EMPLOYMENT TRIBUNALS

Claimant: Iram Rafique

Respondent: Imperial College Healthcare NHS

Heard at: in person at the Central London Tribunal on the first day and then with the Claimant attending via CVP thereafter

On: **4, 5, 6, 7 March 2025 and 10 and 14 March 2025 (in Chambers)**

Before: Employment Judge Woodhead
Mr P Lewis
Ms P Keating

Appearances

For the Claimant: In person on 4 March 2025 and then via CVP thereafter

For the Respondent: Ms J Whiteley (Solicitor Advocate)

JUDGMENT WITH REASONS

The unanimous decision of the Tribunal is:

1. The complaint of direct disability discrimination is not well-founded and is dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

3. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

4. The complaint of harassment related to disability is not well-founded and is dismissed.

REASONS

THE ISSUES

1. The Claimant remains in the Respondent's employment and made the following complaints:

1.1. Direct disability discrimination (Section 13 Equality Act 2010 ("**EqA**"))

1.2. Discrimination arising from disability (Section 15 EqA)

1.3. Reasonable adjustments (Sections 20 and 21 EqA)

1.4. Disability harassment (Section 26 EqA)

2. There was a preliminary hearing for case management on 10 June 2024 ("**the June CMPH**") at which a List of Issues was agreed. The Claimant suggested that she might amend her claim but then did not apply to do so. A public preliminary hearing listed for 14 August 2024 did not go ahead because the Respondent conceded that the following impairments of the Claimant amounted to distinct disabilities at the relevant time:

2.1. hearing impairment

2.2. vertigo

2.3. migraines

THE HEARING

3. This claim was listed for a hearing of four days at the June CMPH. At that hearing the Claimant asked for the final hearing to be listed in person. The orders from the June CMPH record:

> *8. The Claimant has indicated that the following adjustments would be helpful:*
>
> *(i) The witness table is moved so that it faces the parties' desks so that she can lipread both when answering questions during cross examination and when asking questions of the Respondent witnesses*
>
> *(ii) If possible she is placed in a room with a hearing loop*
>
> *(iii) The hearing is conducted in a Tribunal room that is not next to Kingsway to reduce the background noise*

4. We made clear that the Claimant and anyone participating in the hearing could ask for breaks if they needed them.

5. At the start of the hearing we explained the process to the Claimant and made clear that she needed to prepare her questions for cross examination of the Respondent's witnesses (she confirmed that she had done so). We made clear that she should focus on the matters in the List of Issues when cross examining the Respondent's witnesses. We explained the importance of the list of issues as defining the matters that we would be asked to determine and therefore the focus that the parties should put in cross examination.

6. We explained that if a witness is not challenged on the evidence in their witness statement the Tribunal is entitled to accept that evidence (take it at face value) and that if the Claimant did not challenge a witness on a material point then that

could affect the Claimant's ability to establish her case.

7. We reminded witnesses under oath that they were not permitted to communicate with others about the case during breaks or adjournments while they were giving evidence under oath.

8. We were provided with the following documents:

   8.1. A Bundle of 588 pages. On the first day this was extended to 590 pages by the disclosure by the Respondent of an additional email (the Claimant did not object to this being put before the Tribunal). Page numbers in this bundle are referred to with [].

   8.2. Witness statement bundle of 46 pages including statements for:

      8.2.1. The Claimant (7 pages) [CWS]

      8.2.2. **Mr B Ashraf** (the Claimant's partner) (1 page) [BAWS]

      8.2.3. **Mx F Sim** (the Claimant's Trade Union Representative) (7 pages) [FSWS]

      8.2.4. **Mr S McKenzie** (11 pages) (the Claimant's first line manager) [SMWS]

      8.2.5. **Ms M Rajanikanth** (15 pages) (Mr McKenzie's manager and the grievance hearing manager) [MRWS]

9. We sought to clarify the List of Issues. We agreed that matters raised in the List of Issues needed to be clearer and it is regrettable that the parties had not done this work before the start of the final hearing. A significant part of the first day of the hearing was lost to this with the Tribunal having to hold the pen in finalising the list of issues which the Respondent approved subject to one amendment on the evening of the first day and which the Claimant approved at the start of the second morning of the hearing. This agreed List of Issues is in the appendix to this Judgment.

10. We also discussed and agreed a timetable for the hearing. Substantial time was also taken on the first day in clarifying which page numbers of the bundle the Claimant intended to refer to in her witness statement. The Claimant's witness statement included no page references.

11. At the end of the first day the Claimant sought to amend her witness statement. We heard submissions from both parties on that. We concluded that it was in the interests of justice to:

   11.1. At 2.2 [CWS] allow the Claimant to amend her statement to read "6th of March first day back in person we discussed reasonable adjustments, however no support was provided to support my disability". The Respondent did not object to this amendment.

   11.2. At 2.6 [CWS] allow the Claimant to correct her statement to refer to December 2023 not 2024. The Respondent did not object to this amendment.

11.3. Allow the Claimant to include the following sentence in her witness statement: "*In late February 2023 Stephen asked me to search for suitable headsets this conversation was recorded on an email chain via my nhs work account which I can no longer [access] and was deleted.".* The Respondent objected to this inclusion but we permitted it on the basis that the balance of prejudice was in favour of the Claimant:

4.1.1. It related to a matter in the claim and the email disclosed that day by the Respondent.

4.1.2. The Respondent could take instructions from Mr McKenzie and he could give evidence in chief on the point.

11.4. Allow the Claimant to add "(6 January 2023)" after the words "inception of my employment" in paragraph one of the Claimant's witness statement as this just added precision to the time, before her employment started, that the Claimant referred to and so there was no or very limited prejudice to the Respondent.

12. During periods when we were not addressing the matters referred to above we read the witness statements.

13. At the end of the first day:

13.1. the Respondent agreed to prepare and agree a chronology with the Claimant to be ready before submissions;

13.2. the Claimant asked, because of her vertigo and migraines, to attend the hearing the following day via CVP. The Respondent objected on the basis that it was the Claimant that had asked for an in person hearing and pointing to the fact that in her disability impact statement the Claimant referred to difficulties with use of screens.

14. We discussed the three options (hybrid, fully remote and fully in person hearing) and the practical arrangements and difficulties with each. We decided that it was in the interests of justice to allow the Claimant to attend remotely via a CVP and for her partner to swear his evidence remotely (the Respondent having confirmed that it did not intend to cross-examine him). We asked that Mx Sim attend the hearing in person to give their evidence. The hearing adjourned at around 16:20, there having been no opportunity to hear any evidence on the first day. Before finishing we recapped and agreed the timetable with the parties.

Day 2 – 5 March 2025

15. On day two, 5 March 2025, we started to hear the Claimant's evidence. This took longer than anticipated because the Claimant frequently needed to write the question down before answering it. She had mentioned previously that she had dyslexia but during the course of day two also disclosed that she has had a diagnosis of dyspraxia. She attributed her need to write some questions down and the time it took to answer questions to her dyslexia and dyspraxia and it was unfortunate that this had not been raised before as something relevant to the timetable for the hearing. During her evidence there were six matters which she

said she needed to check in the bundle because she could not recall them. We noted them for her and asked her to check them in her clean copy of the bundle before the start of day three. Before adjourning the hearing we warned the Claimant not to talk to anyone about the case while she remained under oath and we reminded her to ensure that she had finalised her questions for the Respondent's witnesses, making sure that her questions related to and covered all the issues in the List of Issues.

Day 3 – 6 March 2025

16. We had intended to allow the Claimant to deal with the six points in respect of which she wanted to check the bundle by way of re-examination of herself after Tribunal questions. However, at the start of the third day we decided (the Respondent having concluded its primary questioning of the Claimant) that it would be in the interests of justice to ask the Claimant to confirm those six points so that the Respondent could ask any follow up cross examination questions based on the answers she gave. This was essentially her process of re-examination but resulted in the Claimant giving extensive further evidence. We then moved to Tribunal questions.

17. We warned the Claimant that the time she was taking in answering questions would restrict the time she had available to cross examine the Respondent's witnesses. Ms Whitely confirmed that she had cut down her cross-examination questions.

18. During her evidence the Claimant sought to introduce a further 21 pages to the bundle which, having established what the document was, the Respondent did not object to. We therefore admitted that evidence but this inevitably consumed further time.

19. Mx Sim then gave evidence. Mr Ashraf then gave an affirmation and swore his witness statement via CVP and the Respondent confirmed that it did not need to cross-examine him. We then had to break for lunch.

20. After lunch the Claimant began her cross of Mr McKenzie. We reminded the Claimant of the limits on her time throughout the afternoon and sought to level the playing field for her by:

    20.1. Helping her frame the questions she appeared to be asking;

    20.2. Reminding her that she needed to challenge evidence that she did not agree with that was relevant to the List of Issues and that if she did not do so then we might take the witnesses' evidence at face value and that might hinder her ability to advance her case.

    20.3. Pointing her to the List of Issues (for example, the fact that a number of complaints are for direct discrimination and harassment and that those complaints gave rise to different questions);

    20.4. Reminding her of the limits on time;

20.5. Reminding her that she did not need to get the witness to agree, she just had to challenge their evidence and it may not be a productive use of time to repeat questions she had already asked;

21. At the end of the day we recapped on the timetable, the process of submissions and made clear that we would need to have heard the evidence by lunchtime on day four so that we could hear submissions in the afternoon. We encouraged the Claimant to work on her cross-examination questions and reminded her that time taken with Mr McKenzie was time she would not then have with Ms Rajanikanth. We reminded the Claimant that she needed to review the chronology prepared by the Respondent so that it could be ready for the submissions stage.

22. **Day 4 – 7 March 2025**

23. By the start of day four the window of time for finishing witness evidence and hearing submissions had of course narrowed. At the start of the day we therefore discussed a strict timetable with the parties and invited comment from them before finalising it. The Claimant, in her comments on the timetable, asked that the Respondent's witness answer her questions quickly. We confirmed that we would be watchful of this but noted that the Respondent's witnesses had, by and large, been doing so and delays had predominantly occurred in the Claimant's questioning of the witnesses. The Claimant confirmed that she had done further work on her questions.

24. The Claimant had not provided comments on a chronology prepared by the Respondent but confirmed that she would do so after the evidence had concluded. She provided comments before the end of the day and added new dates. The Respondent then noted where it disagreed or agreed with the additional dates inserted by the Claimant and sent it to the Tribunal shortly after the hearing had concluded. The Claimant made a more general complaint about the chronology referring to events that post-dated the Claim but she herself made substantial reference to post-claim events in her closing submissions.

25. We allowed some slippage in the timetable and gave the Claimant frequent warnings about the passage of time.

26. At the close of the cross examination of Mrs Rajanikanth the Claimant appeared to put it to Mrs Rajanikanth that the reason the Claimant had agreed that she had said that she did not need alternative noise cancelling headphones if working from home was that she had been put under pressure to agree that position. This had not been our understanding of the Claimant's case and we therefore sought to clarify the Claimant's question and position by reference to her own witness statement, the adjustments she had asked for at this hearing (she was not using headphones) and her evidence under cross examination. The Claimant later suggested that I had questioned her disability. I explained that that was not the case, that the Respondent accepted disability (subject to knowledge) and that I had been seeking to clarify the Claimant's own position.

27. Before the break for lunch the Claimant said she had heard Mrs Rajanikanth's answers to the Tribunal's questions (all of which were posed by Ms Keating) but not the questions themselves. We took a break for lunch and for the parties to finalise their submissions.

28. After the lunch break at around 15:15, Ms Keating repeated for the Claimant the questions that she had posed to Mrs Rajanikanth. We obtained copies of the Respondent's written submissions and those submitted by the Claimant just before the end of the lunch break which the Respondent had not seen. We then read both sets of submissions until 15:50. The Respondent confirmed that this also afforded them sufficient time to consider the Claimant's newly obtained submissions. We heard the Respondent's submissions between 15:50 and 16:24 and the Claimant's oral submissions from 16:24 to 16:45. The hearing concluded at 16:49, the Claimant having confirmed that she would want written reasons.

FINDINGS OF FACT

29. Having considered all the evidence, we find the following facts on a balance of probabilities.

30. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

31. The Respondent is a large NHS Trust. It provides acute and specialist healthcare, principally serving the local communities in the eight boroughs that form the North West London Integrated Care System. The Respondent employs around 15,000 members of staff across its five hospital sites in central and west London: St Mary's; Charing Cross; Hammersmith Hospital; Queen Charlotte's and Chelsea; and the Western Eye Hospitals.

32. The Claimant has been employed by the Respondent as an Outpatients Call Handler since 16 January 2023. She remains in the Respondent's employment.

33. Mr McKenzie is employed by the Respondent as Service Manager, Band 7, working within the Patient Service Centre, Division of Women's Children and Clinical Support. This is a role into which he has been seconded since October 2024. Prior to that he was Outpatient Service Support Manager in the Patient Service Centre [233].

34. The Respondent receives over 12,000 calls per week. One of Mr McKenzie's duties is to oversee the operations of the room (which he referred to as a 'hall') where the Call Handlers work. As Service Manager and Outpatient Service Support Manager Mr McKenzie came to have direct line management for Call Handlers when there was a shortage of Service Support Managers (this is the role that would normally have management responsibility for employees in the Claimant's role). Management of call handlers is quite fluid with Service Support Managers stepping in for each other and managing different pods. Mr L Galvin was another Service Support manager [SMWS21] and he came to hold a Stage One sickness absence meeting with the Claimant on 30 June 2023.

35. Before starting employment at the Respondent Mr McKenzie worked as a Care Home Manager. He has 20 years' experience of working with adults with learning and physical disabilities.

36. Mrs Rajanikanth started employment with the Respondent in December 2023.

She is Deputy General Manager - Outpatient Access. She, amongst other things, provides support to the Service Support Managers. She usually has between four and five direct line reports, depending on staffing levels. Mr McKenzie reports to Mrs Rajanikanth. Before Mrs Rajanikanth started work at the Respondent, Mr McKenzie reported to Ms H Richards-Ruddock (interim Service Manager/Outpatient Access Team).

37. The Claimant was interviewed in late 2022 by Mr McKenzie. She had previous experience of working in a call centre and she impressed Mr McKenzie at interview. Mr McKenzie did not know he would come to have line management responsibility for the Claimant (as part of the very large call handling team which is divided into pods). He introduced himself with this first name at interview. He did not then have contact with the Claimant until after she had started work.

38. It was the recruitment manager (Ms Sylvie Karozi) and Miss Nusaiba Aided (Recruitment Officer) who then handled the Claimant's 'onboarding' and it was anticipated that Ms T Doyle would be the Claimant's manager when she started [191, 205]. New starters are assigned to a pod during their training period and the manager for that Pod then becomes their line manager (subject to the fluidity of line management referenced above). During their training call handers nonetheless also have a manager as a point of contact. For the Claimant this was initially Ms T Doyle and then became Mr McKenzie, on a purely ad hoc basis, at some point in January 2023.

39. As part of the interview the Claimant was shown the 'hall' in which the Call Handers' work. The hall is a large room split into two with 86 work stations (each with a computer and two screens). Mr McKenzie and the Claimant walked through the hall to a glass fronted meeting room at the other end where the interview was conducted. Mr McKenzie asked the Claimant whether it was an environment in which the Claimant thought she could work and the Claimant did not raise any concerns (whether about her hearing impairment or anything else).

40. We accept Mr McKenzie's evidence that he did not at that time independently realise that the Claimant wore hearing aids and that part of the reason for that was that the Claimant wears a head scarf that covers her ears. The Claimant in her cross examination of Mr McKenzie appeared to take offence at this, saying words to the effect of "*Do you think my disability has to be visible to be considered a disability or does it mean that I do not fit your stereotype?".* She said this was offensive. Mr McKenzie quite sensibly explained that not all disabilities are visible and he did not consider that he stereotyped disabilities. We find that the Claimant did not tell Mr McKenzie that she had a hearing impairment, he did not make assumptions about her and because she was wearing a headscarf he could not see that she wore hearing aids – so there was nothing visual to prompt a realisation at that time that she had a hearing impairment.

