Case Numbers: 2204845/2022

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Miss S Alam		**Barts Health NHS Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 2, 4, 5, 11, 12 April 2024; 15 April 2024 in chambers**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mr T Cook, Ms Z Darmas**

On hearing Mr A Pickett, counsel, on behalf of the Claimant and Mr D Bayne, counsel, on behalf of the Respondent, the Tribunal determines as follows:

(1) By consent, the Claimant's complaint of unauthorised deductions from wages is dismissed on withdrawal.
(2) The Claimant's application to amend the claim form first made on 4 April 2024 is granted.
(3) Claimant's complaint of failure to make reasonable adjustments is not well-founded.
(4) Accordingly, the proceedings as a whole are dismissed.

REASONS

Introduction

1 The Claimant was continuously employed by the Respondent as a Band 5 Therapeutic Radiographer from 2 November 2020 until her resignation without notice on 26 August 2022.

2 By a claim form presented by her solicitor on 27 July 2022 the Claimant brought claims for disability discrimination in the forms of discrimination arising from disability and failure to make reasonable adjustments, together with a complaint of unauthorised deductions from wages. For the purposes of the

discrimination claims she relied on two disabilities: a back condition and anxiety/depression. The Respondent disputed the claims on a variety of grounds.

3 At a preliminary hearing for case management on 28 October 2022 Employment Judge[1] Glennie gave certain directions to facilitate clarification of the issues and preparation of the dispute for trial.

4 By further particulars dated 22 November 2022 the Claimant's representative sought to clarify her case in the following ways. (a) The complaint of disability-related discrimination was withdrawn. (b) Particulars were supplied of an 'indirect discrimination' claim (no such claim is discernible in the claim form but in later amended grounds of resistance the Respondent's representative acknowledged that reference had been made to one on 28 October). (c) The money claim was quantified.

5 By way of further updated grounds of claim served in January 2023 the Claimant's representative re-served the document of 22 November 2022, deleting the reference to indirect discrimination and characterising the claim as a complaint of failure to make reasonable adjustments.

6 At a preliminary hearing for case management on 26 June 2023 EJ Gidney listed a preliminary hearing in public for 25-26 October 2023 to determine whether the Clamant was at any material time disabled and a six-day final hearing between 2 and 12 April 2024 (with a large gap in the middle), and gave a number of case management directions.

7 At some point between 26 June and 25 October 2023, the Respondent conceded the issue of disability based on anxiety and depression. The parallel question in respect of the back condition was, however, unresolved and duly came before EJ Davidson. By an oral judgment given on 25 October 2023 and confirmed in written reasons sent out a month later, she held that disability resulting from disc bulge/a prolapsed disc was made out.

8 The final hearing was held before us by CVP. The Claimant was represented by Mr Andy Pickett, counsel, and the Respondent by Mr Dominic Bayne, counsel. We are grateful to both.

9 We devoted day one of the allocation to housekeeping and reading-in. Day two was lost as the judge was away. Over days three to five we heard evidence. Having received written and oral submissions on the morning of day six, we reserved judgment. By great good fortune, we were able to complete our private deliberations on the very next working day, 15 April.

The Legal Framework

10 The Equality Act 2010 (to which all section numbers mentioned below refer) protects employees and applicants for employment from 'prohibited conduct' based on or connected with specified 'protected characteristics'. These include disability

[1] We will use the abbreviation 'EJ' from here on.

(s6).

11 As noted above, the only form of prohibited conduct on which the Claimant ultimately relied was breach of the (alleged) duty to make reasonable adjustments. That duty is enacted by s20, the material parts of which state:

> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice[2] of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

In this context, 'substantial' means 'more than minor or trivial' (s212) and a 'relevant matter' means employment (sch 8, para 5(1)).

12 Failure to comply with a duty to make reasonable adjustments amounts to discrimination (s21(2)). By s39(5) it is provided that a duty to make reasonable adjustments applies to an employer.

13 We remind ourselves that the reasonable adjustments jurisdiction is directed to 'steps' required to counterbalance disadvantage. It does not oblige employers to engage in particular mental processes or carry out particular investigations (see *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 EAT). Of course, the employer who does not ask appropriate questions or take suitable advice may well be found liable for failing to make reasonable adjustments, but that will be because, for want of the necessary information or advice, he or she failed to take a reasonable step to mitigate the effect on the disabled employee of the relevant disadvantage. The failure to inquire is not, of itself, capable of standing as a failure to make reasonable adjustments.

14 More generally, we remind ourselves that the higher courts have often stressed the importance of a methodical approach to the reasonable adjustments jurisdiction (see *eg Environment Agency v Rowan* [2008] ICR 218 EAT).

15 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates,[3] or such other period as the Tribunal thinks just and equitable. 'Conduct extending over a period' is to be treated as done at the end of the period (s123(3)(a)) and a failure to do something is to be treated as occurring

[2] From here on we will use the conventional shorthand, PCP.

