Case No: 2404632/2023

EMPLOYMENT TRIBUNALS

Claimant: Miss J Glass

Respondent: The Ministry of Defence

Heard at: **Bristol (by video)** **On:** **24 – 31 March 2025**

Before: **Employment Judge Bradford**

Representation
Claimant: Ms L Millin, Counsel
Respondent: Mr A Serr, Counsel

JUDGMENT having been sent to the parties on 14 April 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

Introduction

1. By ET1 issued on 24 April 2023 Miss Glass brought claims of unfair dismissal, sex discrimination, disability discrimination, whistleblowing detriment and various pay claims; notice pay, holiday pay, arrears of pay and a claim for 'other payments'. A preliminary hearing took place on 15 May 2024 where time was extended for the unfair dismissal claim and discrimination claims, however, it was determined that the claim for unlawful deductions from wages was out of time meaning that the Tribunal had no jurisdiction to hear it. A number of the claims were dismissed on withdrawal.

2. By the date of the hearing the claims and issues had been significantly narrowed, and were set out in the Case Management Order made

following a preliminary hearing on 2 February 2025. The List is copied below as it represents the issues for determination at this hearing.

3. This hearing was conducted virtually as an agreed reasonable adjustment at the Claimant's request. The Claimant was represented by Ms Leslie Millin of Counsel and the Respondent was represented by Mr Ashley Serr of Counsel.

4. The hearing was listed to determine liability only. It was agreed with the parties on the first day that this would include issues of contributory fault and any Polkey deduction if applicable.

5. The Claimant, Miss Glass, had been employed by the Respondent since May 2008 in its finance department. From 2014 onwards she had significant periods of sickness absence. Having been on sick leave from October 2018, in late 2020, when occupational health deemed her fit for work, a dialogue began with regard to the format such return would take and the adjustments that would be required to facilitate this. That took well over a year, leading to a phased return being attempted from February 2022. Capability meetings took place on 15 June 2022 and 9 September 2022. At the latter review it was considered that the Claimant's return to work plan had not been met. Following a Formal Capability Hearing which took place over two days, 28-29 November 2022, the Claimant was dismissed on capability grounds owing to her health. She brought an appeal, however, the dismissal stood.

6. The Tribunal heard evidence from the Claimant. No further witnesses were called by her. Evidence was hear from three witnesses for the Respondent:

    Ms Lucy Miller, Claimant's line manager from May 2021

    Mr Niall Tomlins, Corporate Operations Manager and Dismissal decision-maker

    Mrs Jenny Sandham, Head of Corporate Operations and Appeal Manager

Issues to be determined

7. At a case management hearing on 2 February 2025 the issues having been narrowed, the matters to be determined at this hearing were stated as follows:

1. Unfair dismissal

1.1 What was the reason for dismissal? The Respondent asserts that it was a reason related to capability, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

1.1 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

1.1.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

1.1.2 The Respondent adequately consulted the Claimant;

1.1.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

1.1.4 Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

1.1.5 Dismissal was within the range of reasonable responses.

2. Disability (joint hypermobility only, other conditions conceded)

2.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

2.1.1 Whether the Claimant had a physical or mental impairment.

2.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

2.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

2.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

2.1.5.2 if not, were they likely to recur?

3. Discrimination arising from disability (Equality Act 2010 s15)

3.1 Did the Respondent treat the Claimant unfavourably by dismissing the Claimant on 29 November 2022.

3.2 Did the following things arise in consequence of the Claimant's disability?

The Claimant's case is that:

3.2.1 The absences that led to the capability investigation, and ultimately her dismissal, were caused by the Respondent's failure to make reasonable adjustments for her disabilities and anxiety/sleep problems, which are features of the Claimant's autism. Regarding the reasonable adjustments the Claimant says should have been made, she says "I was requesting a Workplace Adjustment Passport (Reasonable Adjustment Passport) per policy, so while my main request was for the ability to work outside of 'Office Hours' (due to my known sleep issues, and which had previously been refused), my understanding from the EA2010 at that point was that my employer has a duty to consider what reasonable adjustments could be offered and my request for a Passport was to start that dialogue in earnest."

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim?

The Respondent says that its aims were:

3.4.1 The effective management of employee attendance.

3.4.2 The effective management of employee performance;

3.4.3 Ensuring the capability of its employees for continued employment; and

3.4.4 Ensuring public funds assigned to the Ministry of Defence are spent

efficiently and effectively and such expenditure is lawful and represents

value for money.

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 Could something less discriminatory have been done instead;

3.5.3 How should the needs of the Claimant and the Respondent be balanced?

3.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability/ies? From what date?

4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

4.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability/ies? From what date?

4.2 Did the lack of an auxiliary aid, namely a specialist chair, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability (joint hypermobility and spondylarthritis), in that a chair caused her severe back pain?

4.3 Did the lack of auxiliary aids, namely a specialist mouse and keyboard, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability (joint hypermobility and spondylarthritis), in that a standard mouse and keyboard caused her severe joint pain?

4.4 Did the lack of other auxiliary aids – i.e. those listed in the ATW report, namely Neurodiversity Awareness Training, sit-to-stand desk, wrist rests (mouse and keyboard), USB microphone, and Neurodiversity Awareness Training - put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability (joint hypermobility and spondylarthritis), in that:

 Sit-to-stand Desk. The failure to implement this substantially disadvantaged the Claimant due to her Arthritis, and hypermobility. The

Claimant says, had this been implemented, she would have been afforded better movement and the ability to stretch her joints whilst working and in turn alleviate pain caused by the conditions;

 Wrist rest (mouse). The failure to implement this substantially disadvantaged her due to the Claimant's hypermobility. The Claimant says, without this she suffered wrist pain and implementing this would have alleviated the pain;

 Wrist rest (keyboard). As with the mouse rest, the failure to implement this substantially disadvantaged the Claimant due to her hypermobility. The Claimant says, without this she suffered wrist pain and implementing this would have alleviated the pain;

 USB microphone. The requirement for the Claimant to use a plug-in headset was causing issues with autism and feeling trapped and exacerbating her anxiety symptoms due to her autism. The Claimant says, a wireless headset would have resolved this as she would have been able to move around the room more freely when on calls; and

 Neurodiversity Awareness Training. The failure to implement this substantially disadvantaged the Claimant as her line management didn't understand her autism and this in turn caused conflict.

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

4.6 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

4.6.1 Providing the auxiliary aids.

4.7 Was it reasonable for the Respondent to have to take those steps and when?

4.8 Did the Respondent fail to take those steps?

Facts

8. The evidence before the Tribunal, in the form of occupational health reports, was that the Claimant has a history of generalised anxiety. In November 2015, following a period of sickness absence, the professional

view was that she was fit for work subject to a temporary period of reduced hours and some home working whilst she awaited psychotherapy to help address her abnormal fears around commuting.

9. In July 2017 a recent diagnosis of 'Aspergers' was noted. In December that year the Claimant was again on long term sickness absence "*with psychological symptoms which she perceives as being triggered by work events*". She was considered fit to return to work if working from home could be accommodated, initially on reduced hours. By April 2018 the Claimant had returned to working from home, the recommendation being that this adjustment remain in place long term. The occupational health report noted particular difficulty with public transport and going out alone, which could trigger panic attacks. There had also been a worsening of the Claimant's disrupted sleep pattern. The Aspergers was not considered to affect the Claimant's ability to conduct her work to a high standard.

10. In response to a management question about working hours, the Claimant having indicated she was only able to work between 14.00 and 06.00 due to her irregular sleep pattern, the author stated:

    "*If feasible, some temporary flexibility regarding working hours is likely to be helpful due to the current significant disruption to her sleep pattern. This may be seen as reasonable adjustment under disability legislation. As her condition improves I would anticipate that her sleeping pattern would gradually move back to a more normal pattern and she should then be able to align her working hours to a normal pattern*."

11. In an email to Human Resources (HR) on 16 February 2020 the Claimant confirmed that her then current period of sickness absence had commenced in October 2018. She said it was a direct result of what was included in her outstanding complaint. She asked if it was normal for a complaint meeting to take place during sickness absence. The Claimant also informed her employer that she had recently been diagnosed with Axial Spondylarthritis and Joint Hypermobility.

12. The Claimant was seen by occupational health in July 2020. It was considered she was likely to be able to return to work in the near future, with adjustments in place to manage her anxiety. To this end, long term working from home was recommended. The Claimant would need non-

standard hours due to her sleep pattern. It was recommended that she was referred for a workstation assessment to ensure she was able to adopt healthy sitting postures when working. There was no reference in this report to physical pain or disability, consistent with clinic and Personal Independence Payment (PIP) letters from the time. A phased return plan was set out. The report noted that the Claimant reported a lack of reasonable adjustments as the main barrier to returning to work.

13. The Claimant's anxiety deteriorated over the course of 2020. She underwent a further PIP assessment, at her request, in December 2020, where the mobility component was awarded, not due to physical disability, but because the Claimant could not undertake a journey due to overwhelming psychological distress.

14. The Tribunal finds that at this stage, the Claimant's physical health conditions did not impact on her ability to work.