5 December 2022 – pre employment OH assessment

41. On 5 December 2022, the Claimant underwent a pre-employment health assessment with the Respondent's Occupational Health team ("OH"). OH produced a report which noted, amongst other things [315-316]:

Background

We discussed her pre-employment questionnaire and she tells me the following:

She reports partial hearing loss on the left ear. She wears hearing aid for both ears but reports that noisy environment sometimes affects her hearing. She states wearing headset for a long time affects her hearing. She states taking short breaks from headset in her previous work helped improve her hearing. She states she would like to take mini rest breaks from the headset.

She was diagnosed with dyslexia at university. She states she is able to do her job and does not need any adjustment for work.

Summary

From my assessment and based on the information provided to me today by Ms Rafique. I would advise that she is fit for work.

I would advise that she take mini rest breaks from call centre as I believe this can help improve her hearing.

Complete a DSE assessment with her to identify and address any issues or concerns she may have in the workplace.

I have not arranged a further appointment with her but feel free to contact us again if further occupational health advice is required in future.

42. The Claimant says that she told the Respondent and OH before she started work that she needed noise cancelling headphones that were comfortable to wear over her hearing aids. We consider, on the balance of probabilities that she did not and that, had she done so, then it would have been mentioned in the OH report.

Pre employment checks

43. We were presented with two unconditional offer letters, one dated 4 January 2023 which was in the original bundle and confirmed the Claimant's start date of 16 January 2023 [205]. The second, produced by the Claimant while she was giving evidence, was dated 6 January 2023 [591-611] and attached the statements of terms and conditions which also appeared at [192-204].

44. A letter of 1 November 2022 [188-189] constituting the conditional offer of employment included the following:

[…]

ID check

You will also receive an email with a link/QR code and instructions from […] to upload your ID documents and supporting proofs of address. […]

> *We will be carrying out an ID check appointment via Microsoft Teams Video call. You can join either on your computer or by using your mobile app. Please book your ID appointment within 2 days as this should be completed before you can start working with us. […]*
>
> *In line with NHS regulations we are now required to see your original ID documents in person, therefore could you please come to one of our drop in sessions below.*
>
> *Monday 0930 – 1230 hrs 1330- 1600 hrs*
>
> *Wednesday 0930 – 1230 hrs 1330- 1600 hrs*
>
> *Friday 0930 – 1230 hrs 1330- 1600 hrs*
>
> *[…] This check should not take more than 10 minutes and you can drop in at any time during the specified times above.*
>
> *Please note that until this check is done we will not be able to book a start date for you to commence working with us.*

45. The Claimant said that the 6 January 2023 letter evidenced that she attended the Respondent in person on 6 January 2023 and suggested that she told Mr McKenzie on that date that she needed noise cancelling headphones that were comfortable with her hearing aids. Mr McKenzie denied that he met the Claimant before her start date, other than at the interview, or that the Respondent knew of this requirement. He explained that the Claimant did not know his surname and would not have seen him that day because her onboarding was managed by the recruitment team. We accept this evidence and do not think it probable that in a short attendance at the Respondent simply for the purpose of the inspection of her ID documents that the Claimant would have chosen that time to mention her headphone requirements.

16 January 2023 – Claimant starts employment

46. The Claimant started work at the Respondent on 16 January 2023. We were provided with a copy of the Claimant's thirteen week training plan [206-212]. We accept Mr McKenzie's assertion that during the training plan the Claimant was under the supervision of the training team, not him or other operational managers.

47. The Claimant said at the hearing that the reference to "Call listening" on Wednesday 25 January 2023 of the Training Plan [206] is evidence that she was having to wear a headset from early in her training and that she also raised her need for a more comfortable, noise cancelling headset on this date. Many aspects of the Claimant's complaints were not dealt with by the Claimant in her witness statement and this was one of them.

25 January 2023 – broken hearing aid

48. On 25 January 2023 the Claimant had a problem with a broken hearing aid and she told Mr McKenzie in an email [226] saying "*I need to be referred to OH so I can be fast tracked to Audiology for my hearing aids*". Mr McKenzie a few minutes later acknowledged her request and offered to do her OH referral then and there

with the Claimant at his desk. The Claimant then replied with the details of her hearing aids and the nature of the problem. We accept Mr McKenzie's evidence that this was the first time he knew that the Claimant wore hearing aids (the earlier OH report not having been sent to him and the Claimant not having mentioned it to him).

31 January 2023 DSE assessment

49. On 31 January 2023 the Claimant completed her display screen equipment assessment [213-215] and included replies to questions posed as follows [214] making no reference to the need for noise cancelling headphones:

> ***F ENVIRONMENT***
>
> ***Lighting***
>
> *Has glare and / or reflections on the screen been eliminated e.g. from lights, desks, windows, open blinds etc?* ***- Yes***
>
> *Does the lighting enable you to view your screen and keyboard clearly?* - ***Yes***
>
> ***Noise***
>
> *Are the general noise levels in your work area acceptable?* ***Yes***

50. On 2 February 2023 the email chain in which the Claimant had given Mr McKenzie details of the problems with her hearing aids was sent on again to an Audiology Service Delivery Manager at the Respondent and the same day that team said they need more information about the problem and that the Claimant would need a referral to them from her GP [223].

6 February 2023 and snarky comments incident

51. On 6 February 2023 the Claimant replied but did not provide a GP referral and repeated the issue she was having with her broken hearing aid (the volume button on the right hearing aid was broken/jammed so she could not adjust it). It appears that the Respondent's audiology department agreed to try to help the Claimant without a GP referral and told her where to come to find them. That day Mr McKenzie walked with the Claimant to show her where the audiology department was and they talked during that walk (lasting about 6 to 8 minutes). Mr McKenzie then left the Claimant with that team trying to help her resolve the problem. It was during their walk to audiology that the matters which are the subject of 3.1.1.8 of the LOI occurred.

52. After the Claimant saw the audiology team she sent Mr McKenzie the following email at 12:02 on 6 February 2023 [219]:

> "*Hi Stephen,*
>
> *I have just attended the audiology department at Imperial and unfortunately, they were unable to resolve the issue with my hearing aid. I have an appointment with my Audiology clinic tomorrow at 3pm, is there a chance that I can leave work at 2pm?*

> *Also, regarding my hearing I would just appreciate if you could speak slightly louder and faced me so I can lip-read, that would be helpful. I didn't appreciate your response to "shout" at me when I informed you that I did not hear you say you would escort me to 1st Floor South Wing, thank you.*
>
> *Kind regards,"*

53. Mr McKenzie replied at 13:06 the same day as follows [218]:

> *I'm sorry that they were unable to resolve the issue with your hearing aid. In regards to your appointment tomorrow you can use a few hours annual leave to leave early.*
>
> *Apologies if you didn't appreciate my response and poor choice of words as I meant speak louder and shouldn't be interpreted in a negative way as talking louder is one way of addressing the issue of hearing problems in my limited knowledge.*
>
> *It would be useful if you share with the relevant people how to communicate with you effectively whilst you are having issues with your hearing aid to ensure your specific needs are being met as this would not be something that most people will be familiar with and it will help avoid confusion and miscommunications.*

54. Mr McKenzie's evidence was [SMWS11]:

> "*I was surprised to receive this email from Miss Rafique as we had chatted on the way to and from the appointment. I apologised for my poor choice of words and advised that I thought that speaking louder was one way to help address Miss Rafique not being able to hear me. I also suggested that Miss Rafique let us know an effective way to communicate with her while she was having issues with her hearing aids [218 - 219].*"

55. The Claimant complains that Mr McKenzie made "*snarky and unprofessional comments*". However, she only gave details of the one comment having been made. In her witness statement [CWS2.1] she simply alleged that Mr McKenzie said "*next time I'll shout*" as a response to the Claimant when she told him she could not hear him. On the balance of probabilities we find he did use these words. Mr McKenzie accepted that it was a poor choice of words and what he meant was that he would speak louder. The Claimant said that [CWS 2.1]:

> "*This made me feel belittled and embarrassed as I was shocked to receive that response from management. I emailed him to express that I was disappointed by his response, to which he acknowledged and apologised for. I appreciated his apology and had moved on from it*."

56. In cross examination it was put to the Claimant that there was nothing to suggest that Mr McKenzie had said what he said with the purpose of harassing the Claimant and that it was just a poor use of words. The Claimant accepted this and accepted that she did not raise it again until she brought her claim and that she did not raise as an allegation in the grievance which Mrs Rajanikanth looked into. In cross examination it was put to the Claimant that, had the comment

amounted to unlawful harassment and had it had the effect that it was alleged to have had then the Claimant would have included it in that grievance. The Claimant accept that she would have but said that it was nonetheless "*definitely rude*". She accepted in cross-examination that Mr McKenzie apologised and that she had moved on.

57. We note here that in the email exchanges which included Mr McKenzie between 25 January 2023 and 6 February 2023 [218-227] on the topic of her hearing aids the Claimant did not refer at all to a need for her to be provided with headphones that were noise-canceling and more comfortable to wear with her hearing aids. We find that she did not raise the need for alternative headphones at this time with the Respondent. Accordingly we find that the Claimant did not have difficulty listening into calls on 25 January 2023 (an exercise simply designed to give trainees an opportunity to understand what patient calls are like) because of a lack of noise cancelling or more comfortable headphones. Any problem she had was because of a fault with her hearing aid [206]. We do not consider that on 25 January 2023 the Claimant would have had to wear a headset for an extended period of time or that the requirement to have mini rest breaks would have applied.

Summary of sickness absence

58. The Claimant's sickness absence periods can be summarised as follows:

58.1. **1 February to 3 February 2023** – three days' self certified absence attributed by the Claimant to: *diarrhoea, vomiting, ENT problems, headache, migraine fever, vomiting, sore eyes* [216-217]. Manager comments on the Claimants self certification were: ***Action to taken to support the Claimant's return to work****: Other: Iram returned to work as normal.* ***Further actions:*** *No further action and other: Iram to read the sick leave policy*;

58.2. **14 February – 22 February 2023** – seven days' self certified absence attributed by the Claimant to: *cold, diarrhoea/vomiting, ENT, headache/migraine, MSK - other joint/limbs, fever/vomiting and sore eyes* [228-229]. Manager comments on the Claimants self certification were: ***Action to taken to support the Claimant's return to work****: Other: Iram returned to work as normal.* ***Further actions:*** *formal meeting*. This was also covered by a fit note recording the Claimant as unfit for work due to *dizziness, muscle pain and vomiting* [317].

58.3. **1 March 2023 to 3 March 2023** – three days' self certified absence attributed by the Claimant to: *eyes, headache, migraine* [230]. Manager comments on the Claimants self certification were: ***Action to taken to support the Claimant's return to work****: Other Iram returned to work as normal.* ***Further actions:*** *formal meeting*;

58.4. Absence from **8 March 2023 to 15 May 2023** which was:

4.1.3. Recorded on the Respondent's systems as attributable to ENT problems [239].

4.1.4. Was covered by a fit notes recording that the Claimant was unfit for work (8 March 2023 to 6 April 2023) with vertigo [318] and [319]. **This**

was the first time that the Respondent was told by a medical practitioner that the Claimant was suffering with vertigo but there was no suggestion that it would be long term.

58.5. Whilst there is a gap between this fit note and the next fit note of 25 May 2023, there is no evidence that the Claimant returned to work in the intervening 10 day period.

58.6. **25 May 2023 – 31 August 2023** covered by a fit note following assessment by a GP on 6 June 2023 specifying that the Claimant was not fit for work by reason of vertigo [112], [251], [319]. On **11 August 2023** the Shrewsbury Road Surgery issued a letter saying [111]:

> […]
>
> *This 26-year-old lady has been seen by me for ongoing vertigo symptoms, intermittent ear pains, and also migraines when staring at computer screens. She is awaiting an ENT assessment for her symptoms.*

58.7. **1 September 2023 to 25 September 2023** covered by a fit note following assessment by a GP on 13 September 2023 specifying that the Claimant was not fit for work by reason of vertigo, migraines, earache [113] [257]

58.8. **18 September 2023 to 23 October 2023** covered by a fit note following assessment by a GP on 18 September 2023 specifying that the Claimant was not fit for work by reason of vertigo [114] [258]

58.9. **24 October 2023 to 6 March 2024** covered by a fit note following assessment by a GP on **6 December 2023** specifying that the Claimant was not fit for work by reason of vertigo, migraine, earache (awaiting ENT appointment) [114] [277].

59. It is therefore the case that the Claimant was only in work for a period approximately 12 working days before having her first period of sickness absence. She then only attended work for about 10 working days before 8 March 2023 and there is no evidence (such as return to work meeting notes) that she returned to work from then until the end of the claim period (ending with the Claimant issuing her claim on 28 February 2024).

60. We note here that the Claimant's assertion was that the fit notes referred to above only recorded that the Claimant was not fit to work because she had told the GP's that the Respondent was not prepared to make adjustments for her. We do not accept that assertion. It is not probable that a number of GPs would have said that the Claimant was not fit for work if in fact they thought she could work with adjustments. Had the GPs thought the Claimant was fit for work with adjustments then they would have recorded that as their opinion and specified the necessary adjustments. Even if, which we do not accept, the Claimant told those GPs that the Respondent had told the Claimant that it was not prepared to make adjustments it would have been contrary to the Claimant's interests for the GPs to have said that she was not fit to return to work (leaving aside any professional duty to accurately record their opinions). It would have been contrary to the

Claimant's interests because it would have removed her ability to pressure the Respondent for a return to work with adjustments and to assert her rights. It might also have led to a quicker absence management process and potential dismissal of the Claimant for capability. If we are wrong and the Claimant did tell her GPs that the Respondent was not prepared to make adjustments then she had no basis for telling her GPs that.

27 February 2023 – return to work meeting and noise cancelling headphones

61. On 27 February 2023 the Claimant had a return to work meeting with Mr McKenzie. We find that it was at this meeting that the Claimant first raised with the Respondent her need for alternative noise cancelling headphones that would sit more comfortably over her hearing aids. Had she asked for noise cancelling headphones at an earlier date there would have been a record of it and there is no evidence that the Respondent was resistant to obtaining them for the Claimant but the Respondent reasonably needed to make sure that what it ordered worked for the Claimant and was compatible with the Respondent's equipment.

62. We do not have the notes of that meeting but we have an email chain [589-590] which the Respondent found at the start of the hearing (whilst it was helping the Claimant identify the bundle page numbers relevant to her witness statement). It is the email chain that the Claimant refers to in issue **3.1.1.6** where she complains that the Respondent failed to respond to or acknowledge information that the Claimant sent to the Respondent about suitable headsets. In that email chain:

> ***Mr McKenzie said:***
>
> *Dear Iram*
>
> *Glad to see you well and back to work.*
>
> *We need to meet to do your return to work. Let's do so in the meeting room.*
>
> *Regards*
>
> ***After the meeting the Claimant replied***
>
> *Hi Stephen,*
>
> *Thank you.*
>
> *Please see some suggestions for my phone- I am of course no expert so it would be a case of trial and error if possible.*
>
> *· Shokz OpenRun Pro*
>
> *· Yealink MP50 Wireless W720 Headset*
>
> *· Plantronics Savi Office W710 Cordless Headset*

· Geemarc CL7400 Opti - Amplified Wireless and Foldable TV Headset with Optical Connector - Works with Televisions, Smartphones and Computers - Low to Severe Hearing Loss - UK Version

Kind Regards,

63. Mr McKenzie did not acknowledge or reply to this email and the headphones that the Claimant had suggested were not ordered. We accept the Respondent's evidence that it was not as simple as ordering the headphones. The Respondent, for understandable reasons, has to order non-standard equipment from an approved supplier which does not stock all varieties of headphones. It was appropriate and sensible to ask the Claimant what she had used in the past because it increased the chance, if headphones she suggested could be procured from the approved supplier and were compatible with the Respondent's equipment, that the headphones would be comfortable for the Claimant with her hearing aids. However, we also accept the Respondent's evidence that the equipment into which the headphones needed to be connected did not have standard headphone sockets and the Respondent still had to ensure that the headphones would be compatible with its equipment. Procuring the right headphones was therefore not as simple as ordering what the Claimant suggested. We accept that this all had to be investigated by the Respondent and the headphones were not ordered at that time because the Claimant was in the process of completing her necessary 13-week training for her role and then had further extensive episodes of sickness absence which meant that she had to restart her training, was not placed on calls and therefore did not require a noise cancelling headset.