[3] Now, under the Early Conciliation provisions, the period is further extended by the time taken up by the conciliation process.

when the person in question decided upon it (s123(3)(b)). In the absence of evidence to the contrary, a person is to be taken to decide on failure to do something when he/she does an act which is inconsistent with doing it or, in the absence of any inconsistent act, on the expiry of the period within which he/she might reasonably have been expected to do it (s123(4)). Acts which are not discriminatory (or otherwise unlawful under the 2010 Act) cannot form part of 'conduct extending over a period' for the purposes of s123(3)(a) (*South Western Ambulance Service NHS Foundation Trust v King* EAT 0056/19). The 'just and equitable' discretion to substitute a longer limitation period than the 'default' three months is a power to be used with restraint (*Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

16 In *Fernandes v Department for Work and Pensions* EA-2022-000277-RN (judgment delivered 14 September 2023), the EAT (HH Judge Wayne Beard, sitting alone) analysed how s123 works in a failure to make reasonable adjustments claim. At para 16 he said this:

> **The principles set out in the existing authorities amount to the following propositions:**
>
> **a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled employee from a PCP (presuming the knowledge requirements are met) and failure to make the adjustment is a breach of the duty once it becomes reasonable for the employer to have to make the adjustment.**
>
> **b. Where the employer is under a duty to make an adjustment, however, limitation may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.**
>
> **c. That notional date will accrue if the employer does an act inconsistent with complying with the duty.**
>
> **d. If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee.**

17 Mr Pickett addressed to us a surprising argument to the effect that, at some unspecified point, a continued failure to make a reasonable adjustment will (or may) 'trigger' a fresh limitation period, thereby (seemingly) restoring the Tribunal's jurisdiction lost on the expiry of the initial limitation period. He cited in support *Cast v Croydon College* [1998] ICR 500 CA, a sex discrimination case concerned with a new, supervening tortious act which arose when the claimant's second request to work part-time was turned down. With due respect to him, we reject that submission as plainly untenable. The notion of a self-perpetuating series of limitation periods is not, so far as we are aware, known to our law. It is certainly not compatible with s123 as it applies to omissions.

The Issues

18 We have traced the somewhat circuitous route by which the Claimant arrived at the final hearing pursuing complaints of unauthorised deductions from

wages and failure to make reasonable adjustments. More developments followed before us. In the first place, the money claim was withdrawn. In fairness, Mr Pickett did contend that the Respondent had made some late disclosure which had, for the first time, demonstrated that the Claimant's perception that she had been underpaid was mistaken. Secondly, on 4 April (day three of the allocation, two of the hearing), Mr Pickett signalled an intention to apply to change the basis of his case on reasonable adjustments in two separate respects: (a) to rely for the purposes of some of the adjustments contended for on the 'physical feature' and/or 'auxiliary aid' pathways to liability (s20(4) and (5)) rather than resting them all on PCPs (under s20(3)); and (b) to correct the dates from which, for the purposes of limitation, it would be said that the relevant duties to make adjustments had arisen. Mr Bayne was not obstructive and said that the Respondent would likely be able and willing to meet a new case along the lines foreshadowed, but quite reasonably declined to take a clear position until shown it in writing and given the chance to take instructions. After some further discussion it was agreed that we would proceed with the Claimant's evidence and then hear further from Mr Pickett. There was no appreciable risk of prejudice as her evidence was not expected to extend to what appeared to be predominantly matters of legal analysis.

19 In due course, Mr Pickett presented his application, which was supported by a table. Mr Bayne did not oppose the proposed amendments, although he did register the fact that the Respondent did not agree with Mr Pickett's understanding of the law on limitation in the context of the reasonable adjustments jurisdiction (to which disagreement we have referred above). We took the view that the application sought only to repackage the existing claims, entailed no risk of prejudice to the Respondent and raised no concern about the timely completion of the hearing. In the circumstances, we considered it just and in keeping with the overriding objective to grant it.

20 By the end of the hearing counsel were agreed that the central questions for determination by the Tribunal were the following.

20.1 Was any claim outside the Tribunal's jurisdiction on time grounds?
20.2 To the extent that the Claimant relied on s20(3), (a) did the Respondent apply the PCPs identified in her particulars of 22 November 2022 (or any of those PCPs)? and (b) if so, did the PCP(s) put her at a substantial disadvantage in comparison with persons who were not disabled?
20.3 To the extent that the Claimant relied on s20(4), did any physical feature put her at a substantial disadvantage in comparison with persons who were not disabled?
20.5 To the extent that the Claimant relied on s20(5), would she, but for the provision of an auxiliary aid, have been put at a substantial disadvantage in comparison with persons who were not disabled?
20.6 In so far as, by operation of s20(3) and/or (4) and/or (5), a duty to make any adjustment arose, would any 'step' contended for by the Claimant have been a reasonable step to have to take to avoid the relevant disadvantage?
20.7 To the extent that the Respondent was under a duty to take any relevant step, did it fulfil that duty?

21 We attach as an Appendix to these reasons extracts from the most recent version of the list of issues, dated 22 September 2023. That document, which was treated as uncontroversial by both advocates before us, was entitled 'Respondent's List of Issues' but incorporated all material parts of the Claimant's draft list of issues of 19 September 2023 and even added one proposed reasonable adjustment omitted from the Claimant's draft.

22 As a result of the amendment we have inserted into the Appendix (in square brackets) the provisions of s20 relied upon in relation to each of the adjustments for which the Claimant contended. For reasons which will become clear, we have not thought it necessary to annotate the list of issues further to identify the rival positions of the parties as to the dates from which time ran for limitation purposes.

23 The Appendix largely omits matters which we were not asked to resolve. We have left para 15 of the List of Issues as it was at the start of the hearing so that the reader can see that a 'knowledge' defence was raised. That said, Mr Bayne did not pursue it and we have treated it as abandoned and made no findings upon it.