15. By January 2021 a chair and a laptop had been delivered to the Claimant. A letter from HR dated 27 January 2021 set out the adjustments agreed:

    - Home working
    - Phased return period including time to complete outstanding mandatory training
    - Redeployment change of role and management responsibility due to ongoing grievance
    - Providing you with a mentor on commencement of your new assignment
    - Flexible working hours and pattern
    - Providing you with a desk chair through working from home self-assessment

16. The letter continued, with regard to working hours, which was the sticking point:

    The only remaining issue we are aware of concerns agreement on working hours. We have proposed a number of different working patterns none of which you have yet felt able to agree, these included a 12 hours flexible working pattern which was then extended to 24 hours flexible working

pattern for you to be available to meet with your PDM [line manager] *for a minimum of 1 hour a day between his working hours of 07:00-15:00…*

In the absence of any supporting medical evidence to the contrary then the proposal needs to incorporate a cross over with your DM? Please advise when this will be?

17. It is of note that medical evidence from 2021 referred to early morning stiffness (lack thereof in April, present by October 2021). This suggests that the Claimant was getting up in the mornings. There is no reference in those clinic letters to an abnormal sleep pattern, albeit that sleep was discussed at each clinic.

18. The Claimant was asked to set up her laptop (she had previously refused IT support with this), and her return to work date was to be 9 February 2021. The letter additionally referred to redeployment as follows:

We have considered and offered you other suitable roles in other business areas with a different management team which may help to alleviate your anxiety. These included 2 posts in the Cost Control Finance Function in September 2020. These options were declined as you had specifically asked for a role that you has [sic] experience of and did not feel that an opportunity outside F&A would be suitable to increase your confidence as you have been out of the business for a long period.

As you are aware, we have offered you an alternative role (initially temporary) within Finance as Finance FMT-Capacity-Delivery 2, which will require you to complete the ICAF Audit Review. We have tried to assist you and smooth your move into another role by keeping this role as similar as possible to your previous position.

19. The Claimant was asked to log-on on 9 February 2021 to meet with her manager Mr Kevin Boseley. HR also indicated to the Claimant that the business expected to be able to contact her directly going forward (as she was fit to return to work) rather than through her support worker Ms Morys.

20. When asked under cross examination whether she had logged onto her laptop on 9 February as requested, the Claimant replied that she was still communicating through Ms Morys, who had been communicating with the Respondent on her behalf about reasonable adjustments. The Claimant

did not respond to the 27 January 2021 letter or take the actions requested.

21. Subsequent correspondence referred to the Claimant's objection, which she repeated in her evidence, to the Respondent contacting her via her personal email address, and writing to her home address. A letter from HR dated 16 February 2021 informed the Claimant that the Respondent would rather contact her though her work email, but as she had failed to log-on, that avenue was not open to them. The letter additionally noted that, with regard to flexible working hours, the arrangement needed to accommodate business need as well as the Claimant's adjustments. It reiterated that she was to be available for a minimum of one hour between 07.00 and 15.00 for a verbal check-in with her manager. The Claimant in evidence, when asked whether her position was that the Respondent had to deliver the working pattern she wanted, said that she considered this requirement to be a constraint, and she should not have such a constraint in her Workplace Adjustment Passport (WAP).

22. A further point raised by the Respondent in this letter was that occupational health had made 3 attempts to contact her to arrange an appointment. By the end of March 2021 this had increased to eight attempts. The Claimant was asked to make contact with them. She said she had called back in the afternoons after they had called her around 9am, but they then called her back in the morning the next time. There was no evidence to support her account.

23. Further attempts to start the Claimant's phased return to work were made by the Respondent later in February and again in March 2021. On 16 April 2021 a fifth letter was sent to the Claimant asking her to log onto her laptop and start her mandatory training. She had been warned of the possibility of disciplinary action should she refuse to log on. She did not log on that month as her WAP had not been agreed (the issue being a requirement to work one hour per day within Mr Boseley's working hours of 07.00 – 15.00).

24. In May 2021 Ms Lucy Miller (LM) took over as the Claimant's line manager. Disciplinary action had been planned because of the Claimant's failure to respond to five letters from the Respondent from January 2021

onwards asking her to return to work. It fell to LM to send the letter inviting the Claimant to a disciplinary hearing. In June 2021 the Claimant was disciplined for refusing to return to work as had been requested multiple times, and given a first written warning.

25. Thereafter, LM wished to start afresh with the Claimant and began afresh with her WAP, which seemingly had been behind the Claimant's refusal to return to work. LM put together a return to work timetable which reflected the occupational health advice, ensuring a phased return.

26. At the end of July 2021 Ms Morys emailed LM (contact continued to be via Ms Morys rather than with the Claimant directly) saying that reasonable adjustments would need to be agreed and signed off before the Claimant's return to work. The Claimant was, at that stage, refusing to speak directly to occupational health, meaning that they had closed her case file. There was a similar issue with arranging a workstation assessment which had been outstanding since the beginning of 2021. The Claimant had not sent photos of her work station as had been requested for the matter to be progressed, and ultimately withdrew her consent to the assessment, when the team said that the assessment could not be conducted via a third party (Ms Morys). In evidence the Claimant disputed that she had withdrawn her consent, saying that all Ms Morys was doing was arranging the appointment. However, the documents from the time indicate that there was an issue with the Claimant agreeing to a telephone workstation assessment. She had delayed many months in sending in photos of her workstation in preparation for the assessment. The person attempting to make arrangements wrote in an email to LM on 27 July 2021: "*I'm at a complete loss to see how this can be arranged unless Jacky is willing to take a phone call*." He said that the team had invested a lot of time and unfortunately the Claimant withdrew consent. He said there was no point in a further request being raised if the Claimant would not consent to an appointment. The Tribunal found that the Claimant refused to take part in a workstation assessment.

27. LM, in taking handover from Mr Boseley noted the adjustments that had been implemented; homeworking, a phased return, redeployment, a change of line manager due to the Claimant's ongoing grievance,

provision of a mentor once the Claimant started a new assignment, flexible working hours and provision of a desk chair.

28. On 3 August 2021 Ms Morys explained to LM the impasse with regard to the WAP; the requirement for the Claimant to work for one hour during her line manager's working day was considered a restriction and not an adjustment by the Claimant. The version of the WAP that had been prepared when Mr Boseley was the Claimant's line manager was sent to LM.

29. There were plans for an introductory meeting between LM and the Claimant in late July. This was postponed at the Claimant's request. A proposed meeting in August 2021 was again postponed at the Claimant's request. A meeting eventually took place on 2 September 2021. LM prepared an agenda which was sent to the Claimant in advance.

30. LM took a blank WAP to the meeting, indicating that it was to be considered a blank slate. She asked the Claimant what she would like to see on the passport. The meeting note records that the Claimant's main priority was to be able to work any time of day or night. A phased return over 13 weeks was discussed, and LM suggested that she would email the Claimant a list of tasks to complete at the start of the week, and at the end of the week she envisaged the Claimant emailing back with a progress report. The Claimant thought this was potentially a good idea.

31. The meeting note indicates that the Claimant's physical health diagnoses were discussed and she requested a specialist chair due to getting lower back pain after sitting for a period. LM made the necessary referral. This was the first time the Claimant had requested any reasonable adjustments due to her physical health conditions. Nor had there been reference to them in occupational health assessments. The clinic letters suggest that her back pain was getting worse at this time; by October 2021 there was reference to some early morning stiffness, which had not been present previously.

32. No return to work date was set at this meeting as the Claimant said that she would not return to work until her WAP and total flexibility over her hours was agreed.

33. LM put in place 'Keeping in Touch' (KIT) meetings. The first took place on 23 September 2021 and LM followed this up with a revised return to work plan, incorporating non-working days. LM confirmed at this meeting, having spoken in advance to the Reasonable Adjustments (RA) team, that as the work station assessment referral had been closed (due to the Claimant's refusal to speak directly with them), the Respondent had agreed to a 'Posturite' assessment to identify the equipment needed for the Claimant to be comfortable at her work station, without the need for a further occupational health assessment. In evidence LM said that the Respondent had, to that point, been basing the adjustments on occupational health advice.

34. The next KIT meeting took place on 14 October 2021. The Claimant had requested a hard copy of the WAP in advance. LM had sought advice on the workability of the Claimant's proposals for the business. This version did not contain the previous requirement that the Claimant would work one hour/day during the manager's working hours; that was to be reviewed in the third week. The reasonable adjustments were set out by LM in an email to Ms Morys after the meeting, with a request that the Claimant gave consideration to the wording by the following Monday, so that it could be further reviewed if needed. At the meeting LM confirmed that the version had been approved by HR. The Claimant remained concerned about the wording around 'building to contract' during working hours. LM agreed she would look to reword that.

35. By email of 20 October 2021 Ms Morys indicated that she thought the Claimant would agree to the revised wording in the WAP as proposed by LM. The WAP at that stage included:

    Recognising JG may not be available during the day due to sleep patterns, for the first month of Phased return, an email to be sent to PDM (Lucy Miller) at any time, by COP Friday to confirm work completed that week. At the three week point LM and JG will review whether some contact during working hours is feasible.

36. The note of the KIT call of 21 October 2021 is silent as to whether the Claimant agreed to that wording. The only reference to the document was the Claimant stating that she was concerned about HR having involvement

in her WAP. In her evidence the Claimant stated that the last sentence quoted above (At the three week point…) should not have been included in the WAP. She did not accept that this was part of the reasonable adjustment. She confirmed in evidence that she had not accepted LM's wording.

