EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
MS Y PEMBERTON		**(1) RGB LEGAL SERVICES LTD** **(2) HELEN SEAWARD** **(3) SANJEET SAMRA** **(4) DANIEL ABRAHAMS**

Heard at: London Central, **by CVP**

On: 8-10 July, 2024

Before: Employment Judge O Segal KC
Members: Mr P de Chaumont-Rambert; Mr J Carroll

Representations
For the Claimant: In person
For the Respondents: Mr M White, counsel

REASONS

1. Judgment was given orally, with brief reasons, on the final day of the hearing and confirmed in writing dated 11 July 2024, sent to the parties on about 18 July 2024. The Claimant (C) has applied within time for written reasons for that judgment. What follows are those written reasons.

2. C was employed as a legal secretary in the Real Estate department of the First Respondent (R). For all of the material time, C suffered from seronegative rheumatoid arthritis, which is admitted amounted to a disability during that period within the meaning of the Equality Act 2010 ('the Act'). The most significant relevant symptom of that condition was/is that C experiences pain in her hands, particularly her right hand, brought on inter alia by typing and repetitive mouse clicking.

3. C brings various claims of discrimination, failures to make reasonable adjustments, harassment and victimisation, the essence of all of which is that the Respondents (Rs) did not provide appropriate support in relation to the effects of her disability at work.

Evidence

4. We had an agreed bundle, a supplementary bundle prepared by R and a supplementary bundle prepared by C.

5. We had witness statements and heard live oral evidence from:

5.1. the Claimant;

5.2. Sanjeet Samra, HR Business Partner at R between 4 March 2022 and 10 November 2023 (SS);

5.3. Daniel Abrahams, partner at R during the relevant period in its Real Estate Department and, in effect, C's 'boss' during that time (as well as at his previous firm for about 6 months before he and C moved to R) (DA);

5.4. Helen Seaward, R's Group Head of HR (HS); and

5.5. Richard Faulkner (RF), who provided training to C on Dragon software, which enables users to dictate rather than type ('Dragon').

6. The tribunal considered that all of the witnesses were giving honest evidence and trying to assist the tribunal.

Facts

7. There are, in truth, few disputed facts in what is a 'document heavy' case.

8. C had brought a previous claim against R, with which we were not concerned and the details of which we do not know; but it was settled on the basis that C could not thereafter hold R liable for acts before July 2020. The present claim was brought in July 2023. Thus the potentially directly relevant period in this case is that between July 2020 and July 2023.

9. We set out only those facts from that three year period that are relevant to the issues in the case, as listed at [144-149].[1]

10. During that entire period, whenever C was working she worked from home and not from R's offices, although there was a period during which R explored with C her returning to work some days in the office and on one occasion R requested that she did so when she was unable to work from home because of connectivity problems.

11. C's contract required her to work full-time, but for considerable periods over those three years, C was either not working or was working reduced hours.

12. There was no dispute what C's main duties were (as set out at [669-672]) and, materially, most of those duties required C to type (unless, as later, she could use dictation software instead) and/or to use a computer mouse.

13. There were three legal secretaries in the department supporting some 20 fee earners. Different fee earners had very different requirements for secretarial support, depending on their workload, type of work and the extent to which they were able and chose to do their own typing and other relevant administrative work.

14. In August 2020, after a period on furlough, it was agreed that C would work from home for the time being and that her bespoke chair and mouse would be transported by R to her house. A remote workplace assessment was arranged by Lauren Brett (LB), SS's predecessor in post. R also arranged for C to have an office laptop at this time and offered up to £100 to purchase a larger screen if C wished to do so.

15. Following the workplace assessment, R also provided C with a light-touch keyboard, a footrest and a large monitor in mid-August 2020. C's working hours were agreed, at her request, to be the mornings at this time and one of the secretaries, Jess Read (JR), was asked to 'filter' the work C was asked to do to take account of the restrictions entailed by her disability.

16. Also at this time (the exact date was 13 August 2020) Dragon was installed on C's laptop and initial training provided by RF. At the time, Dragon was the leading such software and RF told us it had been used in law firms for some 10 years, though it

[1] References are to pages of the main agreed bundle, unless stated otherwise.

was recognised that it did not solve all potential problems associated with having to type because it was not compatible with all software platforms.

17. On 17 August 2020, LB wrote to DA in anticipation of C recommencing work, setting out the adjustments and equipment provided and a schedule of breaks C had been advised to take during the working day as part of a phased return to work. It is agreed that C did take those breaks.

18. A slightly slower phased return in terms of hours worked per day, for the period 28 August 2020 to 23 October 2020 was recommended and agreed to on 1 September 2020.

