EMPLOYMENT TRIBUNALS

Claimant: Mrs Susannah Hickman Gray

Respondent: Computershare Services Limited

Heard at: Leeds by CVP video conferencing

On: 24th,25th 26th & 27th February 2025

Before: Employment Judge Lancaster
Members: PC Langman
T Fox

Representation
Claimant: In person
Respondent: Ms H Coutts, solicitor

JUDGMENT having been sent to the parties on 3 March 2025 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal find provide the following:

REASONS

1. The unanimous decision of the panel is that the claim partially succeeds. The complaint of a failure to make reasonable adjustments in the non-provision of an appropriate set of headphones succeeds. All other claims are however dismissed.

2. We are dealing with those claims as they were identified at the preliminary hearing in front of Judge Shepherd on 5th September 2024[i]. Since that hearing the Claimant has made two applications to amend her claim, both of which were refused. On each occasion, firstly in the Order of Employment Judge Davies (11th October 2024) and secondly in the letter sent in the name of Employment Judge Wade (29th October 2024) it was clearly reiterated that the list of issues to be determined at this hearing would therefore remain as agreed before Employment Judge Shepherd, subject only to any further concessions made as to disability status.
3. We deal firstly with the complaint of a failure reasonably to deal with flexible working requests.

FLEXIBLE WORKING

Did the Respondent deal with the Claimant's flexible working request(s) in a reasonable manner?

Did the Claimant present the complaint before the end of the period of 3 months beginning with the relevant date or within such further period as the tribunal considers reasonable?

Is it just and equitable to award compensation, up to 8 weeks' pay?

That is complaint under section 80H of the Employment Rights Act 1996 that the employer had failed to deal with a request for flexible working made under section 80F in a reasonable manner, as required by section 80G (1) (a).

The first flexible working request

4. The claimant made an invalid flexible working request in November 2021. It was invalid because at that stage the law was that you had to work for 26 weeks. So because that was not a valid request under the Employment Rights Act there can be no possible claim for failure to deal with that according to the rules, or a failure to deal with it reasonably.

5. However, it is relevant to set the context. We do not have a copy of that application, the information that we do have is the chain of contemporaneous messages passing between the claimant and her manager Mr Bowe and from that it is possible to deduce what this application was about. When the Claimnt started work she was fully aware that the contract was for shift work, with shifts up to 9 hours in duration and potentially finishing at 8pm: working from home the Claimant expressly did not anticipate at the outset that she would require any adjustments in order to meet this working pattern, Looking at the relevant emails we do deduce that the concern at this time was that, having completed her initial training, the

claimant when she actually started working shifts was then faced with working extended hours on 11 hour shifts. The reason that these had been put on her rota was because during training she had not worked her full contractual 40 hours and therefore owed time back and it was sought to rectify that by adding it on to give extended shifts. The claimant raised an objection that she had not been aware that this might happen, although it was stated within her contractual document that that was a possibility. That was dealt with outside of the formal flexible working request process by an agreement that the claimant would not have to work those extended hours. Instead it was agreed that she would take off that owed-back-time as leave and she would not therefore have to work beyond a nine hour shift.

6. We pause to observe that even though a flexible working request may be dealt with quite properly under the Employment Rights Act, that does not necessarily mean that it could not give rise to a potential claim for discrimination. Most obviously it may be indirect discrimination if the application is refused or, where the protected characteristic is disability, alternatively a failure to make reasonable adjustments. But whereas an employee or worker has a right to make a request for flexible working, they do not in fact have a similar right to claim reasonable adjustments. This may be a difficult distinction to grasp, but the framework of the Equality Act 2010 is that reasonable adjustments come into play where there is a duty imposed upon the employer, and that arises where the employer knows or ought reasonably to know that an employee is disabled and also where they know or ought reasonably to know that by reason of that disability their employee is placed at a substantial disadvantage by the application of a provision, criterion or practice ("PCP") which is in place. Where that imposes a duty on the employer the primary obligation is upon them to then make reasonable adjustments. As we say it may be a difficult decision to grasp but it is not an equivalent provision to the flexible working request where an employee has a right to make such an application.

7. Therefore although this initial request to remove the longer shifts and only work up to the nine hours was dealt with informally and as if it were only a flexible working request there was then also a referral to occupational health (OH). That was because in the course of this discussion it is common ground that the claimant disclosed to Mr Bowe that she suffered from the condition of ulcerative colitis which is now accepted to amount to a disability. So she was referred to occupational health and they reported on 6 January 2022. There is a document in our papers which is a record placed on an electronic file from the external OH provider Axa which records details of their telephone conversation with the Claimant , but that is certainly not a document that was ever passed to Mr Bowe. What comes back to the employer is the actual report and that we also have in our bundle of documents.