37. The evidence before the Tribunal was that LM took this wording back to HR who considered that the wording was 'more than reasonable'. LM's view was that the business had made extensive concessions to accommodate the Claimant, and this wording was the minimum that could be agreed. In evidence the Claimant disagreed that the Respondent had compromised to reach this position. She remained of the view that the reference she disputed (to review contact in working hours in week 3) should not have been included in the WAP. She said it should have been in another document, such at the return to work (RTW) plan.

38. On 4 November 2021 LM emailed the Claimant a form to complete so that her Posturite assessment could take place.

39. On 8 November LM took steps to identify an appropriate mentor in preparation for the Claimant's deployment.

40. On 9 November 2021 LM emailed the Claimant saying that she had taken further advice on the WAP and the wording could be amended to reflect the change the Claimant had requested. LM attached a revised version (this had no reference to an hour a day within a particular time window, nor was there specific reference to reviewing contact in working hours, rather, the phased return as a whole was to be reviewed at week 3). LM additionally attached a Fit for Work plan, outlining the activity the Claimant would undertake in her first few weeks. The WAP stated:

Following discussions between JG and LM, and a review of the previous Occ Health Passports, the following is proposed for the first period of phased return - to be reviewed at the 3 week point -

1. Recognising JG may not be available during the day due to sleep patterns, for the first month of Phased return, an email to be sent to PDM (Lucy Miller) at any time, by COP Friday to confirm work completed that week.

2. No requirement during the phased return period to work from a DE&S office location.

3. Reasonable Adjustment team engaged and Posturite case opened to source RA equipment during Phased return process.

4. Identify and allocate an appropriate mentor from the business during Phased Return process

5. Initiate a follow up Occ Health assessment during the Phased Return process

6. Regular review points to manage progress and to assess any requirements for additional Reasonable adjustments.

41. Following the KIT meeting on 11 November 2021, LM's understanding, as set out in an email to HR of the same date, was that the wording in the WAP had been agreed, the aspects the Claimant had an issue with having been removed. It had also been agreed that the Claimant would return to work on 15 November 2021. An updated version of the WAP which reflected this (quoted above) had been dated and electronically signed by LM and emailed to the Claimant on 9 November 2021. The Claimant, in the KIT meeting of 11 November agreed she would review it. The emails show that on 5 January 2022 the Claimant forwarded that email to her personal email address, and also to her friend Lou, saying she had not yet reviewed the documents.

42. There was nothing in the contemporaneous documentation to indicate that the Claimant did not agree with the finalised WAP dated 9 November 2021. The Tribunal accepted LM's evidence that the WAP was agreed. This was consistent with the documentary evidence. When the Claimant was asked in evidence whether she had been given everything she asked for, the Claimant said she could not recall. She was asked what was outstanding, and again she said she could not recall. The only reasonable inference that could be drawn from the evidence was that the Claimant did not review the document at the time (hence her email of 14 November to Ms Morys stating that she was expected to start work without a WAP in place), and therefore her subjective version of events has been that there was not an agreed WAP in place. The objective evidence is that the WAP

was revised to remove the parts the Claimant disagreed with, meaning that the 9 November version, was an agreed version. However, the Claimant did not sign this because she did not look at it at the time, as per her email to Lou Thomas of 5 January 2022 (above).

43. This finding is further supported by the evidence of LM, which was that the WAP must have been agreed by the Claimant, because otherwise she would not have returned to work. This is consistent with the history, and frequent earlier references by both the Claimant and Ms Morys that the Claimant would not return to work until her adjustments had been agreed. The Tribunal found that an agreed WAP was in place. In the event the Claimant did not return to work until February 2022 because she was again unable to access her laptop, having been locked out due to inactivity.

44. The return went well for the first 3-4 weeks. However very soon the Claimant stopped sending the agreed weekly activity reports. She also had further sickness absence. Therefore, HR advised LM that a formal capability review was needed. The Claimant, in evidence, disputed that the lack of sending of progress reports was to be equated with a lack of progress.

45. The Claimant had periods of sickness absence in March; 8-13 and April; 17, 20-25.

46. At the review meeting on 15 June 2022 LM stated that she had received insufficient evidence of the Claimant's progress, and raised that she had not received progress reports or timesheets in accordance with the RTW plan. The Claimant acknowledged this, but when asked for her view on the way forward, she referred to not having a signed WAP in place. In her evidence to the Tribunal the Claimant initially refused to accept that an agreement as to the WAP had been reached in November 2021, and thereafter relied on a signed version not having been submitted to the Respondent. However, she then acknowledged that it appeared that the issue had been that she had not signed WAP emailed to her in November 2021. The Tribunal found that the lack of a signed WAP was due to the Claimant's failure to sign the WAP which she had verbally agreed to and which had been emailed to her in November 2021.

47. Ultimately, at the review meeting, it was agreed that the RTW plan would go back to week 5. This meant that that Claimant would work 14 hours the following week and provide the updates/evidence of progress in accordance with the plan. The Claimant also acknowledged in this meeting that the 'specialist chair team' had contacted her directly, but she *had a meltdown, told them to contact Ms Morys and they closed the call*. LM would chase about the chair. A follow-up letter was sent on 22 June 2022 setting out the key actions. These were:

    Agreement to realign the previous phased return plan. In line with the last week it was completed, Week 5 of the plan will be updated to 20th June and forthcoming weeks realigned accordingly.

    Activity to be provided to Jacky to complete ahead of a new role being identified in the Finance Function.

    Jacky to send an email to her PDM confirming the activity completed and the hours covered that week. At Jacky's request, this will initially be after each task or activity, with a review of this process at the two week point.

    Lucy (as PDM) to contact the Reasonable Adjustment Team to follow up Jacky's Posturite referral. Jacky to then engage with Posturite as required.

    A Workplace Adjustment Passport (Reasonable Adjustments) to be agreed by Jacky and PDM.

    An Occupational Health (OH) Referral to be undertaken. Jacky to contact OH initially.

48. The Claimant in evidence did not accept that the letter indicated that her role would be in jeopardy if she did not comply with the plan, only if her attendance was not satisfactory.

49. The following week the Claimant again failed to provide an activity update or details of the hours she had worked. She was unapologetic when LM raised this with her by email. Indeed, she said she was not happy with LM '*forcing things without prior discussion'*. She again asked for her WAP to be prioritised, and attached an old version from when Mr Boseley had been her line manager.

50. The Claimant then took sickness leave from 29 June to 8 July 2022. The Claimant did not inform LM at the time (she said she relied on her supportive friend Lou having done so, but it was not clear from the documents that Lou was aware of her absence). In evidence the Claimant stated that she had had an autistic meltdown due to the meeting on 15 June 2022. In contrast, in an email to LM dated 11 July 2022, the Claimant said that her meltdown was due to the WAP not having been prioritised as she expected. The Tribunal found this to be the more likely reason, since it was the one given at the time of events. However, the WAP having been agreed in November 2021, the Clamant appeared to have forgotten. Mr Boseley's version of the WAP had not been agreed by the Claimant, due primarily to the requirement that she work one hour/day between 07.00 and 15.00. In evidence the Claimant stated she got confused as there were a number of versions.

51. As the Claimant did not report her sickness absence and LM was unaware of the reason the Claimant had been offline for 7 days by 5 July 2022, LM attempted to contact the Claimant using her personal email on 7 July 2022. That prompted a concerned response from the Claimant, accusing LM of a '*massive overstep'*.

52. On 8 July 2022 Access to Work (ATW) informed LM that they had conducted a holistic workplace assessment for the Claimant. The recommendations for equipment were set out (and align with the Claimant's reasonable adjustments claim).

53. Following a re-set of the Claimant's phased return to work in June 2022, the Claimant again repeatedly failed to provide LM with the agreed weekly updates on her activities or time she had spent working. On 2 August 2022 LM sent an internal email saying that she was yet to see evidence of the Claimant's progress against the RTW plan. Very little had been achieved since the plan had been restarted on 20 June 2022, which, according to LM, likely demonstrated inactivity, rather than a simple failure to provide updates. In evidence the Claimant stated she would have liked meaningful work, and did not accept that the approach of the RTW plan was to avoid overloading her. However, HR confirmed (email 27 July 2022) that

introducing more work whilst initial tasks were still outstanding would not be productive or supportive.

54. On 28 July 2022 LM confirmed that budgetary approval had been sought from the RA team for the equipment recommended by ATW following the assessment.

55. By 10 August 2022 the extended phased return had reached its end. On 15 August 2022 the Claimant was notified that an End of Capability Review meeting was to be held on 30 August. LM sent the Claimant an email saying that as she remained unsighted on the Claimant's progress, she was unable to assign the Claimant to a role. She made another request for the Claimant's time sheets.

56. In evidence, LM gave some detail about potential roles for the Claimant which had been identified during the phased return, but which it had not been possible to assign to the Claimant, due to the lack of evidence of her ability to work. One of these was fuel card reconciliation, but as the Claimant had not returned to a sufficient level of activity the role had gone to someone else. Then a role in submarine delivery was considered, which was thought to be highly suitable, in part, as it involved a lot of contact with America, but it needed to be filled and the Claimant was not up to speed. Policy audit work had been another option, but again, the role could not be held open indefinitely.

