EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000749/2024

Held in Glasgow on 10, 12 & 13 March 2025

Employment Judge C McManus
Tribunal Members J Lindsay & J Gallacher

Mr M Harvey	**Claimant** **In Person**
The Scottish Ministers	**Respondent** **Represented by:** **Ms E Campbell - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unlawful discrimination under section 21 of the Equality Act 2010 is unsuccessful and is dismissed.

REASONS

Background

1. The claimant's employment with the respondent is continuing. The respondent accepts that the claimant has the protective characteristic of disability. The Note issued following the Case Management Preliminary Hearing ('CMPH') in this case records that at that CMPH it was confirmed that the respondent accepts that the claimant is a disabled person by virtue of a chronic shoulder and back condition and in relation to him suffering from migraines. That Note also recorded that the claimant was not relying on any additional condition as amounting to a disability.

2. The complaint is in respect of alleged failure in the duty to make reasonable adjustments. All requested adjustments had been implemented by the time of this Final Hearing ('FH'). In general terms, the circumstances relied upon are in respect of adjustments requested in the provision of a suitable work space. The claimant's position is that steps taken by the respondent should reasonably have been implemented sooner.

3. The issues to be determined at this FH were limited following a Preliminary Hearing ('PH') on time bar on 24 February 2025. The Judgment issued in respect of that PH (determined by EJ Buzzard) ('the PH Judgment') stated:

"For the avoidance of any doubt, this judgment means the only allegation that is proceeding as part of the claimant's claim is related to an alleged delay in making a reasonable adjustment to the effect that the claimant was granted exclusive use of his permanent desk, such that no other staff could use it when he was not in work for any reason."

4. Steps were taken throughout the Hearing, in line with the overriding objective set out in Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Rules'), to seek to ensure that the parties were on an equal footing.

5. Steps were also taken in respect of reasonable adjustments. The lights in the Tribunal room were dimmed. The claimant was provided with a choice of several adjustable chairs for his use during the proceedings. Additional breaks were taken throughout the hearing.

6. All documents relied upon were included in the Bundle of Productions, which was presented with pages numbered from 1 – 727. Documents in that Bundle are referred to in this Judgement by their page number in that Bundle. The majority of those documents were not referred to in evidence at the FH.

Issues for determination

7. The issues for determination by the Tribunal were agreed in preliminary discussions at the outset of this haring. It was agreed that the effect of the PH Judgment limited the complaint. It was agreed that because of that

limitation, the complaint should be analysed in terms of application of a PCP (section 20(3) EqA), rather than in terms of a 'physical feature' (section 20(4) EqA).

8. These were agreed to be the issues for determination by the Tribunal:

- Did the PCP of 'hot desking by default' put the claimant at a substantial disadvantage in comparison with persons who are not disabled?
- If so, what was that disadvantage?
- Was that disadvantage substantial?
- In the period from July 2022 to February 2024, what steps did the respondent take to avoid that disadvantage?
- Was it reasonable for the respondent not to provide an allocated work space for the claimant's sole use until February 2024?
- Is the claimant entitled to any compensatory award in respect of any breach of the Equality Act 2010, and if so in what amount, having regard to the impact of any such unlawful treatment on the claimant?
- Is it appropriate for the Tribunal to make any recommendation(s) under section 124(3) Equality Act 2010?

Proceedings

9. All evidence was heard on oath or affirmation. Following the claimant's evidence, evidence for the respondent's case was heard from Nicola Watson (at the relevant time Decision Team Manager (Adult Disability Payment)); Fiona Buggy (claimant's initial Line Manager, later Operations Manager (Adult Disability Payment)); Heather Mackie (Place Services Lead) and Mathew Kelly (at the relevant time Decision Team Manager (Client Services Delivery)).

Findings in Fact

10. This is not a narration of events but sets out the facts which are material to the issues for determination. The following material facts were uncontested, admitted or proven.

11. The respondent is employed by the Scottish Ministers, the legal entity which enters into contracts and which employs staff who may be assigned to the Scottish Government and its agencies. Social Security Scotland ("SSS") is an executive agency of the Scottish Government. SSS is responsible for administering the Scottish social security system, delivering a range of benefits to members of the public in Scotland.

12. The Claimant is employed by the respondent as a Case Manager, within the division responsible for processing Adult Disability Payments ('ADP'). The Claimant has been employed by the respondent since 27 April 2022 and he remains in employment. He was previously employed by a separate Government agency.

13. Since the start of the claimant's employment with the respondent the division responsible for ADP has grown considerably in terms of the number of employees allocated to that division. At the time of the claimant's recruitment, restrictions on social distancing were in place because of the COVID pandemic. From the outset, the premises at High Street were intended to be used on a 'hot desking' basis: normally each employee would not be in the office each working day (Monday – Friday). There were insufficient desks for the total number of employees. A plan was put in place for employees from each division to be in the office 2 days a week. Employees did not normally have a designated office workstation/ desk. Staff who were in the office were 'hot desking'. That 'hot desking by default' arrangement was not applied to the claimant. The claimant was never required by the respondent to 'hot desk'. The Claimant was booked to work in the office Monday to Friday and was allocated a particular desk/workspace to work from, from the outset and throughout his employment.