8. Following that report, which came in shortly before the claimant had some time of work, and therefore on her return Mr Bowe confirmed to her that the recommendations specifically made within that report would be acted upon. Those suggested adjustments from OH, if they could be accommodated by the business, were firstly to conduct an open dialogue with her line manager to ensure that she

was coping day to day. There is no dispute in this case that lines of communication between the claimant and her manager Mr Bowe were kept open and she spoke regularly and contacted him. Secondly there was recommended flexibility to attend medical appointments. Again there is no dispute that the Claimant was afforded paid leave to attend all necessary doctor's appointments. The next recommendation is, somewhat imprecisely, for an acceptable work/sleep balance to ensure she is maintaining a rest cycle. However, it is noticeable that what the OH advisor does not say is that the claimant is by reason of any medical condition in fact unable to work up to the standard closing time of 8o'clock, nor that she could not work the maximum nine hour shift.

9. Also although the claimant had seemed to express a concern when making her initial flexible working request, that not only was she given additional hours up to 11 per shift that interfered with her family life and caring for her young son as well as affecting her arrangements to cater for her conditions, that her shift patterns were also changed at short notice. We have not, however, been directed to any evidence that this was in fact the case. The rotas were prepared in advance. They afforded accommodation to the claimant to not work beyond 8 o'clock on any occasion, and which she never in fact did. Nor did the rosters require her to work more than a nine hour shift, which again she never in fact did. So, it certainly is not the case that she was on any evidence that we have been taken to, taken by surprise that her shifts were unexpectedly changed and therefore throwing her pattern out of balance.

10. The next specific suggested adjustment from OH again relates to the Claimant's work pattern, specifically to the core targets she was set.. It does refer to daytime shifts with extended core times. It does not say what is meant by a daytime shift, and as we have said there is no suggestion that the claimant could not work up to 8 o'clock. In the view of OH. even if not ever specifically requested by the Claimant herself, an extension of what is called the AHT would allow for the claimant's need to have regular toilet breaks. There seems to be some misunderstanding on the part of the Claimant as to what was in fact granted by the employer. Her initial AHT (the time expected to be spent on a call), as we understand, it was eight minutes and 10 seconds. OH recommended an increase to 10 minutes so effectively an extra 12 minutes flexibility within any one hour which they seem to have believed would balance out so as to accommodate the claimant's need to take additional breaks. What was in fact granted by Mr Bowe was slightly more than that because there was obviously a general expectation that where such extensions of the AHT were afforded on medical grounds the standard practice was to increase it by 25%. 25% on eight minutes and 10 seconds would take it to approximately 10 minutes and 12 seconds, so marginally more than the 10 minutes suggested by OH. It is not that the Claimant was only granted an extra 12 second. An increase of the AHT to 5/4 of the standard time would equate directly to an expected reduction in targets of 4/5 (80 percent): the Claimant's targets were in fact reduced to 75 per cent.

11. The claimant was told expressly that those recommendations were accepted. What Mr Bowe then anticipated was that after the expiry of six months from the start of

employment, which would have been in January 2022 so very shortly after the preparation of this report, the claimant would be expected to regularise these changes to her contract. That is by removing any requirement to work beyond 8.00 o'clock and any requirement to work more than a nine hour shift. and that would be done by making a further but by this time valid flexible working request.

The second flexible working request

12. When the claimant in fact submitted a further request on 24 January she did not however simply ask for that regularisation of what had already been accepted. She was, of course, to submit a request on her own terms and not to "use up" her yearly entitlement to request changes in this way. Instead, therefore, she put in an application that did at this point indicate that her preferred pattern of working would be on a daily basis finishing at 5.30 pm, but still working nine hour shifts. She made alternative suggestions of working some weekly shifts to 8.00 o'clock and also accepting that she would still on occasions work on Saturdays. She did not explicitly within that flexible working request indicate the desire to not work beyond 5.30 was specifically because of any problems occasioned by ulcerative colitis, nor indeed any other condition.

13. It is common ground that there was then a discussion that led in effect to that application being withdrawn: and that was because Mr Bowe from his knowledge of the business at that time was able to tell the claimant that it was certain that a request to stop working at 5.30, certainly at that time, would not be granted and that if she were therefore to make a formal request and it be refused that would mean she could not make a similar application for another year. There are certainly questions to be asked as to whether dealing with what was a properly submitted flexible working request in this informal matter is dealing with it reasonably as is required by the Act. It would certainly have been better if that process had been formally documented and the Claimant invited to put in writing that she was now withdrawing the application and did not expect it to be dealt with.

14. But in any event this claim from January 2022 would be considerably out of time. The time limit for presenting a complaint under these sections of the Act is three months plus any extension for ACAS conciliation, which does not apply in this instance. That may only be extended if it was not reasonably practicable to bring the claim within time and it is nonetheless then presented within a further reasonable time frame.

15. Even if the Claimant did not, as she said, in fact know specifically of her legal rights to request flexible working we have to consider whether it would have been reasonable for her to explore those. In this case she is making an application expressly under the Respondent's flexible working policy, which makes specific cross-reference to the fact that this is a statutory right. The date of the Employment Rights Act is misquoted in the policy. It is 10 years out. It is a 1996 Act not 2006, but it is quite clear the Claimant has been signposted to the fact that her right to request flexible working is a statutory one, and that we are satisfied is more than sufficient to have put her on notice that if she believed those rights had not been

properly addressed there will be a statutory redress which she could explored and thereby discover that that gave rise to a possible claim to the Tribunal.