19. On 10 September 2020, C wrote to LB to say that the phased return to work was "working", including using Dragon.

20. On 31 January 2021, C wrote to LB, *"I downloaded documents from a data room last week which appears to have triggered pain in my right hand and swelling of my middle finger. At the time of writing this has not abated. If tomorrow morning my right has not improved and I am unable to work I will of course let you know".* LB responded, *"Thanks for letting me know Yolanda, I'm sorry to hear this. ...".*

21. The reference to 'downloading documents from a data room' referred to work which involved significant repetitive use of the mouse.

22. On 16 February 2021, C wrote to LB and DA clarifying that the problem at this time was not so much typing, but *"clicking my computer mouse repetitively"*. This was apparently confirmed by an x-ray taken in about April 2021. As late as August 2021, C was writing about *"the swelling and aggressive deterioration since downloading docs in January of this year"*.

23. There was a further flare up of symptoms in April 2021. C advised LB of this and LB told C *"please only proceed if you feel you are able to"*.

24. On 31 August 2021, all staff in the Real Estate Department were emailed to the effect that there was to be a 'return to the office' by way of hybrid working pattern, with Wednesday and Thursday stipulated as days to be worked from the office. At that time, this was not something asked of C, who wrote to DA on 15 September 2021

"injury to my right hand prohibits travel into the office and I will be working from home until at least January 2022". DA did not question this, but asked C to inform R's HR.

25. On 21 September 2021, LB wrote to arrange a further home workstation assessment, which was carried out a week later. As a result, R ordered for C additional equipment in the form of hands-free Dragon training, a special Dragon compatible headset and a left-handed mouse. C wrote to JR, DA and other relevant fee earners that she *"will be able to assist within the confines of medical advice 'workload adjustments' etc."*. On 4 October 2021, R was advised that C would not be able to work until that equipment was in place.

26. During correspondence between C and LB, on 4 October 2021 C wrote to LB, in explanation of something she had told her GP, that 'before Covid' (so, before March 2020) DA had objected to her leaving early, spoken of the demands she was putting on the department budget and questioned her having tendonitis. DA denied any of those alleged remarks. In light of the long and very good working relationship between the two, and consistently with the contemporaneous correspondence, we think it unlikely that DA did make those remarks; rather, we conclude that C had over time magnified in her mind some comment(s) which were unobjectionable or much less objectionable.

27. RF began the additional training on Dragon on about 12 October 2021. However, C was off work sick and then on annual leave between 13/10/21 and 4/1/22. RF provided further training on 5 January 2022 and on further dates up to 24 January 2022.

28. On 5 January 2022, LB recorded that *"Her latest GP note states she should work 6.5 hours a day. Her specialist doctors want to see how Yolanda copes working 6.5 hours a day and then depending on how well Yolanda does – they may need to readjust her gp note. Therefore it's very much a 'wait and see' process. Yolanda needs to work a full few days before her specialist gp can advise any further adjustments. Apart from completion of the Dragon training, Yolanda confirmed that there is nothing else we can action/ put in place for her at the moment"*.

29. On 13 January 2022, RF advised R on which duties Dragon could/could not assist C in performing. It is agreed that a significant part of C's duties involved the use of software with which Dragon is not compatible (RF estimated 40-50%).

30. R had hoped that, following completion of the Dragon training, C would be able to resume her normal work on a reduced basis from 24 January 2022. However, C felt that because Dragon was not sufficient for her to work almost entirely hands-free, she was not able to resume doing her normal work. LB wrote acknowledging this and informing her that having *"exhausted all adjustments recommended by the occupational health therapist, we will now need to put you on Statutory Sick Pay effective from Monday 24 January 2022".*

31. On 11 March 2022, Occupational Health suggested obtaining a DWP Access to Work report for C. On 23 March 2022, R invited C to a formal meeting to discuss her continued absence. C replied the next day with a list of 28 questions she wanted R to answer in advance of such a meeting – the tone of her email is somewhat confrontational. C emailed a further 21 questions over the following week.

32. The meeting was delayed until 4 April (remotely). SS, who by then had replaced LB, had provided answers to C's questions. The only significant result of the meeting was that R did not commence formal capability/dismissal procedures, but agreed to wait for the results of the Access to Work report, for which C had to apply (which C did promptly).

33. Unfortunately (and consistent with the what the tribunal members know of these matters generally), the Access to Work report was not completed until 2 September 2022 and not sent to R until 13 September 2022.

34. C remained off work sick during the intervening months, during which time there was some correspondence about whether C would be able to work from the office if/when she returned to work, C noting that she had been identified in the early period of the pandemic as 'extremely vulnerable' to Covid. C told the tribunal she was 'immuno-compromised'. R pointed out that C's social media pages showed her attending public places/events during 2022, which C accepted had happened, though she said that on each occasion measures were taken to ensure a degree of separation from other members of the public.