14. Prior to commencing his training period, the claimant told the respondent that he required specific workplace equipment: a chair adjusted for his specific measurements, a vertical mouse and a rise and fall desk to allow working both standing and sitting. Prior to the claimant commencing employment with the respondent, the claimant provided the respondent with the Occupational Health report which had been procured by his former employer (the separate Government agent). That OH Report was dated February 2020. The adjustments recommended for the claimant in that report were:

- The chair backrest was to be adjusted slightly.
- A vertical mouse and a narrower keyboard.
- When standing at his desk, he ought to raise the monitor to eye level.
- Regular short breaks away from his desk throughout the day.

15. That previous employer had arranged for the claimant to be professionally measured and had then provided him with an ergonomic chair specific to his measurements and requirements, an electrically operated rise and fall desk and a vertical mouse.

16. At the time of the claimant's recruitment by the respondent, Heather Mackie was Place Services Manager. Heather Mackie had worked with the claimant in his previous employment at the separate Government agency. Heather Mackie was aware from that previous employment that the claimant required a particularly specified workstation. The Claimant's line manager at the start of his employment was Fiona Buggy, Team Manager at SSS. Prior to the claimant commencing his training period with the respondent, Fiona Buggy liaised with Heather Mackie in relation to providing work equipment for the claimant's requirements. Heather Mackie arranged for the vertical mouse and the chair which had been purchased specific to the claimant's measurements to be procured from his previous employer and to be in place for the claimant to use during his employment for the respondent, from April 2022. Fiona Buggy arranged for that equipment to be placed at desk / workspace location 1.172, with a height adjustable (sit / stand) desk. Fiona Buggy arranged for

that location 1.172 to be booked out to be used by the claimant on a 'full time' basis (i.e. Monday to Friday). That was an adjustment to the normal practice. At that time, employees of the respondent normally worked from home throughout their training period. From the outset of his training period, and throughout his employment, the claimant's place of work has been at the respondent's premises at 220 High Street, Glasgow. It was agreed that the claimant would work in the respondent's premises, 5 days a week. During his training period (April to July 2022), the claimant worked at desk location 1.172. That location was booked out for the claimant's use on a *'full time'* basis. That location allowed the lighting around it to be dimmed to the claimant's requirements.

17. From the outset of his training period, and throughout his employment the practice of 'hot desking by default' has not been applied to the claimant. From the commencement of his employment, adjustments were made by the respondent so that the claimant knew that he was allocated to a particular workstation at the respondent's premises. The hot desking policy was based on the employees working from home for part of their working time. Employees were expected to work from home except on particular days when those in the division they worked in were expected to work in the office. The claimant was not expected to work from home. The claimant was allocated a particular desk/workstation at the respondent's premises, to work from each day, Monday to Friday. He was allocated a desk in an area ('bank') with other employees who were also in the office on a full time (Monday to Friday basis), so that he had continuity with the people around him, who were aware of his requirements in relation to dimmed lighting. That workstation had a rise/fall desk. The claimant knew that each working day he would be working at a particular desk / workstation. The desk / workstation at location 1.172 was booked for the claimant's use for the duration of his training period. At that time the claimant had no expectation of any other employee using that workstation. Location 1.172 did not fully meet the claimant's requirements. During that time, the claimant did experience pain on an ongoing basis linked to the monitor and desk not fully meeting his particular requirements. The monitor could not be easily adjusted to the optimum position when working at

both a sitting and standing position. That led to the claimant mainly using the workstation in a raised sitting position. When the claimant began his employment, the respondent only had electronic height adjustable desks placed by aisles, rather than by a window. The lighting in the aisles could not be dimmed because of emergency exit requirements. The glare from those lights was not suitable for the claimant.

18. An electrically operated height adjustable desk requires separate electric cabling from that in place for other electrical equipment (e.g. monitors). The total cost of sourcing and fitting an electrically operated rise and fall desk is approx. £5,000. Multiple areas of the business are involved in the procurement and installation of electrically operated rise and fall desks. The installation requires to be done at a time when it is least disruptive to the business.

19. The claimant finished his training period in July 2022. In June 2022 it was identified that the proposed workstation to be utilised by the claimant after his training period was not suitable. The desk height at that workstation was adjusted by a hand crank rather than being adjusted electrically. It was recognised that use of a hand crank would cause the claimant pain. The claimant was not required to move from desk at 1.172 at the end of the training period. Robert Egan (then Operations Manager (Adult Disability payment)) arranged for an up to date Occupational Health report to be obtained. The Occupational Health report procured by the respondent is dated 27 July 2022 (197 – 199). That set out recommendations. Following that report, a new chair was procured to meet the claimant's requirements. It was recognised by the respondent that the location of the electrically operated rise and fall desks at that time meant that the workstation allocated to the claimant did not meet his needs in lighting. That OH report recommended *"his sit / stand desk is located by a window"*. Some possible solutions to address the lighting issue if not 'feasible' were suggested in that OH Report. Items suggested in that report were procured by the respondent and trailed by the claimant but found to be ineffective. The claimant considered there to be unreasonable delay in being placed at a workstation which had electrically operated rise and fall and

also met his requirements re lighting, and also a free standing monitor so that the equipment could be used at both standing and sitting positions, without pain being caused in manually moving a monitor arm.