16. Furthermore and in any event, even it was not reasonably practicable for the Claimant to have acted immediately she has not acted promptly. Most particularly this application of January 2022 was superseded by a further application which she made on 7 July that same year. Necessarily, had she formally continued her application from January, she would not have been allowed to present a further one until the expiry of an additional 12 months, In the application of 7 July the Claimant expressly applied to reduce her working week from five days to four and to go part-time , reducing her hours to 32. That application was granted and formalised in a variation to her contract as from 10 August 2022. So that supersedes any earlier possible failure to deal reasonably with the original request.

The third flexible working request

17. And of course, because that third application was granted in the terms that she asked for there can be no possible claim to the Tribunal for a failure to deal with it. In the context of that 10 August change of her terms and conditions the Claimant expressly agreed in an exchange of correspondence that she was still prepared to work the nine hour shifts to 8 o'clock and that is what then happened from that point onwards until the claimant finished work on the expiry of her shortened notice period on 15 March of last year.

18. We move on then to the claim that there was a failure to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 in relation to the shift patterns.

REASONABLE ADJUSTMENTS

Did the Respondent apply a provision, criterion or practice ('PCP') namely:

The claimant indicated that the PCP was a requirement to work shift patterns until 8 PM and lengthy shifts up to 11 hours at a time.

Being required to work at the respondent's Skipton office at times.

Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in

comparison with persons who are not disabled, namely, that:

It is alleged that this placed the claimant at a substantial disadvantage with regard to her work life balance and that she was unable to eat her meals until past 4 pm which placed her at a disadvantage due to her ulcerative colitis.

Having to work shifts past 8 pm placed her at a substantial disadvantage as a result of her bipolar disorder.

Did the Respondent know, or could it reasonably be expected to know, that the Claimant was likely to be placed at a substantial disadvantage compared to a person who is not disabled by the application of the PCP?

If the Claimant succeeds on the points at 3.1 - 3.3 above, did the Respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

In particular, the Claimant asserts that the Respondent should have allowed her to work different shifts and not attend the respondent's Skipton office.

Did the Respondent in fact make/maintain these adjustments?

Was it reasonable for the Respondent to have made such adjustments at the relevant time, taking into account the ECHR Code of Practice on Employment (2011) paragraph 6.28?

19. It has not always been easy to identify precisely what the claimant's concerns are and they were expressed in front of Judge Shepherd in a way that may not accurately reflect precisely what is in issue. Although the claimant indicated that the provision criterion or practice (PCP) was a requirement to work shift patterns until 8.00 o'clock and then shifts up to 11 hours at a time, as we have said she was never in fact required to work 11 hour shifts. She was initially rostered to do so but an alternative work around by taking that difference hour as leave was entered into.

20. The short answer to any claim in this regard of a failure to make reasonable adjustments is that the Respondent did not and could not, certainly after July of

2022, reasonably have known that the claimant was placed at a substantial disadvantage by working up to 8.00 o'clock when she had expressly given her consent to be rostered to work those shift patterns in the course of agreeing her flexible working request to come down to four working days within the week with Tuesday as a regular day off.

21. There is no evidence to which we have been directed to suggest or support the bare and unspecific assertions in her witness statement that the claimant ever in fact subsequently raised any issue that working to 8 o'clock, which of course was not every shift but on occasions, placed her at a disadvantage. At least certainly not in the course of her employment, although it has formed part of her claim to the Tribunal.

22. Although the Claimant is admitted to have been disabled because of her bipolar disorder, she decided not to disclose this condition in the course of her employment. So necessarily the Respondent did not know, and could not reasonably have known that she had that mental impairment

23. The second claim of failure to make reasonable adjustments is said to be based on a provision criterion or practice of being required to work at the respondent's Skipton office at times. In actual fact the claimant only worked in the office on one single occasion on 10 February 2023. She was employed as a home worker and that of course is why she took the job because she believed she could accommodate her health conditions around working from home with the support of her family, particularly her husband. But in February 2023 the claimant was having problems with her computer equipment supplied by the respondent to enable her to do that home working and she was therefore instructed to attend at the Skipton office. That was clearly an upsetting experience for her in that she was not expected and provision had not been made for her atendance in person. She was unfamiliar with the office and it created difficulties, so much so that in her upset she initially tendered her resignation which she then retracted.

24. That is not properly and cannot be a provision criterion or practice applied generally to all employees which disadvantaged the claimant because of her disability. It was something that happened to her on a single occasion and to be a provision criterion or practice there must be an element of repetition or expectation, and that simply is not present in these circumstances. That matter was rectified by Mr Bowe. The claimant went into the office again at Skipton four days later on 14 February, in fact on her day off, and although there was some delay the equipment was then properly provided for her and as we have said she did retract her resignation tendered to Mr Bowe and that never went further.