Evidence and Documents

24 We heard oral evidence from the Claimant and, on behalf of the Respondent, Ms Nicole Coutts, HR Business Partner, Mrs Angela Baker, Head of Radiotherapy and Mr Chris Broderick, Acting General Manager.

25 In addition to witness evidence we read the documents to which we were referred in the bundle of 1,267 pages.

26 The paperwork was completed by the chronology and cast list, Mr Pickett's written application to amend and supporting table and the written closing submissions of both counsel.

The Primary Facts

27 The evidence was extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history. The facts essential to our decision are as follows.

Setting the scene

28 The Claimant's role as a Therapeutic Radiographer sat within the Radiotherapy Department ('the Department'), which was located on one floor within the basement of St Bartholomew's Hospital.

29 The core role of a Therapeutic Radiographer is to deliver radiotherapy treatments using complex equipment including linear accelerator ('LINAC') machines. These, located in the treatment rooms and operated from nearby control rooms, aim high energy radiation beams at tumours. When not operating the machines, Therapeutic Radiographers are typically engaged in a range of ancillary or preparatory tasks.

30 As a newly-qualified Therapeutic Radiographer when she joined the Respondent in November 2020, the Claimant commenced the usual process of developing 'competencies' through practice. This is done by rotating practitioners around the Department, enabling them to become familiar with the equipment and develop all necessary skills.

31 The clinical work of a Therapeutic Radiographer (the role is very largely a clinical one) involves physical activity and effort. This includes standing as well as sitting, walking between rooms and manual handling of patients.

32 The standard working day in the Department is 08.45 – 17.00. In principle, staff are allowed a 20-minute morning break and 45 minutes at lunchtime. But those performing clinical duties often forgo the shorter break because of the disruption of the patient treatment programme which would result if it were taken (the machines are in almost constant use and patients have the benefit of them, usually, for 15 minute slots). For staff performing non-clinical duties, there is not usually any difficulty about taking the allotted break time.

33 Initially, the Claimant was line managed by Ms Raj Randhawa, Therapy Radiographer Superintendent. Mrs Angela Baker, Head of Radiotherapy, replaced Ms Randhawa in November 2021. In turn management responsibility passed to Mr Ryan Nanayakka on 30 May 2022, owing to the fact that the Claimant had raised a grievance against Mrs Baker.

The main narrative

34 By June 2021 the Claimant had secured some 'competencies' within the Department but was yet to secure others. Typically it takes new appointees around a year to acquire the full range of skills required to advance beyond Band 5, and she had lost about a month with a dose of Covid-19.

35 On 10 June 2021 the Claimant sustained a back injury at work. This resulted in her being off work from 22 June until 1 September 2021.

36 By agreement, the Claimant then undertook a phased return to work, performing light administrative duties on a supernumerary basis. This continued until she began a further period of sickness absence on 10 November 2021. During the 10 weeks of the phased return to work she performed no clinical or patient-facing work except for occasionally carrying out some bladder scans. This did not involve manual handling of patients and she neither voiced nor implied any objection to performing bladder scans. The matter was not mentioned anywhere in her written case, or even in her witness statement, and was ventilated for the first time as a cause for concern during her evidence before us. We find that the bladder scanning work caused her no discomfort and no colleague or manager was ever given any reason to think that undertaking it might expose her to any risk or disadvantage.

37 Because she was assigned to light duties and not performing clinical tasks (except for occasional bladder scans), the Claimant was free to take breaks according to her needs. In addition, she was free to move around the Department

and use the available facilities and furniture as she saw fit. In particular, she was able to work at standard height and standing desks, and there was a range of seating to choose from.

38 We find that the Claimant was supportively managed during the phased return to work, for which she expressed appreciation. Ms Randhawa maintained regular contact and responded constructively to her communications. When the Claimant reported worsening back symptoms in late September, Ms Randhawa extended the agreed period of 60% working. She also adjusted her start times to accommodate her concerns about being forced to stand when travelling to work in the mornings. In an email of 1 October 2021 she invited the Claimant to consider some options for back support equipment, to which a response was not received until almost four weeks later (and only after an intervening prompt).

39 During the first two months of the phased return to work, the Claimant made progress and an Occupational Health ('OH') report dated 3 November 2021 recorded a significant improvement in her symptoms and functional limitation. Unfortunately, however, her back condition worsened significantly on or about 10 November 2021, and she was signed off sick again. It was at this point that Mrs Baker decided that the phased return to work approach had not succeeded and a new strategy was required involving expert advice from several quarters.

40 GP 'fit notes' marked the Claimant as unfit to work until 9 December 2021 and thereafter fit subject to adjustments. Mrs Baker took the view, however, that she should not return until she had been reviewed again by OH and a separate Moving and Handling Assessment had been performed.

41 On 9 December 2021 a workstation assessment was carried out. This resulted in the Claimant being provided with information concerning certain equipment. She responded promptly, with the result that the items in which she had expressed interest were ordered at once. These, which included a chair and a footrest, were delivered on 10 February 2022.

42 In the meantime, the assessment of the OH practitioner on 23 December 2021 was that the Claimant was unfit for work of any kind. Thereafter she did not return to work, being repeatedly certified unfit on account of lumbar disc degeneration and, from March 2022 onwards, stress at work.