Return to work meeting 6 March 2023

64. As detailed above, the Claimant was on sick leave from 1 to 3 March 2023. Mr McKenzie undertook a return to work interview on 6 March 2023 [230 - 231] and we accept his evidence that the Claimant made no mention requiring any adjustments to support her return to work. We accept Mr McKenzie's evidence that the Claimant did not ask to work from home as she alleges and returned to work on Monday 6 March and Tuesday 7 March as normal before commencing long term sick leave on 8 March 2023.

30 June 2023 Stage one sickness absence meeting and policy

65. We were provided with the Respondent's sickness absence policy [133-146]. That policy provides, amongst other things:

2. PURPOSE & SCOPE

A good level of staff attendance is crucial to us in providing quality care to our patients, and supporting our colleagues' wellbeing. This policy applies to all employees of the Trust, including our medical workforce, and provides a framework for us to consistently and fairly manage short and long term sickness absences. This includes making reasonable adjustments if needed for disabled colleagues, in line with the Equality Act 2010.

For advice and support with using this policy, please contact your

manager or your trade union (TU) representative.

[...]

11. RETURNING TO WORK

After any sickness absence, there needs to be an informal discussion between you and your line manager. This should be on the first day back at work wherever possible, and your manager will make a note of it on the self-certification form. The confidential meeting should cover how you're feeling now, whether there's any support you need (such as an OH referral), and updates on anything that you've missed while you're away.

Where the absence has been prolonged, a more detailed return to work plan may be needed to support you with a successful return to work. It's important to give your manager as much notice as possible of when you will be coming back so this can be agreed and put in place, including any OH referrals, GP advice and/ or workplace assessments that may be needed to inform the process.

The return to work plan may include a temporary change to the type of work that you'll be doing, a phased return or other adjustments. A review date will always be built in for any changes, unless these are agreed as permanent adjustments.

A phased return is where the individual returns on a part-time basis and gradually builds up their working time over a specific, agreed period until they are back up to their contracted hours and doesn't include bank shifts. Your own GP may recommend a phased return, but we may also seek advice from OH if a phased return is being considered to make sure that we have a specialist medical view. Where OH recommend a phased return, we will fund up to thirty hours (pro-rata for part time staff) for the whole period of the phased return, other than where the individual has had a previous phased return in the past year (based on a rolling year). Where this has happened, the total hours funded will not be more than thirty. You can ask to use outstanding holiday entitlement to support a more gradual or extended return to work, or request a temporary reduction of hours and pay via the Flexible Working Policy.

13. REVIEW POINTS

• Every employee is an individual with their own individual circumstances, and while this will always be taken into account, it's important for fairness and consistency to have specific review points that will prompt a more detailed discussion about absence. The points are usually:

• Short term -within a rolling year for full time colleagues (pro rata for part time), whichever of these is reached first:

o 5 periods of sickness;

o 8 working days or 60 hours

• Long term – any absence of 4 weeks or more.

• Any noticeable trends or patterns, such as time off sick around holidays, weekends or other periods of leave/ non-working time.

Sickness absence that is related to a colleague's pregnancy will not be counted when calculating whether a review point has been reached. Reasonable adjustments to the review points may also be appropriate where absence is related to a disability.

[…]

14. INFORMAL MANAGEMENT

If your sickness absence record is approaching one of the review points, your manager may arrange an informal confidential meeting with you to talk about how we work together to try to support your health and wellbeing, or your recuperation reasons for absence will always be taken into account, particularly when these are related to a known disability or Covid-19. These meetings are for you and your manager to discuss support for you and they do not preclude you from consulting with your TU representative before or after the meeting, if you wish.

15. FORMAL MANAGEMENT

Where a review point has been reached, and the informal meeting has already happened (or your manager has made reasonable efforts to have the meeting with you), a formal process may be the next step if your manager has concerns about your long term or short term sickness absence levels and/ or patterns to your sickness absence. If there is a formal meeting, you will have at least seven calendar days' notice of this. You are welcome to bring a trade union representative, colleague or other companion (other than a practising lawyer) to the formal meeting, and someone from the People & OD team may also be present. Disabled colleagues may also choose to have a second companion who has knowledge of their disability and its effects, such as a support worker.

There is a three-stage formal process for addressing unacceptable levels of absence. The aim of the formal process is to try to improve the situation, and in many cases latter stages will not be needed. Where issues persist, such as where it is unclear if or when someone will be well enough to return to their current role, other routes may be considered, such as redeployment (temporary or permanent) or ill health retirement, subject to eligibility.

The three stages are summarised below.

*• **Stage 1 meeting** – a solutions-focused discussion of the issue, acknowledging current impacts on the service/ team. The outcome and*

expected improvement should be confirmed in writing within 7 calendar days of the meeting. There will be a monitoring period usually between 4 to 12 weeks, following this meeting to make sure that the necessary improvements are made. The length of the monitoring period is decided on a case-by-case basis, taking into account whether the absence is short or long term. If enough improvement is made, no further review meetings will be needed.

• ***Stage 2 meeting*** *– run in a similar way to the stage 1 meeting, the stage 2 meeting happens if attendance is still a concern. After considering all the facts – including any mitigating circumstances – it may be that there will be a further monitoring period of up to 12 weeks, and notification that if attendance continues to be a concern over the following 12 months then it is possible that things will move to stage 3. A potential outcome of stage 3 is dismissal, so other options and possible reasonable adjustments should always be explored first. As with the stage 1 meeting, the outcome should be confirmed in writing within 7 calendar days.*

• ***Stage 3 meeting*** *– if attendance is still a concern after the informal, stage 1 and stage 2 meetings (and more than one stage 2 meeting can be held, if this is felt to be appropriate), then a stage 3 formal meeting may be held. Only a senior manager (band 8b or above) can conduct this meeting, and will always be accompanied by someone from the People & OD team. Possible outcomes of the meeting are an extension of the monitoring period, redeployment or dismissal (with notice) on the grounds of capability. If a colleague was considering ill health retirement, the Pensions Manager would advise on submitting an application separate to this procedure. The line manager will prepare a case summary for the person chairing the hearing, and the individual will have the chance to respond to it. The case summary should include:*

o Up-to-date attendance records

o Impact of the absences on the service and team

o Records of the previous meetings to discuss

o Occupational Health or other medical advice

o Any adjustments considered or already implemented

o Details of the alternatives to dismissal that have been explored (and the reasons why these have not been feasible to date).

Any member of staff who is dismissed from the Trust has the right of appeal under our Appeals procedure.

66. The Claimant was invited to and attended a stage one sickness absence meeting under this policy with her then line manager Mr Galvin on 30 June 2023. The Claimant had been absent for 86 working days over 6 episodes due to sickness and was at that time unable to work due to vertigo. The Claimant's

sickness absence was therefore well over the four week long term absence trigger point.

67. The Claimant complained that the Stage One meeting was held before an informal meeting had been held under the policy. Mx Sim pointed to a potential inconsistency in the policy in that the informal section says "*your manager may arrange an informal confidential meeting with you"* but the formal section says (emphasis added) "*Where a review point has been reached, and the informal meeting has already happened (or your manager has made reasonable efforts to have the meeting with you), a formal process may be the next step…".* Mx Sim said that therefore an informal meeting had to be held before a Stage One meeting could be held.

68. We find that the Claimant had had informal meetings with her managers in the form of Return to Work meetings. She had not had an informal meeting since her absence had become continuous and long term but, given that the Stage One meeting is designed to be supportive (and was supportive in the case of the meeting conducted by Mr Galvin), there would have been no practical benefit to either the Claimant or the Respondent in holding an 'informal meeting' rather than a Stage One meeting. The discussion points and outcomes would have been the same.

69. The Claimant was not warned at the Stage One meeting that she needed to improve her attendance or she would be dismissed. The purpose of the Stage One meeting was to discuss the Claimant's sickness absence and to look at ways to support her health and wellbeing and her return to work. At the meeting it was agreed that the Claimant would be referred to OH. The Claimant agreed to provide weekly updates to Mr Galvin about her health [252 - 253]. As such the Stage One meeting did not amount to unfavourable treatment of the Claimant or any sort of detriment [LOI 3.1.1.7 (an allegation if less favourable), 4.1.1, 6.1.1.7 (harassment)].

OH report of 1 August 2023

70. The Claimant had a consultation with OH on 1 August 2023 and OH produced a report which commented as follows [254-256]:

> ***Background***
>
> *Iram was referred for advice and support related to long term sickness absence.*
>
> *Iram tells me that she has been absent from work for approximately three months due to vertigo and frequent headaches/migraines. She was seen by her GP who believed her symptoms to be related to a problem in her right ear. She was sent for an MRI scan and referred for an urgent ENT review. She is currently waiting for an appointment to see the ENT team.*
>
> ***Current situation***
>
> *Iram remains off sick for the time being and has been signed off until 01.09.23.*

Unfortunately, she reports no improvement in her symptoms since being off sick. She describes continuing frequent vertigo attacks, which are random and intermittent with no specific identified triggers. She has also been experiencing frequent headaches/migraines likely related to the problems in her right ear. As a result, she tells me she is unable to leave the house except for essential medical appointments. Fortunately, she is well supported by family at home.

Summary

From my assessment and based on the information provided to me today I would advise that Iram remains unfit for work.

Recommendations and Future Outlook

Iram has an appointment with her GP this week. I have asked her to speak to her GP to expedite her ENT appointment given the ongoing impact on her physical and emotional wellbeing, quality of life and her attendance at work. I am unable to predict when she may be able to return to work at this time as this will depend on her symptoms improving hopefully following ENT intervention. It may be worthwhile re-referring Iram when she feels able to return for advice regarding any adjustments which may be required to facilitate her return.

As you are aware Iram has a history of hearing loss in both ears for which she wears hearing aids. I would recommend that she has a workplace assessment on her return for recommendations regarding any required adjustments for her hearing loss. Iram would be able to arrange this via the link below:

Get help at work - RNID

The costs for the assessment and any required adjustments will need to be met locally by your department or via an Access to Work grant as detailed in the link.

I have signposted Iram to Contact -the confidential staff counselling service for further support if required regarding the emotional/psychologica! impact of her symptoms.

[…]

Specific Questions not already addressed

2. Is a full recovery likely?

Hopefully yes in time or at least her symptoms will stabilise and become manageable following further assessment and treatment as required.

6. Is the condition likely to impact on attendance in the future?

Yes, at least in the short term until her symptoms improve.

7. Does the employee's health make them able to provide regular and efficient service in the foreseeable future?

Not for the time being but this should improve in the longer term as her symptoms improve.

I have not arranged a further appointment with Iram but feel free to contact us again if further occupational health advice is required in the future.

This report can only be advisory in nature and it is a management decision to determine the operational feasibility of the advice, adjustments, and/or recommendations provided.

71. Based on this Report there was nothing immediately that the Respondent could reasonably have been expected to do. The Claimant was not fit to work and there was no suggestion that she might be fit to work from home [5.2.1 and 5.2.2]. The Claimant did contact Access to Work but did not pursue it because she did not think that they would be able to respond in an appropriate timescale?. As detailed above, the Claimant remained on sick leave and not fit for work (with or without adjustments).

Stage 2 sickness absence meeting 4 October 2023

72. On 15 September 2023 Mr Mckenzie took over line management for the Claimant from Mr Galvin and he invited her to a Stage Two sickness absence meeting. There was some correspondence between him and the Claimant as to the arrangements [259-261] and it was agreed that the meeting would take place on 4 October 2023 via Microsoft Teams so that Mx Sim could attend with the Claimant. The Claimant was provided with the sickness absence policy as an attachment to the MS Teams meeting [261]. The Claimant referred in her correspondence with Mr McKenzie to the meeting being a disciplinary meeting but it clearly was not a disciplinary meeting and there was nothing to suggest that it was (the Claimant's notes of the meeting record the fact that he made this clear at the meeting [322]). The meeting invitation recorded [263-264]:

Date 3rd October 2023

Dear Iram

Re: Invitation to Rearranged stage 2 sickness absence meeting

Following your request, I am writing to invite you to a stage 2 sickness absence meeting which will take place as you requested on 4th October 2023 2:00pm via Microsoft teams.

The reason for the meeting is that unfortunately you continue to be on sick leave after the meeting on 30th June 2023. Let's talk about how you are and what support/treatment you are accessing. Let's also discuss what we might be able to do to support your return to work and review the advice from Occupational Health / your GP / your specialist have given, to see if there are any adjustments that might help you return to work/stay well at work.

If you would like to have someone with you at the meeting, you're welcome to bring a trade union representative, colleague or friend. Please let me know who you'd like to bring. John Marsden from Employees Relations will be attending the meeting with me to join the discussion.

I have attached a copy of the Trust sickness absence policy. Please don't hesitate to get in touch with me if you have any questions in advance of the meeting. I look forward to seeing you.

Just as a reminder, you may like to consider getting in touch with our CONTACT team who can offer confidential counselling and support with coping in difficult situations. […]

Yours sincerely,

73. The notes of the meeting that took place record [265-266]:

Stage 2 Sickness Absence 04.10.23 – 2pm

Iram Rafique – (trainee) call handler

Choo-Chen Sim (Fiona) – BECTU Rep

Stephen McKenzie – Service Support Manager

John Marsden – HR

Green tablets in September but the migraines are still there. These are helpful. But the vertigo is still there. This is a trial of this tables. If this does not work the does can be increased.

Right ear perforated drum on waiting list for Homerton.

Doctors reckon its all part of the same things.

If Homerton refer then it can be expedited.

Have hearing aids in both ears.

Really bad light sensitivity.

Not fit for work.

Asked if can work from home: What could you do? Small hours, rest breaks. At home she would not need the headset.

Training not completed. She was nearing the end – needed the last bit, the phone call training. Has completed the online training.

Reasonable adjustments: OH recommended she find a set [they need to be noise cancelling]; but she went off sick.

Can any adjustments be made for the training: can it be done at home?

How long to complete the training? Its flexible and adaptable but depends on where she is.

Headset is only an issue when on site.

Things to check:

Stephen will…[within a week]…

Check training with the team. How much left?

Can the training team work remotely for listening?

Special equipment for home inc an IP phone.

Can she work home as a reasonable adjustment?

Access to Work – Iram will contact them

If the training can be delivered, then next steps will be:

Phased return -

Flexible working.

74. We accept Mr McKenzie's evidence that at the meeting Mr Marsden of HR advised that a request to work from home in the Claimant's case would be classed as a reasonable adjustment request [SMWS29].

Knowledge of disability

75. The Respondent accepts that from **7 August 2024** the Claimant's conditions of vertigo and migraines amounted to disabilities. The Respondent knew or should have known that migraines and vertigo were having a substantial adverse effect on the Claimant's day to day activities in February/March 2023. **By October 2023 these conditions had clearly lasted for seven or eight months**. The Respondent did not seek guidance from OH as to whether the conditions would be long term and we consider that had they asked that question at that point, because they were discussing long term options with the Claimant (such as Access to Work) and because there appeared to be no foreseeable treatment plan that would resolve the conditions, the Respondent could reasonably have been expected to know that the conditions would be long term by 4 October 2023. We therefore find that the Respondent could reasonably have been expected to know that that the Claimant's vertigo and migraines amounted to disabilities from **4 October 2023**.

Actions following Stage 2 meeting

76. On 31 October 2023 a Training, Quality Assurance and Service Improvement Manager confirmed to Mr McKenzie by email (following a discussion that they had had the previous week and an email exchange they had had between 5 and 16 October 2023) [267-268] that:

76.1. The Training Teams' preference was for learners to train onsite as it

widens the available support network new starters often need when they are training and learning.

76.2. They could train administrative tasks remotely with good connectivity and communication with learners.

76.3. Calls training would need to take place onsite.

76.4. As the Claimant had been out of the office since May she would need to be retrained on registration followed by e-RS training, pod bookings training and calls training.

77. On 1 November 2023 Mr McKenzie intended to send, but did not send, a Stage 2 outcome letter [273] which read:

> ***Re: Outcome of Stage 2 sickness absence meeting***
>
> *Thanks for meeting with me on 04.10.2023 to review your sickness absence. You came to the meeting with Foo Foo Chiem (Fiona) and you were happy to proceed.*
>
> *John Marsden from HR also joined us to take part of the discussion. I started by clarifying that this is a sickness review meeting and not a disciplinary meeting as you wrote in your email.*
>
> *We talked about your sickness absence/s and you said that your health had improving a little with medication for your migraines/not changed. I explained the purpose of the meeting was to discuss how we can work together to support your health and wellbeing for your return to work.*
>
> *I was sorry to hear that you still aren't well. You said that your GP/specialist had told you that you are on the waiting list for a procedure/operation at Homerton hospital.*
>
> *In the last 12 months you have been absent for 145 working days / hours over 6 episodes due to sickness. We reviewed the reasons for your absences and we talked about the help that you are accessing and whether there is anything we might be able to do to help you improve your attendance.*
>
> *You said you are still suffering headaches and vertigo. Sometimes you have to sit in darkness as you get sensitive to light*
>
> *You said Homerton suggested if we can get you seen at Imperial but we said that can only be done through a referral from a health professional.*
>
> *We agreed you would contact Access to work to see what support they can give you whether they can access your workstation/provide transport to work*
>
> *We agreed you would contact your GP to inquire if Homerton hospital could make a referral to Imperial without risking your current position on Homerton's waiting list*

We agreed you would try to get details of the procedure/operation so we can possibly check the waiting times at Imperial to ascertain if it was worth getting a referral at CX

I asked if there was anything else we could do to support you and you said you would like to work from home because of your health issues.

I said that this would be a flexible working request which is dealt with by senior management. John was specific and said this would be fall under a reasonable adjustment request.

John asked if you had contacted Access to work to see what support they can offer as they can offer transport to work and you said you hadn't.

I informed you of our onsite/offsite arrangements we have in place for our staff team and the required infrastructure you would require and the equipment (IP Phone).

I said that staff are normally added after they had completed their training.

We discussed the type of headphones that you had used in previous employment as you said the noise in the background was an issue when you did some call listening during training in the office.

We discussed, what you had covered in training to date and you asked if you could be trained remotely.

I said that this will depend on the training team and what training is outstanding as some training would be difficult to do remotely not only to ensure you have the support but also something like calls training and listening would require you to be sat with staff in the office.

We agreed I will inquire with the training team where you are actually on your training plan and whether it was possible to complete the remaining training remotely.

I said that the outcome letter is normally within 7 days but could be 7-10 days as I would need feedback from the training team.

I realise this is a difficult time so please consider getting in touch with our CONTACT team who can offer counselling and support with coping in difficult situations. […]

If you would like to discuss the content of this letter, please do not hesitate to contact me.

78. We accept Mr McKenzie's evidence [SMWS31] that the meeting was a positive one and that steps had been agreed to help facilitate the Claimant's return to work once she was fit to return. However, at this stage, as was subsequently confirmed in the fit note of 6 December 2023, she was not fit to return with or without adjustment. The Claimant complained that Mr McKenzie had been

offensive in misnaming Mx Sim in this letter. We accept Mr McKenzie's evidence that this was simply an error and do not draw any inferences from it as to Mr McKenzie's attitude to the Claimant or Mx Sim.

79. On 24 October 2023 the Claimant chased Mr Mckenzie by email for an update following their meeting [324]. He replied on 30 October 2024 to say [324]:

> *"[…] Apologies as I missed this and I'm just catching up on my emails following a week filled with meetings and 3 days of interviewing.*
>
> *I will send an update tomorrow with the required forms for which you need to submit your requests. […]*"

80. The Claimant chased again on 13 November 2023 [325] and asked how she could raise a formal complaint about how her reasonable adjustments for her disability were being handled. We accept Mr McKenzie's evidence that the 1 November 2023 letter was intended to be a summary of the stage two sickness absence meeting, he thought he had emailed a copy to the Claimant but transpired that it had not been attached to the email. On 15 November 2023 [325] he therefore replied to the Claimant as follows:

> *I sent you an update on 01/11/2024 to both your personal and work email as shown in the attached email.*
>
> *Please can you confirm if you have submitted the required form as I wasn't copied in and may have missed it.*
>
> *[…]*
>
> *If you want to raise a formal complaint please contact my line manager Hannah who will advise you. I have copied her in for your convenience.*

4 December 2023 request for adjustments

81. On 4 December 2023 the Claimant completed the form setting out the details of the adjustments that she wanted to be made [274-276] and sent it to Mr McKenzie by email [326]. She said:

> **In her cover email:**
>
> *[…]*
>
> *In our Stage Two meeting, there was no mention of me having to request a flexible working arrangement, it was stated that this would be discussed on your part with the training team to see if my reasonable adjustments for WFH were feasible or not. I never heard back from yourself, the team, or HR.*
>
> *Moving forward, please kindly note that I have attached my flexible working arrangements request for your information, Please confirm that this has been received to avoid further miscommunication. Also, could you shed some light on how long the wait time is to hear a response/outcome? Thank you.*

[…]

In the form:

I am writing to formally request consideration for flexible working arrangements due to ongoing health concerns that have recently begun to impact my ability to perform effectively under the current work schedule.

I have been diagnosed with vertigo, a condition that often leads to heavy migraines and severe disorientation. These episodes can be unpredictable and significantly impair my concentration and overall productivity. Additionally, I am managing a partial hearing disability, which sometimes makes communication in a traditional office environment challenging, particularly during migraine episodes where my symptoms are exacerbated.

The combination of these health issues has prompted me to seek a more adaptable work schedule. I believe that with flexible working arrangements, such as the option to work from home or to have adjustable start and finish times on days when my symptoms are particularly acute, I can maintain my productivity and continue to meet my job responsibilities effectively.

This adjustment would not only help me manage my health better but also ensure that I can continue contributing to the team without compromise. I am committed to maintaining open communication with my supervisors and team members to ensure that my work remains on track and that any adjustments do not adversely affect our team's operations.

I am happy to provide any medical documentation or further information if required, and I am open to discussing how this arrangement could be structured to minimize any impact on the team and company operations.

Thank you very much for considering my request. I am hopeful for a positive response and a mutually beneficial arrangement. Please let me know if there is a formal process I should follow, or any additional steps I need to take as part of this request.

Yours sincerely,

Iram Rafique

[…]

What is the change that you are requesting? ***To be allowed to work from home***

What is the time period of the request? From ***Current****……To…****ongoing****. Permanent* ☐

[…]

Is this part of a reasonable adjustment request? Please see the supporting staff with disability policy for further details: ***Yes***

82. The Claimant did not complain on the form that she had been required to complete it. The form was also clearly intended to serve the purpose of either helping the Respondent understand an employee's flexible working request or a request to make an adjustment for a disability. Of course a disabled employee does not need to request a reasonable adjustment for an Employer to have a legal obligation to make an adjustment. There is a clear risk in the Respondent's approach of dealing with both matters via the same form (not least because it could mislead a manger as to the Respondent's obligations and cause confusion and/or delay). However, here it did not cause a delay because the Claimant was not fit to return to work, with or without adjustments, and the implementation of adjustments she asked for was not a prerequisite for her being able to return to work.

83. We find that the natural interpretation of the Claimant's request was that she wanted to be granted the "*option to work from home*" rather than for her home to become her only place of work and that she wanted the adjustment to continue indefinitely. She also wanted the indefinite adjustment of being able to adjust her start and finish times on days when her symptoms were particularly acute and for this adjustment also to continue indefinitely.

6 December 2023 fit note

84. On 6 December 2023, the Claimant's earlier fit note having expired on 23 October 2023, the Claimant attended her GP and was again signed off as unfit for work and the GP noted that the Claimant was awaiting an ENT appointment. This fit note was not provided until 29 May 2024 [MRWS51] [502-503].

85. Hannah Richards-Ruddock, Mr McKenzie's then line manager, contacted the Claimant on 6 December 2023 to arrange a meeting with the Claimant which took place on 19 December 2023 [327].

20 December 2023 grievance

86. On 20 December 2023 the Claimant raised a grievance [313- 327, 329] in which she said:

In the cover email:

Hi Stephen,

I hope you are well.

I am writng to raise a formal grievance.

I have a complaint about the disability discrimination I have experienced while requesting reasonable adjustments. The lack of communication, and support I have received, not to mention the incorrect advice I was given to apply for flexible working hours when I need reasonable adjustments for my disability and ill-health.

I would be grateful if you could let me know when I can talk to you about

my grievance. I would like to be accompanied by Fiona and Hannah who are both CCd at the mee ng, thank you.

At the head of the body of the grievance

I have a complaint about the disability discrimination I have experienced within my role at the PSC as a Contact Centre Advisor. As you are aware of my hearing impairment and diagnosis of vertigo/migraines, I believe no action has been taken to support me. The little guidance I have been provided with is incorrect as confirmed by both my Trade Union representative, Fiona, and HR manager, Hanna Ruddocks. As you are aware, I have requested reasonable adjustments to help accommodate my disability, instead, I was instructed by you to apply for flexible working arrangements. This has caused me a great deal of stress, anxiety, worry and not to mention financial loss. My mental wellbeing has also been severely affected. Please see below the evidence I have attached in the form of screenshots of our email communications.

I would be grateful if you could let me know when I can meet you to talk about my grievance. I would like to be accompanied at the meeting by my Trade Union representative, Fiona.

[…]

87. The grievance makes clear one of the key differences in the understanding of the Claimant and the Respondent. The Claimant's case is that the Respondent continued to fail to help her return to work during the course of 2023 and that she told the Respondent that she was fit to return to work with adjustments on 4 October 2023. This is not what the notes of the meeting record and we do not accept this assertion by the Claimant. In making such an assertion the Claimant unreasonably ignored the fact that:

87.1. the medical evidence she submitted made clear; and

87.2. what she told OH (and OH then reported to the Respondent) made clear; and

87.3. what she had said at the 30 June 2023 and 4 October 2023 meetings made clear;

that she was unfit to return to work regardless of any adjustments that the Respondent might be able to make. The Claimant's grievance suggests that she was ready to return to work [323]. However, as we note above, the Claimant's GP note of 6 December 2023 makes clear that she was not fit to return to work (with or without adjustments) pending an ENT appointment. The Claimant did not submit that note to the Respondent and the expiry of her 23 October 2023 fit note, because of the Respondent's systems, triggered erroneous salary payments to the Claimant which the Claimant did not draw to the Respondent's attention. There was nothing that the Respondent could have done that would have helped the Claimant return to work over that period. From October 2023 there was discussion of things that might help in the future (such

as a working from home arrangement) but, even then, there was nothing that the Respondent could do because there was nothing to suggest in the medical evidence that the Claimant submitted that the Claimant was able to return to work with any such adjustments. If the Claimant, considered that she was fit to return to work with adjustments then she did not make this sufficiently clear either to the Respondent or to her own GP (when she spoke to a GP on 6 December 2023).

88. The Respondent would have been legitimately perplexed by the Claimant's complaint given that the Claimant had not made clear that circumstances had changed and she considered that she was fit to return to work with adjustments. Had the Respondent known at that time that the Claimant had on 6 December 2023 been again signed off as unfit to work until March (with or without adjustments) pending an ENT appointment and was therefore in fact not fit to return to work with adjustments then that would have only added to the confusion.

89. Mr McKenzie acknowledged the Claimant's email on 21 December 2023 [328] saying:

> *I acknowledge receipt of your email and I'm aware that you have sent further details of your grievance to Nisa.*
>
> *I'm sorry to hear that the whole experience has been unsettling for you but rest assured we are keen to resolve the issue.*
>
> *As Nisa will explain, our senior managers are on leave at present and we have a new manager in place so we will have to get back to you next week to arrange a meeting to talk about your grievance.*
>
> *In the mean me I hope you enjoy the festive season and New year celebrations.*

90. Mrs Rajanikanth contacted the Claimant on 2 January 2024 to arrange a meeting to discuss the Claimant's grievance.

91. On 4 January 2024 the Claimant contacted ACAS [9] and the Claimant continued to have correspondence with Ms Richards-Ruddock and Mrs Rajanikanth in January 2024. In her email of 25 January 2024 the Claimant omitted Mrs Rajanikanth [334].

92. On 26 January 2024 Mrs Rajanikanth sent the Claimant the following email [343]:

> *Hope you are well. I am sorry that I was unable to join the meeting on 8th Jan 2024 when you met with Hannah. I am keen for us to meet to discuss your concerns outlined in your grievance and mutually agree on action plans to ensure you have a smooth transition to work.*
>
> *This is an opportunity for us to work collaboratively to understand what immediate support can be provided to you. As recommended by the trust policy, we will work with you to resolve your concerns informally at this*

meeting.

Please rest assured that you are still be able to proceed with formal process if you note that your concerns are not addressed fully following the informal meeting.

Please let me know your availability for week commencing 29th January and I will work around your dates. If you would like to bring your trade union representative, please do so.

Wishing you a restful weekend

93. That evening the Claimant declined an informal meeting and said that she had 'raised a formal grievance with ACAS against the Trust' and asked Mrs Rajanikanth to liaise with the ACAS conciliator.

94. On 1 February 2024 Mrs Rajanikanth sent the Claimant an email which included the following [358]:

The purpose of the meeting is to discuss my findings following the concerns you have raised in your grievance and offer you appropriate solutions, discuss your absence from work and the support to facilitate smooth return to work. I note that the early reconciliation is currently open until 15th February 2024 and it is important that we meet to discuss with you so you are informed of the next actions and put support arrangements in place.

I understand you would like to work from home when you are having ad-hoc dizzy spells 'flare ups' and I am able to accommodate this but we need to discuss this in more detail when we meet as I need to clarify some of the information you included in the request form.

I would also like to make another OH referral to further assess any additional support you may require while you are working on/off site. To avoid further delay, I would be grateful if you could please confirm your consent in writing so that I could submit your referral by end of this week.

7 February meeting with Mrs Rajanikanth

95. On 7 February 2024 there was nonetheless an informal meeting under the Respondent's Resolution Policy to discuss the Claimant's grievance and that evening the Claimant wrote: "*Thank you for taking the time to meet today (7th February 2024). As agreed, I look forward to receiving the summary overview of this meeting by the 9th of Feb and the outcome letter by 15th February 2024. Thank you.*" [356].

96. This was the first time that the Respondent had clarity that the Claimant, notwithstanding the GP note of 6 December 2023, nonetheless thought she might be fit to return with adjustments.

7 February 2024 OH referral

97. On 7 February 2024 Mr McKenzie submitted an urgent OH referral [440] which he chased two days later and Mrs Rajanikanth chased on 13 February 2024

[378-379]. No report was then received and the Respondent must have been content to progress with attempting a return to work on a phased basis as proposed by the Respondent without confirmation from her GP or OH that she was fit to return with adjustments. The absence of an OH report was then overtaken by events. Mr McKenzie contacted the OH team on 10 April 2024 as he had understood the appointment was due to take place in March 2024. The OH team confirmed to him that an appointment had been scheduled for the Claimant on 23 March 2024, but that the clinician had not been able to get hold of her [439] and [SMWS49].

9 February 2024 outcome email

98. On 9 February 2024 Mrs Rajanikanth sent her outcome email which read as follows [365-366]:

> *Dear Iram,*
>
> *Thank you for attending the resolution meeting on Wed, 7th February 2024. Please find the summary of main points from our discussion yesterday as below. As agreed, a full outcome letter will be sent to you by 15 Feb 2024:*
>
> *Attendees*
>
> *IR - Iram Rafique*
>
> *FCSS - Fiona Choo-Sen Sim Bectu Trade Union Representative*
>
> *[…]*
>
> *1. IR is fit to return to work if the requested adjustments are put in place.*
>
> *2. MR provided an update on the recommended OH adjustments and IR's requests to ensure smooth transition to work:*
>
> *a. Mini rest breaks from the headset once IR is fully trained and ready to undertake the calls independently*
>
> *b. Noise cancelling headsets - MR had contacted trust approved supplier and recommended headset order to be place today*
>
> *c. Op on of working from home if IR encounters dizzy spells/vertigo while she is getting ready to work. IR informed that the occurrence may be 3-4 days a week. IR to contact the line manager at the earliest convenience so rota changes could be made accordingly.*
>
> *d. Phased return - agreement outlined below*
>
> *4. Phased Return arrangement*
>
> ***Week 1, commencing 12th Feb 2024***

2 half-days, working from home (2 x 3 hours and 45 minutes) - Mon & Thu from 9am to 12.45pm

Week 2, commencing 19th Feb 2024

2 full days and 1 half-day, working from home (2 x 7 hours and 30 minutes from 9am to 5pm (Monday & Tuesday) and 1 x 3 hours and 45 minutes from 9am to 12.45 pm on Thursday))

Week 3, commencing 26th Feb 2024

4 full days, working from home(4 x 7 hours and 30 minutes) - Mon, Tue, Thu and Fri 9am to 5pm

Attending hospital appointment on Wed, 28th Feb 2024

Week 4, commencing 4th March 2024

Full-time, 4 days working from home and 1 days working on site 9am to 5 pm - IR to come to the office on Monday.

In line with our policy, during the phased return, the hours that IR will work, she will be paid for in the normal way. In addition, the Trust will pay for a total of 30 hours that IR will not be at work. It has also been agreed that the remaining hours that IR will not be at work for will be marked as annual leave so that IR receives full pay.

5. Sickness Management - IR was concerned about her sickness being proceeded to stage 2 without noise cancelling headset and home working she said she had verbally requested and that further absences may result in a stage 3 meeting. AN and MR acknowledged delay in commencing discussions about requested adjustments and miscommunication. IR was reassured that the sickness absences are reviewed and considered case by case basis and the nature of sickness reasons and length of sickness absences. The trust policy clearly outlines that stage 2 meetings can be conducted more than once where needed and therefore, should there be further concerns about IR level of sickness absence, the manager may arrange a stage 2 meeting.

6. PC login and NHS Mail reset - MR logged a call with ICT and reference number is 364143. IR to contact ICT before 12th Feb to reset her PC login and NHS mail. ICT contact number: 020 331 5555

7. MR also flagged that after the last GP certificate that ended on 23 October 2023, IR sickness record was ended, which resulted in a full pay being paid to IR for the rest of October, November and January. This constitutes an overpayment and the normal process for the organisation is to recover the overpayment. However, AN proposed that this aspect is negotiated via ACAS under a formal agreement within the conciliation period. IR said she could review whether she has any more recent GP certificates and to forward them to MR and request a backdated

certificate from 24 October 2023 and forward to MR. IR said that she was fit to return to work from 24 October 2023 with adjustments. In such case, however, a GP would normally issue a certificate that states the person 'may be fit to work with adjustments'.

Wishing you a restful weekend and will catch up with you on Monday via teams.

99. The Claimant responded on 9 February 2024 [364-365]:

Thank you for the summary, however there are some slight inaccuracies/missing information that are important to acknowledge. Please see below & feel free to correct me if I'm wrong.

1) There has been no written acknowledgment of your management team failing to adhere to your own policy guidelines procedures regarding sickness absence meetings. By Anita's own admission, the guidelines were not correctly adhered to by my line manager, Steven McKenzie.

Therefore, your refusal to agree to draw a line under this, has damaged the little trust I had in you and is quite illogical. To say that I will remain on Stage Two is frustrating especially when my reasonable adjustments, i.e. to work from home were requested verbally to my manager. I am struggling to understand why my disability, a condition that I am unable to control is being vilified instead of being supported.

2) Coincidentally, there has been no written acknowledgment that following my second occupational health referral there was no follow up report sent to me by my line manager, ie Stephen McKenzie. Not to mention no action or support was offered to me by the Trust after my first OH report either, despite me providing solutions. I was ignored. This had a disastrous effect on my ability to receive the reasonable adjustments I required to support my return to work. It also caused severe delays and disruptions in my ability to return to work. And to be frank, it has caused me severe levels of anxiety and depression that have been debilitating to manage alongside my disabilities.

3) Point number 7 has some inaccuracies. I did not receive full pay for the month of October 2023.

Preparation for phased return to work

100. The Claimant was due to return to work on 12 February 2024 on a gradual phased return to work. She was due to work entirely from home until the fourth week (commencing 4 March 2024) by which point it was hoped that she would be back to full time hours. In that fourth week the plan was for the Claimant to work at home and only come on site for one day. Progress was to be kept under review and for an assessment to be made at that point as to adjustments that might be needed after the initial four weeks.

101. In anticipation of the Claimant's return to work Mrs Rajanikanth asked the training team to plan for the Claimant to restart her training [368-369]. On the

Friday before the Claimant's return to work (9 February 2024) the Claimant exchanged email with Ms A Niczyporuk (Associate HR Business Partner), with Mrs Rajanikanth on copy, as regards the Claimant's IT access. The Claimant sent an email that afternoon saying "*Mathy FYI- my appointment is at 9:45 am I will most likely finish at 10 am so the earliest I can start work is at 11 am. My ability to come into the office is of course dependent on my vertigo. However, I will ensure that I maintain communication on with you/Anita*.". By the end of that day the Claimant had a new IT password but needed to call the IT on Monday 12 February 2024 to get a new email address set up [370].

Feasibility of supervising call handling training from home

102. We accept the Respondent's evidence that it is common practice for call handlers to work from home and that the 'hall' where they work does not in fact have capacity for all of the Call Handlers to attend site. However, we also accept that it is not possible for a Call Handler to complete the final part of their training, when they need to be supervised in active call handling, working from home ("**call training**" as distinct from "**call listening**"). This is because there is no way for a call handler and their trainer to both be present on the same call and for the trainer to give effective supervision to the trainee if the trainee is at home. This is because the trainer has to be physically present with the trainee and to be plugged into the same hardware as the trainee in order to listen to and supervise calls during call training.

103. Subject to the Claimant needing to be on site for those days on which she was undertaking call training (at the end of her training plan) there is nothing to suggest that the Claimant, had she been fit to work and sought to attend work, would not have been provided with mini breaks, noise cancelling headphones or a working from home arrangement.

12 February 2024 – Claimant s anticipated date of return

104. On the morning of 12 February 2024 Mrs Rajanikanth tried to call the Claimant on Microsoft Teams to make sure she had managed to login remotely. She subsequently emailed her (on the Claimant's personal email address) asking her to contact her should she require any support [374]. We accept that the Claimant's Trainer had asked Mrs Rajanikanth if she had heard from the Claimant as the Claimant had not logged into the training, as anticipated [377]. The Claimant said that she was having problems with her phone but there is no evidence of her trying to reach the Respondent by other means (such as Microsoft Teams or another phone). We find that the Claimant had been given IT access. Mrs Rajanikanth did not hear from the Claimant at all that day.

15 February 2024 outcome letter

105. On 15 February 2024 Mrs Rajanikanth sent the Claimant her outcome letter to the Claimant's work email address which read [384 - 390].

> *I write further to the informal resolution meeting that was held on 7 Feb 2024 under the Trust's Resolution Policy, to discuss your concerns that you raised in your grievance on 19 December 2023 and the resolution that you are seeking. At this meeting, I have also taken opportunity to share the conclusions I have reached following the local investigation and to share my findings in relation to your pay. We also discussed your*

wellbeing and the plan to support your return to work.

I am now in a position to summarise our discussion and suggested resolution and provide details of my investigation.

At the meeting you were accompanied by Fiona Choo-Sen Sim, BECTU Trade Union representative.

Anita Niczyporuk, Associate HR Business Partner was also present to support and advise on the procedural matters.

I asked how you were feeling and you said you wanted to resolve the issues and return to work as soon as the adjustments you requested are implemented. We went through the adjustments recommended by Occupational Health as well as the ones you have requested and you confirmed you need mini rest breaks from using headset, noise cancelling headset and to work from home when you have dizzy spells or start later / finish earlier and to return on a phased return basis.

As a result of our discussion at this meeting, we agreed we would take the following actions:

1. You are fit to return to work if the requested adjustments are put in place.

2. I have updated you on the recommended Occupational Health adjustments and further updates have been included as below:

> *a. Once you are fully trained to take calls independently, you will ensure mini rest breaks are incorporated into your daily work schedule*
>
> *b. An order for two types of noise cancelling headsets have now been placed. You may want to test both and use the set that suits you.*
>
> *c. I have agreed for your flexible working request when you experience dizzy spells and/or vertigo while you are on your way to work. You have informed that the occurrence may be 3-4 days a week. Your union representative, Fiona Choo-Sen Sim clarified that you are still able to continue to work from home. It was agreed that you will let us know of your symptoms at the earliest convenience, ideally an hour before your shift starts so we can make the changes to the staffing rota accordingly.*
>
> *d. You are attending a hospital appointment on 28th Feb 2024 to see ENT specialist. At this consultation, you may be referred to surgery as a treatment plan. I have agreed that your time off for surgery can be taken as planned sick leave. You will let us know the recovery time period once you have attended the appointment.*
>
> *e. I also note that you have not confirmed self-referral for Access*

to Work. It is important that you proceed with the referral so they can advise on your eligibility for further support and adjustments you require. Access to Work is a government grant scheme that facilitate practical and financial support for disabled people at work. All applications must be made by the member of staff. To apply please visit: […]

f. Phased return plan was discussed and agreed. An outline is as below.

Week 1, commencing 12th Feb 2024

You will be working 2 half-days from home, equating to 7 hour and 30 minutes and the Trust will fund the remaining 30 hours that you won't be at work that week. In the follow up email, I advised that you would work Mon & Thu from 9am to 12.45pm.

Week 2, commencing 19th Feb 2024

You will be working 2 full days and 1 half-day form home, equating to 18 hours and 45 minutes. We agreed that the remaining 18 hrs 45 minutes that you won't be at work will be recorded as annual leave so that you receive full pay. In the follow up email, I advised you will work Monday & Tuesday from 9am to 5pm and 3 hours and 45 minutes from 9am to 12.45 pm on Thursday.

Week 3, commencing 26th Feb 2024

You will be working 4 full days from home, equating to total of 30 hours. We agreed that the remaining 7.5 hours will be recorded as annual leave so that you receive full pay. In the follow up email, I advised you will work Mon, Tue, Thu and Fri 9am to 5pm.

Week 4, commencing 4th Mar 2024

You will be working your contractual 37 hours and 30 minutes, 4 days working from home and 1 day on site on Monday. The hours will be 9am to 5 pm.

It was explained to you that the trust would pay your normal salary for the hours that you will be working and in addition, we will pay a total of 30 hours that you would not be working during phased return. You have agreed that the remaining hours of 26 hours and 15 minutes to be recorded as annual leave given that you have a lot of accrued outstanding annual leave to take before the end of this financial year.

We also discussed the concerns you outlined in your grievance on 19 December 2023, which were as follows:

1. You were off sick due to ongoing vertigo and migraines. You have also been diagnosed with hearing impairment and you believe that no action was taken to support you at work.

2. You have requested reasonable adjustments put in place to help accommodate your disability, but you were asked to submit flexible working application. This has caused you a lot of stress, anxiety, worry and financial loss.

Following my investigation, I concluded that there was a delay in starting the discussions about the adjustments you requested for which I sincerely apologise. I am glad we were able to meet and agreed to put all the adjustments in place to enable your return to work.

As part of my investigation I reviewed all the points and documents you referred to in your grievance and with Anita's support, we sought further clarification from your managers, OH and payroll where required. I have established the following:

1. The pre-employment Occupational Health report on 5th Dec 2022 states that you have reported partial hearing loss on the left ear, noisy environment and wearing headset long time affect your hearing. You have stated taking short breaks from headset in your previous work helped improve your hearing. Occupational Health recommended mini rest breaks from headset and completion of Display Screen Equipment (DSE) assessment to identify and address any concerns you may have in the work place in relation to that. I hope you were able to incorporate mini rest breaks from the headset in your work schedule when you started with us on 16th Jan 2023 although I understand from the training team that you did not reach the call training part and therefore, you may not have needed to take them at the time. Going forward, when you start using the headset, please do take mini rest breaks. As you are working from home, I recommend you undertake DSE assessment, which I have enclosed with this letter to assess your work environment in order for us to support you with further adjustments you may need. It is a work station assessment that should be undertaken by the user so please complete it and send it back to me in the next week. When you start working on site, please conduct another DSE assessment if you did not complete it last year and we will review the recommendations when you are on site.

2. You were signed off not fit for work by your GP for the period of 14th Feb – 22nd Feb 2023 due to dizziness, muscle pain and vomiting. Following the return to work meeting on 27th Feb 2023 with your line manager, you have emailed options of headsets you could use at work. The order of headsets were not placed at the time as you were in the process of completing 10-week training and had further episodes of sickness, which meant that you were not placed on calls. However, as you are now back at work I have ordered the headset for you as outlined above.

3. You were signed off not fit for work by your GP for the period of 8th Mar – 6th Apr 2023, 25th April – 15th May 2023, 25th May 2023 – 31st Aug 2023 due to vertigo.

4. Stage 1 sickness meeting was conducted on 30th Jun 2023 as per the trust Sickness Absence Management policy and the outcome of the meeting was referral to Occupational Health and you to provide weekly update your health status. You were signposted to Trust confidential staff counselling service for further support. I understand that following the meeting, your manager Liam referred you to Occupational Health for advice.

5. You said you had an OH telephone appointment but no report was sent to you and no further action was taken and no support was provided to you. I understand from Carl Norwood from OH that he recorded in his notes that the report content was discussed with you and that you verbally consented to the report being released to you and the manager simultaneously. I have obtained evidence that an OH report was sent to you at [Claimant work email address] and your manager Liam via email on 1 August 2023, which I included with this letter. Occupational health report indicated that you had reported no improvements in your symptoms since the start of your sickness. OH advised you were unfit to return to work and they could not predict when you may be able to return to work as it would depend on ENT intervention. You were asked to speak to your GP to expedite your ENT appointment and self-refer for Access to Work so that on your

return to work you can have a workplace assessment for any recommendations regarding required adjustments for your hearing loss. OH advised that you would be able to arrange this via the link they included in the report. It was also recommended for us to re-refer you to Occupational Health when you feel you are able to return to work for advice on further adjustments. We agreed earlier this month that you can be referred to OH so that we can get any additional advice from them and I can confirm your line manager had submitted referral to Occupational Health and I have followed it up requesting an urgent appointment for you.

6. You were signed off not fit for work by your GP for the period of 1st Sep – 18th Sep 2023 due to vertigo, migraines and ear ache, followed by another fit note that was submitted for the period of 18th Sep – 23rd Oct 2023 indicating that you were not fit to work due to vertigo.

7. You said that you were invited to stage 2 meeting despite no attempts being made to help support or accommodate your disability. I note that the invite to the stage 2 meeting said that the purpose of the meeting is to discuss what support / adjustments you may need to return to work and to review any recommendations from OH or your doctors. From the evidence that was available for me to review, it appears that up to this point, the adjustment recommended by OH were the mini rest breaks when you use headset and you requested a noise cancelling headset as outlined above. In the meeting we had, you said you

had asked for home working prior to the stage 2 meeting but it was verbal and it was not accommodated. The managers I spoke to, namely Theresa, Liam and Stephen had no recollection of you raising this prior to the stage 2 meeting and therefore I was not able to establish when you may have raised it for the first time. In any event, I note that during the periods of your sickness up until 23 Oct 2023, your GP did not indicate you may be fit for work with adjustments but stated you were unfit for work. OH also stated you were unfit for work.

8. Stage 2 sickness meeting was conducted on 4th Oct 2023 as per the trust sickness absence management policy. I note that the outcome letter was drafted on 1st Nov 2023 and an email was sent to you but however, the outcome letter was not attached in the email. As agreed in our meeting, I enclose the letter that Stephen drafted at the time for completeness. Having reviewed the outcome letter and the notes of the meeting, I note that you have requested option of working from home when you experience dizziness/vertigo and the option of receiving the training remotely while working from home and a phased return. You were asked to contact your GP to transfer your referral to Imperial and you have informed that you have not yet made referral for Access to Work. The required infrastructure for working from home and onsite was discussed and it was confirmed that you will require IP phone and noise cancelling headsets when you are on site. You were also signposted to Trust confidential staff counselling service for further support.

9. You did not hear back from your manager until you emailed him on 24 Oct 2023. Following your email correspondence on 24th Oct 2023, requesting phased return to work and reassurance on the requested reasonable adjustments, an email was sent to you on 1st Nov 2023, with a link to flexible working application form where Stephen asked you to complete a flexible working request form. I understand you completed it on 4 Dec 2023, although you queried the need for that given that you believed it was as a reasonable adjustment.

10. On 13th Nov 2023, you have emailed requesting advice on the process for raising a formal complaint about the reasonable adjustments for your disability. The email was forwarded to the interim service manager, Hannah Richards-Ruddock who reached out to you on 6 Dec 2023 to discuss your concerns. I acknowledge there has been a delay in commencing the discussion about facilitating your return to work until December 2023.

11. A meeting was conducted on 19th Dec 2023 by Hannah Richards-Ruddock via teams with you and your trade union representative, Fiona Choo-Sen Sim to discuss your concerns.

12. On 20th Dec 2023, you have submitted your formal grievance

to your line manager, Stephen McKenzie and service manager, Hannah Richards-Ruddock. Your complaint was acknowledged by Stephen McKenzie on 21st Dec 2023 and forwarded to Nisa Dhokia, former Business Manager.

13. On 8th Jan 2024, you have met with Hannah Richards-Ruddock as part of wellbeing check. Hannah advised you to self-refer for Access to Work.

14. As you know, I have recently joined the team and when your grievance was brought to my attention, I looked into your concerns and reached out to you to meet and discuss the resolution and return to work plan.

In the meeting we held, you said you were concerned about your sickness absence being proceeded to stage 2 without any requested reasonable adjustments put in place and you requested that these are removed from your record. You were concerned that further sickness absences may result in proceeding to stage 3. I and Anita Niczyporuk acknowledged delay in commencing discussions around adjustments since you raised them in October 2023 as I would have expected your manager to continue the conversation with you and decide whether or not your home working request could be accommodated and if so, to agree an action plan with you sooner. The adjustments that were previously requested or recommended to support you at work were the mini breaks from the headset and noise cancelling headsets for when you start being put on calls. I accept we did not order the noise cancelling headset sooner and I also note that you would not have needed them as you were still undergoing training. As indicated above, you had a significant period of sickness absence since you joined the Trust and both your GP and OH deemed you unfit for work. After reviewing the trust sickness absence management policy and your sickness records, I am satisfied that it was appropriate for your managers to hold these sickness meetings with you.

We confirmed that we are not in a position to remove factual information from your record as these sickness meetings did in fact take place. However, I have reassured you that future sickness absences will be reviewed and considered on a case by case basis, nature and length of sickness absences. I also would like to point out that the trust policy clearly outlines that stage 2 meetings can be conducted more than once where needed and therefore, should there be further concerns on our sickness absence, we will hold a stage 2 meeting again.

I am aware that your login to PC and email access was disabled due to long period of inactive. I have logged a call with ICT and shared the reference number for you to contact ICT so they can verify your details and provide you with the required access.

I have also made you aware that your last GP fit note ended on 23rd Oct 2023 and we have received no further fit notes from you. You have agreed to check whether you have had any other GP notes and request

backdated fit notes from GP for our records as you said you were fit to work with adjustments from 24 October 2023

As part of the local investigation, I established that as your sickness absence ended on 23rd Oct 2023 on Health roster, it in turn resulted in a full pay being paid to you for the remaining month of Oct 2023, Nov 2023, Dec 2023 and Jan 2024 as the system interpreted this as you being back at work. This constitutes an overpayment and usually, the trust will make an arrangement to recover the sums.

However, Anita Niczyporuk proposed that this aspect is negotiated with ACAS under a formal agreement within the conciliation period that was due to end on 15 February 2024.

Anita also talked you through the query you had raised about your sick pay and receiving £4.20 in October 2023 although you may have already contacted payroll directly. She explained that payroll confirmed that this was a tax refund. As for your sick pay, because you were in the first year of NHS employment, your entitlement to sick pay was 1 month full pay and 2 months half pay as outlined in your contract. Due to the fact that you lost a number of days due to sickness in February and March 2023, the entitlement to full pay ran out around 26 March 2023, after which you were in half pay. As you had further episodes of sickness after that, your half pay came to an end at the beginning of June 2023, after which your pay was nil.

I hope you feel you have had an opportunity to fully explore your concerns and are satisfied with the adjustments and support we have put in place.

Every concern raised gives us the opportunity to learn and improve. As a result of your concerns, I have addressed the issues with your line managers and we are also planning a refresher HR training in place for all line managers within the Booking office.

If you feel that you need help or support you can get in touch with our CONTACT team who can offer counselling and support with coping in difficult situations. For Hammersmith & Charing Cross you can ring […]

More information about the service is available on our intranet.

Attempts to contact the Claimant and the Claimant unable to attend work

106. On 15 February 2024 Mrs Rajanikanth tried to call the Claimant again and was again unable to reach her [391]. Accordingly, she emailed the Claimant the details of the courses that the Claimant needed to complete and asked that she contact her. She also sent a text message to the Claimant asking that the Claimant call her [421], but the Claimant did not make contact that day. The Claimant suggested in evidence that she had called a central management number. She said that she could not evidence that because her call records disappeared because of a problem with her phone. There are references in the contemporaneous documents to the Claimant having a phone problem but she

gave no explanation of why she sought to call a central management number (which she suggested was for reporting absence) rather than contacting Mrs Rajanikanth directly. She did not explain why she did not log in to the Respondent's systems to report her absence. On the balance of probabilities we find that she did not seek to contact the Respondent.

107. On 16 February 2024 Mrs Rajanikanth sent the Claimant the following email [392]:

> *Hope you are well.*
>
> *I am concerned that you have not responded my emails sent on Monday, 12th Feb 2024 and yesterday. I have also called you and sent you a text message but I didn't receive any response. I hope everything is ok with you. Please do give me a call if you need any support.*
>
> *I have scheduled return to work meeting on Mon, 19th Feb at 09:00. I will send an invite shortly.*
>
> *Stephen - Please kindly join the return to work meeting on Monday with us. Thank you*

108. On 15 February 2024 ACAS issued its Early Conciliation Certificate [9].

109. On the morning of 19 February 2024 Mrs Rajanikanth joined the Teams call at 9am [393] but the Claimant did not attend so Mrs Rajanikanth sent her a further email her to check if she intended to attend [398]. The Claimant only then responded to advise that she was having some technical problems and needed to restart her computer. The Teams call was rearranged for 15.00 that afternoon [394 - 398]. It then became apparent to Mrs Rajanikanth that the Claimant did not in fact have remote access. This was despite Mrs Rajanikanth having told the Claimant that she had logged a call with the IT team and Mrs Rajanikanth having sent the Claimant the reference number so that the IT team could verify her details and provide access prior to her return to work.

110. Mrs Rajanikanth therefore made a further call to IT to reset her login / password. She emailed the Claimant on 21 February 2024 asking the Claimant to contact IT urgently so that her remote access could be reset. Mrs Rajanikanth received no response so Mrs Rajanikanth sent a further email on 22 February 2024 to check if the Claimant had made contact with IT [399]. Mrs Rajanikanth also sent a text message to the Claimant to try to establish if she had spoken to IT about her login and email account [421]. The Claimant did not reply.

111. On 22 and 23 February 2024 Mrs Rajanikanth emailed Ms Niczyporuk to let her know that she had been unable to reach the Claimant [400]. The Claimant did not respond to her emails, calls or text messages.

112. On 23 February 2024 Mrs Rajanikanth sent a further email to the Claimant advising her that she had scheduled a Teams meeting at 9am on Monday 26 February 2024 to obtain an update on the IT issues and provide any support required [401 and 403]. The Claimant failed to attend the meeting and declined Mrs Rajanikanth's call [402]. Mrs Rajanikanth sent text messages to the

Claimant on 26 and 27 February 2024 but received no response [421].

113. On 28 February 2024 the Claimant submitted her claim to the Employment Tribunal [10-21].

114. On 1 March 2024 Mrs Rajanikanth sent yet another email to the Claimant making clear that she had sought to contact the Claimant by telephone on 22 February, 23 February, and 27 February 2024 but had been unsuccessful and had sent text messages on 22 February and 26 February 2024 which had been read, but not responded to. She noted the Claimant's failure to attend the meeting scheduled for 26 February 2024. She asked the Claimant to make contact by 4 March 2024. She said that she may make contact with the Claimant's emergency contact as a last resort, out of concern, as she had not received any communication from her [408].

115. Only then did the Claimant reply, by email on 1 March 2024. All that she said was [408]:

> *Not sure why my email didn't go through I'm not well due to my disability related vertigo and migraines. Hope this helps.*

116. This was not a proper explanation for the Claimant's failure to contact the Respondent. Mrs Rajanikanth reasonably replied to ask when the Claimant had become unwell. The Claimant responded that afternoon to say [407]:

> *[…] I haven't been well since 28th of Feb and I had an ent appointment on that day. They've booked me in for an mri scan and I have another appointment on Tuesday 5th March at 3pm.*
>
> *Also my phone does not work properly and I'm due to order a new on3. Thanks for your understanding.*

117. The Claimant had not had the courtesy to attempt to contact Mrs Rajanikanth to advise her that she was unwell and she provided no explanation as to why she had not responded during the days she was not unwell (i.e. 22, 26, 27 February 2024). We find that her references to her phone not working properly were not an adequate explanation (not least because her reply of 1 March 2024 at [407] makes clear that she had not yet obtained a replacement). The Claimant then provided a Fit Note to cover the period from 4 March to 18 March 2024 stating that the reason for her sickness absence was 'stress at work' [404]. The sickness absence reason is not clear because the Claimant had not returned to work and she had referred to vertigo and migraines in her correspondence. We find that vertigo and migraines was the reason for the Claimant's sickness absence, not stress at work.

118. It was on 29 May 2024 that the Claimant provided her fit note of 6 December 2023 covering the period 24 October 2023 to 6 March 2024 (referencing 'vertigo, migraine and earache – awaiting ENT appointment') [MRWS51] [502-503].

119. We note that the chronology records as one of the agreed facts that, amongst other things, the Claimant first returned to work on 19 February 2025 but then commenced sick leave again on 25 February 2025.

THE LAW

Time limits – the EqA

120. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

121. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

122. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

123. In **Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. An example is found in the case of **Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/17** where it was determined that the respondent's decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.

124. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548**; The tribunal in ***Lyfar*** grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time.

125. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

126. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the *rule (***Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576***).*

127. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23,** the best approach is for the tribunal to *assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of* **British Coal Corporation v Keeble [1997] IRLR 36** as well as other potentially relevant factors*.*

128. Where the reason for the delay is because a claimant has waited for the outcome of his or her employer's internal grievance procedures before making a claim, the tribunal may take this into account (**Apelogun-Gabriels v London Borough of**

Lambeth and anor 2002 ICR 713, CA). Each case should be determined on its own facts, however, including considering the length of time the claimant waits to present a claim after receiving the grievance outcome.

129. In the case of **Harden v (1) Wootlif and (2) Smart Diner Group Ltd UKEAT/0448/14** the Employment Appeal Tribunal reminded employment tribunals that we must considering the just and equitable application in respect of each respondent separately and that it is open to us to reach different decisions for different respondents

Discrimination under the EqA

130. The Equality Act 2010 (EqA) protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics' (section 4). These include disability (section 6).

Direct disability discrimination

131. Section 39(2) of the Equality Act 2010 prohibits an employer discriminating against one of its employees by dismissing him or by subjecting the employee to a detriment. This includes direct discrimination because of a protected characteristic as defined in section 13.

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

133. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator. In a case of alleged direct disability discrimination the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).

134. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

135. We must consider whether the fact that the Claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

136. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of disability. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as she was.

137. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent committed an act of unlawful discrimination.

138. At the second stage, discrimination is presumed to have occurred, unless the Respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the Respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the Claimant's disability. The Respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

139. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258** and we have followed those as well as the direction of the court of appeal in **Madarassy v Nomura International plc [2007] IRLR 246, CA**. The decision of the Court of Appeal in **Efobi v Royal Mail Group Ltd [2019] ICR 750** confirms the guidance in these cases applies under the Equality Act 2010.

140. The Court of Appeal in Madarassy, states:

> 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.' (56)

141. It may be appropriate on occasion, for the tribunal to take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (**Laing v Manchester City Council and others [2006] IRLR 748; Madarassy**) It may also be appropriate for the tribunal to go straight to the second stage, where for example the Respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A Claimant is not prejudiced by such an approach since it effectively assumes in his/her favour that the burden at the first stage has been discharged (**Efobi v Royal Mail Group Ltd [2019] ICR 750,** para 13).

142. In addition, there may be times, as noted in the cases of **Hewage v GHB [2012] ICR 1054** and **Martin v Devonshires Solicitors [2011] ICR 352**, where we are in a position to make positive findings on the evidence one way or the other and the burden of proof provisions are not particularly helpful. When we adopt such an approach, it is important that we remind ourselves not to fall into the error of looking only for the principal reason for the treatment, <u>but instead ensure we properly analyse whether discrimination was to any extent an effective cause of the reason for the treatment</u>.

143. Allegations of discrimination should be looked at as a whole and not simply on the basis of a fragmented approach **Qureshi v London Borough of Newham [1991]**

IRLR 264, EAT. We must "see both the wood and the trees": **Fraser v University of Leicester UKEAT/0155/13** at paragraph 79. Our focus "must at all times be the question whether or not they can properly and fairly infer… discrimination.": **Laing v Manchester City Council, EAT at paragraph 75**.

Discrimination arising from disability - section 15 EqA

144. Section 15 EqA provides: "(1) A person (A) discriminates against a disabled person (B) if— (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim. (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

145. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant.

146. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others.

147. What caused the unfavourable treatment requires consideration of the mind(s) of alleged discriminator(s) and thus that the reason which is said to arise from disability be more than just the context for the unfavourable treatment. There need only be a loose connection between the unfavourable treatment and the alleged reason for it, and it need not be the sole or main cause of the treatment, though the reason must operate on the alleged discriminators' conscious or unconscious thought processes to a significant extent **(Charlesworth v Dronsfield Engineering UKEAT/0197/16).**

148. By analogy with **Igen**, "significant" in this context must mean more than trivial. Whether the reason for the treatment was "something arising in consequence of the Claimant's disability" could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator's thought processes.

149. Simler P in **Pnaiser v NHS England [2016] IRLR 170, EAT**, at [31], gave the following guidance as to the correct approach to a claim under **section 15 EqA**:

> '*(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination*

case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see ***Nagarajan v London Regional Transport [1999] IRLR 572****. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.*

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in ***Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb)*** *a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) There is a difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the

effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

150. The burden of establishing a proportionate means defence is on the Respondent. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax [2005] IRLR 726** per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: **Hardys & Hansons plc v Lax [2005] IRLR 726, CA**.

151. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

152. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27**.

153. A complaint of discrimination arising from disability will also be defeated if the Respondent can show that at the time of the unfavourable treatment, it did not know and could not reasonably be expected to know that the Claimant was a disabled person.

Reasonable Adjustments

154. By section *39 (5) EqA* a duty to make adjustments applies to an employer. By section *21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

155. *Section 20(3) EqA* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer 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.

156. *Section 21 EqA* provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

157. The duty to make reasonable adjustments only arises where the employer has knowledge (actual or constructive) that its employee is disabled and likely to be placed at a substantial disadvantage as (Paragraph 20 (1)(b) Schedule 8 EqA).

158. In **Environment Agency v Rowan 2008 ICR 218** and **General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4** the EAT gave general guidance on the approach to be taken in reasonable adjustment claims. A tribunal must first identify:

158.1. the PCP applied by or on behalf of the employer

158.2. the identity of non-disabled comparators;

158.3. the nature and extent of the substantial disadvantage suffered by the Claimant in comparison with the comparators.

159. Once these matters have been identified then the tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

160. The phrase PCP is interpreted broadly. The EHRC Code of Practice on Employment (2011) ("**the Code**") says at paragraph 6.10:

> "*[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions*."

161. The Code goes on to provide at Paragraph 6.24, that *"there is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask);* At paragraph 6.37, *that Access to Work does not diminish or reduce any of the employer's responsibilities under the 2010 Act.* At paragraph 6.28 the factors which might be taken into account when deciding if a step is a reasonable one to take:

> *Whether taking any particular steps would be effective in preventing the substantial disadvantage; The practicability of the step; The financial and other costs of making the adjustment and the extent of any disruption caused; The extent of the employer's financial or other resources; The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer*.

162. In **Lamb v The Business Academy Bexley EAT 0226/15 the EAT** commented that the term "PCP" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

163. It is also generally unhelpful to distinguish between "provisions", "criteria" and "practices": **Harrod v Chief Constable of West Midlands Police [2017] ICR 869**.

164. There is no formal requirement that the PCP actually be applied to the disabled Claimant. The EAT said in **Roberts v North West Ambulance Service [2012] ICR D14** that a PCP (in this case, hot desking) applied to others might still put the Claimant at a substantial disadvantage.

165. There are some limits to what can constitute a PCP. In particular there has to be an element of repetition, actual or potential. A genuine one off decision which was not the application of policy is unlikely to be a "practice": **Nottingham City Transport Ltd v Harvey [2013] All ER(D) 267 (Feb), EAT**. In that case the one-off application of a flawed disciplinary process to the Claimant was not a PCP. There was no evidence to show that the employer routinely conducted its disciplinary procedures in that way.

166. In **Ishola v Transport for London [2020] ICR 1204** the Court of Appeal said that all three words "provision", "criterion" and "practice" "..carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."

167. The test of reasonableness imports an objective standard. The tribunal must examine the issue not just from the perspective of the Claimant, but also take into account wider implications including the operational objectives of the employer.

168. It is not necessary to prove that the potential adjustment will remove the disadvantage; if there is a "real prospect" that it will, the adjustment may be reasonable. In **Romec v Rudham [2007] All ER (D) 206 (Jul)**, EAT: HHJ Peter Clark said that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If there was a 'real prospect' of removing the disadvantage it 'may be reasonable'. In **Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)**, EAT: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'. In **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075**, the EAT said that, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage.

169. Schedule 8 EqA (Work: Reasonable Adjustments) - Part 3 limitations on the duty provides:

> *S. 20. Lack of knowledge of disability, etc*
>
> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know— (a) in the*

> *case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement. Under Part 2 and an interested disabled person includes in relation to Employment by A, an employee of A's.*

170. If relied upon, the burden is on the Respondent to prove it did not have the necessary knowledge. The Respondent must show that it did not have actual knowledge of both the disability and the substantial disadvantage and also that it could not be reasonably have been expected to know of both the disability and the substantial disadvantage.

Harassment (disability)

171. Section 40 of the EqA renders harassment of an employee unlawful.

172. Section 26 EqA 2010 provides: *(1) A person (A) harasses another (B) if- A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of - violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— the perception of B; the other circumstances of the case; whether it is reasonable for the conduct to have that effect*.

173. The Tribunal is therefore required to reach conclusions on whether the conduct complained of was unwanted and, if so, whether it had the necessary purpose or effect and, if it did, whether it was related to disability.

174. If the Claimant proves any of the conduct they complain about, it was unwanted. There is no need to say anything further about that.

175. It is clear that the requirement for the conduct to be "related to" disability needs a broader enquiry than whether conduct is "because of disability" like direct discrimination **Bakkali v Greater Manchester Buses (South) Limited UKEAT/0176/17**.

176. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to disability, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

177. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before the Tribunal **GMB v Henderson [2016] EWCA Civ 1049**.

178. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on her (they must

actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the remark, and all the surrounding context. That much is clear from section 26 and was confirmed by the Employment Appeal Tribunal in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724**. The words of section 26(1)(b) must be carefully considered. Conduct which is trivial or transitory is unlikely to be sufficient.

179. Mr. Justice Underhill, as he then was, said in that case:

> *"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard … whether it was reasonable for a claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have Case No: 1301063/2019 22 been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …"*
>
> and
>
> *"…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"*

180. Similarly in the case of **HM Land registry v Grant [2011] EWCA Civ 769**, Elias LJ as he became said, when discussing the descriptive language of subparagraph 1:

> "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*."

181. In the case of **Greasley-Adams v Royal Mail [2023] EAT 86** for harassment to have occurred, the person must have been aware that it had happened in order to perceive that it was harassment. Therefore, if comments are made behind an employee's back that they become aware of later on, for example because of an investigation into their grievances about other matters, to determine whether harassment has taken place, the correct approach is to look at the Claimant's perception of the situation at the date time the alleged harassing incident took

place. Consequently, if the Claimant was not aware of the harassment at the time, they could not perceive that they had been harassed at the time.

182. Further, if they then later found out about the harassment event, it could well still amount to harassment at the time they find out about it. However, whether it is reasonable for the Claimant to believe that they have been subject to harassment in accordance with section 26 (4) (c), that question is to be determined in the context of events taking place at the time the Claimant finds out about the harassing event. In the context of **Greasley-Adams**, this meant that finding out about a harassment event during an investigation meeting into his grievances and claiming this was violating his dignity, was unreasonable in the context of the employer investigation the Claimant's concerns in good faith.

183. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If they do, then it is plain that the Respondent can have harassed them even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c).

184. Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met **Driskel v Peninsula Business Services Ltd. [2000] IRLR 151**.

185. In addition, if what the issue alleged by Claimant as amounting to a breach of the EqA would not be unlawful under the EqA, then it cannot be a protected act for example see **Waters v Metropolitan Police Comr [1997] IRLR 589**.

186. The employee must be subjected to a detriment, which has been decided to mean placed at a disadvantage **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230**. Unfavourable or less favourable treatment arguments are not in accordance with the correct statutory wording of section 27. Detriment is established if treatment is of a kind that a reasonable worker would or might take the view that in all the circumstances it was to their detriment: **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL.** Therefore, for detriment to be proven, it is for the Claimant to show that they were or would have been, in their subjective view, placed at a disadvantage and that it was objectively reasonable for them to have held that view.

187. Detrimental treatment of a Claimant will not be because of a protected act if the detrimental treatment is caused by the way in which the protected act is done or the behaviour of the Claimant whilst communicating the protected act or gathering information for it. For example see **Woods v Pasab Limited [2012] EWCA Civ 1578** and **Martin v Devonshire Solicitors [2011] ICR 352.**

188. The detriment relied upon by the Claimant, must be linked to the protected act. The same test for causation in direct discrimination, is therefore relevant to victimisation because the statutory wording is the same.

ANALYSIS AND CONCLUSIONS

189. Whilst we have we have structured our analysis and conclusions by issue, we were also careful to look at the evidence 'in the round' to determine whether it suggested that the Claimant had been subjected to the unlawful treatment of which she complains (this is particularly important when it comes to allegations of direct discrimination and harassment). Having done so we did not find cause to change our decisions on any issue or issues.

Disability

190. The Respondent concedes that the Claimant's impairments (hearing impairment, vertigo and migraines) amounted to disabilities at the relevant times but disputes knowledge of them as disabilities until the following dates:

    190.1. hearing impairment from 5 December 2022 (no allegation predates this date);

    190.2. vertigo/migraine knowledge from **7 August 2024**.

191. For the reasons set out in our findings of fact we conclude that the Respondent could reasonably have been expected to know that the Claimant was disabled with her impairments of vertigo and migraine from the earlier date of **4 October 2023**.

Harassment and direct discrimination

192. The Claimant makes a number of complaints which she says amounted to either disability harassment or direct disability discrimination.

193. As agreed with the parties, we first considered whether the allegations amounted to harassment. If it was made out as harassment then we dismissed it as an allegation of direct discrimination. If it was not made out as harassment we went on to consider whether it amounted to direct disability discrimination. Of course if a factual allegation was not proven, then we dismissed it as an allegation of both harassment and direct discrimination.

194. We deal with the allegations in an order that more closely relates to the chronology rather than in the order of the List of Issues.

Snarky/unprofessional comments – 3.1.1.8

195. As we explain in our findings of fact, we conclude that on 6 February 2023 Mr McKenzie said to the Claimant "*next time I'll shout*" as a response to the Claimant when she told him she could not hear him.

196. As we explain and as Mr McKenzie accepted, that was a poor choice of words and what he meant was that he would speak louder. It was a comment that was clearly unwanted (as evidence by the Claimant's email at the time) and it also related sufficiently to the Claimant's hearing impairment disability.

197. However, we do not consider that it was said with purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It was simply an unintentional and clumsy choice of words by Mr McKenzie.

198. The Claimant said that [CWS 2.1] comment: "*made me feel belittled and embarrassed as I was shocked to receive that response from management. I emailed him to express that I was disappointed by his response, to which he acknowledged and apologised for. I appreciated his apology and had moved on from it*.". We consider that the comment created some offence to the Claimant but it was transitory in nature and the comment must be seen in its wider context. Mr McKenzie was prompt to apologise for any unintentional offence he had caused and he was helping the Claimant at the time by walking with her to the audiology department. The Claimant accepted Mr McKenzie's apology and moved on.

199. We do not consider in all the circumstances that it had the effect of violating the Claimant's dignity and even less did it create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. If we are wrong on that and it did violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant then we consider, taking into account the Claimant's perception and the other circumstances, that it was not reasonable for the conduct to have that effect.

200. This allegation also fails as a complaint of direct disability discrimination. The Claimant has failed to shift the burden of proof and there is no evidence that Mr McKenzie would not have said the same thing to someone who could not hear him (for example because a short term hearing blockage or infection that did not amount to a disability). We accept his evidence that it was simply a clumsy choice of words and that he did not say what he said because the Claimant had a disability.

Request for headsets on 16 January 2023 – 3.1.1.1

201. As we have explained in our findings of fact, it was on 27 February 2023 at a return to work meeting with Mr McKenzie that the Claimant first raised with the Respondent her need for alternative noise cancelling headphones that would sit more comfortably over her hearing aids. As the request was not made on the date relied upon by the Claimant it was not ignored and the Claimant was not therefore subjected to either disability harassment or direct disability discrimination as she alleges. As soon as the Claimant did mention her need for a different headset the Respondent agreed to look into it but there was no particular urgency because the Claimant had not yet started calls training or calls handling and her sickness absence then intervened and was long term.

Requiring the Claimant to source her own equipment - 3.1.1.5

202. Related to issue 3.1.1.1 is issue 3.1.1.5. This allegation fails as both a complaint of harassment and direct disability discrimination because the Claimant was not required to source her own equipment. The Respondent simply and quite reasonably asked if the Claimant could provide details of headphones she thought might be comfortable with her hearing aids based on the fact that she had used noise cancelling headphones in a previous job and the Respondent wanted to

take that into account when assessing what headphones it could source. The Claimant provided information without complaint at the time. It was not incumbent on the Respondent to progress the search when the Claimant had not yet reached the call training part of her induction and in circumstances where soon after the Claimant commenced long term sick leave (which itself meant that her training needed to be restarted). Further, it is also clear that the Claimant did not consider that she needed a noise cancelling headset unless she was working on site. There is no evidence that she was pressurised or otherwise coerced into saying that she did not need a different noise cancelling headset if she was working from home [265]. When it became apparent that the Claimant might be able to return to work the Respondent promptly ordered two types of noise cancelling headsets for the Claimant to trial [385].

Failing to respond or acknowledge information provided about headsets– 3.1.1.6

203. Mr McKenzie did not reply to the Claimant's email of 27 February 2023 [589]. There is no evidence of the Claimant chasing for a response at the time or any evidence that the Respondent had indicated to the Claimant that she would be denied a pair of noise cancelling headphones. The discussion of this was not pressing for the reasons we have explained and, in any event, was overtaken by events and the Claimant's long term sick leave. Whilst it related to the Claimant's disability there is no evidence that any failure to respond to the Claimant's email was unwanted conduct (the Claimant did not chase for a response at the time) or was with the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

204. We also do not consider (for example taking account of the failure on the part of the Claimant to chase for this or explain why it was important in the context of her ongoing sick leave) that in all the circumstances it had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. If we are wrong on that and it did violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant then we consider, taking into account the Claimant's perception and the other circumstances, that it was not reasonable for the conduct to have that effect.

5. This allegation also fails as a complaint of direct disability discrimination. The Claimant has failed to shift the burden of proof and there is no evidence that the Respondent would have acted any differently with respect to a comparator in materially the same circumstances but who did not have a disability.

Working from home – 3.1.1.2

205. The Claimant alleges that the Respondent subjected her to disability harassment and direct disability discrimination by ignoring a request for the adjustment of working from home that she says she made at a meeting on Monday 6 March 2023 with Mr McKenzie. Claimant did not make the request as she alleges. The first time she raised the question of working from home was on 4 October 2023. The Respondent did not ignore any request as the Claimant alleges. This complaint of disability harassment and direct disability discrimination is therefore not well founded. In any event, working from home is a normal working practice for Call Handlers, subject to the need for a limited amount of calls training to be

done onsite in person and there is no evidence of the Respondent being resistant to the Claimant working from home once appropriately trained.

Requirement to apply for flexible working – 3.1.1.3

206. The Claimant alleges that the Respondent subjected her to disability harassment and direct disability discrimination by ignoring her request for a reasonable adjustment and telling the Claimant to apply for flexible working when she asked to work from home. The Respondent agrees that Mr McKenzie referred the Claimant to the Respondent's flexible working request form at the 4 October 2023 Stage 2 meeting [265] and, as we have explained, Mr Marsden of HR advised that a request to work from home in the Claimant's case would be classed as a reasonable adjustment request [SMWS29]. As we have explained in our findings of fact, the Flexible Working Form serves two purposes, the second of which is documenting a reasonable adjustment which a disabled employee considers that they need and this is clear from the wording of the form. As such the Respondent did not ignore the Claimant's request for an adjustment by telling the Claimant to apply for flexible working when she asked to work from home. Clearly this did relate to the Claimant's disability but the Claimant did not complain at the time about filling in the form and it was not unwanted conduct. If we are wrong there was no evidence that the Respondent's conduct was with purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We consider that in all the circumstances it did not have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. If we are wrong on that and it did violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant then we consider, taking into account the Claimant's perception and the other circumstances, that it was not reasonable for the conduct to have that effect.

207. This allegation also fails as a complaint of direct disability discrimination. The Claimant has failed to shift the burden of proof and there is no evidence that the Respondent treated the Claimant, by acting as it did, less favourably because of any of the Claimant's disabilities than it would have done someone else in materially the same circumstances who was not disabled.

Failing to follow OH recommendations – 3.1.1.4

208. The Claimant alleges that the Respondent subjected her to disability harassment and direct disability discrimination by ignoring the Claimant's request for reasonable adjustments and failing to follow up the required actions following two OH reports/meetings (i.e. those of 5 December 2022 [315] and 1 August 2023 [254]).

209. The only recommendations from the 5 December 2022 report were for the Claimant to have mini breaks when using a headset and to carry out a DSE assessment. At no point in the claim period did the Claimant reach the stage of her training where she would need minibreaks and there is no evidence that she would have been denied them had she reached the point where she needed them. A DSE assessment was completed by the Claimant on 31 January 2023 and gave light to no other need for adjustments. In this regard the Claimant's allegations of disability harassment and direct disability discrimination fail on the facts.

210. As regards the 1 August 2023 OH report, again the Claimant's complaints fail on the facts. There was no failure to follow OH recommendations. The Claimant was not fit to return to work at that time with or without adjustments. Once the Claimant expressed clearly that she might be able to return to work with adjustments, all the necessary steps were taken to discuss and implement those adjustments with her but the Claimant was not fit to return to work on 12 February 2024 as she suggested that she might be.

Stage one and stage two absence management – 3.1.1.7

211. The Claimant alleges that the Respondent subjected her to disability harassment and direct disability discrimination by ignoring her request for reasonable adjustment by placing the Claimant on a stage one and then a stage two absence management meeting/processes. It is the fact of the meetings being called that is complained of. The arranging of these meetings clearly was related to the Claimant's disability. Notwithstanding that they were supportive meetings with the purpose of discussing how the Claimant could be helped back to work, we accept that the Claimant nonetheless did not want them and the calling of the meetings was therefore unwanted conduct.

212. There is no evidence that the meetings were called with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The meetings were called to support the Claimant and it was entirely appropriate for them to be called and for the matters discussed to be discussed.

213. We do not consider in all the circumstances that the calling of the meetings (or indeed the holding of the meetings which were clearly supportive, if not also positive) had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

214. If we are wrong on that and the meetings did violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant then we consider, taking into account the Claimant's perception and the other circumstances, that it was not reasonable for them have had that effect.

215. This allegation also fails as a complaint of direct disability discrimination. The Claimant has failed to shift the burden of proof and there is no evidence that had a non-disabled employee had the same level of sickness absence that they would have been treated any more favourably or that the Respondent would not have called the meetings.

Discrimination arising from disability (Equality Act 2010 section 15)

216. As regards the Claimant's arising from disability claim, we find as follows:

<u>The something</u>

217. The Claimant was on sick leave predominantly because of vertigo and migraines. She was not on sick leave because of her hearing impairment. At the point of the Stage One meeting the Claimant's vertigo and migraines did not amount to disabilities because they did not meet the long term element of the test until 4

October 2023. It is therefore only the Stage Two absence meeting which was called because of something arising in consequence of disability.

Unfavourable treatment – stage one and stage two absence management meetings

218. Even if we are wrong and the stage one and stage two absence meetings were both called because of something arising in consequence of disability, we conclude nonetheless that the Respondent did not treat the claimant unfavourably by holding either of the meetings. The meetings were both supportive and had the purpose of exploring how the Claimant might be assisted in returning to work. The fact that that the meetings were not 'informal' does not mean that they amounted to unfavourable treatment. There was no threat of dismissal or other formal warning. The same matters would need to have been discussed had the meetings been informal. This complaint fails for this reason.

Proportionate means of achieving a legitimate aim

219. If we are wrong and the stage one and stage two absence meetings were both called because of disability related sickness and they also amounted to unfavourable treatment we nonetheless find that the calling of the meetings and the way that they were conducted was a proportionate means of achieving a legitimate aim. The Respondent's aims as follows were clearly legitimate:

    219.1. Ensuring that the Claimant was supported to maintain a suitable level of attendance;

    219.2. Ensuring that patient safety is maintained by ensuring staffing ratios are not impacted on as a consequence of staff sickness;

    219.3. Ensuring that other members of staff are supported and not overworked as a consequence of the sickness absence of their colleagues;

    219.4. Ensuring that employees who work for the Respondent can make the best possible contribution, individually and collectively to improving the services that the Respondent provides; and

    219.5. Managing sickness absence and improving sickness absence rates is an indicator of both a healthier and more efficient workplace resulting in high quality patient care;

    219.6. The efficient delivery of public services;

    219.7. Equitable management of staff and cost; and

    219.8. Safeguarding the wellbeing of all staff.

220. The calling and holding of the Stage One and Stage Two meetings were clearly an appropriate and reasonably necessary way to achieve those aims. There was nothing less discriminatory that could have been done instead and there is nothing to suggest that the Respondent would not have followed the same approach with an employee in the same circumstances who had been on sick leave for a non-disability related reason. The Respondent might well have been justified in calling the meetings sooner.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

221. The Respondent accepts that it applied the following PCP's:

    221.1. Requiring the Claimant to work on site (throughout the relevant period)

    221.2. Requiring people to work on site during training periods (in effect during the entirety of the relevant period because the Claimant did not get past the training stage).

222. As regards the substantial disadvantage to which the Claimant says the PCPs put her compared to someone without the Claimant's disability we find:

Increased risk of accident travelling to work?

223. The requirement to attend site and travel to work might have put the Claimant at a substantial disadvantage compared to someone without vertigo because it might have increased the risk of her having an accident when travelling to work. However, the Claimant did not actually suffer this disadvantage during the claim period because at no point after the point at which her vertigo was likely to last at least 12 months was she required to work on site (she was either on sick leave or, had she not been on sick leave, she would have been on a phased return to work which allowed her to work from home).

Increased occurrence of migraines

224. The evidence of the requirement on the Claimant to work on site increasing her occurrence of migraines is less clear. The Claimant did not in her 31 January 2023 DSE assessment raise any concerns about working on site increasing the occurrence of migraines but at that point it does not appear that she was suffering from migraines. The August 2023 OH assessment suggested that the frequent headaches/migraines that she was by then experiencing were by then "*likely related to the problems in her right ear*". It is not therefore clear why working on site might have increased their occurrence. At home the Claimant would have had to use computer screens albeit she may have been able to control the lighting in the room she worked in which would not have been possible on site in the hall. On balance, taking what we know of migraines into account, and the fact that they appear to have been related to the Claimant's vertigo we accept that with other factors, such as travel to work, noise and lighting, had she been required to attend site the Claimant would have been at risk of having an increased occurrence of migraines and that would have put her at a substantial disadvantage.

Having a noisy background

225. The Claimant would have been able to control her noise environment at home better than when working on site (even with the benefit of noise cancelling headphones when on site) and we therefore accept that, with the apparent link between vertigo and a problem with her right ear, had she been required to attend site would have put her at a substantial disadvantage (being noisier than her home environment).

226. Based on the Claimant's responses to the DSE assessment and subject to the Claimant being provided with noise cancelling headphones when on site, we do not consider that a requirement to work on site would have put the Claimant at a

substantial disadvantage based on the Claimant's underlying hearing impairment alone.

Increased fatigue due to light and computer sensitivity

227. The Claimant would have been able to control the light at home better than when working on site however she would still have had to work on computer screens at home. Nonetheless, taking into account what we know of migraines, had she been required to attend site, where she would have had no control over the ambient light (subject to wearing tinted glasses) she would have been put at a substantial disadvantage with increased fatigue.

Knowledge of disadvantage

228. We consider that the Respondent knew or could reasonably have been expected to know that the claimant was likely to be placed at the substantial disadvantages referred to above only from October 2024 when the Claimant asked about working from home.

Work from home

229. At no point during the claim period did the PCPs put the Claimant at a substantial disadvantage because, for the reasons explained, at no point during the relevant part of the claim period (i.e. after 4 October 2023) was the Claimant required to attend site. At no point would it therefore have been reasonable for the Respondent to have allowed the Claimant to work from home.

230. When it came to the days on which the Claimant, had she been fit to attend work, would have been required to do call training, it would not have constituted a reasonable adjustment for the Claimant to have worked from home because the Respondent, for the reasons we have explained in our findings of fact, could not practically accommodate the Claimant working from home for calls training. As it happened, the first day on which the Claimant, under the proposed phased return to work plan, was due to attend work was after the claim period. In any event, by then, the Claimant was not fit to attend work at all (whether at home or on site).

Minibreaks - and when would it have been reasonable for the Respondent to have made them

231. The need for mini rest breaks did not arise directly out of the PCPs. The need for mini rest breaks arose out of the need for the Claimant to wear headphones which she would not have needed to wear at home. The Claimant did not at any point during the Claim period have to do calls training or calls handling (for the reasons we do not repeat). At no point did the requirement for this adjustment arise. In any event, the Respondent was clear that the Claimant could have and should take mini rest breaks when the need arose.

232. Accordingly there was no failure on the part of the Respondent to make reasonable adjustments.

Time limits

233. The Claimant's claims not being well founded we have not gone on to consider the question of time limits.

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Employment Judge Woodhead

23 April 2025

Sent to the parties on:

25 April 2025

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For the Tribunals Office

Appendix

LIST OF ISSUES

1. **Time limits**

1.1. The claimant commenced early conciliation on 4 January 2024 (Day A) and the early conciliation certificate was issued on 15 February 2024 (Day B). The Claimant submitted her claim to the Tribunal on 28 February 2024. **Date before which claims may be out of time is 5 October 2023.**

1.2. Were the disability discrimination complaints made within the time limit in section 123 of the Equality Act 2010? Specifically the Tribunal will decide:

a. Was the claim made to the Tribunal within three months (plus early conciliation extension) starting with the act to which the complaint relates?

b. If not, was there conduct extending over a period?

c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

2. **Disability**

2.1. The Respondent concedes that the Claimant's impairments (hearing impairment, vertigo and migraines) amounted to disabilities at the relevant

times but disputes knowledge of them as disabilities until the following dates:

2.1.1. The hearing impairment from 5 December 2022;

2.1.2. vertigo/migraine knowledge conceded from 7 August 2024.

3. **Direct disability discrimination (Equality Act 2010 section 13)**

3.1. Did the respondent do the following things:

3.1.1. Ignore the claimant's request for reasonable adjustments as follows:

3.1.1.1. **Request for headsets** – The Claimant says that the request was made on 16 January 2023 (the first day of employment) during a meeting with Stephen McKenzie. The Respondent does not agree with this date and says the request was made to Mr McKenzie in February 2023.

3.1.1.2. **Working from home** – The Claimant says that the request was made at a meeting on Monday 6 March 2023 with Mr McKenzie. The Respondent does not agree with the date and says the request was not made until 4 October 2023 at the stage 2 meeting [271].

3.1.1.3. Tell the claimant to apply for flexible working when she asked to work from home. The Respondent agrees that Mr McKenzie said this to the Claimant on 4 October 2023 at the stage 2 meeting [265 notes] [271 and outcome letter.

3.1.1.4. Fail to follow up the required actions following two OH reports/meetings – This relates to the OH reports of 5 December 2022 [315] and 1 August 2023 [254].

3.1.1.5. Requiring the claimant to source her own equipment such as headsets. It is alleged that Mr McKenzie told the Claimant to do this in an email of February 2023. Note is made of the following a paragraph 2 of [387]: *"Following the return to work meeting on 27th Feb 2023 with your line manager, you have emailed options of headsets you could use at work. The order of headsets were not placed at the time as you were in the process of completing 10-week training and had further episodes of sickness, which meant that you were not placed on calls. However, as you are now back at work I have ordered the headset for you as outlined above*."

3.1.1.6. Fail to respond to or acknowledge the information when the claimant sent the relevant information about suitable headsets to her line manager (see 3.1.1.5).

3.1.1.7. Place the claimant on a stage one and then a stage two absence management meeting/processes. It is the fact of

the meetings being called that is complained of and the meetings were held as follows:

3.1.1.7.1. Stage 1 meeting on 30 June 2023 [253]

3.1.1.7.2. Stage 2 meeting 4 October 2023 [271].

3.1.1.8. Make snarky and unprofessional comments when the claimant informed them of issues she was having. This is the comment allegedly made by Mr McKenzie on 6 February 2023, whilst escorting the claimant to an audiology appointment, which is referred to by the Claimant at [219] as follows: "*I didn't appreciate your response to "shout" at me when I informed you that I did not hear you say you would escort me to 1st Floor South Wing, thank you*".

3.2. Was that less favourable treatment?

3.2.1. The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

3.2.2. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

3.2.3. The claimant has not named anyone in particular who they say was treated better than they were.

3.3. If so, was it because of disability?

3.4. How should the needs of the claimant and the respondent be balanced?

4. **Discrimination arising from disability (Equality Act 2010 section 15)**

4.1. Did the respondent treat the claimant unfavourably by:

4.1.1. The holding of the Stage one and stage two absence meetings

4.2. Did the following things arise in consequence of the claimant's disability:

4.2.1. The Claimant off sick (all of the Claimant's sickness absence)?

4.3. Was the unfavourable treatment because of any of those things?

4.4. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

4.4.1. Ensuring that the Claimant is supported to maintain a suitable level of attendance;

4.4.2. Ensuring that patient safety is maintained by ensuring staffing ratios are not impacted on as a consequence of staff sickness;

4.4.3. Ensuring that other members of staff are supported and not overworked as a consequence of the sickness absence of their colleagues;

4.4.4. Ensuring that employees who work for the Respondent can make the best possible contribution, individually and collectively to improving the services that the Respondent provides;

4.4.5. Managing sickness absence and improving sickness absence rates is an indicator of both a healthier and more efficient workplace resulting in high quality patient care;

4.4.6. The efficient delivery of public services;

4.4.7. Equitable management of staff and cost; and

4.4.8. Safeguarding the wellbeing of all staff.

4.5. The Tribunal will decide in particular:

4.5.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2. could something less discriminatory have been done instead;

4.5.3. how should the needs of the claimant and the respondent be balanced?

4.5.4. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

5. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

5.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

5.2. A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

5.2.1. Requiring the Claimant to work on site (throughout the relevant period)

5.2.2. Requiring people to work on site during training periods (in effect during the entirety of the relevant period because the Claimant did not get past the training stage).

5.3. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that,

5.3.1. Increased risk of accident travelling to work?

5.3.2. Increased occurrence of migraines

5.3.3. Having a noisy background

5.3.4. Increased fatigue due to light and computer sensitivity.

5.4. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

5.5. What steps could have been taken to avoid the disadvantage? The claimant suggests:

5.5.1. Being able to work from home

5.5.2. Have mini rest breaks in accordance with the OH recommendations

5.6. Was it reasonable for the respondent to have to take those steps and when?

5.7. Did the respondent fail to take those steps?

6. **Harassment related to discrimination (Equality Act 2010 section 26)**

6.1. Did the respondent do the following things:

6.1.1. The Claimant relies upon the same allegations as set out in the direct disability discrimination complaint.

6.2. If so, was that unwanted conduct?

6.3. Did it relate to disability?

6.4. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. **Duplication of Harassment and Direct Discrimination**

7.1. The claimant's complaints relating to disability are presented as both harassment and/or direct discrimination. The tribunal will determine these allegations in the following manner.

7.1.1. In the first place the allegations will be considered as allegations of harassment. If any specific factual allegation is not proven, then it will be dismissed as an allegation of both harassment and direct discrimination.

7.1.2. If the factual allegation is proven, then the tribunal will apply the statutory test for harassment under s. 26 Equality Act. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination because under s. 212 (1)

Equality Act the definition of detriment does not include conduct which amounts to harassment.

7.1.3. If the factual allegation is proven, but the statutory test for harassment is not made out, the tribunal will then consider whether that allegation amounts to direct discrimination under the relevant statutory test.