25. So even if this had been a breach of the duty to make reasonable adjustments, again it is substantially out of time. Although we could extend time for bringing discrimination complaints under the Equality Act where it would be just and equitable to allow an extension, it is certainly not just and equitable to allow such an extension here when that matter was resolved at the time by Mr Bowe and she was never on any subsequent occasion ever asked to attend at the office.

26. The third allegation of a failure to make reasonable adjustments is the one which we find does succeed.

REASONABLE ADJUSTMENTS

Did the Respondent apply a provision, criterion or practice ('PCP') namely:

The requirement to use the headsets supplied by the respondent.

DISABILITY STATUS

Is the Claimant disabled within the meaning of section 6 of the Equality Act 2010 ('EQA')?

The Claimant asserts she is disabled by virtue of ulcerative colitis and she indicated that there are other impairments which amount to disability. The respondent accepts that the claimant is disabled within the meaning of section 6 of the Equality Act 2010 by reason of bipolar disorder and osteoarthritis. The claimant referred to another medical conditions including ulcerative colitis. The claimant has provided a substantial amount of medical evidence. The respondent needs to consider this and to clarify what medical conditions it accepts amount to the disability. It is hoped this is a matter that can be discussed between the parties and clarified.

27. Although it is not accepted by the Respondent, we find that there is more than sufficient evidence for us to conclude that in addition to the admitted disabling complaints of osteoarthritis, ulcerative colitis and bipolar disorder, the claimant was also disabled by reason of otitis media recurring ear infections.

28. She has given evidence that this has been a longstanding complaint. We have on the evidence before us two instances where she was off sick because of this condition, firstly in November 2022 and then later it at least partly accounted for her absence in October and November of 2023. And also we bear in mind that because of the suppression of the claimant's auto immune system, partly as we understand it as a result of the medication that she has to take for other conditions, when she is subject to the recurring ear infection it creates additional problems in the prolonging of the recovery time. The Respondent was aware both that the Claimant was alleging that she suffered from this condition and that it resulted in her being subjected to a disadvantage as from March 2023 when she alerted them to the fact that the headphones that she had been provided through work were exacerbating her condition. She said that and that she needed an alternative over-the- ear headphone of a type that she had already previously provided for herself

and indeed had recently bought, the third set of such headphones which she had had, sourced via Amazon.

29. The claimant we repeat was a home worker. She was therefore required to take calls from the respondent's customers and also to liaise electronically with her team and the Respondent certainly did have a provision that in order to facilitate their home workers carrying out these tasks there was a standard set of equipment which was authorised to be given out. Only in exceptional circumstances would permission be given for any such non-standard or different equipment to be provided.

30. That is sufficiently, we consider, encapsulated in the identified PCP as "a requirement to use the headsets supplied by the respondent". The difficulty was in part that there was a changeover in systems that the Respondent was moving from operating on the basis that previously most operators had used systems connected to their own mobile phones. That was certainly going to be phased out, if the Respondent not already done so, and therefore it is a further element of the PCP that the standard equipment authorised to be provided through the IT department had to be compatible with the systems used by operators in the course of their day to day work.

31. As of March 2023, having had a period in hospital the previous November which the Claimant has said - and we have no reason to doubt this - was in part caused by the use of the provided headset and the way that sat in her ear and caused a perforated eardrum., she alerted to the Respondent to the fact that the standard equipment which was provided was not suitable for her. This was by reason of her otitis media, the recurrent risk of ear infections, and the Respondent immediately accepted that that therefore necessitated the provision of an alternative headset so the claimant could work.

32. We are satisfied that that clearly identifies that she was indeed disadvantaged by the system currently in place of only providing standard equipment that was in the event unsuitable. And that imposes the obligation under the Equality Act upon the Respondent knowing that she was alleging that she had a condition, which we find to be established was indeed a disability, and that the consequence of having that condition was that the provided equipment was unsuitable and that there was an alternative form of over the ear headphone which would alleviate that disadvantage. That duty then arises immediately.

33. We are satisfied that was a continuing duty because the claimant was never in fact provided with a suitable alternative headset. This not a case where the Respondent was refusing to make an adjustment and therefore we have to hypothetically identify a time by which it must have come apparent that they were not going to do so. In actual fact as we have indicated, the Respondent from the word go accepted that they should seek to source an alternative for the claimant. That remained the position throughout. The reason it did not happen was because of the Respondent's insistence that this be dealt with through a particular process that placed obligations upon the Claimant to raise the concerns on an electronic

risk assessment, which would then generate a task for her manager and which would then generate a task for the authorising person, in this case Mrs Nicola Mercer who gave evidence before us to allow IT to provide non-standard equipment, In the course of that bureaucratic process the Respondent's policies provided that they required medical evidence in support of the need for non-standard equipment to be provided. Therefore from the outset when she responded to this request Mrs Mercer identified that the Claimant would need a doctor's note. There were alternative methods within the policy to allow for further referral to OH or for authorisation via a workplace assessment, but all that was stated at that point was that it was anticipated that a doctor's note would identify and confirm the authorisation. But that did not happen and time went by until May where it was recorded that there had been no progress, that the Claimant had applied to her own GP but had not had an answer but it was still expected.