35. The Access to Work report made several recommendations for additional equipment and software, including in particular Lightkey software (which enables the user to avoid typing by instead dictating/giving oral 'commands' – similar to Dragon, but with different/additional functionality), together with appropriate additional training. On 28 September 2022, SS and HS met with C to discuss those recommendations and a plan for C to return to work. The equipment recommended by Access to Work was ordered shortly afterwards and in the main delivered during October 2022 and the additional recommended training organised to start in November 2022.

36. A return to work plan was prepared and sent to C on 3 November 2022, to commence on 7 November, with C working 7 hours a day (9-5 with an hour break, at C's request), initially a three day week, all from home.

37. C did recommence working on 7 November, though much of that day was taken up with training and 'inductions'. However, C experienced exacerbated symptoms that day. C was not able to work the following day, but did work on 9 November, in anticipation of which SS emailed DA and JR and others, saying *"Huge thanks to Jess for providing some tasks for Yolanda to work through that should complement the Dragon training. And is aware to avoid giving work that is time-bound".*

38. C was on annual leave the next day and signed off sick from 11 November 2022. C agreed with R at a meeting (remote) on 7 December a revised return to work plan to commence 5 December 2022, four hours a day for three days a week for the first two weeks, then 5 hours a day for three days a week, increasing to 6 hours a day after the Christmas break.

39. On 12 December, C began experiencing problems with her home Wi-Fi, meaning she could not do much/any of the work she would otherwise have done for R. When those connectivity problems persisted, R requested C to attend at the office on 15 and 16 December. C did not attend the office as requested. SS and C met remotely on 16 December to discuss that and the impact her absence was having on her team; but no action was taken by R as a result of C's failure to attend work. During that meeting, a GP note was received by R recommending that C continue working from home, but C was not able to explain that recommendation.

40. C returned to her agreed reduced working pattern on 4 January 2023, but had a flare up of symptoms on 12 January and needed to take three days off work sick.

41. On 24 January 2023, HS wrote to C to invite her to a formal capability meeting with HS and DA on 1 February, later rearranged for 2 February 2023. In cross-examination, C said that she did not object to being invited to that meeting, save for HS referring to her 'medical condition' instead of her 'disability'.

42. In advance of the 2 February meeting, C sent a lengthy 'Statement of Events' and several pages of questions she wanted answered following the meeting. The meeting took place. It covered the relevant ground comprehensively and there are full notes (taken by HS). Following the meeting R reviewed C's 'Statement' and made notes on various points raised by it.

43. On 14 February, HS invited C to an outcome meeting with herself and DA and attached responses to the questions C had raised on 2 February. That meeting took place on 15 February, the outcome being that R would continue to support the phased return to work, with a review date set for 15 March 2023.

44. The phased return to work went well over the coming weeks and in fact the first review took place on 27 April 2023 between C and SS, with a notetaker. The notes appear to be full (though not verbatim) and C confirmed that the particular notetaker took good notes generally. At that meeting there was considerable discussion about whether C could return to a hybrid working pattern. C stated that she was immune-suppressed and, being from an ethnic minority, was disproportionately affected by Covid. However, at one point during the meeting, C said there was no physical impediment to her working from the office, but she would expect an up to date risk assessment to be done. It is clear from the email SS sent to HS the following day that SS believed C's position to be that it was not safe for her to work from the office because *"she has disability, compromised immune system, ethnic minority disproportionately impacted by effects of COVID-19 (son is disabled and at home)".*

45. C says that at that meeting SS had told her that her "recovery period had been too long". The minutes do not reflect that and SS denies saying it. The tribunal considers it likely that this is an example of mis-communication or misunderstanding. We find that, on the balance of probabilities, the alleged comment was not made: rather,

something was said which did not mean to convey that, but C believed that what had been said did convey that.

46. Following the meeting, C raised several series of questions to SS: most immediately, she queried the need for secretaries to work from the office and suggested that R's hybrid working policy was not being applied consistently, including to JR – C told us in evidence that *"I don't mind following the policy if others are"*.

47. On the first issue, it is self-evident to the tribunal and we accept DA's evidence that it is more convenient for fee-earners if legal secretaries work at least a significant proportion of their time from the office. DA gave examples at the time to SS and HS, including that he would have to scan and re-scan a document to which he was making ongoing corrections rather than just handing the annotated document to C. He gave a further example in an email on 6 July 2023, *"Please note that I have spent the last 20 minutes printing and preparing physical completion documents. This is a task that I would ordinarily expect my secretary to undertake and involves physically printing, replacing signature pages and scanning pages. Obviously I do not have a secretary in the office and will need to undertake a similar task at least once more today myself, wasting valuable fee earning time. I send this note for information only"*.