43 The Claimant initially took the position that the Moving and Handling Assessment should be deferred until she was fit to return to work, and rejected several proposed dates accordingly. She changed her position after a case conference with the OH Consultant on 24 February 2022. Dates were then proposed from 4 March 2022 onwards but the first for which she declared herself available was 7 April 2022. A draft report, which was prepared by Ms Beaux Bryant, an in-house specialist in moving, handling and ergonomics, was sent to her for her comments on 22 April 2022. There was then an exchange of correspondence following which, on 18 May 2022, Ms Bryant sent her a revised report, having accommodated some if not all of her points on the earlier draft. The Claimant eventually gave her consent for the report to be released to Mr Broderick,

but stipulated that it must not be shown to Mrs Baker, since she was no longer her line manager.

44 In her report, Ms Bryant made a number of recommendations for the provision or modification of equipment for use by the Claimant in the performance of clinical and other duties, and for modifications of her 'work pattern'. Many of her recommendations feature in the list of reasonable adjustments for which the Claimant contends in these proceedings. An example of the equipment mentioned is the 'air wedge' patient positioning device. Ms Bryant also proposed installation of a standard height desk and appropriate chair in each control room or, if that was not possible, installation of a 'sit to stand desk' in each control room, which would entail modification of the work bench. Proposed changes to the work pattern included the Claimant returning to work initially on a 50/50 split of clinical and administrative duties with the clinical proportion being confined to head and neck treatments in the first instance.

45 On 26 April 2022 the Claimant submitted to the Respondent an application for Injury Allowance ('IA'). This is a form of payment that tops up sick pay for NHS staff to 85% of standard pay where the sickness absence is attributable to an accident in the workplace. To guard against double recovery, payment is conditional upon confirmation from the Department for Work and Pensions ('DWP') that no state benefit has been paid in respect of the period for which IA is claimed. Accordingly, any claimant must submit a signed consent form permitting the Respondent to ask the DWP to carry out the necessary check. The Claimant had done so and, on the day on which she submitted her application, the Respondent sent the necessary form to the DWP. Unfortunately, that Department did not reply and did not respond to a chasing email of 30 May 2022. Eventually, on 10 June 2022, the Respondent elected to proceed on an assumption that no relevant benefit had been paid and, on that day and on a number of dates thereafter, made payments to the Claimant based on its calculation of her assumed IA entitlement. Although in these proceedings she maintained up to the start of the hearing that she had not received her full entitlement, that position was, as we have mentioned, abandoned before us.

46 On 29 April 2022 the Claimant submitted to Mr Broderick (a witness before us) a 20-page grievance containing complaints and allegations against Mrs Baker and Ms Geniva Chisholm, HR Advisor. Mr Broderick acknowledged receipt the next working day (a bank holiday had intervened) and pointed out (as was the fact) that he would be out of the office until 9 May 2022. On 16 May 2022 (a week after his return) Mr Broderick offered the Claimant an informal resolution meeting on 18 May. Not surprisingly, given the short notice, the Claimant declined, whereupon further dates, 25 and 27 May, were offered. The Claimant responded, stating that she wished a formal process to be followed, with the result that a formal meeting was scheduled for 27 May 2022. At that meeting, which was minuted, it was agreed that an investigation should be commissioned to look into the Claimant's grievance. Mr Broderick also took the decision on that date to relieve Mrs Baker of her line management and substitute Mr Nanayakkara on a temporary basis. On 31 May 2022 Mr Broderick sent to the Claimant a letter summarising the outcome of the meeting together with draft terms of reference for the investigation, inviting her comments by 6 June. The Claimant responded on that day, approving the

arrangements. An investigator, Mr Simon Hamilton, was then, on 10 June 2022, commissioned to prepare a report by 11 July 2022. At Mr Hamilton's request the period was later extended to 25 July 2022, on which date his report which, with appendices, ran to 250 pages, was delivered. A meeting was arranged for 4 August 2022 for the purpose of discussing the report, but it had to be abandoned because the Claimant had become very unwell. Mr Broderick suggested that the Claimant should signal when she was feeling well enough to attend a meeting. Having heard nothing from her, he sent an email on 16 August proposing that a fresh date be agreed. On 19 August he wrote again to say that a meeting had been set up for 26 August and that, if necessary, it could proceed in her absence with an outcome to follow in writing.

47 On 26 August, the day scheduled for the meeting, the Claimant delivered notice of her summary resignation.

48 On 28 August 2022 a letter was delivered to the Claimant containing the outcome of her grievance.

Policies

49 We were referred to the Respondent's grievance procedure. It does not stipulate a timeframe within which any grievance process must be completed but does, in several places, stress the importance of timely outcomes and avoiding damaging delays. It envisages an informal stage which may last up to four weeks but should not last longer than that (para 2.5). If the grievance is taken to the formal stage, the policy envisages that the employee and the responsible manager will work together to agree a plan to resolve the complaint (para 2.10). Where an investigation is required, it should normally be completed within a four-week period (para 2.11).