57. A formal Capability Review Meeting was held on 9 September 2022. The purpose was to review progress against the actions agreed at the 15 June 2022 meeting. These were:

 agreement to realign the last successful point in the previous phased return plan,

 activity to be completed ahead of a role for JG being identified in the Finance Function,

 an email to be sent from JG to her PDM (LM) confirming the activity and hours completed (which at JG's request was to be after each activity or task).

58. The Claimant agreed that the third of these had not been completed. More generally the note records:

    JG [the Claimant] *stated that the only other thing on her mind was the rest of the physical reasonable adjustments that had been identified.*

    LM confirmed that the request had gone to the RA team and that they were waiting for financial approval when she spoke with them last week. She confirmed that she would follow up again with them next week.

    JG confirmed that, in light of that, she had no other comments

59. On 16 September 2022 the follow up letter confirmed that the Claimant's Fit for Work plan had been unsuccessful because:

    Insufficient progress has been made against the activities outlined in the Plan. This includes the duration of time taken to complete the activities. Certain tasks remain outstanding, including the addition of your Goals to MyHR.

    Limited communication from you throughout the process on your progress against the activity in the Plan despite repeated requests to you.

    No updates received throughout the process on the hours you have undertaken for the duration of the Plan, despite repeated requests to you.

60. The matter would proceed to a Formal Capability Review Hearing.

61. In October 2022 the Claimant requested disability leave, and an email from HR advising on this states:

    Jacky is currently in receipt of a number of other reasonable adjustments to support and enable her to attend work: A different working pattern to accommodate her sleep pattern and significantly reduced tasks as outlined in her RTW plan… Throughout, Jacky hasn't mentioned being unable to complete the initial tasks or attend informal/formal meetings due to not having a new chair or this being adjusted correctly.

62. On 11 October 2022 LM responded to the Claimant's request as follows:

    The Procedure states that with the requested adjustments in place you would be fit to attend work, and without these you are unable to. I do not believe that with the adjustments you refer to in connection to the request for Disability Leave, that this would be the case.

 There are already a number of other reasonable adjustments in place to support and enable you to return to work (an alternative working pattern to accommodate your sleep pattern and significantly reduced tasks) as outlined in your RTW plan. This already meets the criteria of 'PDM exploring temporary adjustments to enable the employee to undertake meaningful work' - referred to under the Disability Leave section of the Procedure.

 There has been no prior reference from you that you are unable to complete your initial tasks due to a lack of equipment. The Posturite referral documentation was initially sent to you for completion in September 2021, but was not returned to the business by you until March 2022.

 You confirm that you are able to attend any current / planned meetings and will continue with discussions regarding your reasonable adjustments. It is reasonable to suggest therefore that you are able to undertake the outstanding activity, and attend the Capability Hearing once scheduled by the appointed Decision Manager.

63. Mr Niall Tomlins (NT) was appointed as the Decision Manager for the Formal Capability Review Hearing. The possible outcomes of this, in line with the Supporting Health and Attendance Procedure, were to extend the review period, to terminate the Claimant's employment or to offer the Claimant an alternative role. NT was provided with the Claimant's most recent grievance and the outcome of that because it in large part related to reasonable adjustments. He had information as to the Claimant's history of absences dating back to 2014, relevant letters from HR, the Capability Report prepared by LM along with documentation relating to the Claimant's return to work and the detailed timeline LM had kept of interactions with the Claimant. NT was also provided with the Claimant's occupational health reports.

64. NT's evidence was that when he reviewed the history he was struck by the amount of absence since 2014. That included:

- 42 days in November/December 2014
- 206 days from November 2015 to May 2016

- 238 days between July 2017 and May 2018
- The entire period October 2018 to August 2020
- Special Paid Leave August 2020 to early 2021
- In 2021 extended periods where the Claimant was unaccounted for or unavailable.

65. He noted that the Claimant had done very little substantive work since November 2015, and, effectively, none at all for the previous four years.

66. NT went on to note the extensive support that the Claimant had received. In particular, he referred to the WAP of 9 November 2021 which enabled the Claimant to work at any time of day for the first month of her phased return. He was surprised that the business had agreed to that; it had been extremely accommodating. The WAP also allowed for full time home working during the phased return. NT noted that a Posturite case had been opened to source any equipment required. The evidence was that these adjustments had been implemented. Further, despite moving roles, LM had agreed to remain the Claimant's line manager to provide continuity.

67. NT noted that progress against the return to work plan had been very limited, and that this had been preceded by difficulties in the Claimant being contacted both by line managers, HR and occupational health, because she had at one stage withdrawn consent for direct contact. He noted a history of the Claimant failing to take required actions to gain the support she sought, such as completing the Posturite self-referral form. Whilst the Claimant had had a chair since 2020, her delays in contacting Posturite had meant that a specialist chair approved in September 2021 had not been received until September 2022. There was however, no reference to the Claimant indicating that she was unable to complete her return to work plan due to a lack of equipment.

68. Having familiarised himself with the Claimant's case, NT explored with LM whether there was anything else that the business could do to support her. He noted that the most recent occupational health report had said it had not been possible to cover all the Claimant's conditions in one appointment. LM had asked the Claimant whether she wanted a follow-up

appointment with more specific questions asked. The Claimant's authority was required before that could be arranged. On balance NT did not see any benefit in waiting for a further occupational health report; previous assessments had not resulted in any positive change to the Claimant's wellbeing or ability to perform.

69. On 19 October 2022 NT invited the Claimant to a Formal Capability Hearing on 3 November 2022. The Claimant did not respond or attend the virtual hearing. The hearing was rescheduled twice more, and took place on 28 November 2022. At the Hearing the Claimant refused to accept that a WAP had been agreed and referred to the business putting constraints on her because she could not guarantee she would be awake between 7am and 3pm (albeit that this was not a requirement of the agreed version of the WAP). Her long periods of absence and issues with being contactable were discussed, in addition to her failure to communicate to LM the hours she had worked or tasks completed. The hearing was adjourned to the following day as the Claimant wanted to provide a list of points for NT's consideration.

70. NT noted the generous timeframe that had been accorded to the Claimant to complete her RTW plan, and that the plan had been very low level, focussing on mandatory training, and she had been unable to complete that. In NT's view, the Claimant had failed to demonstrate that she was capable of assuming a new role. Therefore, redeployment was not a viable option. Given this position, in the context of the WAP with incredibly accommodating adjustments, NT's view of the evidence was that there was no possibility of the Claimant successfully returning to work. In reaching this decision, NT took into account that not all the reasonable adjustments (equipment) had yet been implemented. He concluded that even with further adjustments there was insufficient evidence to enable him to conclude that attendance and availability would return to a satisfactory level. The outstanding equipment and a mentor would not have made a difference given the severity of the Claimant's health issues. He also took into account that the reason those items had not yet been provided was the Claimant's lack of engagement. NT concluded that the situation would not improve, whatever the business tried. The Claimant's

continued employment would not have been consistent with an efficient and effective use of public funds.

71. Under cross-examination NT confirmed that the reasonable adjustments as agreed in November 2021 had been in place, irrespective of the fact the WAP had not been signed. It was further put to him that the lack of an specialist chair prevented the Claimant from working. NT's response was that there was no evidence to suggest that a lack of equipment prevented the Claimant from working. He further explained that the Claimant could not have been assigned to a finance role until she demonstrated she could deliver output. Finally, NT made clear, when it was put to him that the Claimant was dismissed because of her disability, that this was not the case; the Claimant was dismissed because of her absences and her inability to deliver very basic tasks as part of a structured RTW plan.

72. NT dismissed the Claimant on 29 November 2022 on the ground of loss of capability due to ill-health. This decision was confirmed by letter of 30 November 2022. That letter stated:

Having considered all the options available to me including an extension to the review period or redeployment, I am content that there is no reasonable expectation that redeployment would influence your ability to sustain attendance or effect a return to work. Considering your health and wellbeing and the range of medical conditions that you are working to manage, I consider that even with further Reasonable Adjustments in place, there is insufficient evidence that your attendance and availability will return to a satisfactory and sustainable level that will meet your needs and that of the business.

73. The Claimant 'appealed' on 13 January 2023. However, as Mrs Jenny Sandham (JS) stated in evidence, the Claimant's challenge was not to the decision to dismiss, but was really a request for explanations as to the financial sums she was entitled to. She did not wish to return to work but wanted confirmation as to whether PILON or Gardening Leave would have been more financially beneficial, and she raised queries about annual leave and sickness absence. JS nevertheless gathered information to provide answers to the Claimant's questions.

74. After some failed attempts to meet to discuss the issues, a virtual meeting took place on 28 April 2023. The Claimant wanted the Respondent to revise its decision on her absence record and payment in a way that was more financially beneficial to her. She also wanted to collect some items from the office and raised that some physical health conditions were not considered prior to her dismissal, in other words, she was not content with how the capability process had been conducted.

75. JS's evidence was that she considered the capability procedure alongside the Claimant's RTW plan, the notes of the capability hearing and its outcome. JS concluded that the Respondent followed its processes in supporting the Claimant, but that the Claimant had not recognised this. Having considered NT's decision and the reasons for it, JS agreed with the conclusion that the Claimant was incapable of remaining in employment due to her health conditions. An appeal outcome meeting had been scheduled for 11 May 2023. The Claimant did not attend. A letter was sent to her on 15 May 2023 confirming that the appeal had not been upheld.