20. The claimant continued to work at desk location 1.172 until end August / start September 2022, when the claimant moved to desk/workstation at location 1.04, beside 2 windows. The claimant's workstation was moved to location 1.04 as a temporary solution on the first floor of the High Street premises. This was temporary because the placement of the growing ADP division was not known and it was preferred that the claimant be seated within the ADP division. Location 1.04 is beside 2 windows and met the claimant's requirements in respect of lighting. From end August/start September 2022 until mid December 2022 (when the claimant began a period of unrelated sickness absence) the claimant worked at desk / workstation location 1.04. The claimant knew that that desk/workstation was booked for his use every day. The claimant was not required to hotdesk or to work at any other desk during that period. While the desk/workstation at location 1.04 was booked for the claimant's use, that location was not made available for booking by any other employee.

21. From August 2022 the respondent operated a desk booking plan. Throughout his employment, the desk/workstation allocated for the claimant's use was never made available for booking by another employee. From August 2022, the desk / workstation location utilised by the claimant was marked out in the seating plan in red, under the claimant's Line Manager's name. The desk plan operators used manager's names, to keep individual staff's names anonymous so avoiding publicising their reasonable adjustments. It was also simpler to keep track of manager's names in case the situation changed. The red colour on the seating plan showed that that desk was required each working day (Monday to Friday). The claimant's Line Manager took steps to ensure that no other Manager would use that desk or allow it to be allocated to anyone else. In effect, the desk / work location allocated to the claimant was permanently allocated for the claimants' use alone.

22. There continued to be communications in relation to the placement of the workstation to be used by the claimant, the suitability of placements because of the claimant's particular lighting requirements and the suitability of the provision of a free-standing monitor, rather than one fixed to the desk by arms. The claimant continued to suffer pain linked to the work equipment provided for him because the monitor could not be adjusted in line with the rise and fall desk to be utilised at both sitting and standing. This, and the continuing discussions in relation to placement within the office, were causing the claimant pain and anxiety. During that time there continued to be ongoing discussion at a higher management level in relation to placement of the ADP division within the High Street premises.

23. There was significant work involved in divisional desk allocation. There were a number of factors which impacted on this, particularly:

- There was a mass recruitment exercise;
- Staff levels in various divisions were fluctuating;
- For ADP, there were 143 desks for 500 staff;
- Considerations of reasonable adjustments for multiple staff, while ensuring people were placed within the area where other members of their team were;
- Ongoing Covid-19 restrictions;
- Staff were trialling out different areas of the office to establish best fit, before a firm decision was reached; and
- Multiple stakeholders were involved.

24. The claimant and Nicola Watson identified various locations for placement of the electric rise and fall desks in the High Street premises which would enable the claimant's lighting requirements to be met. In November 2022 electrically operated rise and fall desks were installed by Place Services. These were installed in a location which Place Services Manager Heather Mackie understood to be suitable for the claimant's needs (replacing the manually

height adjustable desks there). That location was not one of those identified by the claimant and Nicola Watson. The claimant did not believe that that the location where the electrically operated rise and fall desk had been installed was suitable because he would require the lighting on two sets of banking to be dimmed (to ensure no glare from behind). The claimant did not feel comfortable being placed where, as he perceived it, he would require to frequently ask employees sitting at two banks of desks (rather than one) to work with dimmed lights. The installation of the electrically height adjustable desks at a place other than one identified by the claimant and Nicola Watson as suitable was a source of frustration and upset for the claimant. The claimant was not required to move to the location where the electrically height adjustable desk had been installed. Location 1.04 continued to be booked out for the claimant's use and he continued to work there each working day.

25. During the claimant's unrelated sickness absence from mid December 2022 until mid-January 2023, an electrically operated height adjustable desk was installed at location 2.116, for the claimant's use. That coincided with the ADP division moving to the second floor of the High Street premises. At the time of his return to work in January 2023 the claimant believed that desk / workstation 2.116 was allocated for his permanent use. Desk / workstation 2.116 was marked red on the seating chart. It was permanently booked out under the claimant's line manager's name, for use by the claimant on Monday to Friday on each week. The claimant's line managers took steps to ensure that no other manager would book that desk / workstation. From February 2023 the claimant was allowed by his Line Manager to put signage at the workstation to prevent others from touching the equipment there. The claimant considered the situation in relation to his workplace to be finalised from February 2024, when official signage was put in place by the respondent directing that the equipment at that workstation was not to be used or touched.

26. Prior to May 2023, the claimant and his Line Managers operated on the basis that the particular workstation allocated for the claimant's use was for his exclusive use. They worked under that assumption because it was recognised that if someone else used that workstation, the settings on the

equipment provided for the claimant would be likely to be changed. It was recognised that the claimant required to be provided with work equipment at particular settings.

27. The claimant's understanding that workstation 2.116 was allocated for his permanent use changed on 11 May 2023, when the claimant received email from Fiona Buggy (410). That email was sent in relation to the ongoing issues around provision of a monitor which could be easily adjusted by the claimant so that he could work both sitting and standing (*'a free standing monitor'*) Fiona Buggy's email to the claimant of 11 May 2023 (410) concluded with *"We are concerned about the possibility of risk to other staff within this bank of desks, including those who may use this desk when you are out of the office"*. That sentence raised for the claimant *'the spectre of it not being permanent'*. From that email, the claimant was concerned about the possibility of the desk / workstation allocated for his use possibly being used by someone else when he was not there. That was a concern for the claimant because he required his equipment to be at particular settings. It would not be immediately obvious if a setting on the work equipment had changed. The claimant would know that a setting had been changed when he began to experience pain, either at the time or later that day.