34. After May the matter appears to have simply gone to sleep. There is an indication at the end of June that Mr Bowe was seeking to advance it but nothing in fact happened until September of 2023. Following further discussions then with Mrs Mercer by which time , even though there was still no note from the Claimant's own GP, she had obtained a paid for private consultation with a doctor which recorded at least that she was suffering from the condition of otitis media but could not give any specific recommendation for the type of headset that would alleviate that problem. On that basis the authorisation was then given by Mrs Mercer at which point she effectively ducked out of the process. There was then further discussion with IT but the headset that they did then subsequently provide was still unsuitable. It was returned by the claimant on 8 December 2023 and as we have said we accept her evidence that she never ever in fact received an appropriate replacement.

35. So that we are satisfied is a failure on the part of the Respondents to comply with a duty that arose. The obligation is upon them to make the necessary arrangements to ensure that the equipment they are prepared to supply to their operators is not only compatible with their systems but is also conducive to meeting the needs of a particular disability. In relation to the use of the headset there was also an issue as to whether this should be a wired set or a Bluetooth set, and as of September 2023 the respondents were also on notice that the claimant was asserting that it had to be a Bluetooth set allowing her to be mobile so that she could move away from her workstation in order to alleviate the symptoms of her other conditions. She was particularly having issues with her legs at this point and therefore would need to be able to exercise to a degree. So that further confirms that this was a necessary reasonable adjustment to alleviate a disadvantage occasioned by the claimant's disability, certainly in that instance as from September.

36. In summary we observe that the Respondent's strict adherence to their procedures and the obligations that they also therefore placed on an employee meant that they failed in their primary obligation to provide Bluetooth equipment. This might alternatively framed as a failure to provide an auxiliary aid rather than a failure to

alleviate the disadvantageous effect of a PCP, but it matters not. As we say the simple answer is the Respondent were well aware from March that the Claimant needed something additional and they failed to provide it . And it does not matter in relation to their duty that the Claimant throughout the whole of this period did have access to her own self-provided headset. That may be relevant in assessment of the level of injury to feelings throughout this period, but it does not obliterate the respondent's duty to make the necessary arrangements for their employees.

37. The claimant also seeks to bring complaints under section 15 of the Equality Act unfavourable treatment because of something in consequence of her disability.

DISCRIMINATION ARISING FROM DISABILITY

Did the Claimant's disability cause, have the consequence of, or result in, "something"?

The Claimant asserts her disability resulted in:

1. **The claimant's absence record.**
2. **The claimant's inability to achieve the set targets.**
3. **The inability to work with the respondent's headset.**

Did the Respondent treat the Claimant unfavourably because of that 'something'.

Did the Respondent know, or could it reasonably be expected to know, that the Claimant had the disability relied upon?

Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

38. Firstly she relies upon the fact a number of her absences from work were disability related. However the claimant was never put on any formal attendance performance management as a result of those absences. She met the triggers for it being recorded on a return to work interview that it was an informal warning. But those matters were never ever followed up. And on the occasions when the additional absences thereafter meant that the triggers for moving to the first formal stage would have been met the decision was consciously taken not to do so. The Respondent's policies allow that consideration could be given to disregarding disability related absences in terms of the triggers and that certainly before moving to any stage 1, 2 or 3 of the attendance management policy, expressly under the terms of that policy the effects of any disability must be considered at that stage.

39. The claimant never got beyond the informal notification that she had had a number of absences from work which on the face of it meant that she was to be put on notice that her continued attendance would be monitored and we do not consider that that, given that there were no consequences of that notification, certainly no

financial consequences (such as loss of entitlement to benefits or bonuses), and given that it did not ever then progress to any further more formal process does not properly amount to what can reasonably be considered to be a disadvantage to a disabled person.

40. Detriment is not, of course, limited to an identifiable financial or similar disadvantage, but it is a significant factor. In this case it has emerged in the course of the hearing that the Claimant is empathising the emotional impact of being subject to the absence policy. She expresses it as anxiety that having already been absent because of disability any subsequent sickness – for instance being off with a cold – might then cumulatively trigger disciplinary action. That is an elaboration upon the very brief reference in her witness statement to, in about October 2023 being "extremely anxious about my time off". The alleged unfavourable treatment because of her absence record being something arising in consequence of disability was not specifically identified at the preliminary hearing

41. The Claimant feeling anxious because she was herself aware of the possible implications of her repeated absences is not, however, the same thing as her being discriminated against by being treated unfavourably (section 15 (1) (a)) by being subjected to a detriment (section 39 (2) (d)) by the Respondent

42. Also the last such notification of any such informal warning was at the end of November 2023,.Anything arising from that date on the face of it is out of time, admittedly not by very long. It would not, however, in our view be just and equitable to extend the time for complaining about the imposition of that noted absence warning on the return to work form in the circumstances of this case. Before the Claimant left work and before she submitted her claim, she also knew full well that her attendance record had not actioned by taking it on to stage 1 even though the further triggers had by then in fact been met but were not being relied upon.