48. In oral evidence, which we accepted, DA said that he had modified his own working habits in part to accommodate C's absence/reduced capacity, by training himself on software like PDF Editor, Docusign and by learning to touch-type, as well as by simply working longer hours

49. On the second issue, we heard evidence that JR was allowed a certain flexibility for personal reasons in relation to R's hybrid working policy, but that she generally worked one or two days a week from the office. As noted, C was never in effect required to work from the office and was only on one occasion reasonably requested to work from the office. The tribunal has no doubt that if C presented good reason(s) why she should not always work two days a week from the office, those would have been considered sympathetically by R.

50. C continued to send further questions to SS during May and June. R replied to the first few sets of questions, though not to C's satisfaction. When C continued to raise (or re-raise) additional questions in writing, HS suggested on 27 June 2023 that they

have a meeting to discuss them. C wrote the following day declining that invitation on the basis that R did not record meetings and had produced inaccurate minutes of meetings and C's disability prevented her from taking her own notes, that she had *"already started proceedings with ACAS to protect my rights"*, and that there would be no benefit to a meeting where R had not provided written answers to C's questions.

51. Between 28 June and 30 June 2023, C sent/re-sent some 100 written questions to SS the tone of which was confrontational – perhaps not surprisingly so since by then C was clearly embarked on what became this tribunal litigation. C also addressed some questions to DA, who responded that C should deal with HR on those matters.

52. In early July 2023, C wrote to each of SS, HS and DA saying that she had named them as individual respondents to a potential ET claim and that unless they provided written answers to her questions within a week or so, she would take it as *"an admission of liability"* and would *"submit my claim to the tribunal without any further notice"*.

53. It appears that the decision was taken that HS and SS should not attempt to reply to the written questions sent by C in late June/early July 2023. They explained that to the tribunal on the basis that it would have been counterproductive and they said that the issue had been discussed with senior management and legal counsel. In answer to one question from C in cross-examination, HS said, *"We were getting a huge number of questions regularly, no matter what we said you came back with more questions, we had nothing more to say … We tried to arrange a Teams meeting with you, but you declined"*.

54. On 6 July 2023, DA provided a further example to HS and SS of the inconvenience of not having a secretary working in the office. He wrote, *"By way of example, as my secretary is not on site, I have to scan documents to her, as attached, rather than just handing them to her. I have a number of out of the office meetings today, so this wastes valuable time"*. Like the other examples recorded above, this was written in answer to a request to clarify whether/why it made sense to require C to work some of the time from the office, in the context of an ongoing failure to agree such a working pattern. Unfortunately, on this occasion DA's email to HS and SS was mistakenly

also put onto a 'client file', where it could not be seen by the client but by could be seen by a fee earner or secretary working on that file – and it was seen by C in that capacity.

55. The tribunal has no hesitation in accepting DA's evidence that this was a pure mistake (there is no other plausible explanation) and we reject C's suggestion that, as a matter of fact, DA's placing of that email on the client file was influenced by any protected act C had previously done. For completeness, the tribunal does not accept that the email (which is quoted in full above) contained or implied personal medical information.

The Law

56. There was no dispute, and almost no discussion, as to the relevant principles of law.

Direct discrimination

57. As to the claims of direct discrimination, s. 13 EqA 2010 (the Act) provides that

(1) 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.

58. Section 136 of the Act provides, as to the burden of proof, that

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

59. Although the two-stage analysis of whether there was less favourable treatment followed by the reason for the treatment can be helpful, as Lord Nicholls explained in Shamoon at [8], there is essentially a single question: *"did the claimant, on the proscribed ground, receive less favourable treatment than others?"*

60. A claimant does not have to show that the protected characteristic was the sole reason for the decision; *"if racial grounds or protected acts had a significant influence on the outcome, discrimination is made out"*: Nagarajan v London Regional Transport [2000] 1 AC 501 at pp512-513. The discriminator may have acted consciously or subconsciously: Nagarajan at p522.

61. We refer to well-known remarks of Mummery LJ in Madarassy v Nomura International Plc [2007] ICR 867, [56-58] on the burden of proof issue, albeit in the context of a claim that the claimant had been treated less favourably than actual comparators: that for stage 1 of the burden of proof provisions to be met, what is required is that *"a reasonable tribunal could properly conclude"* from all the evidence, that discrimination occurred.

Discrimination arising

62. Section 15 of the Act provides, materially:

(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.

The reasonable adjustment claims

63. Section 20 of the Act provides that

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant

matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage….

64. Section 21 of the Act provides that

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person. …

65. Laws LJ in Newham Sixth Form College v Saunders [2014] EWCA Civ 734 noted that *"the nature and extent of the [claimant's] disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP"*

66. In Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep), EAT, HHJ McMullen said that *"it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage".* The EAT in that case then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant 'a chance' of getting better through a return to work.