28. At the time Fiona Buggy sent that email in May 2023, there was increased pressure for desks to be fully utilised, including in periods when employees who were normally permanently booked to a particular desk were on holiday. Because of the pressure to fully utilise office space, Fiona Buggy created a plan to take into account individual employee's annual leave, and so allow the workspace normally booked for them to be available for booking by others when they were not in the office. There was a 'push back' from Line Managers and that policy was never fully implemented.

29. The claimant replied to Fiona Buggy's email by his email of 12 May 2023 (409). That email concluded:

"I am also extremely concerned to hear you suggest anyone else would be sitting at my desk at any time. My understanding was that this desk has been

allocated to me on a permanent basis and it's worrying to hear any suggestion this is not the case. The equipment at that desk is intended to be adjusted for my needs and should not be used or adjusted by anyone else. I believed this issue had been settled. I would be grateful if you could confirm the position on that."

30. The desk workstation allocated for use by the claimant (2.116) was never made available for booking by anyone else. The claimant's Line Manager provided reassurance to him that the workstation utilised by him (2.116) was not made available for booking by anyone else. That desk space was marked in red on the floor plan as being permanently booked out in the claimant's Line Manager's name. The Line Manager took steps to ensure that no other person booked that desk space. No other Manager booked that desk. From the time when desk/workstation 2.116 was first booked for the claimant, no other employee has been able to book to work at that desk / workstation.

31. The work equipment at workstation 2.116 did not initially meet all of the claimant's needs, because the monitor was fixed by an arm rather than on a stand on the desk ('free standing'). The arm could not be easily moved by the claimant without causing him pain. The claimant did not then utilise the equipment at both sitting and standing positions, so as to avoid pain from moving the monitor to the optimum position for the claimant's standing position. The respondent's Health and Safety team had raised concerns about the risk of a free standing monitor falling when the height of the desk was being adjusted. As a result of ongoing discussions in relation to the suitability of a monitor being provided to the claimant which could easily be height adjusted by him when he moved from sitting to standing work positions (and vice versa), Fiona Buggy undertook a Risk Assessment with the claimant's then Line Manager, Nicola Watson) and input from the claimant via Nicola Watson. That Risk Assessment was carried out in June 2023 (419 - 423). Fiona Buggy has a qualification in carrying out risk assessments. The risk assessment was carried out as a solution to the issue raised by the respondent's Health and Safety division in respect of the risk of a free-standing monitor falling from a desk when the height was being adjusted.

Fiona Buggy identified in that Risk Assessment that the following should be in place:

- Provision of a stand-alone monitor and riser (419)
- *'Sign on monitor when not in use not to touch or adjust desk'* (421)
- *'Block desk out on seating chart in Malcolm's absence (Malcolm is in office 5 days per week)'* (421)
- *'Put notes on desk to avoid anyone adjusting the desk'* (421)
- *'Remove desk from seating chart in Malcolm's absence so only Malcolm can use this'* (421 – 422)
- *'Notes on desk to advise not to adjust desk while cleaning'.* (422)

32. That Risk Assessment was signed off by Fiona Buggy, after she had obtained approval from her Line Manager. Ms Buggy was then on leave, before moving division and so was not involved in ensuring that her recommendations in the Risk Assessment were fully implemented. In practical terms, there was no difference to the claimant in respect of the provision of a permanently allocated desk to him as a result of the Risk Assessment.

33. Throughout his employment, the claimant's Line Managers provided reassurances to the claimant that the desk / workstation he worked at was permanently allocated for his use and would not be booked to be used by anybody else. Throughout his employment, the claimant's Line Managers were supportive of the claimant's requirements.

34. The claimant's Line Manager from 22 June 2022 until August 2023 was Nicola Watson. The claimant had a good working relationship with Nicola Watson. During the time when Nicola Watson was the claimant's Line Manager, she was not aware of anyone other than the claimant using the desk / workstation allocated to the claimant.

35. From August 2023 to April 2024, the Claimant's line manager was Matthew Kelly. The claimant had a good working relationship with Mathew Kelly. During

the time when Mathew Kelly was the claimant's Line Manager, he was not aware of anyone other than the claimant using the desk / workstation allocated to the claimant.

36. Seating plans were normally booked under the Line Manager's name. That was so that contact could be made with the appropriate Line Manager if any issue arose over who what using that particular desk/workstation. The seat booking plan (724) had desk location number 2.116 marked in red, with 'M Kelly'. That showed that that desk was required every day (Monday to Friday) for an employee line managed by Mathew Kelly, rather than only the days when the rest of that Manager's team were in the office. Both Nicola Watson and Mathew Kelly had taken steps to ensure that the identified desk booked under their name would be available to use every day by the claimant and would not be available to be booked by any other line manager. The claimant's Line Managers *'chose not to declare'* that desk as being available for booking. Reassurance was given to the claimant that the desk/ workstation allocated to him would not be available for booking by anyone else. When handing over line management responsibilities to Mathew Kelly, Nicola Watson ensured that Mathew Kelly was aware of the arrangements which were in place for the claimant.