Law

Unfair dismissal

76. The Employment Rights Act at s98 states:.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

…

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

77. As the Claimant's case includes an assertion that the Respondent's treatment of her prior to 2021 exacerbated her health conditions, specifically anxiety, the case of *Royal Bank of Scotland v McAdie 2008 ICR 1087, CA* is relevant. Such fact, if proved, is to be taken into account when determining the fairness of the dismissal. In such cases, it may be necessary for the Respondent to 'go the extra mile' for example by accommodating longer periods of sickness absence.

78. Employers do not have to prove that an employee's illness renders him or her incapable of performing all the duties under the contract. They only have to show that the ill health relates to the employee's capability and that it was a sufficient reason to dismiss - *Shook v Ealing London Borough Council 1986 ICR 314, EAT* .

Disability

79. The Equality Act 2010 at s6 defines disability as follows:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities*.

80. The burden of proof is on the Claimant to demonstrate that she meets this definition with regard to Joint Hypermobility. The Respondent accepts that at the material times the Claimant was a disabled person due to her anxiety, Aspergers and Axial Spondylarthritis.

81. In *Goodwin v Patent Office [1999] I.C.R. 302* which remains good law notwithstanding that it was decided under predecessor legislation, the Disability Discrimination Act, the EAT set out four questions that Tribunals should pose to themselves sequentially:

• did the claimant have a mental and/or physical impairment? (the 'impairment condition')

• did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')

• was the adverse condition substantial? (the 'substantial condition'), and

• was the adverse condition long term? (the 'long-term condition').

<u>Discrimination arising from Disability</u>

82. The Equality Act at s15 states:

(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.

83. Unfavourable treatment is not defined in the Equality Act, however the Equality and Human Rights Commission's Code of Practice on Employment (2011) states that it means that the disabled person 'must

have been put at a disadvantage'. It is generally accepted that dismissal is unfavourable treatment.

Reasonable Adjustments

84. S20 Equality Act states:

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

(2) The duty comprises the following three requirements.

…

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

85. The duty is imposed by s21 as follows:

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

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

(3) *A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise*.

86. In *Thompson v Vale of Glamorgan Council EAT 0065/20* the EAT dealt with 'substantial disadvantage' as follows: '*The Tribunal should identify the nature and extent of the "substantial disadvantage" caused by a PCP before considering whether any proposed step was a reasonable one to have to take… There must obviously be some causative nexus between disabilities relied on and the "substantial disadvantage"; the tribunal should*

look at the "overall picture" when considering the effects of any disabilities.'

87. As to 'substantial', section 212(1) EqA states that 'substantial' means 'more than minor or trivial'. Whilst this is generally accepted to be a low threshold, it is not the case that simply because an employee is disabled, the employer is obliged to make a reasonable adjustment. Consideration of the functional effects of the disability are required. As set out in *Environment Agency v Rowan 2008 ICR 218, EAT* a tribunal must consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and what adjustments would be reasonable.

88. In *HM Prison Service v Johnson 2007 IRLR 951, EAT*, the EAT made it clear that it is insufficient for a claimant simply to point to a substantial disadvantage and then place the onus on the employer to think of what possible adjustments could be put in place to ameliorate the disadvantage. The EAT in *Project Management Institute v Latif 2007 IRLR 579, EAT*, confirmed this, Mr Justice Elias stating: *The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty*.

Submissions

Claimant

89. Ms Millin, on behalf of the Claimant, with regard to unfair dismissal, referred me to *BS v Dundee City Council [2014] IRLR 131* which states that there are three matters that fall to be considered where an employee has been on long term sickness absence: whether a reasonable employer would have waited longer before dismissing; the employees views, and their medical condition and its prognosis. She submitted that it is likely to be difficult for an employer to show it has acted reasonably if it has not taken to steps to try to find another suitable role for the employee. She

submitted that where the employer is responsible for the employee's incapacity, that is a relevant consideration.

90. Ms Millin submitted that the Respondent made no proper attempt to look for alternative employment for the Claimant and that a lesser role should have been identified for her due to exhaustion. She also submitted that dismissal was not appropriate in circumstances where occupational health had said that the Claimant was fit to work.

91. As to disability arising from Benign Joint Hypermobility, Ms Millin submitted that was a matter for the Tribunal to decide.

92. Moving to discrimination arising from disability, Ms Millin submitted that there is a low threshold for unfavourable treatment, and that there are two issues: first whether the employer treated the employee unfavourably due to an identified 'something', and secondly, whether that 'something' arose in consequence of the employee's disability (*City of York Council v Grossett [2018] IRLR 746*). If these are established, it is for the employer to prove that the treatment was a proportionate means of achieving a legitimate aim.

93. Ms Millin submitted that LM's attempts to get the Claimant back to work failed because the Respondent did not make reasonable adjustments. She submitted that the Respondent's stance was that the Claimant could have a chair, not the other items recommended because they would have to be bought with public money. Ms Millan further submitted that the process was unfair as JS was lined up for any appeal before the Formal Capability Hearing had taken place.

94. Finally, as to the duty to make reasonable adjustments, Ms Millin submitted that whether a claimant has been substantially disadvantaged is a question of fact; *Cave v Goodwin* [2001] EWCA Civ 391. She referenced the 'knowledge defence'. In oral submissions when asked what the Claimant's case was as to when auxiliary aids should have been provided, Ms Millin submitted that the Claimant was diagnosed with spondylarthritis in 2019 and she needed the auxiliary aids as soon as she was diagnosed, although the Claimant, at that time, probably did not realise that she needed them.

95. In conclusion, Ms Millin submitted that the Claimant was not able to work 'properly' because she did not have auxiliary aids, so was dismissed because of her disability. She submitted that there was a lot of absence because the Claimant could not work all the time. In Ms Millin's submission, the only concession the Respondent made was to allow the Claimant to work at night for three weeks. Ms Millin submitted that the Claimant wanted to get out of the house and that her disability was exacerbated by having to work from home. Ms Millin submitted that the Respondent just looked at her sick leave and dismissed her.

Respondent

96. Mr Serr set out the background with reference to the evidence in the bundle, and summarised the law beginning with s15 Equality Act, noting specifically the two limbs of the test as referred to by Ms Millin, and that it is not a question of whether the complainant was treated less favourably because of their disability: *Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305*. He submitted that the test under s15(1)(b) is an objective one: *Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15*.

97. It was submitted on behalf of the Respondent that the Claimant was dismissed because of her inability to maintain sustained attendance and meet the modest requirements of the phased return programme. The Claimant's absences from September 2020 were unrelated to disability, as was her failure to provide LM with evidence of her work.

98. In the alternative, Mr Serr submitted that the dismissal was a proportionate means of achieving the legitimate aims set out in the List of Issues:

    97.1 From 2015-2020 the Claimant had had an extraordinary amount of sickness absence. Repeated indications of satisfactory service in the future by the various OH never materialised.

    98.2 From July 2020 the Claimant was placed back onto full pay under the Respondent's disability policies pending the implementation of adjustments.

    98.3 By January 2021 an extensive list of adjustments had been agreed by the Respondent including home working, a phased return including

time to complete mandatory training, redeployment change of role and management responsibility due to ongoing grievance, a mentor on commencement of new assignment, flexible working hours and pattern, provision of a desk chair, a 24 hrs flexible working pattern.

98.4 The Claimant's refusal to accede to the modest request to work 1 hour per day between 7am-3pm was not supported by occupational health advice nor in reality practical, given it would, or may, result in no face to face contact at all with her manager.

98.5 Even the wholly unobjectionable amended wording was refused.

98.6 The Claimant appeared to be of the view that any demand had to be acceded to by the Respondent as of right. The Claimant also failed to cooperate with basic management requests. In April 2021 it was recorded that there were 14 attempts to schedule an occupational health appointment. There were also failures to progress her grievance or provide workstation photos leading to a disciplinary sanction on 28/6/21.

98.7 Eventually the Respondent agreed to every demand the Claimant had made in a final attempt to facilitate a return to work reflected in the WAP of 11/11/21.

98.8 The ensuing phased return was a failure on every metric. There were 3 further periods of sickness absence, failures to join the single weekly catchup, repeated failures to provide evidence of work progress in the form agreed, and failure to progress as planned. LM on 15/6/22 allowed the Claimant to revert back to week 5 of the plan without improvement.

98.9 There is no evidence that an absence of auxiliary aids was impacting on the Claimant's performance nor that the provision of such aids would improve performance.

98.10 At no point in the capability meeting with NT did the Claimant suggest satisfactory service was imminent or what could be done to aid this. The most recent occupational health report gave no indication to the Respondent that there were additional measures that could

assist the Claimant or explain the lack of performance/continued absences.

97.11 The Respondent had made efforts to identify a role without success due to the Claimant's continued failure to meet the minimal return to work programme. As LM explained in evidence, roles couldn't be held open. Likewise, as Mr Tomlins explained, redeployment was not a viable option while the phased return was not completed.

99. Mr Serr submitted that if the Tribunal is not with him and finds the dismissal disproportionate, then the likelihood was that the Claimant would have been fairly and lawfully dismissed a few weeks later in any event; further absences and failure to progress were inevitable. Further, the Claimant contributed to her own dismissal, meaning that any compensation should be reduced by 100%.

100. As to s20 and reasonable adjustments, Mr Serr submitted that limitations on the duty are contained in schedule 8, part 3 of the Equality Act: An employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the relevant substantial disadvantage.