67. 'Reasonableness' is a holistic concept and must be considered in the round. In particular, where an employer has made a number of adjustments they should be assessed together: Burke v College of Law [2012] EWCA Civ 37.

68. Finally, the duty to make adjustment arises by operation of law. It is not essential for the claimant himself to identify what should have been done (Cosgrove v Ceasar and Howie [2001] IRLR 653, EAT). The EAT held in Southampton City College v Randall [2006] IRLR 18 that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.

Harassment

69. As to harassment, s. 26 of the Act provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

70. As to the 'objective' element of the test, the EAT in Reed and another v Stedman [1999] IRLR 299 at [28] observed in relation to similar statutory provisions:

"Because it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what a tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed. … the fact-finding tribunal should not carve up the case into a series of specific incidents and try and measure the harm or detriment in relation to each". The tribunal must keep in mind that *"each successive episode has its predecessors, that the*

impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes."

71. The *"related to"* test is broader than the *"because of"* test in s. 13. However, as Underhill LJ explained in Unite the Union v Nailard [2018] IRLR 730 at [108]-[109], the tribunal is required to make findings about the motivations and thought processes of the individual decision-makers as to whether their actions were 'related to' the protected characteristic.

Victimisation

72. Section 27 of the Act provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, …

(2) Each of the following is a protected act—

…

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

73. Section 136 (reversal of the burden of proof) applies to victimisation claims: Greater Manchester Police v Bailey [2017] EWCA Civ 425.

Time limits

74. In relation to the tribunal's wide discretion to extend time when just and equitable to do so, pursuant to s. 123 of the Act, the burden is on the claimant and there is no presumption that a tribunal should do so: Robertson v Bexley Community Centre [2003] EWCA Civ 576, [2003] IRLR 434, at para 25, per Auld LJ.

75. However, in Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327 the Court of Appeal dismissed any suggestion that Auld LJ's comments in Robertson were to be read as encouraging tribunals to exercise their discretion in a restrictive manner. According to Sedley LJ: *"there is no principle of*

law which dictates how generously or sparingly the power to enlarge time is to be exercised" (at [31]); whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case *"is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it"* (para 32).

76. There is no 'list' of relevant factors, but they generally include: the length and reason for the delay; the prejudice suffered by each party if time is/is not extended; and the merits/potential merits of the claim: Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, [2021] ICR D5.

Discussion

77. R provided written submissions. C made oral submissions. We have taken those into account and refer to them as appropriate below.

78. We start by making the overarching observation that all members of the tribunal concluded without hesitation that the Respondents had attempted to support C and accommodate the effects of her disability as best they could over the course of the material three year period. There was no occasion on which they did not seek medical or other specialist advice when that was indicated and there was no occasion where they did not follow and implement that advice when received.

79. Having said which, we turn to the individual complaints by reference to the List of Issues referred to above.

Allegations of direct discrimination, discrimination arising (s. 15), harassment and/or victimisation

80. The following matters were presented as complaints falling potentially under s. 13, s.15 or s. 26 – and in one instance in the alternative under s. 27.

Inviting the Claimant to capability meetings on 2 February 2023, 15 February 2023 and 27 April 2023 to discuss her phased return to work following a period of sickness absence, and her ongoing capability to carry out her role as legal secretary;

81. The meeting on 15 February 2023 was the outcome meeting following the 2 February 2023 capability meeting. The 27 April 2023 meeting was simply a review meeting. Neither was therefore a 'capability' meeting in the material sense.

82. The 2 February 2023 meeting was a formal capability meeting. The invitation to the meeting was sent on 24 January 2023, not long after C had experienced a flare up of symptoms and taken three days off sick, and only a couple of months after a very long period off work. As noted above, in cross-examination, C said that she did not object to being invited to that meeting, save for HS referring to her 'medical condition' instead of her 'disability'.

83. We consider that no reasonable tribunal could conclude that R would have made any different decision about whether to invite an employee to a capability meeting at that time, on the basis of a similar recent history of absences from work, had she not been suffering from a disability. On the contrary, it is likely that, mindful of C's disability, R treated her more favourably in this respect than it was likely to have treated an appropriate hypothetical comparator who did not suffer from a disability.

84. Inviting an employee who is disabled to a capability meeting because of their inability to work or work to their contract is always, strictly, unfavourable treatment because of something arising from their disability. However, generally, as here, such 'treatment' is a proportionate means (indeed recommended as good employment practice) of achieving the legitimate aim of reviewing the employee's position at a formal meeting with due notice and the right of accompaniment afforded to the employee (as it was to C), so as to see whether adjustments can be made to enable the employee to continue to be employed – as was successfully done in this case.

85. The tribunal does not accept that the invitation to the meeting – or anything said at the meeting – constituted harassment as defined in the Act.