Secondary Findings and Conclusions

50 As can be seen from our brief narrative, the claims must be viewed in their proper temporal contexts. There are four relevant periods: 1 September 2021 to 10 November 2021; 11 November 2021 to 8 December 2021; 9 December 2021 to 23 December 2021; and 24 December 2021 onwards. We will refer to them as 'period 1', 'period 2' and so on. In period 1, the Claimant was attending work on a phased return. In period 2, she was signed off sick, with a prospect of returning after a short absence. In period 3 she was certified as fit to return with adjustments but did not do so owing to a managerial decision (to which she raised no objection) that any return should await the next 0H assessment, due in a fortnight's time. In period 4 she was signed off sick, initially on the ground of her back problem but after some weeks also on the basis of the psychiatric effects of stress at work. We will address the four periods in turn by reference to the complaints made.

Period 1

51 According to her case as clarified by the amendment which we permitted, the Claimant relies in respect of period 1 on the pleaded adjustments up to and including item (xii).

52 From these, item (xi) (carrying out a manual handling risk assessment) was rightly withdrawn by Mr Pickett as falling foul of the *Tarbuck* principle (see above).

53 Of those that remain, all rest on alleged PCPs and three rely additionally on s20(5), the 'auxiliary aid' provision.

54 In our judgment, there was plainly a duty to make adjustments during period 1 because the Claimant was not fit to perform her full contractual duties. The Respondent applied a PCP of requiring Therapeutic Radiographers to perform the full range of work required of their role and that PCP was applied to her as a member of the cohort of Therapeutic Radiographers. Mr Bayne's objection to the formulation in the List of Issues para 6(i) seems to us pedantic. In any event, he rightly does not quibble with para 6(ii). And the disadvantage of applying the PCP speaks for itself: but for adjustments, the Claimant would have been forced to remain away from the workplace altogether, with obvious adverse consequences not only for her pocket but also for her professional development.

55 We find no substance in the separate 'auxiliary aid' argument under s20(5). We do not accept that the absence of any auxiliary aid put the Claimant at any material disadvantage during period 1. As to aids, she appears to rely on the rise and fall desk (items (i) and (x)) and the display screen equipment recommended in the workstation assessment (item (xii)). We are not persuaded that any disadvantage is shown to have arisen during period 1 arising out of the Claimant being without access to a rise and fall desk or the display screen equipment which was later provided.

56 In any event, the 'auxiliary aid' complaint is, in the context of period 1 hopeless because it would not have been reasonable for the Respondent during that time to have to take the 'step' of providing the aid contended for. Up until mid-November 2021 there was no evidence pointing to a likely need for either. The only evidence was that the Claimant appeared to be making good progress towards a recovery. Moreover, it certainly could not have been reasonable to invest the money and time of a hard-pressed public resource on acquiring equipment without first receiving specialist advice. And given the progress which the Claimant appeared to be making, the Respondent had no reasonable ground for procuring specialist advice at any point during period 1.

57 That does not diminish our finding of a duty under s20(3). But the adjustments required at that stage did not go beyond those which were actually made. It was entirely right and appropriate to arrange for the Claimant's return to work on a phased basis with restricted duties. It made obvious sense for her to start on shortened hours as well as restricted duties. Given those restricted duties, she was well placed to manage her condition and react as necessary to symptoms as they arose. In particular, she could stand or sit as she chose, use the available furniture as she saw fit and take breaks as and when she felt the need. She was further assisted by the support of Ms Radhwana, including her helpful agreement to an adjustment of her starting hours in order to facilitate a more comfortable journey to work. There appeared to be a good prospect that she would recover within a relatively short period and be able to make a safe transition to full duties.

Up to the very moment in mid-November 2021 when her back condition suffered a marked deterioration, she showed a steady improvement. Until then, there was no reason for the Respondent to change course.

58 Given our analysis so far, we can deal very shortly with the individual adjustments contended for. Item (i) calls for very little further comment. For the reasons already stated, it would have been anything but reasonable for the Respondent to invest in a rise and fall desk at any point during period 1. Items (ii) (frequent breaks), (iii) (flexible hours), (iv) (light duties with restrictions), (v) (avoiding heavy manual handling), (vi) (avoiding prolonged standing), (vii) (avoiding walking long distances), (ix) (avoiding squatting, kneeling and bending down) and (x) avoiding prolonged sitting) were all met by the arrangements under which the phased return to work operated. We would only add in relation to (vii) that it is open to question whether the role of Therapeutic Radiographer ordinarily entails walking 'long distances'. Perhaps it depends what one understands by that expression. At all events, the adjustments in place left the Claimant with a daily routine which, on any view, did not require her to walk long distances. We take item (viii) out of order because it falls into a slightly different category. We find that there never was any requirement for Therapeutic Radiographers to climb up and down stairs, 'repeatedly' or otherwise. As we have recorded, the Department is located on a single level in the basement of the Hospital building. It can be accessed by means of the lift. As to item (xii), we have already found in the context of the 'auxiliary aid' argument that the evidence does not establish any disadvantage arising from the absence of the equipment suggested by the workstation assessment.

59 Moreover, even if we are wrong in respect of item (xii) we are satisfied that it would not have been reasonable for the Respondent to have to provide the Claimant with the relevant equipment before receiving appropriate specialist advice in that regard. In our judgment, the advice was sought at the right time and the Respondent must be acquitted of any unreasonable delay in procuring it. To repeat, all the signs were that events were moving in the right direction and that major interventions beyond the phased return to work were unlikely to be necessary. The workstation assessment was commissioned without delay (on 2 December 2021) following the unexpected deterioration in the Claimant's condition less than three weeks earlier.