37. The claimant sought that desk/workstation 2.116 be booked out under his name other than the name of his Line Manager. Whilst initially concerned about singling the Claimant out by having his name on the seating plan, Mathew Kelly was willing to concede to the claimant's request for this. Mathew Kelly arranged for the Claimant's name on to be stated at location 2.116 on the desk plan, along with a note that the lighting needed to be dimmed, as shown in the desk plan at 725.

38. No objections were made from anyone in the Respondent's business in respect of the Claimant having signage at his allocated workstation noting that this should not be used/touched by anyone else. Mathew Kelly procured a sign for the Claimant through official channels and on letter head ('official signage'). The official signage required to be signed off by Communications. Health and Safety had identified a risk with the initial proposal of the sign

being on a free-standing pole. It took longer than the Claimant would have liked for the official signage to be in place. In the meantime, from Jan/Feb 2023 signs organised by the claimant and Nicola Watson (with the authority of Fiona Buggy) were in place and continued to be used by the claimant. The Claimant's team and other colleagues all knew that the Claimant's desk was '*his*' and ought not to be touched by anyone else.

39. The claimant has had no sickness absence as a result of any issue with the allocation of a permanent workspace/desk location to him. He has had no wage loss arising from that issue.

40. During the course of his employment with the respondent to date, on one occasion the claimant has found another employee sitting at the workstation allocated to the claimant. On that occasion the claimant required to ask that person to move, and they did so. On two or three occasions the claimant has suspected that someone has sat at the desk allocated to him and the work equipment provided for the claimant's use has been moved, knocking out the particular settings. The signs put in place by the claimant have been moved for cleaning the area and the claimant has put them back in place. The chair which was provided to the claimant's particular measurements was kept in a particular cupboard to minimise the risk of someone else sitting on that chair and putting out the settings. On occasion, some employees chose to work at a desk / workspace location which they have not booked. Location 2.116 is in an area of the office where it is least likely that an employee would pass and chose to sit at or use that workspace, even though not booked by them.

Comments on evidence

41. There was no sign of antagonism between the claimant and the various witnesses for the respondent. It was clear that the claimant had a good working relationship with his Line Managers. There was no evidence of any issue with the claimant's work performance or capability. The claimant willingly made a number of significant concessions. He conceded that from the outset of his employment he was not required to hot desk, and instead he knew which particular workstation he would be working at when he came into

work each day. The claimant also conceded that before desk 2.116 was allocated for his use, in the main, he suffered no substantial disadvantage in respect of a particular location not being permanently allocated to him, because he knew which desk / workstation was allocated to him on a day to day basis. The claimant accepted that he suffered from no disadvantage in terms of the issue of permanent allocation of a desk/workstation from end August/start September 2022, when the claimant's booked desk was moved to location 1.04 as a temporary solution. That location 1.04 was suitable in terms of lighting (being beside 2 windows). The issue at that time was in relation to provision of a suitable monitor which could be easily adjusted by the claimant. Any disadvantage suffered by the claimant because of failure to fully implement adjustments in that period was beyond the limitations of this Tribunal's determinations, because of the PH Judgment.

42. We accepted that there was some uncertainly for the claimant in relation to his workstation location at the end of the training period in July 2022, but that was in the background of it being agreed that the claimant would be allowed to work in the office, at the same desk/workstation, each day, rather than hot desking, which was the 'default' policy. There was no medical evidence to support the claimant's position that he felt isolated and depressed by not knowing where his permanently allocated desk would be placed. That was at a time when other employees who were not disabled were also undergoing stress in relation to return to office working.

43. There was clearly a communications issue at the time of the installation of electrically operated rise and fall desk in November 2022. Fiona Buggy believed the placing of that installation to be *'a mistake'.* Heather Mackie was clear that that placement was not a mistake, and that she understood that that the desks were being installed at a suitable place. Heather Mackie sought to ensure that there was no further communication issue at the time of the installation of the electric rise and fall desks on the second floor (email of 28 November 2022 at 262 seeking confirmation of positioning arrangements)

44. The respondent's witnesses were all straightforward in giving their evidence and we found them all to be credible. There was no real dispute in relation to

the facts. The claimant was also credible. There was some communication issues which meant that the claimant was not always aware of the steps which were being taken to meet his requirements, or the reasons for the delay in those steps being taken. We accepted Nicola Watson's evidence that she had gained Fiona Buggy's approval for the claimant to be allowed to place his own signage at his workstation. We accepted the respondent's representative's position that Fiona Buggy could not remember having given that approval because of the passage of time and because she had moved post since then.

45. The Bundle included Policy documents in relation to workplace adjustments (513 – 528). Other than a question from Member J Gallacher to Fiona Buggy, the witnesses were not taken to these Policies. It was not clear whether these Policies were considered to have applied to the claimant at the material time. Fiona Buggy's evidence was that she was not aware of the policy which gave a recommendation that be permanent allocation of a workstation should be considered as a reasonable adjustment. Her evidence was that the Policy '*would have been helpful*'. We heard no evidence of those involved being aware of these Policies, or of the Policies being applied to the claimant's circumstances.

46. The evidence of each of the respondent's witnesses showed a clear willingness to put in place adjustments to meet the claimant's needs. The respondent sought to put adjustments in place, and did so from the commencement of the claimant's employment with them.

