unconnected with the specified protected characteristic, what was the reason for the Claimant's treatment?

5 Discrimination arising from disability – section 15 Equality Act 2010

5.1. The Claimant relies on the following alleged acts as incidents of discrimination arising from disability:

5.1.1. The Claimant's dismissal on 1 July 2021
5.1.2 The Claimant's alleged "redeployment blocked"
5.1.3 Failure to provide admin/alternative work
~~5.1.4 The reduction of the Claimant's sick pay~~

5.2 Did the alleged unfavourable treatment occur in the manner alleged?

5.3 If so, did it arise in consequence of the Claimant's disability? The Claimant relies on her long term sickness absence as the “something” that arose as a result of her disability

5.4 If so, was the treatment a proportionate means of achieving a legitimate aim?

5.5 What is the legitimate aim relied on by the Respondent?

5.5.1 Ensuring regular attendance at work to ensure the effective running of its operations.

5.5.2 The effective control and management of the Respondent’s finance (being a public sector employer)

5.5.3 Ensuring that employees are not disincentivised to return to work.

5.6 What were the proportionate means of achieving the legitimate aim relied on by the Respondent?

5.7 Were there any other means by which the Respondent could have achieved the legitimate aim on which they rely?

6. Failure to make reasonable adjustments – section 20-22 Equality Act 2010

6.1 What is the provision, criterion or practice (PCP relied on by the Claimant? The Claimant relies upon (1) the requirement to undertake call centre working; and (2) undertake the associated training.

6.2 What is the substantial disadvantage to which the Claimant has been put by the application of the PCP? The Claimant relies upon suffering anxiety, panic attacks, nausea, sleeplessness and pains in chest.

6.3 What adjustments does the Claimant asserts the Respondent should have made? The Claimant relies on being placed in a non-telephony role, and being redeployed.

6.4 What is the disadvantage to which the Claimant has been put as a result of the alleged failure by the Respondent to make reasonable adjustments?

6.5 Was such disadvantage substantial?

6.6 If so, did the Respondent know that the Claimant was disabled?

6.7 If not, could the Respondent reasonably be expected to know that the Claimant was disabled?

6.8 Did the Respondent know of the substantial disadvantage which the Claimant claims to have suffered?

6.9 Could the Respondent reasonably be expected to know that the Claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled?

6.10 If the Respondent knew, or could reasonably be expected to know, that the Claimant was disabled and that the Claimant was likely to be placed at a substantial disadvantage in comparison with persons who are not disabled, did the Respondent take such steps as were reasonable to avoid the alleged disadvantage?

7. Remedy

7.1 What is the Claimant's basic award?

7.2 What is the Claimant's compensatory award?

7.3 Is the Claimant entitled to an award for injury to feelings in accordance with the guidelines set out in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*?

7.4 Should the Claimant's compensation be reduced or limited to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors made by the Respondent made no difference to the outcome (*Polkey v AE Dayton Services Ltd [1997] IRLR 503*)?

7.5 Should the Claimant's basic award be reduced because the Claimant's conduct before the dismissal was such that it would be just and equitable to reduce the award?

7.6 Should the Claimant's compensatory award be reduced because the dismissal was to any extent caused or contributed to by any action of the Claimant (section 123(6) ERA)?

7.7 Did the Respondent comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

7.8 If the Respondent did not comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, was that failure reasonable?

7.9 Did the Claimant comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

7.10 If the Claimant did not comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, was that failure reasonable?

7.11 What element of the award constitutes loss of earnings to which the Recoupment Regulations apply?

7.12 Has the Claimant taken reasonable steps to mitigate their loss?

Revised 19 January 2024