60 In summary, we are satisfied, for the reasons given, that the complaint of failure to make reasonable adjustments in respect of period 1 is not well-founded. In so far as it rests on s20(3), a duty to make adjustments arose but the Respondent fully complied with it and the adjustments contended for, to the extent that they were not made, would not have been reasonable. In so far as it rests on s20(5), the proposed duty to make adjustments did not arise and in any event the adjustments contended for would not have been reasonable.

Period 2

61 We can deal very shortly with period 2. Here the obligation to make adjustments which, on our findings, arose (but was satisfied) during period 1, did not arise at all. The Claimant was not in the workplace and the adjustments for

which she contends were no longer apt. Nor, over the short life of period 2, ought any adjustment to have been made. Of course, this is not to say that the Respondent was under no obligation to do anything during period 2. Mrs Baker rightly acknowledged that, given the deterioration in the Claimant's condition, a new strategy was required and expert assistance needed to be enlisted. But, for reasons already given, the duty to set a new course arose at that point and not before. She then did the right thing, without delay, namely to commission the necessary assessments. There can be no question of any breach of duty in respect of item (xii), during period 2 or thereafter. To repeat, it would obviously not have been reasonable for the Respondent to have to take the step of procuring workstation equipment without obtaining advice as to what was required and why. The advice was swiftly procured and acted on immediately.

62 Accordingly, we are satisfied that no duty to make a reasonable adjustment arose during period 2.

Period 3

63 We can also deal briefly with period 3. We agree with Mr Bayne that, despite the Claimant being nominally 'fit' to return to work, subject to adjustments, on 9 December 2021, the Respondent acted prudently and reasonably in taking the view, with which the Claimant concurred, that any return should be on terms which took proper account of up-to-date advice from the OH Consultant, which was expected in only a fortnight's time. Indeed, had the Claimant been invited to return before an assessment by the OH Consultant, the Respondent would have been open to legitimate censure, particularly if steps taken at the start of the return to work had been shown in hindsight to be in conflict with the Consultant's views.

64 For these reasons, we are satisfied that no duty to make reasonable adjustments arose at any time during period 3.

Period 4

65 It is convenient to consider the complaints in respect of period 4 in two parts: first, those alleging failures to make adjustments to accommodate her physical impairment (the back condition); second, those concerning the handling of the grievance, which argue for adjustments to accommodate, mainly at least, her mental impairment (anxiety).

66 The complaints in the former group include all of those already addressed in relation to period 1. We will not repeat the findings and conclusions already expressed on those matters. But we will address the claims afresh in relation to period 4. With these, we will also consider items (xiii) (wider steps)[4], (xiv) (air wedge), (xv) (avoiding carrying and positioning the Omniboard), (xvi) (standard height desk and chair), (xvii) (avoiding use of draughtsman chair), (xviii) (50/50 ratio of practical/clinical and administrative work) and (xix) (initial return to head and neck only work).

[4] We would have thought that this complaint would have fitted better with s20(4), the 'physical feature' gateway, rather than s20(5), but nothing turns on that.

67 In our judgment, there are three major difficulties with these claims. The first problem is that the auxiliary aid pathway is inapplicable. The disadvantage which the Claimant experienced in period 4 was that she was not able to perform her duties as a Therapeutic Radiographer. That was because of her back condition. She was not 'put' at that disadvantage by the want of any auxiliary aid, but by her medical conditions. Accordingly, no question arises of any duty under s20(5). The PCP pathway is, however, applicable in principle: our reasoning in relation to period 1 is repeated. It follows that the first difficulty serves only to defeat three period 4 claims in so far as they were pursued (in the alternative) under s20(5).

68 The second difficulty, which is much more substantial, is that the PCP-based claims are premature because there could be no duty to make any adjustments until such time (if any) as the Claimant returned to work or, at least, there was a foreseeable prospect of her returning to work. It could not have been reasonable to have to make any adjustment until such time as there was a realistic prospect of it serving its required purpose of alleviating, at least to some material extent, the relevant disadvantage.[5] That moment never came. Rather, as experience sadly shows, with the passing time through period 4 the prospects of the Claimant returning to work (of any kind) became steadily more remote.

69 The third difficulty, an obvious corollary of the second, is that none of the adjustments for which the Claimant contends would have amounted to steps which it would have been reasonable, at any point during period 4, for the Respondent to have to take since there would have been no prospect of any fulfilling its statutory purpose of avoiding her disadvantage of being unable to perform the functions of her role.

70 Of course, it is entirely possible that, had the Claimant returned to work or even reached the point at which there was a realistic prospect of her returning, the Respondent might have come under a duty to make fresh adjustments. If so, no doubt these would have taken the form of a phased return in some shape, perhaps along the lines of the September 2021 arrangements, perhaps then developing into a hybrid working routine of the sort envisaged by Ms Bryant. There is nothing to suggest that the Respondent would have been opposed to a solution of this sort. And in terms of provision of auxiliary aids and/or adjustments to any relevant physical features, there is again no reason to suppose that the Respondent would have declined to make a reasonable adjustment. But this is, necessarily, mere speculation. Events did not move forward to the point at which any duty to take concrete action arose.

71 We now turn to the last two adjustments, items (xx) and (xxi), which are concerned with the grievance process. Here the Claimant's case rested on s20(3) alone. The PCP, as we understood it, was the grievance procedure and the adjustments contended for were to create 'an investigation plan and/or timeline' with 'clear timeframes' and to complete the grievance within a 'reasonable timeframe'. But the nub of the case here was quite simply that the grievance process took an unreasonably long time.