47. We accepted the evidence of both Nicola Watson and Mathew Kelly that they are not aware anyone else using the desk/workstation which was booked out for the claimant's use each working day. It was not in dispute that the claimant was getting reassurance from his successive Line Managers that a particular desk / workstation was booked for his use each day. The only area where the claimant was inconsistent in his evidence was in relation to occasions when others had used his allocated desk or touched the equipment there. It was unclear when these occasions were said to have occurred. At its' highest, the claimant's evidence was that on *'two or three'* occasions he had found

someone sitting at his allocated desk and that on one occasion he had to ask someone who was working at his allocated desk to move.

48. There was no evidence before us of the claimant raising concerns about others using his allocated desk with his Line Managers. The claimant had a good relationship with his Line Managers and there was no evidence before us of any reason why the claimant would not raise concerns with his Line Manager if his allocated desk was being used by others. The claimant's position in his evidence seemed to be seeking reassurance from a higher level of management, rather than accepting the position of his successive Line Managers and accepting that the steps taken by his Line Managers were effective in practically ensuring that the claimant was permanently allocated a particular desk / workstation for his exclusive use. Nicola Watson's evidence that *'desk 2.116 was Mathew's desk and wouldn't be used by anyone else'* was not disputed.

49. The claimant was candid in his evidence that before Fiona Buggy's email of 11 May 2023 (410) the issue of the particular desk/workspace allocation being only for his sole use did not arise because everyone assumed that would be the case. That position was consistent with the position in the claimant's email to Fiona Buggy of 12 May 2023 (409). The claimant's position in that email was significant and showed that he had not been put to a substantial disadvantage in respect of the issue of having permanent sole use of the allocated desk/workstation, because he had believed that that was the arrangement.

Relevant Law

50. The duty to make reasonable adjustments is set out in Section 20 of the Equality Act 2010 ("the EqA"), as follows:

> *(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 these 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 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…

51. The provisions in respect of failure to comply with the duty to make reasonable adjustments are in section 21 EqA, as follows:

(1) A failure to comply with the first… 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.

The effect of section 21 is that a failure to comply with the duty to make reasonable adjustments pursuant to section 20 EqA amounts to an unlawful act of discrimination.

52. In the context of section 20 EqA reference to *"substantial disadvantage,"* the general interpretation provisions as section 212(1) sets out that *"substantial"* means *"more than minor or trivial."*

53. In *General Dynamics Information Technology Ltd v Carranza [2015] ICR 169*, HH Judge David Richardson, at paragraph 32 of the judgment commented in relation the section 20 duty:

"Sections 20-21 are focused upon affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step to avoid substantial disadvantage."

54. The test of reasonableness is an objective one and it is not necessarily met by an employer showing that he believed that the making of the adjustment would be too disruptive or costly (*Smith v Churchill Stairlifts plc 2006 ICR 524*, paragraph 45).

55. In addressing the issue of reasonableness of any adjustment the focus has to be on the practical result of the measures that can be taken. Any proposed adjustment must be one which has a real prospect of preventing the disadvantage in order to be an adjustment that the employer is placed under a duty to make (*Romec v Rudham UKEAT/0069/07/DA* and *Royal Bank of Scotland v Ashton 2011 ICR 632, EAT*).

Code of Practice

56. Chapter 6 of the Equality and Human Rights Commission's statutory Code of Practice ("the EHRC Code") deals with the duty to make reasonable adjustments. Paragraph 6.2 states:

"The duty to make reasonable adjustments is a cornerstone of [the EqA] and requires employers to take positive action to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled. "

57. What will be considered a reasonable step for an employer to take will depend on all the circumstances of each individual case (EHRC Code Paragraph 6.23). The EHRC code at paragraph 6.28 sets out the following factors which might be taken into account when deciding what is a reasonable step for an employer to take:

(i) whether taking any particular steps would be effective in preventing the substantial disadvantage;

(ii) the practicability of the step;

(iii) the financial and other costs of making the adjustment and the extent of any disruption caused;

(iv) the extent of the employer's financial or other resources;

(v) the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

(vi) the type and size of the employer.

Burden of Proof

58. The standard of proof applied in Employment Tribunal cases is the civil standard of proof of *'on the balance of probabilities'.* As noted by Lord Hoffman in *Re B (Children) [2008] UKHL 35* *"If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof."*

59. For claims under the Equality Act 2010 ('EqA'), the approach to the burden of proof is as set out in s136 of Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. –v- Wong and others 2005 ICR 931*, CA (as approved by the Supreme Court in *Hewage –v- Grampian Health Board [2012] IRLR 870*).

60. In *Project Management Institute v Latif [2007] IRLR 579 EAT*, Mr Justice Elias, then President of the EAT, approved the guidance on the application of the burden of proof on reasonable adjustments cases, stating at paragraphs 54-55 of the judgment:

> *"54. In our opinion the paragraph in the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made."*

Submissions

61. On agreement, both parties prepared and exchanged written submissions, and their comments on the other's submissions. They were given the opportunity to speak to those submissions and answered questions from the Tribunal. The respondent relied on the following case law authorities:

- *General Dynamics Information Technology Ltd v Carranza [2015] ICR 169*
- *Project Management Institute v Latif [2007] IRLR 579 EAT*
- *Royal Bank of Scotland v Ashton 2011 ICR 632, EAT*
- *Smith v Churchill Stairlifts plc 2006 ICR 524*
- *Romec v Rudham UKEAT/0069/07/DA*
- *Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871*

Decision

62. The PCP relied upon by the claimant is the policy of 'hot desking by default'. The claimant accepted that that PCP was never applied to him by the respondent. From the outset of the claimant's employment with the respondent, the respondent took steps (made adjustments) so that that PCP did not apply to the claimant. The claimant knew from the outset of his employment that there was a workstation booked for his use. The claimant was not put to a disadvantage by the application of the hotdesking policy.

