Case Number: 2301919/2024

EMPLOYMENT TRIBUNALS

Claimant: Ms Idowu Dahunsi

Respondent: London Borough of Southwark

Heard at: London South (by CVP) **On:** 14, 15, 16 and 17 July 2025

Before: EJ Rice-Birchall; Mr C Wilby; Mr Cann

Representation
Claimant: In person
Respondent: Mr Udeje, Counsel

JUDGMENT

1. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.
2. The claim of race discrimination is dismissed on withdrawal.

REASONS

Background

1. The claimant was employed by the respondent, a local authority, as a Business Services Manager, from 4 February 2019. She has now left her employment under redundancy, although at all material times for this claim she was employed.

2. In fact, the material time for the purposes of this claim is the period leading up to her claim which was brought on 8 February 2024, commencing in the period following lockdown in which the respondent was seeking to effect a return to the workplace for all staff. The most notable event in that period was the refusal of the claimant's return to work request on 2 October 2023. Early conciliation started on 30 November 2023 and ended on 11 January 2024.

3. The claim is about failure to make reasonable adjustments. The respondent's defence is that they acted reasonably at all times.

4. Disability, in relation to pulmonary sarcoidosis, is conceded by the respondent. The claimant had pulmonary sarcoidosis since prior to her employment with the respondent.

5. It is noteworthy that the claimant has brought a subsequent claim against the respondent in respect of the termination of her employment.

The Issues

6. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 30 August 2023 may not have been brought in time.

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

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

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

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

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

2.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date? The respondent admits that it had knowledge that the claimant had the medical condition pulmonary sarcoidosis from 2019 but does not admit knowledge of disability at the material times.

2.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

2.2.1 A requirement that employees attend the office at Coupland Road at least two days a week in person. The respondent says that this PCP is not accurate. It says there was a requirement for employees to attend the office two days a week but not Coupland Road.

2.3 Was the PCP in place to address a legitimate aim and if so, was it proportionate? This issue is removed with the agreement of the parties as it is not relevant to the section 20 test.

2.4 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was exposed to a dangerous risk of infection from colleagues, contractors and service users?

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

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

2.6.1 Allowing her to work from Tooley Street

2.6.2 Allowing her to work from home more often

2.6.3 Allowing her to attend meetings virtually

2.7 Was it reasonable for the respondent to have to take those steps and to do so within a reasonable time period. The claimant says that there was unnecessary delay in considering her flexible working request.

2.8 Did the respondent fail to take those steps?

3. Remedy

3.1 How much should the claimant be awarded?

3.3 Should the Tribunal make any recommendations?

3.3 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.4 Did the respondent or the claimant unreasonably fail to comply with it?

3.5 Is it just and equitable to increase or decrease any award payable to the claimant?

3.6 By what proportion, up to 25%?

Evidence

3 The Tribunal had the benefit of a bundle of documents of 449 pages and witness statements from the claimant and Mr Lucas, the respondent's Head of Services for the Traded Services Division.

4 The Tribunal also had before it an Addendum to the Bundle and a chronology to which the claimant originally objected but then agreed to be included in the evidence before the Tribunal as the respondent confirmed that the policies sought to be included were the respondent's policies in existence at the material time. There were also emails and a record of a 1:1 held with the claimant that were admitted in evidence at the outset of the hearing.

5 Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it the Tribunal were taken to the document in evidence or as part

of a reading list. The Tribunal notified the parties at the outset of the Hearing that they would only read documents that they were specifically referred to and would only read documents referred to in witness statements insofar as they were identified as being relevant to an issue in the case.

Facts

6 The claimant was employed by the respondent as a Business Service Manager, within Traded Services.

7 The claimant worked from the respondent's Copeland Road site, on a full time basis, prior to the pandemic. At all material times she was line managed by Mr Lucas. Mr Lucas was aware that the claimant had some sort of respiratory condition, but he thought it was COPD. He did not have any reason to believe at this time (prior to the pandemic) that the claimant was disabled within the meaning of the Equality Act, as there was no evidence that the claimant's condition had any substantial adverse impact on her day to day activities: she attended the workplace daily and had little, if any, time off sick.

8 In response to the COVID pandemic, in March 2020, the respondent issued a work from home instruction for non-critical staff, which included the claimant.

9 Risk assessments were conducted throughout the period during which the work from home instruction was in existence. The first risk assessment to which the tribunal was referred was dated 2 February 2021, and identified the claimant as clinically extremely vulnerable (CEV) and shielding. It identified that the claimant was set up to work from home and was able to carry out her work as normal.

10 A second risk assessment was conducted on or around 9 September 2021. Again it identifies the claimant as CEV, and shielding, It records that the claimant was able to carry out work as normal and that she continued "to manage personal wellbeing when personal activities such as shopping, travelling etc. All in compliance with Covid safety guidance."

11 During the lockdown period, the claimant continued to have 1:1s with Mr Lucas via Teams and weekly meetings with the team were also held via Teams, during which colleagues would share what they had been doing.

12 As restrictions began to be lifted, the claimant indicated in some of the calls that she had been visiting relatives, going to church and on outings to museums and had been to the USA following a bereavement.

13 Around the end of June/early July there was a business planning meeting which the claimant was invited to attend in person, and did so attend. She, and Mr Lucas, caught covid.

14 On 26 August 2022, the respondent issued a policy document entitled: "Safely Returning to the Workplace: HR Guidance". It informed staff that, from Monday 3 October 2022, the respondent "would resume pre-pandemic working arrangements for all colleagues." It stated that everyone would be expected to attend their normal place of work during their contracted hours unless they had agreed a flexible working arrangement with their line manager. It also set out the respondent's rationale for doing so, including to

build strong, trusting relationships with colleagues; induct new members of staff; support colleagues on apprenticeships and early careers programmes; collaborate and work with others to generate new ideas; benefit from informal learning opportunities; stay connected to the council's culture and values; and maintain a healthy separation between personal and working lives.

15 The document stated that colleagues who wished to request flexibility should complete the flexible working request form and send it to their manager. It also specifically stated that the respondent was committed to making reasonable adjustments for colleagues with disabilities but that they should also complete a flexible working request form and that their manager may seek OH advice before deciding on the request.

16 In September 2022, the respondent issued FAQs on its Safely Returning to the Workplace plan. It stated that, as a local authority, the respondent had "a special responsibility to operate locally alongside the people and communities [they are] here to serve".

17 From this time, the respondent set about trying to persuade the claimant to return to the office, but the claimant was resistant and wanted to be able to continue to work from home. The Tribunal finds that even though the claimant suggested during her oral evidence and in her witness statement (and indeed in the issues to this claim) that she would have been prepared to work from Tooley Street, that was not something that she indicated she would be prepared to consider at the time the discussions were ongoing, despite the respondent's invitation to do so (see email of 2 March 2023) though she was prepared to attend the odd face to face meeting there.

18 On 23 November 2022, the respondent received an OH report. It states: "Ms. Dahunsi confirms symptoms of a chronic respiratory conditions which was originally diagnosed in 2012. The condition typically causes periods of coughing. Ms. Dahunsi states the condition is GP managed. Ms. Dahunsi states that no advice to isolate or take specialist precautions has been advised when in a public or work environment. Ms. Dahunsi states her GP has advised to keep her environment well ventilated. Ms. Dahunsi reports no issues completing normal day to day activities such as washing, dressing, cooking, and cleaning." It stated that the claimant was fit to be at work and complete her normal duties and hours, but suggested additional ventilation when working in the office. OH expressed the opinion that the claimant was not disabled as the disability had not lasted 12 months or more and was not having any significant impact on her ability to undertake her normal day to day activities.

19 During these proceedings, the claimant challenged the OH report on the basis that she had had Pulmonary Sarcoidosis for many years and so the report must be erroneous as it stated that it had not lasted for twelve months or more. However, the report was not challenged at the time.

20 As to the comments on ventilation, the FAQ document specifically addressed ventilation and stated that ventilation had been "maximised…in line with guidance published by the Health and Safety Executive and the good practice recommendations promoted by the Chartered Institute of Building Services Engineers."

21 On 23 February 2023 Mr Lucas and the claimant had a 1:1. The claimant's current working pattern was discussed. The claimant was still working from home full time at this stage. Mr Lucas was keen for the claimant to comply with the respondent's "corporate need" (50% in borough) to aid team, culture and cooperative working. The claimant said that she was not willing to compromise her health by travelling to the office. The minutes of the meeting report that Mr Lucas and the claimant "agreed to disagree" and Mr Lucas was to take advice on next steps.

22 On 02 March 2023, Mr Lucas asked the claimant, by email, to submit a flexible working request. He also stated: "As we spoke about earlier please consider opportunities for late and early starts and finishes, working at Copeland, Tooley Street or elsewhere in the borough and the adjustments suggested by the occupational health advisor of open windows for fresh air. All of which we can accommodate." The claimant replied, "Thanks for this I will review as advised." There was no further response. At no point until these proceedings was there any evidence that the claimant indicated that she would consider any of the options offered.

23 On 23 March 2023, the claimant submitted a Flexible Working Request, asking for full time working from home. It stated: "I am requesting to work from home as a reasonable adjustment under the Equality Act 2010. It continued: Following our conversations and the OH referral, I am writing to request a flexible working arrangement to work from home due to my chronic lung condition (Pulmonary Sarcoidosis) which I have had for over 10 years and has a substantial adverse effect on my day to day activities . As you are aware, my condition requires me to take extra precautions to avoid exposure to respiratory illnesses, including Covid-19, and that I caught Covid-19 on my first return to work. I have since been struggling with the impact on me such as coughing, breathlessness and anxiety when on public transport. This has consequently caused a very high increase in my blood pressure which as you also know, is now being monitored by my GP. I am requesting to work from home as a reasonable adjustment under the Equality Act 2010. I believe that working from home would allow me to continue to perform my job duties effectively while reducing my risk of exposure to respiratory illnesses, and help me manage my blood pressure. I am confident that I can continue to maintain the same level of productivity and quality of work."

24 As already stated, even though the claimant gave the impression in her oral evidence that she would have happily worked at Tooley St, her request was very much to work from home. In fact, she was resistant to work anywhere but from home, other than possibly attending meetings at Tooley St from time to time.

25 Mr Lucas referred the claimant to OH, as discussed with the claimant at her one to one in April 2023. A second OH report was dated 09/06/2023. It states: "As you are aware Ms Dahunsi is currently at work with health issues. Ms Dahunsi reports she was diagnosed with chronic respiratory conditions which cause periods of cough and shortness of breath. She tells me she contracted Covid last year and it flared up symptoms of her respiratory condition since then she has been suffering from coughing and shortness of breath. She reports she still struggles with her mobility as she gets short of breath if she walks for more than 5-10 minutes but reports no coughing symptoms at present. Ms Dahunsi reports she takes precautionary measures not to

contract Covid by wearing a face mask when she is in a public environment, but she gets short of breath if she has to wear the mask for a long period of time. She tells me she also struggles to breathe if the environment is not well-ventilated. She tells me with all what is going on her mental health is affected and her GP realised her blood pressure is raised so her GP is monitoring her for high blood pressure and symptoms of anxiety. Ms. Dahunsi reports she is anxious she will contract Covid if she goes into the office, and it will flare up her respiratory condition. She states she gets short of breath in environments that are not well-ventilated thus she will struggle in her journey to the office because she uses the train to the office and the train is not well-ventilated if it is full of other people. She walks from the train station to the office, and she will struggle with that due to her getting short of breath on walking for 5-10 minutes. Also, she attends meetings in rooms in the office and will struggle with her breathing during these meetings if the rooms are not well-ventilated."

26 It continued: "In my opinion, Ms. Dahunsi is fit for work with adjustments. Ms Dahunsi has limited mobility due to shortness of breath and her journey to the office involves taking the train and walking. If the business can accommodate, I suggest she works from home until she notices improvement in her mobility. Once she has noticed improvement in her mobility then the following adjustments can be considered. I suggest working more from home to minimise the risk of contracting Covid. I suggest extra ventilation is provided when working in the office environment. I suggest flexibility in starting and finishing times so Ms. Dahunsi can take the train at less busy times. It is for the business to decide if it can accommodate the above adjustments.

27 It expressed the opinion that the claimant was not disabled because: "- has not lasted longer than 12 months nor is likely to last longer than 12 months - is not having a significant impact on his/her ability to undertake their normal daily activities - is unlikely to recur - would not have a significant impact on normal daily activities without the benefit of treatment".

28 Mr Lucas had asked specific questions which were responded to as follows:

Given that the employee previously attended the work place with her condition, what increased (unmitigated) risk is there in her attending the work place now?

Answer: Mr Dahunsi reports she contracted Covid and it flared up her respiratory condition, since then she has been having symptoms of shortness of breath and coughing. Currently, she reports no coughing symptoms but continues to experience shortness of breath which affects her mobility.

Are the previously proposed adjustments of flexible start / finish times, part workplace / part home working and workplace ventilation reasonable adjustments for this condition?

Answer: These adjustments are reasonable once Ms Dahunsi notices improvement in her mobility.

Please provide advice on how we might support this staff member into the workplace.

Answer: Adjustments on how to support Ms Dahunsi are outlined in the capability to work section.

29 OH did not recommend that the claimant should work exclusively from home and suggested extra ventilation and flexibility in start and finish times, all of which had been offered to the claimant.

30 Again, although the claimant stated in evidence that she disagreed with the OH advice, she could not demonstrate that she had challenged it in any way, either by contacting OH or by pointing out any discrepancies or inaccuracies to Mr Lucas.

31 On 24 August 2023, the claimant had a 1:1 with Mr Lucas, in which it was agreed that Mr Lucas would write to the claimant to set out the position on her home working request, next steps and the process to be followed for the next steps. The Tribunal finds that, at this meeting, or around this time, Mr Lucas indicated to the claimant that it was unlikely that her request for home working would be approved, though his formal response was still yet to be provided, despite a policy aim of three months for a response.

32 On 11 September 2023, the claimant submitted a Respect at Work complaint in regard to her he application for flexible working. She alleged that the refusal of her request to work from home, despite chronic lung disease, which she said, qualified as a disability, constituted a violation of her rights under the legislation and that she was being bullied; harassed and victimised as a consequence of her request.

33 On 2 October 2023, Mr Lucas issued a response to the flexible working request, turning down the claimant's flexible working request. He confirmed that there were no other members of the team who had full time work from home, and that the leadership team, of which the claimant was part, had consulted and agreed that Tuesday would be the crossover day to secure that they were all in the office together to connect and work collaboratively. He confirmed that he had offered adjustments which included staggered/amended attendance hours; late or early starts or finishes; working at Copeland Road, Tooley St or elsewhere in the borough and a dedicated individual office with window ventilation. He recommended a phased return to Copeland Road, being the claimant's contractual place of work and in the absence of the claimant expressing any interest in working at any different work location, to take into account the claimant's mobility issues and proposed a further OH report to ensure that this proposal was feasible. In his oral evidence to the Tribunal, Mr Lucas explained that, had the claimant accepted work from Tooley St, he would have organised for the management team to all work from that site on the cross over day so that they could meet up together physically on a weekly basis as was desired. The Tribunal finds that the offer of working from Tooley St two days a week was open for the claimant to discuss with Mr Lucas and accept at any time.

34 By this time, the claimant's colleagues had been back at work in the workplace for some significant period of time, but the claimant had been allowed to continue to work from home, and in fact, never returned to the office for the remainder of her employment with the respondent.

35 On 17 October 2023, the claimant was invited to a formal interview with Louise Turff (LT), Investigating Officer, regarding her Respect at Work complaint.

36 The interview with Mr Lucas took place on 18 October 2023.

37 On 25 October 2023 the claimant's doctor wrote a letter "To whom it may concern". The Tribunal does not know if this was given to Mr Lucas but assumes that it was, as the claimant stated in evidence that she was asked to contact her GP. However, this states: This patient was diagnosed with Pulmonary Sarcoidosis in 2007. Patients with sarcoidosis are in the vulnerable category for COVID as they are risk of severe illness if they catch COVID." This was the only medical evidence ever submitted by the claimant and gave no indication that she should socially isolate.

38 On 24 November 2023, the grievance outcome (Management Inquiry Report) was delivered to the claimant. The claimant's allegation that the respondent had failed to make reasonable adjustments was not upheld and it noted that the doctor's letter did not recommend that the claimant should work from home on a permanent basis; that government advice was that those who were vulnerable no longer needed to shield; and the claimant had received all of her Covid vaccinations. It identified that the claimant's issues about returning to the workplace were related to her anxiety about the potential health impact should she catch Covid. It was held that, ultimately it was at management discretion whether or not a request for flexible working would be granted.

39 The outcome upheld the claimant's complaint that the response to the flexible working was unreasonably delayed. This was acknowledged by Mr Lucas who apologised. In any event, the Tribunal finds that Mr Lucas was continuously discussing the situation with the claimant throughout the relevant period, such that the claimant knew that her request was unlikely to be granted and, in any event, the claimant continued to work from home during that period.

40 On 13 February 2024, Mr Lucas wrote to the claimant. The letter set out that Mr Lucas was providing the claimant with "a reasonable management instruction" that she return to the workplace, namely the Copeland Road depot as per a specified plan, with the claimant's first day in the office being Tuesday 27 February 2024 at 10am. The letter set out a phased return, with the claimant working for four hours one day a week for weeks 1 and 2, then one full day for weeks 3 and 4 (start time and finish time to be flexible); one full day and four hours on another day for weeks 5 and 6 and from week 7 onwards attending the workplace two days a week but with flexible start and finish times (8-10am and 4-6pm respectively). It is important to note that this letter was sent after the claim form was presented and so does not form part of the claim, but is relevant background information.

Law

Failure to make reasonable adjustments

44. S.20 EqA 2010 provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule

apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

42. The term 'provision, criterion or practice' ('PCP') should be construed widely to include any informal policies, criteria, conditions or prerequisites (para 4.5 of the Employment Code).

43. S.212 EqA states that: '"substantial" means more than minor or trivial'.

44. In **Royal Bank of Scotland v Ashton** [2011] ICR 632, the EAT emphasised that tribunals should avoid a discourse as to the way the employer has treated the employee generally, or as to the thought processes of the employer (although those might be relevant to a claim of direct discrimination). It stressed the importance of identifying the various elements of the statutory test when considering whether there has been a failure to make reasonable adjustments, particularly the identification of the PCP concerned and the precise nature of the disadvantage which it creates. Restating guidance from another EAT decision, **Environment Agency v Rowan** [2008] IRLR 20, Langstaff J said that an employment tribunal considering a reasonable adjustment claim must identify:

- The provision, criterion or practice applied by or on behalf of an employer.
- The identity of non-disabled comparators, where appropriate.
- The nature and extent of the substantial disadvantage suffered by the claimant, in comparison to the non-disabled comparators.

45. The proper comparator for the purposes of identifying if an employee is put to a substantial disadvantage in comparison with persons who are not disabled should be identified by reference to the specific disadvantage relied on (**Griffiths v Work and Pensions** [2017] ICR 160, CA at paras 20 and 21).

46. An employee must show on the balance of probabilities that they were in fact put to the substantial disadvantage relied on and the Tribunal must have regard to the overall picture, not just medical evidence.

47. The approach in Rowan and Ashton was upheld by the Court of Appeal in **Newham Sixth Form College v Sanders** [2014] EWCA Civ 734. The court in that case also emphasised the requirement of knowledge: "an employer cannot... make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP."

48. In **Lamb v The Business Academy Bexley** UKEAT/0226/15, the EAT noted the observation in *Sanders* and went on to add that "an adjustment

to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage".

49. In assessing what adjustments are reasonable, the focus must be on the practical result of the steps which the employer can take, not on the thought processes of the employer when considering what steps to take.

50. An employer is not required to select the best or most reasonable selection of adjustments, nor is it required to make the adjustment preferred by the disabled person. The test of reasonableness is an objective one and "so long as the particular adjustment selected by the employer is reasonable it will have discharged its duty" *(***Smith v Churchill's Stairlifts plc** [2005] EWCA Civ 1220*).*

51. In considering whether an adjustment was reasonable, the Tribunal must consider whether the adjustment contended for would or could have removed the disadvantage (**Romec Ltd v Rudham** [2007] 7 WLUK 408 at para 38), although it does not need to be guaranteed to be a success (**Griffiths** at para 29).

Employer's knowledge

52. 43, Schedule 8, para 20 provides:

53. (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

54. (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

55. So, an employer is not under a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that the individual concerned has a disability and is likely to be placed at a substantial disadvantage by the employer's PCP, compared with persons who are not disabled.

Knowledge of both disability and substantial disadvantage required

56. **Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10** held that an employer is under no duty to make adjustments unless it knows (actually or constructively) both that the employee in question is disabled **and** that the employee is likely to be placed at a substantial disadvantage because of that disability. The second part of the test will not come into play unless the first part is satisfied.

What amounts to knowledge?

57. Actual knowledge of disability and substantial disadvantage are not needed for the duty to make reasonable adjustments to arise:

- The employer will not avoid being under the duty unless it "could not reasonably be expected to know" that the applicant or employee is disabled or that there was a substantial disadvantage (*Schedule 8, EqA 2010*).

- Case law and the EHRC Code suggest that knowledge will sometimes be imputed to the employer.

Reasonable to have knowledge

58. Employers will not avoid the duty to make reasonable adjustments where they did not know, but **should reasonably have known**, about an individual's disability and substantial disadvantage. Therefore, they should take reasonable steps, and have systems in place, to find out the relevant information. The EHRC Code advises that employers must "do all they can reasonably be expected to do" to find out this information, although it emphasises that "when making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially" (*paragraph 6.19*).

59. In **Gallop v Newport City Council [2013] EWCA Civ 1583**, the Court of Appeal held that the employer was wrong to have unthinkingly followed an occupational health adviser's opinion that an employee was not disabled. While occupational health assessments or other medical advice may be helpful, the court made clear that a responsible employer must ultimately apply its own mind to the test for deciding whether an employee is disabled under the discrimination legislation. The court also made it clear that the required knowledge is of the *facts* of the employee's disability. The employer does not need to also realise that those particular facts meet the legal definition of disability.

60. In **Donelien v Liberata UK Ltd** [2018] EWCA Civ 129, the Court of Appeal upheld the previous decisions of a tribunal and the EAT that an employer did not acquire constructive knowledge of an employee's disability as it had taken reasonable (but not exhaustive) steps to ascertain whether they were disabled. The employer had not just "rubber stamped" an occupational health report that stated that the employee was not disabled: it had asked further questions of its occupational health advisers, held "return to work" meetings with the employee and considered correspondence received from her GP. The Court of Appeal held that, when viewed as a whole, the employer's actions were sufficient to avoid having constructive knowledge of the employee's disability.

Conclusions

Time limits

61. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 30 August 2023 may not have been brought in time.

62. Whist there were many discussions leading up to the refusal of the flexible working request which may have preceded 30 August 2023, the discrimination complaint made by the claimant is about the refusal of her request which was formally communicated to the claimant in October 2023.

63. The claim was therefore made within the time limit in section 123 of the Equality Act 2010. The claim was made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

Knowledge of disability

64. The respondent knew of the claimant's condition. It did not know that she had a disability. There was no evidence of any substantial impact on the claimant's normal day to day activities and the respondent had no reason not to rely on the OH reports which categorically stated that the claimant was not disabled. The claimant had always managed with her condition with minimal time off sick, and nothing in the OH reports changed that view. Whilst the second report refers to mobility issues, those were considered to be temporary, as the reference is to the claimant returning to the office once her mobility improves.

65. This was no rubber stamping of the OH report as Mr Lucas had specifically asked questions of OH and had engaged with the process. Given that the claimant did not challenge it at the time, Mr Lucas would have no reason to doubt the conclusions, particularly as the claimant had never struggled to attend work before the COVID pandemic.

PCP

66. The alleged PCP in this case is a requirement that employees attend the office at Copeland Road at least two days a week in person.

67. In the response to the claimant's flexible working request on 2 October, Mr Lucas turned down the claimant's request to work exclusively from home and proposed a phased return to work to achieve ultimately two days a week working from Copeland Road.

68. Further, on 13 February 2024, the respondent sent the claimant an instruction to return to the office at Copeland Road two days a week. Copeland Road was the claimant's contractual place of work. However, this post-dated the claimant submitting her claim and could not have been what the claimant was contemplating at the time she brought her claim.

69. In fact, the respondent had made it clear, in previous communication with the claimant, and in writing, on 2 March 2023, that it would accommodate the claimant working at its Tooley Street premises or elsewhere in the borough: "As we spoke about earlier please consider opportunities for late and early starts and finishes, working at Copeland, Tooley street or elsewhere in the borough and the adjustments suggested by the occupational health advisor of open windows for fresh air. All of which we can accommodate."

70. The PCP as set out in the list of issues, is therefore made out, albeit that the respondent had indicated clearly that it would accept the claimant attending an alternative workplace should she so wish. Really, it was a requirement for employees to attend the workplace, as in a place of work (as opposed to home) twice a week.

Substantial disadvantage

71. The claimant says she was put at a substantial disadvantage by the PCP

requiring her attendance in the workplace compared to someone without the claimant's disability, in that she was exposed to a dangerous risk of infection from colleagues, contractors and service users.

72. The medical evidence on which the claimant relies in this regard is the letter from her GP dated 25 October 2023 in which the claimant's doctor wrote: This patient was diagnosed with Pulmonary Sarcoidosis in 2007. Patients with sarcoidosis are in the vulnerable category for COVID as they are at risk of severe illness if they catch COVID."

73. The Tribunal recognises that if the claimant had caught COVID again, she was at more risk than people without a respiratory illness of more severe consequences of COVID. The Tribunal also recognises that the claimant was, naturally, anxious about that.

74. However, the OH reports specified that the claimant, post COVID, had not been given any advice to isolate or take specialist precautions when in a public or work environment. Further, when Mr Lucas specifically asked OH: "Given that the employee previously attended the work place with her condition, what increased (unmitigated) risk is there in her attending the work place now?" the answer given was: "Ms Dahunsi reports she contracted Covid and it flared up her respiratory condition, since then she has been having symptoms of shortness of breath and coughing. Currently, she reports no coughing symptoms but continues to experience shortness of breath which affects her mobility."

75. Significantly, the claimant had attended work every day, in accordance with her contract, prior to COVID and there was no reason explained to the Tribunal, why, once an instruction was given for those who had been shielding to return to work, she should not do so.

76. An employee must show on the balance of probabilities that they were in fact put to the substantial disadvantage.

77. The claimant has not satisfied the Tribunal in this regard. If the claimant's condition put her at a substantial disadvantage vis a vis her attendance in the workplace, it would have done so prior to COVID as well as post-COVID in relation to respiratory illnesses such as colds and flu. Although the claimant's fears and anxiety related to COVID, which is understandable, there was no reason, once vaccinations had been introduced and those who were identified as CEV were no longer required to shield, the claimant could not return to work, and no medical evidence whatsoever to suggest that she should not do so. In this regard, she was not at a substantial disadvantage in comparison to a person without a disability.

78. Further, there was evidence that the claimant did attend church, socialise with relatives, attend public places eg museums, and travel, none of which are consistent with her removing herself from public places and demonstrating that she was in fact put to the substantial disadvantage.

79. The Tribunal finds that the claimant was not at a substantial disadvantage compared to someone without her disability because she herself attended work full time prior to COVID when she had the disability.

Knowledge of substantial disadvantage

80. For the reasons set out above, particularly that the claimant continued to attend church and other public places, the respondent could not reasonably have been expected to know that the claimant was likely to be placed at the substantial disadvantage.

What steps could have been taken to avoid the disadvantage?

81. The claimant now suggests that a reasonable adjustment would have been to allow her to work from Tooley Street. The Tribunal finds that she was invited to consider this option by the respondent. There was no evidence before the Tribunal to suggest that the claimant was amenable to that option or even that she expressed that she would consider it as an option. During the relevant time, the claimant's clear position to the respondent was that she wanted to work from home, but that she may be prepared to attend the odd meeting at Tooley Street. We find that the respondent was prepared to make the adjustment for the claimant's place of work to be Tooley St for the two days a week required, and that that was clearly communicated to the claimant, but it was not accepted, or even considered by the claimant at the material time.

82. In her witness statement, the claimant says this: "Tooley Street, a safer and more accessible site proposed in internal correspondence (email dated 2 March 2023), was ruled out without clear explanation to me. I was never offered a hybrid from Tooley Street or compressed working arrangements, which were within my managers powers of discretion."

83. To the contrary, the Tribunal finds that Mr Lucas made it abundantly clear to the claimant that he would consider any workplace within the Borough and was open to early/late starts and finishes to assist the claimant. However, the claimant was not open-minded to any proposal other than working from home full time, with the odd trip to one of the respondent's places of work for ad hoc meetings.

84. The claimant now also suggests that a reasonable adjustment would be to allow her to work from home more often. In fact, at the relevant time, she wanted to work from home permanently.

85. Given the claimant has pleaded, and confirmed in evidence, that, for a number of reasons it would have been a reasonable adjustment to allow her to work from Tooley Street, the claimant cannot now succeed in an argument that a reasonable adjustment would have been to allow her to work from home permanently and that allowing her to be at home permanently would be the only adjustment which would avoid the alleged substantial disadvantage.

86. The claimant now also suggests that a reasonable adjustment would be the respondent allowing her to attend meetings virtually. She was permitted to do so. Other than 3 or 4 meetings over a lengthy space of time from COVID to the claimant's dismissal, she attended all meetings virtually. In addition the Tribunal finds that the claimant had, despite the Return to Work agenda of the respondent, been permitted to remain at home full time bar, to the Tribunals knowledge, the three or four meetings which she had attended

physically.

87. Whilst we have sympathy for the position in which the claimant found herself and the anxiety she felt about a return to work, we find that the respondent was open to negotiation and consideration of all options, other than a permanent arrangement to work from home exclusively. However, we find that the claimant's mind was closed to any option other than permanent working from home other than occasional attendance at Tooley Street. In fact the respondent had already made a significant adjustment by allowing her to work at home three days a week. Although the claimant alleged that Mr Lucas was not listening to her, we find, in fact, the she was not listening to the respondent and could not accept any proposal other than staying at home through her own anxiety.

88. Finally, the claimant says that there was unnecessary delay in considering her flexible working request. Whilst we find that there was a delay, this was acknowledged and Mr Lucas apologised. The Tribunal finds that nothing turns on this as the respondent in any event offered all reasonable adjustments and, further, the claimant was never actually required to return to the workplace to work prior to her dismissal.

89. For all these reasons, the claimant's claim fails.

Approved by:
Employment Judge **Rice-Birchall**
Date: 3 September 2025

Sent to the parties on:
Date: 4 September 2025

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/