101. He submitted that there was no substantial disadvantage through lack of provision of auxiliary aids, nor was there a culpable delay by the Respondent in providing them. Efforts were made to discuss equipment with the Claimant on 19 October 2022 and again in November 2022. The Claimant's lack of co-operation delayed the recommendations being actioned.

102. Finally, with regard to unfair dismissal, Mr Serr submitted it is unlikely given the facts of this case that the Tribunal could find the dismissal unfair absent a finding in the Claimant's favour in her s15 claim.

Application of law to facts

Disability

103. The Tribunal first considered disability. The burden of proof is on the Claimant to establish that Joint Hypermobility was, at the relevant time, a

disability as defined in s6 Equality Act 2010. The Respondent has already accepted that her Aspergers, Anxiety and Axial Spondylarthrosis were disabilities.

104. Joint hypermobility is a physical health condition, and it is not disputed, given the medical evidence, that the Claimant was diagnosed with this condition in 2019. The Tribunal accepted her evidence that this is an ongoing condition and has lasted for more than 12 months. Indeed, this diagnosis was made before the diagnosis of Axial Spondylarthritis. The hospital letter following the clinic that the Claimant attended on 30 October 2019 noted this diagnosis and stated that the Claimant was to undergo investigation for spondylarthritis. In December 2019 the Claimant underwent an MRI and thereafter the spondylarthritis diagnosis was confirmed. The medical evidence, namely a hospital letter dated 9 December 2019, written after the MRI had been performed, and which gave the spondylarthritis diagnosis, referred to irregularity and erosions of the sacroiliac joints (hips). The evidence therefore is that hip pain was primarily a consequence of spondylarthritis

105. The Claimant attended a clinic on 6 February 2020. It was noted that she suffered some lower back pain with variable early morning stiffness, which got better with activity. Pain was not disturbing her sleep. It is not clear which condition this back pain was attributed to. In her disability impact statement, the Claimant attributes back pain to spondylarthritis. The Tribunal finds on the balance of probabilities that the Claimant's back and hip pain was due to spondylarthritis.

106. The clinic letters thereafter, whilst listing joint hypermobility as a diagnosis, do not distinguish between the impact of each condition on the Claimant's reported symptoms. The letters appear to focus on spondylarthritis. In her evidence the Claimant referred to these conditions 'cancelling each other out'; she explained that given the spondylarthritis, she would not be expected to have the range of movement in her joints that she in fact has, and this is because of the joint hypermobility. When asked about the symptoms of joint hypermobility, the Claimant talked about pain in joints such as hips, wrists, hands, knees, left shoulder and fingers. However, her disability impact statement attributed hip, back and knee pain to

spondylarthritis. She referred to this causing pain when doing housework. In addition, the clinic letters appear to attribute the joint pain and back pain to spondylarthritis. There is no subsequent mention of joint hypermobility and clinic follow up appears to be required due to the spondylarthritis. It is noted that the doctors recommended she attend a 'virtual ax SpA course'. Exercise was recommended to help with symptoms of spondylarthritis.

107. In the Claimant's disability impact statement, there is a very brief section on joint hypermobility, the Claimant simply saying that she got joint pain if she worked on her laptop in an 'unsuitable situation' such as on the sofa.

108. According to the PIP letters, the Claimant was not awarded the mobility component due to her physical health (but rather severe anxiety). These letters note reference to an adequate range of movement and power in the upper and lower limbs and normal grip in both hands. This, combined with a lack of any direct evidence of the impact of joint hypermobility alone, meant that there was insufficient evidence on which the Tribunal could find that the joint hypermobility had a substantial (more than minor or trivial) impact on the Claimant's ability to carry out day to day activities. The Claimant was not taking regular medication, nor is there evidence of her undergoing any treatment for joint hypermobility.

109. The Tribunal finds that the Claimant was not disabled due to Joint Hypermobility at the relevant time.

110. Therefore, the disability claims will proceed on the basis that the Claimant was disabled by reason of Anxiety, Aspergers and Axial Spondylarthritis only.

<u>Discrimination arising from disability</u>

111. There is some fairly significant overlap in the claims of discrimination arising from disability and unfair dismissal. Given that disability / capability is behind both, the Tribunal dealt with the s15 claim first.

112. The unfavourable treatment that the Claimant relies on is her dismissal on 29 November 2022. The Respondent accepts that dismissal is unfavourable treatment and the Tribunal agrees.

113. The Claimant's case is that her absences were the 'something' that caused the dismissal. The Tribunal needs to determine 1) whether the

Claimant was dismissed due to her absences and if so, 2) whether her sickness absence was a consequence of her disabilities.

114. The Claimant was dismissed (NT's letter 30 November 2022) because there was insufficient evidence that her attendance and availability would return to a satisfactory and sustainable level that would meet the needs of the business.

115. Absence was therefore in part the reason for the dismissal. Indeed, NT had noted the significant periods of absence when undertaking his review.

116. As to whether absence was a consequence of disability, the evidence is:

- Occupational Health report 15.12.17: on long term sick with psychological symptoms which the Claimant perceived as being triggered by work events. She was ready to return to home working but unlikely to be able to return to the workplace for the foreseeable future due to inability to use public transport because of panic attacks. Her psychological condition was likely to be considered a disability.
- Occupational Health report 13.04.18: Referred regarding long-term absence due to psychological symptoms with severe anxiety. Recent diagnosis of Aspergers syndrome. She continued to describe particular difficulty with public transport and going out alone. She had returned to working from home and the recommendation was that this support remained in place long term. She would also benefit from flexibility with working hours to assist with concentration.
- Occupational Health report 14.07.20: Absent since October 2018 due to stress she attributed to work. Impaired sleep. Did not leave the house. Able to return to work in the near future with adjustments to manage anxiety. Recommended home working and non-standard hours due to sleep pattern.
- From January 2021 repeated requests were made by the Respondent that the Claimant returned to work and she did not, as set out in the facts section above. The evidence is that her absence from early February 2021 (first return date given being 9 February 2021) was not because of health and hence disability, but because the terms of her

return could not be agreed, and because of IT issues consequent on the Claimant's refusal to log-in over extended periods of time.

117. Following her return in late February 2022, the Claimant again had short periods of absence in March 2022, April 2022 and from 28 June to 8 July 2022. The last of these, the Claimant said, was due to an autistic meltdown. There was no medical evidence such as GP records before the Tribunal confirming the reasons for these absences.

118. NT in his review noted that the Claimant had not worked (save for the limited mandatory training during the RTW plan) for four years.

119. The Claimant's absence from 9 February 2021 onwards she says was due to the Respondent's failure to make suitable reasonable adjustments (and by extension, due to her disability). On the evidence, this is not a plausible stance. Appropriate reasonable adjustments were made that accorded with occupational health advice. The adjustments offered by Mr Boseley were very accommodating. They allowed the Claimant to work entirely from home (adjustment for her anxiety and consequent inability to commute) and to work flexibly such that her unusual sleep pattern could be accommodated. Whilst the Claimant would not agree to the proposed adjustments because she was required to work 1 hour/day between 07.00 and 15.00, the needs of the business had to be balanced against her needs. Indeed, this hour/day was in large part to ensure support, because otherwise the Claimant and her line manager would not be able to speak as they would never be working at the same time. There has been no claim that the Claimant's abnormal sleep pattern was a disability, but the Respondent made adjustments to her working hours in any event.

120. The Tribunal does not find that the Claimant's absence from February 2021, save for the 10 day period, which the Tribunal is prepared to accept was due to an autistic meltdown in June/July 2022, arose in consequence of her disability.

121. NT was clear in his statement that his decision to terminate the Claimant's employment was a combination of absence and a loss of capability due to ill-health.

122. The Tribunal finds that the dismissal was due in part to disability related absence; the long history of disability related absence was a factor that weighed in the decision to dismiss. In addition, there was a generalised lack of ability to meet the requirements of the phased RTW plan.

123. The burden therefore shifts to the Respondent to provide objective justification. The Tribunal needs to consider whether the dismissal was a proportionate means of achieving a legitimate aim. The Respondent says its aims were:

> The effective management of employee attendance.
>
> The effective management of employee performance;
>
> Ensuring the capability of its employees for continued employment; and
>
> Ensuring public funds assigned to the Ministry of Defence are spent efficiently and effectively and such expenditure is lawful and represents value for money

124. An objective assessment is required to determine whether dismissal was proportionate. The Tribunal must critically evaluate the evidence, weighing the needs of the employer against the discriminatory impact on the employee – *Gray v University of Portsmouth EAT 0242/20*.

125. As noted by NT, the Claimant had not worked, save for some training, which was not producing an output of value to the business, for 4 years by the date of her dismissal. She had been in receipt of full pay for a significant proportion of that period. NT's assessment was there was no basis upon which he could conclude that the Claimant would be able to sustain her attendance at work at a satisfactory level, even with further reasonable adjustments. In the Tribunal's assessment this was a rational and clearly reasoned decision based on the evidence before NT. He had regard not only to the significant history of absence, but also the fact that notwithstanding considerable support and tailored reasonable adjustments, the Claimant had not been able to sustain attendance or produce even a very modest level of output during the extended phased return period.