63. The claimant's complaint does not succeed because the PCP relied on by the claimant of hot desking by default was not applied to the claimant.

64. In their submissions, the respondent's representative stated: *"It is accepted the PCP of 'hot desking by default' was applied by the Respondent to staff generally, (however, it is denied that the Claimant was ever required to 'hot desk', because of his reasonable adjustments)."* They then argued that because of the adjustments made, the claimant did not suffer a substantial disadvantage.

65. On the basis of that analysis, we considered the steps taken by the respondent to avoid the substantial disadvantage which the claimant was put to (in terms of section 20(3)).

66. We accepted the respondent's representative's reliance on *Romec v Rudham UKEAT/0069/07/DA* and *Royal Bank of Scotland v Ashton 2011 ICR 632, EAT*. We accepted that the focus should be on the practical result of any adjustment. The practical result of the adjustments made by the respondent from the outset of the claimant's employment was that the claimant had exclusive use of the desk / workstation allocated to him. The practical result of the steps taken by the respondent were so that no other staff could book that workstation/ desk. The steps taken by the respondent had the practical effect of permanently allocating a particular workstation/ desk for the claimant's use.

67. We appreciated that the workstation booked for the claimant's use did not always fully meet the claimant's needs. We appreciated that the claimant was not satisfied with the time taken before all adjustments required by the claimant were in place. We were limited by the Judgment of the PH to only considering the issue of allocation of a permanent desk space. Although prior to location 2.116 the claimant's desk/workspace allocation was not permanent, in the sense of being forever, it was not disputed that from the outset and throughout the claimant's employment with the respondent the claimant has always known which particular desk was booked for his use. It was not until the email in May 2023 that the claimant or his Line Manger expected the allocated desk / work to be used by anyone else. The booked desk / workstation was effectively booked for the claimant's sole use throughout this employment. From the outset and throughout the claimant's employment with the respondent there was a permanent allocation to the claimant such that the hot desking policy did not apply to him. Although there was one occasion when the claimant found someone at his desk and asked them to move, there was no dispute that the claimant was always allocated a particular workspace and did not have to hot desk. There was no issue with the claimant's entitlement to ask that employee to move so that the claimant could use the desk/workstation allocated for his use. The desk / workstation allocated to the claimant was effectively booked throughout his employment for the claimant's sole use.

68. The steps taken by the respondent to permanently book a desk / workstation for the claimant's use were the steps which were reasonable for them to take to avoid the disadvantage of the hot desking by default policy applying to the claimant. Because of the steps taken by the respondent to ensure that a particular desk/workstation was always booked for the claimant's use, the disadvantage the claimant would have been put to on application of the hot desking by default policy to him was avoided. Had that policy been applied to the claimant, the claimant would have suffered a disadvantage. Had the policy of hot desking been applied to the claimant he would not always have a desk / workstation booked out for his sole use and would have required to book a desk / workstation in the same way as other employees. On application of the hot desking by default policy, the claimant would not always be booked to use a desk / workstation which met his requirements (or at least some of his requirements) and he would have suffered pain. On the findings in fact, the respondent took such steps as it was reasonable for them to take to avoid that disadvantage.

69. In relation to the limited issue which falls for our consideration, the respondent took the following steps:

- Booking a desk for sole use by the claimant every working day each week, initially booked under his Line Manager's name and then booked under the claimant's name.

- Ensuring that other Line Managers knew that the desk booked for the claimant's use was not available to be booked by other Team Line Managers.

70. By taking these steps, the respondent avoided any substantial disadvantage to the claimant which the normal application of the hot desking by default policy would have had on him. The practical effect of these steps was that the claimant was allocated a desk for his permanent use. It was not expected that anyone else would use the desk / workstation allocated to the claimant until Fiona Buggy raised that possibility in her email of 11 May 2023 (410). Despite that suggestion that the desk / workstation used by the claimant may

be used by others when he was not in the office (e.g. when the claimant was on holiday) that never occurred. Once that suggestion was made, and the claimant raised his concerns, it was accepted that the desk / workstation would continue to be for his sole use on each working day.

71. We accepted the respondent's representative's position that the claimant suffered no substantial disadvantage in relation to the narrow issue which is for our consideration. The evidence before us showed that the claimant's concerns, and his pain and anxiety, was because of the issues re the placement of his desk / workstation, and the issue with provision of a monitor which could be easily moved by him. Any disadvantage suffered by the claimant in relation to the lighting or in relation to provision of a suitable monitor are not part of our consideration, given the limiting effect of the PH decision.

72. We accepted the respondent's representative's reliance on *Smith v Churchill Stairlifts*. We accepted that on an objective basis the respondent had taken all reasonable steps to avoid the disadvantage the claimant would have suffered from on application of the policy of hot desking by default. On the evidence before us, the claimant was not put to a substantial disadvantage because of the steps taken by the respondent to ensure that he always had a particular booked desk in the office, on every working day.