[5] We base our reasoning on the straightforward language of s20(3). If further authority is needed, however, it can be found, for example, in *Doran v DWP* UKEATS/0017/14/SM (Lady Stacey), para 43.

72 In our judgment, the Claimant's case begins with the problem that it is not easily reconciled with the statutory scheme. Ordinarily, a complaint of failure to make reasonable adjustments based on the operation of an internal practice or procedure argues that the ordinary application of the practice or procedure causes a substantial disadvantage to the complainant as a disabled person, and that that disadvantage necessitates an adjustment to counterbalance it. But Mr Pickett seemed to come very close to suggesting that a proper application of the grievance procedure would have been unobjectionable and that the problem here was that the Respondent had somehow fallen short of what its own procedure required. A case so put would not have been tenable as a complaint of failure to make reasonable adjustments. It would rest on a supposed duty not to adjust a PCP, but to comply with it. Nonetheless, we are prepared (with some misgivings) to assume in the Claimant's favour that Mr Pickett was seeking to put forward a case which fits with the scheme of s20(3).

73 Is the requisite 'substantial disadvantage' made out? The evidence establishes that the Claimant was experiencing anxiety at the time when the grievance was underway. We are prepared to accept that, had the Respondent's grievance procedure generally been ponderous and drawn out, there would have been an evidential basis for finding a more than trivial degree of disadvantage to the Claimant in employing it unadjusted as the vehicle for examining her complaint. But there is no evidence that the Respondent's grievance procedure was generally ponderous or drawn out. In our judgment, no evidential basis is offered for any duty to make a reasonable adjustment in relation to the grievance exercise. In short, the *status quo* was not shown to be in need of adjustment. In these circumstances, no duty to make adjustments is established and the claim necessarily fails at this point.

74 Moreover, even if we had found that the PCP occasioned a measure of disadvantage to the Claimant we are not persuaded that any practicable adjustment would have been, in the circumstances, a step which it would have been reasonable for the Respondent to have to take. Restricting the scope of the investigation would obviously have been impermissible and only calculated to increase the disadvantage to her. And cutting the time available to deliver the outcome would have been liable to produce the same result. Either way, there would have been a substantial risk of a justifiable complaint from her that the grievance had not been taken seriously or given the attention which it deserved. She had insisted that her complaint must be considered formally and had included a lot of detail in it. The result of the investigation was a report running to 250 pages. There was no suggestion before us that it was verbose or repetitious or lacking in focus. Mr Pickett proposed no *modus operandi* by which the Respondent could reasonably have been expected to explore and report in adequate detail on her concerns and yet reduce by an appreciable margin the time allowed for doing so. As we have pointed out, this part of the case had more the look of a complaint of direct discrimination than one of failure to make reasonable adjustments. The key perceived 'detriment' was said to be an unreasonable delay in completing the grievance procedure. We have gone through the chronology of that procedure with care. We find that there was no material, culpable delay on the Respondent's part at any point in the chronology. Stepping back, we consider that the time taken to

complete the grievance exercise was entirely reasonable given what was involved. Indeed, we cannot disagree with Mr Bayne that it was very much at the shorter end of what is normally achieved, particularly where the employer is a hard-pressed public service organisation. In our judgment, it would not have been reasonable for the Respondent to have had to shoehorn the grievance procedure into a shorter timeframe than that which it occupied and any attempt to do so would have been likely to occasion not less, but more disadvantage to the Claimant than any which she did in fact experience.

75 Mr Pickett, understandably we think, did not press the small detail of his grievance-based claims. In particular, item (xx) does not withstand close scrutiny against the real events. The Claimant was made aware of indicative timeframes and the Respondent maintained appropriate contact through the grievance exercise. Communication was clear and unobjectionable. It would not have been beneficial to the Claimant to communicate in closer detail regarding intended timeframes. Doing so would have been likely to generate needless satellite correspondence on questions of process and only increase her anxiety.

76 It follows, for the reasons stated, that no duty to make reasonable adjustments arose during period 4.

Overall conclusion on liability

77 Our analysis results in the conclusion that no complaint of failure to make reasonable adjustments succeeds. In period 1, a duty under s20(3) arose but was complied with. In periods 2, 3 and 4, no duty arose and, in any event, the adjustments for which the Claimant contended were not steps which, in the circumstances, it would have been reasonable for the Respondent to have to take.

Limitation

78 The consequence of our findings on liability is that there was no relevant 'conduct extending over a period' for the purposes of s123(3)(a). To state the obvious, 'conduct' must be unlawful conduct in order to engage the provision.[6]

79 We have been provided with no evidential basis on which we could properly apply s123(1) to substitute for the 'default' three-month time limit some longer limitation period. To the contrary, it would obviously be an idle exercise and anything but 'just and equitable' to bring within the Tribunal's jurisdiction any out-of-time claim which has been found to be without merit.

80 Since all claims have failed on their merits, we prefer to leave our adjudication on limitation there. If any higher court were to find that we were mistaken on any liability point, no doubt the matter would be remitted for us to grapple with all the consequences of that, including the analysis, in respect of the relevant individual claim(s), which s123, as interpreted in *Fernandes,* requires.

[6] If authority were needed, see *South Western Ambulance Service NHS Foundation Trust v King* EAT 0056/19.

Outcome and Postscript

81 In the result, the complaints of failure to make reasonable adjustments fail and are dismissed.

82 We would not wish to leave this matter without saying that we recognise that the Claimant's claims are entirely sincere and heartfelt and we greatly regret the misfortune which she, so early in her career, has had to endure. We. We hope that before long she will be able to put them behind her and re-launch her most promising career.

Employment Judge Snelson

_____

26 April 2024

Judgment entered in the Register and copies sent to the parties on 14 May 2024 …

..... for Office of the Tribunals

APPENDIX

AGREED ISSUES AS AT 2 APRIL 2024

The Claimant's claims

1. The Claimant brings claims for:

(i) Failure to make reasonable adjustments
(ii) …

Jurisdiction

2. …

3. In respect of each claim for reasonable adjustments:

(i) By what date is it alleged that the Respondent ought to have put the adjustment in place, or on what date did the Respondent make the decision not to put it in place? In accordance with Order number 9 of the Case Management Orders made at the PH on 26 June 2023 ("the Orders"), the Claimant has confirmed (in a letter to the Tribunal dated 3 July 2023) that all adjustments pleaded should have been made by 8 September 2021.
(ii) If that date was before 19th February 2022, did it form part of a continuous discriminatory state of affairs which continued after 19th February 2022?
(iii) If not, would it be just and equitable to extend time to enable the tribunal to consider it?

[NOTE: As recorded in the above Reasons, the Claimant was granted permission at the final hearing to amend her case as to the dates from which time ran in relation to each alleged failure to make reasonable adjustments. The dates relied upon are set out in the table which was produced in support of the application]

4. …

5. …

Reasonable Adjustments

6. Did the Respondent apply the following provision, criteria and/or practice ('the PCP'), more particularly set out at paragraph 4 of the Claimant's Further Information and paragraph 9 of the Orders, namely:

(i) The requirement of the Claimant to fulfil her job role,
(ii) The band 5 radiographer duties, which involve lifting,
(iii) The grievance process, specifically the time taken to conclude the process and process followed an unclear timeline.

7. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that the Claimant was unable to complete her role as she was unable to:

(i) Position patients using desks which were fixed to the wall in the CT and LINAC

control areas,
(ii) Handle radiotherapy treatment equipment to set up for each patient treatment,
(iii) Assist patients from the treatment bed,
(iv) Handle the treatment machine and assessing patient set up for particular cancer set ups due to the positions involved, and
(v) Work in the current set up in the treatment area with draughtsman's type chairs.

8. Did the Claimant struggle with the intensity and pace of the role in relation to frequent long standing and quickly sitting to treat a patient to then quickly setting up the next patient treatment?

9. Was the Claimant put at risk of a flare-up of her condition and further pain?

10. Did the Claimant therefore remain on sick leave and reduced pay?

11. Was the Claimant thereby isolated from her job and colleagues?

12. Did the Claimant suffer additional stress and anxiety exacerbating her symptoms of anxiety and depression due to the delay and lack of an investigation plan or timetable?

13. Was the period of time before the Claimant could return to work thereby prolonged?

14. Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant asserts that the following adjustments would have been reasonable:

(i) A rise and fall desk, **[(3) and (5)]**
(ii) Regular short breaks to enable the Claimant to sit down, **[(3)]**
(iii) Flexible start and finish times, **[(3)]**
(iv) Light duties with restrictions, **[(3)]**
(v) Avoiding heavy manual handling duties, **[3)]**
(vi) Avoiding prolonged standing, **[(3)]**
(vii) Avoiding walking long distances, **[3]**
(viii) Avoiding repeatedly climbing up and down stairs, **[3)]**
(ix) Avoiding squatting, kneeling, bending down, **[(3)]**
(x) Avoiding prolonged sitting, **[(3) and (5)]**
(xi) Carrying out a manual handling risk assessment, **[not pursued]**
(xii) Providing display screen equipment suggested by the workstation assessment, **[(3) and (5)]**
(xiii) Wider steps in the treatment area, **[(3) and (5)]**
(xiv) An air wedge patient positioning device, **[(3) and (5)]**
(xv) Avoiding carrying and positioning the Omniboard and its attachments, **[(3) and (5)]**
(xvi) Standard height desk and chair, **[(3), (4) and (5)]**
(xvii) Avoiding using draughtsman chairs, **[(3)]**
(xviii) 50:50 ratio of practical and administrative work, **[(3)]**
(xix) Allowing the Claimant to have carried out head and neck treatments only initially and then increasing to chest and lungs at 25% when back to full time work **[(3)]**
(xx) Creating an investigation plan and / or timetable for the grievance with clear timeframes **[(3)]**
(xxi) Investigating and concluding the Claimant's grievance within a reasonable timeframe **[(3)]**

[NOTE: As explained in the Reasons above, the Claimant was given permission at

the hearing to rely on s20(4) and (5) in respect of some of the adjustments contended for (her case up to that point having rested solely on s20(3)). Entries above in square brackets identify the subsections ultimately relied upon in relation to each adjustment.]

15. Did the Respondent not know, or could the Respondent not reasonably have been expected to know either:

(i) That the Claimant had a disability or
(ii) Was likely to be placed at the disadvantage set out above?[7]

[7] As noted in the Reasons above, no 'knowledge'-based defence was in fact pursued.