Failing to provide the Claimant with assistive software which could be used with the First Respondent's technology from 28 July 2020 until September 2022; and failing to provide the Claimant with required and/or necessary training in order to be able to use assistive software from January 2022 to September 2022.

86. The first part of this complaint relates to the provision by R of Dragon software in 2020 and R's failure to identify until after the Access to Work report was received in September 2022 that additional software, such as the Lightkey software provided to C in October 2022, would further assist C in enabling her to type less and dictate/issue commands more.

87. It is clear that the provision of text-to-speech software falls within the meaning of 'auxiliary aid': see the EHRC Employment Code of Practice at para 6.13.

88. It was common ground that Dragon was the market-leading dictation to text software at the material time and (as noted above) that it was widely used by law firms.

89. We were provided with little or no evidence as to the development or availability of Lightkey software, which is described as *"AI-powered"* on its website. We do not therefore know whether that software was available in 2020, and if so the extent to which R might reasonably be supposed to know of its availability in circumstances where neither C nor the occupational health physicians (or C's GP) were aware of it.

90. This is, in truth, a complaint about an alleged failure to make a reasonable adjustment and is framed as such in the alternative (see below).

91. Certainly, in our view, no reasonable tribunal could conclude that R's failure to provide that software earlier was because of C's disability or because of anything arising from it, let alone that it constituted harassment of C.

92. The second part of this complaint, *failing to provide the Claimant with required and/or necessary training in order to be able to use assistive software from January 2022 to September 2022*, does not make sense. C was provided with all appropriate training on Dragon (the last session was on 21 January 2022). There then followed an exacerbation of symptoms (not due to any deficiency in Dragon, nor to C's lack of expertise in using Dragon), which prompted a referral to occupational health, which triggered a lengthy period off work sick whilst the parties waited for the Access to Work report.

93. The factual premise of this complaint is therefore wrong and the complaint must be rejected.

Refusing, between 28 July 2020 and the present date, to modify the Claimant's duties or allow home working.

94. This complaint is clearly wrong in fact: R permitted very considerable modifications to C's duties during that period (reduced hours/days, filtering of work to avoid excessive clicking, DA taking on some of what he previously relied on C to do, etc.) and did allow home working throughout that period, with the arguable exception of a few days in December 2022 when C was not able to work from home because of connectivity issues and was therefore requested to work from the office.

95. During the evidence, it appeared that the burden of this complaint related largely to what C considered the unfair expectation of R, in particular from April 2023, that she work some days from the office unless there was a good reason why she should not do so (see the following complaint, which focuses on the April 2023 meeting).

96. Even if one were to re-frame this complaint along those lines, we reject it. C's stance at the April 2023 meeting and thereafter was neither clear not cooperative. C might have said (as she told the tribunal) that she had no objection to working some days from the office provided the relevant equipment was in place (so as to duplicate in effect her home office) and provided that the hybrid working policy was being applied to her in the same way as to others. Instead, she rather conveyed that R should not be applying its hybrid working policy to her at all because of an immune-suppressed condition which she did not evidence and which (in so far as it exists – and even at the tribunal hearing there was no clear evidence about this) C told us did not prevent her working from the office.

97. We therefore find that in the relevant factual circumstances:

    97.1. R acted reasonably in seeking to explore with C whether she could work two days a week from the office; and

    97.2. R acted reasonably in the way it responded to C's position in that regard.

98. No reasonable tribunal could conclude that R's actions in this regard were because of C's disability or because of anything arising from it.

99. We do not find that those actions constituted harassment of C.

100. It is not clear that R's expression of its desire for C to work some of the time from the office was 'related to' C's disability for the purpose of s. 26(1)(a). Even if so – and even on the premise that, subjectively, C experienced those actions as creating an intimidating or offensive environment for her – taking into account not only the perception of C herself, but also the other circumstances of the case (as noted above) and whether it was reasonable for the conduct to have that effect, we conclude that R's conduct in this respect did not have the purpose or effect of creating an intimidating or offensive environment for C.

In a capability meeting on 27 April 2023, strictly requiring the Claimant to adhere to the First Respondent's hybrid working policy.

101. Again, as framed, this complaint is factually incorrect: R did not strictly require C to adhere to its hybrid working policy.

102. Even re-framed as a complaint that R unfairly expected C to adhere to that policy, it is rejected, for the reasons given under the previous heading.

Failure by the First, Second and Third Respondent to answer queries raised by the Claimant on 27 April 2023.

103. There was a failure by the Respondents to answer some of C's written questions. C's complaint about the particular questions raised by her on 27 April 2023 is not that R refused to reply (they did) but that their replies were inadequate. However, R did not reply at all to questions raised later by C, but still within the material period before she presented this claim.