73. The issue of signage and steps taken to ensure that no one touched the equipment provided for the claimant's use was not part of the limited issue we were confined to by the PH decision. In any event, we found that the steps taken by the respondent in allowing the claimant to put signage on his desk, in arranging for signage to be put on his desk, in arranging for the measured chair to be kelp in a particular cupboard and in placing the desk / workstation booked for the claimant's use in an area least likely to be passed by employees were reasonable steps for them to take to avoid the disadvantage of the claimant suffering pain because the specific work equipment had been touched and the settings put out.

74. The claimant made concessions in relation to the periods of disadvantage. His position was that there were two periods of when he suffered a disadvantage because he (in his view) did not have a permanently allocated desk space: (1) from July 22 until Aug / Sep 22 then (2) from May 23 until Feb 24.

75. The claimant's position was that the disadvantage he suffered from in the period from the end of training in July 2022 until the move to location 1.04 Aug/Sep 22 was *'uncertainty'.* We accepted that during that time the claimant did experience uncertainty about where his permanent desk/workspace allocation would be located. We did not accept that, on analysis under section 20(3) that uncertainty was a substantial disadvantage in comparison with persons who were not disabled. The email communications at the time are concerned with the lighting requirements and provision of an easily adjusted monitor. The claimant's Line Manager at the time was not aware of any issue re the desk allocated for the claimant's use being used by anyone else. On the evidence before us the claimant did not prove that he suffered a substantial disadvantage in that period because there was uncertainty about where his allocated desk would be permanently located.

76. The claimant's position was that the disadvantage he suffered from in the period from his receipt of Fiona Buggy's email until the official signage was put in place (from May 23 until Feb 24) was stress & anxiety that someone else might use that desk/workspace & pain if someone did move the equipment. The claimant accepted that his Line Managers provided him with reassurance that the desk/workspace allocation where the specialist equipment used by him was would not be booked to be used by anyone else. On the evidence before us, the claimant did not prove that he suffered a substantial disadvantage as alleged. The claimant did not prove that his work equipment was used by anyone else in that period. His evidence was unclear on when he had found someone working at his allocated workstation. The evidence from both Nicola Watson and Mathew Kelly that they were not aware of any issue with the claimant's allocated desk/workstation being used by others was significant. It was not in dispute that in that period the claimant

knew that each working day he would be working at the desk/workstation location at 2.116. In that period, the practical effect of the steps taken by the respondent were that they had made arrangements to permanently allocate a desk for the claimant's exclusive use.

77. The claimant did not have sickness absence. There was no medical evidence before us to support his position that his need for routine meant that any pain suffered at work was preferrable to being absent on sick leave. We accepted that the claimant suffered pain because of the delay in allocation of a suitable monitor. The claimant did not prove that he suffered pain because of a failure to permanently allocate him a particular desk/workstation. There was no evidence of increased pain in that period or related visits to his GP. The claimant accepted that he was getting reassurances from his Line Managers that the particular desk / workstation would always be booked for him. There was no evidence of exacerbation of the claimant's condition because of any failure in permanently allocating a desk for the claimant's use. On the evidence before us, the claimant did not prove that he was put to a substantial disadvantage because of others touching the work equipment supplied for his sole use.

78. There was no suggestion that what the claimant considered to be reasonable adjustments was not reasonable: all steps required by the claimant in relation to allocation of a permanent workstation to him have been taken. The claimant's position was that the time taken for all steps required by him to be put in place was not reasonable.

79. For the above reasons, we reached conclusions on the identified issues as follows:

- Did the PCP of 'hot desking by default' put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

  No – because that PCP was not applied to the claimant.

- If so, what was that disadvantage?

The claimant suffered no disadvantage from the application of the PCP relied upon

- Was that disadvantage substantial?

No. The claimant suffered pain because the workstation provided for his use could not easily be adjusted so that he could work from both a sitting and a standing position. That issue was causing the claimant upset, stress and anxiety as well as pain due to the workstation not being optimal for him. There was no medical evidence before us of any particular reason why the claimant should be provided with additional reassurance that no one else would be allocated his workstation. The provisions put in place by the claimant's line managers were working so that no one else was allocated that workstation. The practical result of the steps taken were that the claimant has had a permanently allocated workspace throughout his employment with the respondent. The claimant was allowed to place signs asking that the equipment would not be touched. In these circumstances, we accepted the respondent's representative's submission that no substantial disadvantage was suffered by the claimant. The claimant did not prove that he suffered a substantial disadvantage because others used or touched the work equipment allocated to him.

- In the period from July 2022 to February 2024, what steps did the respondent take to avoid that disadvantage?

As set out in the findings in fact

- Was it reasonable for the respondent not to provide an allocated workspace for the claimant's sole use until February 2024?

The basis of that question is not borne out by the findings in fact. In practical terms, the claimant has been provided with an allocated workspace for the claimant's sole use from the outset and throughout his employment with the respondent.

- Is the claimant entitled to any compensatory award in respect of any breach of the Equality Act 2010, and if so in what amount, having regard to the impact of any such unlawful treatment on the claimant?

  No

- Is it appropriate for the Tribunal to make any recommendation(s) under section 124(3) Equality Act 2010?

  No. In all these circumstances, the respondent did not fail in their duty to make reasonable adjustments. All requested adjustments have been taken in respect of the claimant.

80. For these reasons, the claimant's complaint under section 21 of the Equality Act 2010 is not well founded and is dismissed.

Date sent to parties **27 March 2025**