126. It follows in the Tribunal's assessment that the Respondent could not feasibly have done more to support the Claimant in maintaining attendance at work. The Respondent had, in accordance with *McAdie*, 'gone the extra mile'. NT gave reasons in evidence as to why it had not been appropriate to allocate a finance role to the Claimant prior to her completing mandatory training. The Tribunal accepted that evidence and also noted that the Claimant had not undertaken the finance specific training allocated to her by the person identified as her next line manager (Talib). She had provided no explanation for that. The Tribunal accepted NT's evidence that the Claimant was not capable of producing meaningful work or of attending work in a sustained manner, because she failed to meet the very basic requirements of the RTW plan and had further periods of absence during the period of the phased return. The Respondent, like all the public sector, has a duty to spend public money in a manner consistent with providing value for money to the taxpayer. Given that the Claimant had received pay for the large part of 4 years and provided no valuable work in return, the Respondent appropriately recognised that the situation could not be permitted to continue.

127. The Tribunal finds that the dismissal was a proportionate means of achieving legitimate aims in view of the above. The Respondent could not run its business efficiently or effectively and provide value for money to the government and the taxpayer if it were not able to terminate the employment of employees who provide no work in return for remuneration, whether this is because of sustained absence or lack of ability to perform a role or, as here, a combination of the two.

128. In view of the significant support provided to the Claimant, nothing less discriminatory could have been done. There is no evidence that additional reasonable adjustments (those which had not been implemented by the date of dismissal) would have assisted the Claimant in terms of sustained attendance or capability to produce work, because at no time did she cite back pain or joint pain as a reason behind her absence or her failure to perform.

129. The dismissal was a proportionate means of achieving legitimate aims.

<u>Unfair dismissal</u>

130. The Respondent asserts that the reason for dismissal was capability. It has demonstrated, through evidence of the RTW plan and the capability review meetings on 15 June, 9 September and 28-29 November 2022, that in its judgment, the Claimant was not capable of performing her role. The Tribunal accepts this evidence as it comprises contemporaneous documents which set out the expectations on the Claimant, show that she was aware of those, and that she repeatedly failed to meet them.

131. The principal reason for dismissal was capability (against a background of prolonged sickness related absence).

132. The Tribunal needs to determine whether the Respondent acted reasonably in treating this as a sufficient reason to dismiss the Claimant. In the case of *O'Brien v Bolton St Catherine's Academy 2017 ICR 737, CA*, Lord Justice Underhill expressed that a finding that dismissal was either proportionate or disproportionate in a s15 Equality Act claim was likely to directly link to a finding of reasonableness or unreasonableness in a related unfair dismissal claim. He suggested that the law is complicated enough, without the parties and tribunals having to judge dismissal by one standard for one claim, and a different standard for another. Recognising there may be cases where both dismissal and non-dismissal would have been reasonable, that did not reduce the task of the tribunal to one of 'quasi-Wednesbury' review, and consequently he very much doubted that the tests should lead to different results.

133. However, subsequent cases, including *Gray* above, have criticised tribunals where they have conflated the two tests, and it has been emphasised that the two tests may yield different results. Here, the Respondent's position is that capability was the principle reason for dismissal, which differs from the sickness related absence behind the s15 claim (albeit that there is overlap). Therefore, whilst noting the Respondent's submission, the Tribunal has evaluated whether the Respondent acted reasonably in all the circumstances, and whether the dismissal was within the band of reasonable responses.

134. Did the Respondent adequately consult the Claimant? The Claimant was informed by LM in a KIT call on 28 April 2022 that she was going to submit a capability review. LM followed this up in an email of 4 May, confirming

that this was because the Claimant had not been providing the agreed activity/progress updates and therefore LM did not have the evidence that the Claimant had progressed to the point the business would expect. This was in response to an email from the Claimant questioning the decision to refer her for such review.

135. At the meeting on 15 June 2022 the Claimant's progress was discussed. She was informed that LM had very little evidence that the Claimant was either attending work or delivering the agreed outputs. It was, however, agreed that initially the RTW plan had gone well, and as such, LM suggested that the RTW plan reverted to week 5. In other words, the Claimant was given the opportunity to re-work a number of weeks and hence a second attempt to demonstrate her capability.

136. After that meeting, the Claimant again failed to provide the weekly progress reports and she was reminded of the need to do so by LM. The Claimant did not provide updates over the following weeks.

137. An End of Health Capability Review Meeting was held on 9 September 2022. This was a further opportunity for the Claimant to provide evidence that she had met the RTW plan, or explain why she had not. Her lack of progress was discussed, and the Claimant was informed that a Formal Capability Review Hearing would take place.

138. The Tribunal finds that the Respondent adequately consulted the Claimant and she was given repeated opportunities to demonstrate that she was meeting the agreed RTW plan, but failed to do so.

139. Did the Respondent carry out a reasonable investigation, including finding out about the up-to-date medical position?

140. The capability review meetings referred to above were the main part of the Respondent's investigation. In addition, in preparation for the Formal Capability Review Hearing in November 2022, LM produced a Capability Report. That was a detailed document setting out events since LM began to line-manage the Claimant in May 2021. It included the options that had been considered, such as ill-health retirement and a change of job role/level. It referred to the Claimant's lack of engagement and lack of consistent communication with the Respondent, as well as lack of

progress under the RTW plan. The occupational health reports and sickness absence record were appended in addition to the capability reviews and outcomes.

141. As part of the capability process, the Claimant had been referred to occupational health. An assessment took place on 18 October 2022 and the report was available to NT. The appointment had focussed on the Claimant's mental health, noting that it had not been possible to focus on all her conditions during a single appointment.

142. The Claimant's case was that the decision to dismiss was inconsistent with the most recent occupational health report. In evidence NT said that he took into account the Claimant's health alongside the interventions and support she had received. He concluded that there was insufficient evidence to enable him to conclude that a further assessment and/or provision of ancillary auxiliary aids would enable the Claimant to progress to a satisfactory return. NT considered that a further occupational health appointment would cause further stress for the Claimant, and was not necessary or proportionate, given that adjustments implemented following previous assessments had not resulted in any positive change to the Claimant's ability to perform.

143. The Tribunal was satisfied that the Respondent had carried out a reasonable investigation and satisfied itself as to the up-to-date medical position.

144. Did the Respondent consider redeployment? (Whilst this is not included in the list of issues, it was agreed with the parties on day 1 that this is a relevant consideration and would be considered, noting that it had been addressed in witness statements and the documentary evidence).

145. Once the Claimant had embarked on her RTW plan, a search for a role got underway. In an email to her on 4 May 2022 LM said that a post had been identified and would be discussed with the Claimant at their upcoming meeting. LM explained how posts are allocated, and noted the Claimant's request for an audit/compliance role. When the Claimant failed to progress as expected during the RTW plan, LM considered a lower grade role. However, the evidence to the Tribunal was that lower grade roles offered less flexibility in terms of working patterns, so would not be suitable given

the adjustments the Claimant needed. LM gave detailed evidence, as set out above, in relation to the roles that had been considered for the Claimant.

146. The evidence is that redeployment was discussed at the 15 June 2022 capability meeting and at the Formal Capability Review Hearing.

147. NT's evidence included that he requested the Claimant's job description – the success profile for her grade - so he could see the typical tasks and responsibilities, with a view to determining whether she would be able to fulfil her current role or another role with the same success profile, i.e. be redeployed. NT's letter of 30 November 2022 confirming the outcome of the Formal Capability Review Hearing stated that he had considered redeployment but concluded that there was no reasonable expectation that redeployment would influence the Claimant's ability to sustain attendance.

148. The Tribunal found that redeployment was considered as part of the capability process. In any event, the Claimant did not have a substantive role at the time of her attempted return, seemingly due to the length of her absence. A decision was taken in late 2020 that she would have a different line manager, in view of the grievance raised against her previous manager, so redeployment was always the plan.

149. Could the Respondent have been expected to wait longer before dismissing the Claimant?

150. Whilst the Claimant's grievance was not upheld, her perception that the way she had been treated by previous managers appears to have exacerbated her anxiety and stress is a factor the Tribunal bore in mind when considering this question. It is relevant to note that, in view of this concern, the Claimant was allocated a new line manager, Mr Boseley, to work with her to support her return to work from late 2020. As such, a return to work in early 2021 was, in the Tribunal's view, a reasonable request for the Respondent to make, particularly given that the Claimant had been on extended sickness absence since October 2018, and was deemed fit to return by occupational health. Beyond the issues in the grievance exacerbating stress, there was no evidence that the

Respondent caused the Claimant's disabilities. Her anxiety appears to have been primarily around commuting and leaving the house.

151. The Claimant does not say how much longer the Respondent should have waited before dismissing her. Indeed, she appears to accept that continued absence was not justified, because her evidence was that she would have made a successful return had she been allocated a finance role. She criticised the Respondent's approach of simply requiring her to undertake training during the RTW plan.

152. Given that the Claimant had, until attempting to return to work, been absent for some 3.5 years, and given her lack of output despite support, not only by way of reasonable adjustments, but a particularly supportive line manager and a reset of the RTW plan part way though, to enable a second attempt to meet it, there was no basis for a finding that the Respondent could reasonably have been expected to wait longer before dismissing the Claimant. The Respondent's decision that it had waited long enough was reasonable.

153. In the context of the foregoing, did the Respondent act reasonably in treating capability as a sufficient reason to dismiss the Claimant? Was dismissal within the range of reasonable responses?

154. These questions require the same considerations and are dealt with together. The Tribunal is cognisant that it must not substitute its own view, noting that even if not dismissing would have been reasonable, dismissal may also have been.