43. An alternative way of approaching this issue would be to say that had we had to consider a section 15 claim in respect of the informal notification as at November 2023 it would almost certainly be justifiable. It would be proportionate to manage the persistent absences of a disabled person by deferring the specific considerations of the impact of disability-related -absences until such time as the possibility of formal action arose, particularly when in practice no action was in fact taken at that stage and nor had it been taken on a previous occasion when the further trigger points had been reached..

44. It is not explicit in any of the claim, although there is reference in the Claimant's witness statement to a reduction in pay in December and an email to pay roll after the end of employment querying the calculation of or deductions for sick pay, that the Claimant is as she now seeks to argue saying that it also a breach of section 15 to have reduced her pay as a result of the absences.

45. The claimant was paid in accordance with her contract as to when she had exhausted the entitlement to sick pay. The policy in relation to absence and the potential discounting of disability related absences in terms of the trigger points for activating that policy are entirely separate from consideration in relation to pay.

There is a well-established line of authorities that only be in exceptional cases would it possibly be a reasonable adjustment or unfavourable treatment because of disability related absence to afford a disabled employee, in fact more favourable terms by paying her more than an equivalent non-disabled person would receive had they been absence for an equivalent period and therefore also exhausted their contractual right to pay. None of those exceptions are evident in this case.

46. The proposal to adjust the Claimant's target upwards from the 75 percent agreed in January 2022 to 80 percent, would not have subjected her to any disadvantage. She would have been able to meet that target and says that she was already exceeding it. We note that there has never been any criticism of the Claimant's application or performance at work.

47. The further alleged disability-related- discrimination is in relation to the previous finding of inability to work with the respondent's headset. We have already dealt with the failure to make reasonable adjustments in this regard. The claimant was not on the evidence we have heard treated unfavourably, that is subjected to any detriment, because she was unable to use the type of headset provided by the Respondent. It is right that not being able to use that equipment meant the Claimant continued to use her mobile phone and that did result in consequences, but that is not to say that she was treated or subjected to a detriment by the Respondent <u>because</u> she was unable to use their provided headset. Her inability to use the equipment is not the reason why the Respondent did anything. Rather it is because she was unable to use the provided headset that she (and indeed other non-disabled employees who were still using their own mobile phones and therefore having unwanted business messages directed to their personal accounts) experienced a detriment, but that is not the same thing. In any event the Claimant cannot recover twice for what is effectively the same alleged discrimination by a different name.

48. The Final matter therefore that we need to deal with is the claim of constructive unfair dismissal under section 95 (1) (c) of the Employment Rights Act 1996.

CONSTRUCTIVE DISMISSAL

Did the Claimant terminate the contract under which she was employed in circumstances which entitled her to terminate it without notice by reason of the Respondent's conduct?

Was there an actual or anticipatory breach of an express or implied term of the Claimant's contract by the Respondent and/or discriminatory treatment which was sufficiently serious to justify the Claimant resigning?

Did the Claimant accept the breach and treat the contract as at an end?

Did the Claimant resign in response to the breach?

Did the Claimant delay too long in accepting the breach and waive the breach and treat the contract as continuing?

49. The claimant resigned on notice on 21 February, to end on 29th March 2024. She was then given permission to bring that departure date forward and her last working day was in fact 15 March. The claimant must prove that she resigned in circumstances where the respondent had committed a fundamental breach of contract that would have entitled her to resign in fact without notice and that that was indeed the reason why she did resign.

50. In her resignation letter the claimant makes no reference as to the reason being any alleged breach of contarct. She says : "The decision was not an easy one and took a lot of consideration. Unfortunately due to the salary constraints a new job offer that aligns more closely with my skillset and experience." After the end of employment when she was disputing with HR the deductions from pay in December having exhausted her entitlement to sick pay, she also makes reference to financial considerations and the lack of available alternative positions, as well as now asserting a lack of support and resources as a disabled person.

51. In evidence before us the Claimant stated very explicitly that it was the continuation of the shifts to 8.00 o'clock that meant that she could not continue to work for the Respondent, but we repeat that from July 2022 the Claimant had given the Respondent no actual indication that working her contracted hours to 8.00 o'clock was indeed a problem, provided she was afforded the reduction from 40 to 32 hours over the working week.

52. So there has been no failure to make reasonable adjustments in relation to her contracted maximum end time for working shift and the Respondent is not thereby in breach of contract. Nor even though we find that there has been a failure to make reasonable adjustments in relation to the headset, is that a fundamental breach of contract evincing an intention by the Respondent not to be bound by its terms. That is because,, even though there was a failure to provide what was due the Respondent throughout was intending to make that provision. It is their own bureaucratic complexities and the confusion that arose as to who would fund or source this, whether it be the claimant herself or the DWP through Access to Work and then claiming back on expenses, that contributed to the failure but it does not evince any intention that they would not in fact seek to honour that obligation. It is simply a failure of their systems to do that in good time.

53. So the claimant had not established that in relation to either of those matters which appear to be the ones that she is relying upon that the Respondent had in fact breached the implied term as to mutual trust and confidence. The immediate trigger for her resignation is self-evidently the fact that, no doubt for good reasons, she had sought to move to an alternative position with the Respondent as a

paralegal. That was a post that would have afforded her more regular hours and not working as late and that would have been preferential. It would also have attracted a higher salary expectation and would have been a skilled position , more fitting to the Claimant's experience and expertise. She had taken substantial steps to improve her position by taking a legal secretary's course and starting a paralegal course, but unfortunately when it narrowed down to two candidates and we have heard from the interviewer Mr Cowen, the claimant of the two was the one who was not successful. She was informed that on the morning of 21 February and almost immediately she then put in her resignation. The stated reason for leaving accords with the loss of the higher salary and improved job satisfaction that would have come had she been successful in her application. So as we say it is self-evident that the principal triggers to why she resigned when she did was that she had failed to secure a preferential position as a paralegal. The Claimant then left to undertake a CPD training course with the Money Group that would then allow her to practice as a self-employed regulated mortgage adviser.

54. So for those reasons as we said at the very outset the claim partially succeeds and we will therefore need to deal with issues of remedy arising from that specific and only from that specific finding.

REMEDYJUDGMENT

1. We have to deal with the compensation which is purely for the injury to feelings where there is a causal link between the proven discriminatory conduct and that loss. We are dealing with a period effectively of a year from when the Claimant first notified of the need for an alternative headset until she left the employment during al of which time it had not been provided. We have heard further representations on half of the Respondent .The Claimant elected not to make any further submission as to quantum.

2. However throughout the whole of that time the respondents were still evincing the apparent intention to deal with this matter. Nonetheless the claimant no doubt must have been frustrated by a lack of proactive initiative on the part of the respondent and the fact that the obligations they placed upon her throughout this process led to difficulties in chasing up her GP and in not knowing what she should do. She expressed those frustrations within the course of the emails and ultimately, after 8 December, the additional frustration of still not having an appropriate headset provided by the Respondent and of her having had to return the one that they had sent to her. Throughout all this time of course there are the intermittent issues that because she could not use a provided headset compatible with the team system she was having the inconvenience of aggravation of her messages coming through to her own mobile phone.

3. However equally throughout this period the claimant had access to her own self-provided headset and we could also see on occasions throughout the process

however frustrating it may have been she expresses her gratitude to Mrs Mercer for trying to guide her through the process that the respondents had imposed upon her.

4. We certainly do not consider that there should be any reduction in our award because of an alleged failure to comply with the grievance procedure. There is no unreasonable failure because the Respondent has accepted from the outset that they should source the alternative set. The claimant was working through this process of the Respondent's instigation and it is not unreasonable for her not to have gone outside that process and initiated a formal grievance and complaint about the length of time it was taking or the failure to supply her with her equipment.

5. We also are aware however that although the claimant is clearly distressed by her perceived total discrimination at the hands of the employer, we have to separate her other concerns and deal as we say only with the causal link between this proven misconduct and her injury to feelings. But it still had a significant effect upon her.

6. Taking all those matters into consideration therefore, we do agree with the Respondent this is appropriately within the lower band of Vento for assessing the range of compensation. But that band goes up to £11,700 and taking all these factors into account we consider it is at the upper end of that band and we therefore award as compensation for injury to feelings for this proven failure to make reasonable adjustments £10,000.

7. This is not properly a claim which could, as the Claimant has asserted in earlier correspondence, give rise in these circumstances to any complaint of aggravated damages. It is not a case where the manner in which the discrimination was committed exacerbates the injury to feelings nor where there is any discriminatory motive. It can only possibly be as a result of the alleged conduct of these Tribunal proceedings and the claimant specifically in the course of correspondence has relied upon the delay in acknowledging that she was disabled by reason of the ulcerative colitis.

8. However that is not the principal element of this claim of failure to make adjustments, which is in relation to the protected characteristic of otitis media and which has had to be decided by us by looking at the whole matter in the round. in any event we stress particularly the EAT indicators in Zaiwalla &Co v Walia [2002] IRLR 697; although we can award aggravated damages because of the conduct of Tribunal proceedings, hat would be only in exceptional circumstances and this is not one of those.

9. The Respondent did not act in an oppressive way putting in their defence. They did not admit the claimant was disabled by reason of ulcerative colitis. They asked for further information and they did then make a concession. And that is not an unreasonable conduct of proceedings awaiting clarification of the evidence. Within the defence they did of course acknowledge that they knew from the occupational health report of January 2022 that she has had a diagnosis

and the issue was whether or not there was sufficient evidence to show that that met the definition of disability notwithstanding the provisional opinion of the OH advisor, acknowledging of course this is ultimately a legal matter.

10. So that is simply the ordinary conduct of proceedings and not unnecessarily aggressive. Nor did the alleged mistakes of fact made in the course of some of the evidence take this above that threshold. So there is nothing to say that we should include in this compensatory, not punitive, award an element of injury to feelings to also take account of aggravating factors.

11. So the total award remains at £10,000 but that is of course subject to interest. That will flow at the rate of 8% from 15 March when the duty first arose. That is just under two years. So it is one full year plus a further 350 days. 8% of £10,000 on a yearly basis is of course £800 and the total award of interest is therefore £1,567.12. So the total award of compensation in this case is £11,567.12.

12.

Approved by Employment Judge Lancaster

Date 21st March 2025

---

[i] **Draft List of issues**

1**. FLEXIBLE WORKING**

Did the Respondent deal with the Claimant's flexible working request(s) in a reasonable manner?

Did the Claimant present the complaint before the end of the period of 3 months beginning with the relevant date or within such further period as the tribunal considers reasonable?

Is it just and equitable to award compensation, up to 8 weeks' pay?

DISABILITY STATUS

Is the Claimant disabled within the meaning of section 6 of the Equality Act 2010 ('EQA')?

The Claimant asserts she is disabled by virtue of ulcerative colitis and she indicated that there are other impairments which amount to disability. The respondent accepts that the claimant is disabled within the meaning of section 6 of the Equality Act 2010 by reason of bipolar disorder and osteoarthritis. The claimant referred to another medical conditions including ulcerative colitis. The claimant has provided a substantial amount of medical evidence. The respondent needs to consider this and to clarify what medical conditions it accepts amount to the disability. It is hoped this is a matter that can be discussed between the parties and clarified.

REASONABLE ADJUSTMENTS

Did the Respondent apply a provision, criterion or practice ('PCP') namely:

The claimant indicated that the PCP was a requirement to work shift patterns until 8 PM and lengthy shifts up to 11 hours at a time.

Being required to work at the respondent's Skipton office at times.

The requirement to use the headsets supplied by the respondent.

Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, namely, that:

It is alleged that this placed the claimant at a substantial disadvantage with regard to her work life balance and that she was unable to eat her meals until past 4 pm which placed her at a disadvantage due to her ulcerative colitis.

Having to work shifts past 8 pm placed her at a substantial disadvantage as a result of her bipolar disorder.

Did the Respondent know, or could it reasonably be expected to know, that the Claimant was likely to be placed at a substantial disadvantage compared to a person who is not disabled by the application of the PCP?

If the Claimant succeeds on the points at 3.1 - 3.3 above, did the Respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

In particular, the Claimant asserts that the Respondent should have allowed her to work different shifts and not attend the respondent's Skipton office.

Did the Respondent in fact make/maintain these adjustments?

Was it reasonable for the Respondent to have made such adjustments at the relevant time, taking into account the ECHR Code of Practice on Employment (2011) paragraph 6.28?

DISCRIMINATION ARISING FROM DISABILITY

Did the Claimant's disability cause, have the consequence of, or result in, "something"?

The Claimant asserts her disability resulted in:

The claimant's absence record.

The claimant's inability to achieve the set targets.

The inability to work with the respondent's headset.

Did the Respondent treat the Claimant unfavourably because of that 'something'.

Did the Respondent know, or could it reasonably be expected to know, that the Claimant had the disability relied upon?

Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

DISCRIMINATION - REMEDIES

Are the Claimant's claims time barred under section 123 of the EQA 1996?

Does the alleged unfavourable treatment amount to conduct extending over a period under section 123(3)(a) of the EQA 1996?

Is it just and equitable to extend the time limit?

Is the Claimant entitled to an injury to feelings award and/or financial loss?

Should any award be reduced as a result of any failure to comply with the ACAS Code?

CONSTRUCTIVE DISMISSAL

Did the Claimant terminate the contract under which she was employed in circumstances which entitled her to terminate it without notice by reason of the Respondent's conduct?

Was there an actual or anticipatory breach of an express or implied term of the Claimant's contract by the Respondent and/or discriminatory treatment which was sufficiently serious to justify the Claimant resigning?

Did the Claimant accept the breach and treat the contract as at an end?

Did the Claimant resign in response to the breach?

Did the Claimant delay too long in accepting the breach and waive the breach and treat the contract as continuing?

UNFAIR DISMISSAL - REMEDIES

Has the Claimant mitigated her loss in accordance with section 123(4) of the Employment Rights Act 1996 ('ERA')?

Would the Claimant have been dismissed in any event and if so, should compensation be reduced in line with Polkey v AE Dayton Services Limited [1987] ICR 142?

Is it just and equitable to award compensation to the Claimant, in accordance with section 123 of the ERA 1996?

Should any award be reduced as a result of any failure to comply with the ACAS Code?