104. We have set out above the factual circumstances relating to that decision and why it was made. We consider R to have been reasonable in reaching the view after a certain point that it would not be productive to continue a form of 'written cross-examination' by C under threat of tribunal proceedings, but rather to invite her to a meeting to have a meaningful discussion about outstanding matters.

105. In all events, no reasonable tribunal could conclude that R's actions in this regard were because of C's disability or because of anything arising from it. We are confident that R would have acted in the same way had another employee, who was

neither disabled nor had taken significant periods off work, were to be sending it repeated lists of questions, often confrontationally expressed.

106. We note further that the underlying bone of contention to which C's questions were directed – whether R was reasonable in exploring the application of its hybrid working policy to C – was objectionable to C, not because of her seronegative rheumatoid arthritis, or anything 'relating to' that condition (within the meaning of s. 26), but:

106.1. As she told us, because of her sense that the policy was not being applied properly to certain other(s), and/or

106.2. As she told R at the time, because it would expose her to an increased risk of contracting Covid as someone immune-suppressed.

107. We therefore do not find that the failure of the Respondents to answer many of C's written questions constituted harassment of C. That failure was not 'related to' C's disability for the purpose of s. 26(1)(a) and did not have the purpose or effect of creating an intimidating or offensive environment for C.

The Third Respondent insisting on 27 April 2023 that the Fourth Respondent was requesting that the Claimant return to the office, despite the Claimant's objections to this.

108. This complaint is repetitive of complaints already addressed above and is rejected for the same reasons as given there.

The Third Respondent asserting on 27 April 2023 that the Claimant's recovery period had been too long

109. As found above, on the balance of probabilities this comment was not made.

The Fourth Respondent sending an email to the Second and Third Respondents on 6 July 2023, discussing the Claimant's medical condition on a client file

110. First, the email in question did not discuss C's medical condition, or even impliedly refer to her having such a condition.

111. In all events, for the reasons set out in our factual findings, no reasonable tribunal could conclude that placing that email on a client file was because of C's disability or because of anything arising from it. Nor did it constitute harassment of C. It was a reasonable email for DA to send to SS and HS (as C accepted); placing it additionally on the client file was a simple mistake.

112. This is the complaint which is presented in the alternative as one of victimisation. For completeness, we restate our factual finding that placing the email on the client file was a mistake uninfluenced by any protected act done by C.

Other allegations in relation to hybrid working: failure to make reasonable adjustment, indirect discrimination

113. C also frames her complaint about hybrid working in terms of there being *"a PCP of requiring the Claimant to attend the office in line with the First Respondent's hybrid working policy on 27 April 2023"*.

114. This is factually mis-premised. R did not require C to attend the office on or after 27 April 2023.

115. In any event, in so far as R asked C to do so and sought to understand from her why she could/would not, that did not as a matter of fact put C to any disadvantage, since R did not compel C to work from the office and C did not do so.

116. Further, as noted above, the reason(s) (if there were any) why C would have been disadvantaged by working two days a week from the office were not related to her disability, but either to her increased risk (or perceived increased risk) of contracting Covid or to her concern that other member(s) or staff were not being required to comply with R's hybrid working policy for unrelated reasons.

117. For completeness, we consider that, even on the assumption (which we do not accept) that C was put to a disadvantage by the application of the hybrid working policy compared with persons without that disability, it was a proportionate means for R to explore that issue with C in the meeting on 27 April 2023 in pursuit of its legitimate aim of having C work from the office some of the time in order to facilitate the work of DA and other fee earners.

The alleged failure to provided auxiliary aids after July 2020

118. The first set of aids relied on are: an ergonomic chair, (wrist) rollers and electronic pen(s).

119. R did provide these aids once they had been identified by C or OH as useful.

120. The separate allegation at List of Issues para 18, that R failed *"to assure the Claimant, on 27 April 2023, and thereafter, that it would provide the following auxiliary aids; an ergonomic chair to allow for hand to lie flat, rollers and electronic pens"* is, on its face, obviously wrong, since those aids had long previously been provided to C for her use. However, the apparent target of this latter complaint is that C was not given sufficient assurance on or after 27 April 2023 that those aids would be available to her if she worked some of the time from the office.

121. The only potential factual basis for such a complaint is that the type of ergonomic chair provided for C's use at home had not also been installed in the office as at April 2023 – although this only emerged in evidence because HS had double-checked the position and volunteered that information to the tribunal.

122. However, in circumstances where C never agreed to return to work from the office and where she had not identified the need for the purchase of a second such chair before she did, R cannot be criticised for exposing C to a substantial disadvantage (let alone requiring her to suffer such disadvantage) within the meaning of s. 20(5). The situation would be different had C agreed to work from the office and had R not then arranged for an ergonomic chair to be purchased for her use.

123. The final complaint under this head is that R failed to provide the Claimant with assistive software which could be used with the First Respondent's technology from 28 July 2020 until September 2022; and failed to provide the Claimant with required and/or necessary training in order to be able to use assistive software from January 2022 to September 2022.

124. We refer to our earlier discussion of this complaint framed as one of discrimination or harassment.

125. Para 6.32 of the Code of Practice says that a relevant factor is 'whether taking any particular steps would be effective in preventing the substantial disadvantage'. Lightkey, C explained, made it possible/easier for her to give commands and to dictate in some of the circumstances where Dragon did not allow for that, because of the incompatibility between Dragon and software platforms used by R. However, C was very clear, both in the contemporaneous documents and in her evidence to the tribunal, that the significant exacerbations to her symptoms caused by work were largely due not to the requirement to do a certain amount of typing, but rather to the need at times to use a computer mouse repetitively and/or frequently. It would not seem, on the evidence before us, that the latter problem could be avoided by the provision of Lightkey.

126. Even taking account of the guidance provided by the Collingwood case (cited above), it is at the highest unclear whether earlier provision of Lightkey would have effectively given C '*a chance*' being able to return to work.

127. Taking all the above matters into account – in particular that R and C, together with the occupational health physicians were not aware of it/its potential benefits – we find that R did not fail to take such steps as it was reasonable for it to have to take at the material time, in not providing Lightkey software for C earlier than it did.

128. For the reasons given above, the other part of this complaint, in relation to an alleged failure to provide training, is rejected.

A discrete complaint under s. 15

129. C complains (List of Issues para 22.2) that she *"was put on sick leave when she was unable to use the assistive technology"*.

130. An OH report dated 24 February 2022 [399], following a consultation with C the day before, noted that C was *"presently .. signed off work due to problems with her right hand"* and that she was *"temporarily not fit for work"*. Under the heading **Recommendations of adjustments and support**, the doctor wrote, *"My opinion is that an independent assessment should be carried out, ideally by Access to Work, who are a charity that are able to visit individuals in the workplace with varying disabilities and tailor those adjustments to the needs of an individual. My opinion is*

that if a suitable assessment can be carried out by Access to Work, then this would also include recommendations regarding training and usage of any workplace packages that are tailored for Ms Pemberton. Clearly the recommendations of Access to Work would need to be followed in respect of training before any kind of return to work could reasonably be considered." (Underlining added). The report concluded that , *"I would not wish to offer any projection for the future and the progress of her condition and her ability to be able to work meaningfully in the future"*.

131. On 9 May 2022, SS wrote to C noting those observations from OH and that C's GP note dated 22 April 2022 was consistent with them. SS therefore said that *"unless and until we have received recommendations from Access to Work and feel that these constitute reasonable adjustments which we can make to support your return to work, then you remain not fit for work as explained in your GP's certificate"* (though noted some steps C might consider taking in the interim, in terms of learning to use her left hand for mouse work, etc.).

132. We saw no evidence over the following months prior to the Access to Work report, either in the form of correspondence from C or GP fit notes, that suggested that C was ready to return to work and should not be on sick leave.

133. In short, not only did R act reasonably in accepting the medical opinions of OH and C's GP, it would have been irresponsible for it to have done otherwise. In the language of s. 15, R has shown that the 'treatment' (agreeing with C's GP that she remain on sick leave) was a proportionate means of achieving the legitimate aim of protecting C's health.

Jurisdiction – time limits

134. In the circumstances, we do not need to reach any conclusions about whether certain of C's complaints were out of time. However, R made submissions on that issue, so we set out our findings briefly.

135. The relevant date for limitation purposes is 27 April 2023: complaints of acts done/not done on or after that date are 'in time'.

136. For the period November 2022 (once C resumed work after a long period off sick) to April 2023, the complaints made are not of specific acts, but rather are of conduct 'extending over a period'. We would therefore have accepted jurisdiction in respect of those complaints.

137. The exception is the complaint about the meeting(s) in February 2023, which is a discrete incident. We do not consider it would have been just and equitable to extend time in respect of that complaint.

138. In respect of the period January to October 2022, although the issue is not 'black and white', we would not have extended time pursuant to s. 123(2)(b). C is an intelligent and articulate person, seemingly aware of her rights in law. C provided no evidential basis for why she could not or would not bring a claim in respect of conduct in that period that she believed was unlawful – that was the period during most of which C was on sick leave waiting for the Access to Work report.

139. The position in respect of the period prior to January 2022 is more clear cut. There seems no proper basis for extending time in relation to complaints of unlawful conduct during that period (unless the conduct complained of extended over the course of the following 15 months – which it did not).

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Employment Judge Segal KC

15 August, 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

19 August 2024

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FOR THE TRIBUNAL OFFICE