155. The overwhelming evidence before the Tribunal was that the Claimant was provided with adjustments tailored to her circumstances. These provided her with a significant amount of flexibility from the beginning of 2021. She was initially disciplined, it being considered that it was her attitude rather than her health or capability which was the reason behind her not engaging with the Respondent's requests that she return to work. Nevertheless, rather than pursuing the matter down a conduct route, LM started afresh with the Claimant and asked her what it was that she needed in order to be supported to a successful return. This dialogue resulted in the Claimant's request for full flexibility over her working hours being granted, and in turn, her agreement to LM's version of a RTW plan.

At the Claimant's request, LM also initiated an assessment of the Claimant's physical workstation, with a view to ensuring that she had the necessary aids to support her physical disability, spondylarthritis.

156. The Claimant has not said what more she expected of LM, save that she has maintained that it was somehow LM's responsibility to ensure a signed WAP was in place. The evidence here, and the Tribunal's finding is that the agreed WAP having been emailed to the Claimant on 11 November 2021, it was her responsibility to sign and return it. That was the key area of contention, and was factored into NT's decision-making process. He noted that notwithstanding that the WAP had not been signed and filed, the adjustments set out in the WAP were in place, and were incredibly accommodating. He concluded that there was no evidence that further adjustments (equipment) would have enabled a return to satisfactory attendance or output.

157. The Tribunal was satisfied that NT took all relevant considerations into his decision-making process. He weighed the support provided to the Claimant against her response to it and evaluated this in the context of her significant history of sickness related absence. He concluded that the situation would not improve, whatever the business did to support the Claimant. He took into account that ultimately the business had to ensure that its employees were capable of continued employment, and had a duty to ensure that public funds are used effectively and represent value for money.

158. The Tribunal finds that the Respondent genuinely believed that the Claimant was no longer capable of performing her duties, notwithstanding the occupational health report declaring the Claimant fit to work. The Tribunal concludes that this was a reasonable belief given the evidence of her failure to meet the RTW plan despite significant support and adjustments. This is clearly evidenced by the formal capability meeting with LM in August 2022 and the Capability Review Hearing in November 2022. Even if a different employer may have given the Claimant further time to demonstrate her ability to attend work (albeit from home) and produce output, dismissal was within the reasonable range of responses to the Claimant's failure to demonstrate capability for work given her

failure to meet the modest requirements of the RTW plan in the context of a significant history of health-related absence, which continued during the period of phased return.

159. Further the Respondent followed a fair process. The evidence was that it followed its absence management procedure and conducted a capability process in line with that. In respect of the Claimant's submission that the process was unfair because JS was lined up to deal with any appeal before the Capability Review Hearing had taken place, the Tribunal did not find that identifying a suitable person to hear any appeal represented unfairness. It accepted the evidence of JS that in order to meet the timescales in the relevant procedure this was appropriate. It accepted her evidence that the timing of her appointment did not represent any conflict of interest or similar; she was not given any information other than a summary of the type of case, so she was aware that it was being dealt with under the capability procedure.

160. The Claimant was fairly dismissed due to a lack of capability.

Reasonable adjustments

161. The Claimant's case is summarised in submissions above. She submits that auxiliary aids should have been provided from the time of her diagnosis with spondylarthritis. The evidence is that the Respondent, whilst informed of this diagnosis on 16 February 2020, had no information as to its effects. The Claimant did not state her symptoms or how they may impact on her ability to undertake her role. She was in any event on a period of extended sickness absence at the time and not working.

162. The Tribunal finds in line with *Mefful v Citizens Advice Merton and Lambeth* [2024] EAT 198 that because the email of 16 February 2020 related to other matters, and its purpose was not to give the Respondent information about her medical conditions, the Respondent did not have actual or constructive knowledge that adjustments were required due to the diagnosis of spondylarthritis at that time. Whist that case dealt with a s15 discrimination arising from disability claim, there is no obvious reason why the same principle would not apply to a s20 claim. Indeed, neither this diagnosis, nor its impacts were mentioned at all in the next occupational health report of July 2020.

163. The Tribunal accepts the Respondent's submission with regard to the limitations on the duty in circumstances where the Respondent did not know and could not reasonably be expected to know that the disabled person was placed at a substantial disadvantage. The question therefore arises as to when the Respondent should reasonably have had such knowledge.

164. A workstation assessment was planned as part of the Claimant's general support to return to the planned home-based working from February 2021 but the Claimant did not engage and the referral was closed. Further, the assessment was not planned due to complaints by the Claimant of physical discomfort, but with a general view to ensuring that she had a suitable workstation at home, given that she was to be home-working. The Respondent did not have either actual or constructive knowledge of a substantial disadvantage due to disability at that time.

165. It was during the meeting with LM on 2 September 2021 that the Claimant mentioned back pain with prolonged sitting and her diagnosis of spondylarthritis. At that date the Respondent had knowledge of the Claimant's disability and potential substantial disadvantage. LM in response said that she would speak to the Reasonable Adjustment Team with regard to equipment that many be needed. She also took steps to arrange for a Posturite/Access to Work assessment and sought approval for the cost of an ergonomic chair. The Claimant was sent a form to complete in November 2021, which she did not complete until March 2022, delaying the assessment. She then acknowledged at the 15 June 2022 review meeting that she had gone into a meltdown when contacted about an assessment, and the matter had not progressed. Therefore, LM chased up the referral, and an assessment took place on 8 July 2022. Later in July 2022 LM sought approval for the cost of the equipment recommended. The cost of a specialist chair had been approved at the time of the original referral and the chair was provided in September 2022. The Respondent was attempting to liaise with the Claimant (who was not engaging) about the remaining equipment recommended (to ensure that what was purchased would both meet her needs and be compatibility with the Respondent's IT) until the date of her dismissal.

166. The Tribunal found that once the Respondent had knowledge that the Claimant was potentially disabled due to spondylarthritis, appropriate steps were taken by the Respondent to understand the nature and impact of her disability with a view to providing aids and equipment to mitigate any substantial disadvantage. The delay in assessment was due to the Claimant's lack of engagement with the process.

167. Was the Claimant placed at a substantial disadvantage? The Respondent's position is that an appropriate chair was provided as soon as was reasonably practicable and that there was no substantial disadvantage through either the time take to provide the chair or the lack of provision of auxiliary aids. Any delay in the provision of these was due to the Claimant's lack of co-operation.

168. In accordance with *Environment Agency v Rowan*, the Tribunal must consider the nature and extent of disadvantage to ascertain whether a duty applies. If a duty to make adjustments applies, the Claimant must establish a breach of that duty in accordance with *Project Management Institute v Latif*.

169. In view of the Claimant's diagnosis of spondylarthritis, her reports of pain with prolonged sitting and the Access to Work Report noting that her previous chair did not provide a comfortable seated position for prolonged computer-based work, the Tribunal finds that the Claimant would have been placed at a substantial disadvantage in the absence of an ergonomic chair had she been spending prolonged periods of time sat at her workstation. It is not clear precisely what is meant, in terms of hours by 'prolonged periods'. Nor is there any evidence, because the Claimant refused to provided it, despite repeated requested from LM, as to the hours the Claimant was working. When the RTW plan was reset in mid-June 2022, the Claimant was to work 14 hours the following week. Thereafter, LM considered that the Claimant was largely inactive in terms of work (her reference to the lack of progress reports likely demonstrating inactivity). LM further noted in her Capability Report that at no time during the attempted return to work had the Claimant indicated that she was unable to meet the requirements of her RTW plan due to the lack of a specialist chair (or any other reasonable adjustment).

170. There was no evidence that the lack of a specialist chair chair put the Claimant at a substantial disadvantage during her phased return to work because the there was no evidence that the Claimant was spending prolonged periods at her work station. The Tribunal accepted LM's evidence, which the Claimant did not dispute, that she had at no time said that the lack of a specialist chair was a reason that she was not adhering to her RTW plan. This was not mentioned in the capability review meetings.

171. The Claimant's claim that she was placed at a substantial disadvantage due to a failure to provide her with a specialist chair cannot succeed. She was not placed at a substantial disadvantage, and in any event, the delay in provision of the ergonomic chair was due to the Claimant's delay in completing the request form and delay in engaging with the assessment.

172. As to the other equipment recommended in the Access to Work report, the evidence was that the Respondent was attempting to liaise with the Claimant to put this in place. The same rationale applies as with regard to the chair, namely that had the Claimant been working for a prolonged period each day, then it is likely that she would have been at a substantial disadvantage without the specialist equipment she claims should have been provided. Her claim reflects the Access to Work recommendations. However, in the absence of evidence that the Claimant was working during the latter part of the RTW plan, and was only required to work minimal hours in the early part of the plan, the Tribunal finds that she was not in fact placed at a substantial disadvantage. The Access to Work report throughout refers to the equipment being necessary to support the Claimant during prolonged periods of computer work. In any event, any delay in this being provided was entirely due to the Claimant's lack of engagement. The assessment was delayed due to this as set out above, and then the Claimant was not replying to the Respondent's requests to discuss the equipment in October and November 2022.

173. There was no failure by the Respondent to make reasonable adjustments.

174. In summary, none of the Claimant's claims succeed. Judgment has been issued accordingly.

Employment Judge Bradford

Date: 16 April 2025

REASONS SENT TO THE PARTIES ON
07 May 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE