



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001450/2025

Heard in Glasgow on the 9th, 10th, 11th 12th and 16th March 2026

Employment Judge L Wiseman

Ms J Fergusson

**Claimant
In Person**

Scottish Courts and Tribunals Service

**Respondent
Represented by:
Ms K Smith
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 9th June 2025 alleging the respondent had failed to respond to her flexible working request appropriately and that she had been discriminated against because of the protected characteristic of disability. The complaints of disability discrimination were of alleged indirect discrimination; discrimination arising from disability; failure to make reasonable adjustments; harassment and victimisation.

2. The respondent entered a Response in which it asserted it had dealt with the flexible working request in a reasonable manner and denied the allegations of discrimination.
3. The tribunal heard evidence from the claimant and Mr Alistair Young, trade union branch secretary; Ms Caroline McShane, Senior Executive Officer, who made the decision regarding the claimant's flexible working request; Ms Danielle Blue, Director of Sheriff and Justice of the Peace Operations, who heard the appeal; Mr Victor Vickers, Senior HR Manager and Ms Tracy McLellan, Higher Executive Officer, who was the claimant's line manager.
4. The parties had prepared a joint file of documents for the hearing. An Agreed List of Issues was produced at page 116.
5. The tribunal, on the basis of the evidence before it, made the following material findings of fact. These are facts which are material to the legal issues which the tribunal had to determine. The tribunal acknowledged that many facts will be important to the parties, but if those facts are not material to the legal issues, they will not be included in the Judgment.
6. The claimant, having heard the evidence of Mr Vickers, withdrew her complaint of harassment against him. The tribunal has not, accordingly, included any reference to the evidence of Mr Vickers in this Judgment.

Findings of fact

7. The claimant commenced employment with the respondent on the 9th March 2009. She is employed as a Sheriff Clerk Depute (Executive Officer grade) at Kilmarnock Sheriff Court. (The role and the grade were referred to interchangeably throughout the hearing).
8. The structure of staff in Kilmarnock Sheriff Court is that Ms McShane is the Sheriff Clerk (Senior Executive Officer grade), responsible for the running of the Courts, the building, staff, training and the Court programme. Two Higher Executive Officers report to her: one in civil and one in criminal and Ms McLellan was one of those officers. There are 10 Executive Officers (EOs), five working in the criminal courts; four in the civil courts and one is the Cashier. There are 16 Administrative Officers (AOs): six working on the criminal side; five on the civil side and 3 assisting the Cashier. There is also a team of 10 court officers. The claimant was one of the four Executive Officers doing civil work.
9. The claimant and her three Executive Officer colleagues were responsible for clerking civil courts and it was usual for each Officer to clerk one or two courts a week: they also covered other Courts as requested. The Executive Officers also line managed Administrative Officers and were responsible for checking their work

and helping/supporting them with any questions or training. There is a public counter at Kilmarnock Sheriff Court which is covered by the Administrative Officers, but an Executive Officer must be available to deal with queries from the Administrative Officers and oversee that they are giving the correct advice and information. The Executive Officers must also be available to deal with issues from the Sheriffs. The administrative work done by the Executive Officers is almost all online, but some matters remain on paper.

10. The respondent conceded the claimant is a disabled person in terms of section 6 of the Equality Act, and that she was so at the time of the alleged discrimination. The claimant has stage 3b kidney disease. Her right kidney has failed and she has partial left kidney function. The damage to her kidneys was caused by the fact she has no valves on her bladder. The claimant has an overactive bladder. She is required to drink 2 litres of water each day and requires to use the bathroom frequently.
11. The claimant had a lengthy period of absence from work which culminated in an Occupational Health (OH) referral in early February 2025, which (it was agreed) included questions regarding reasonable adjustments. The claimant, prior to receipt of the OH report, made a Flexible Working request, seeking to work from home two days per week. This request was made because, if granted, it would result in a permanent change to the claimant's pattern of work. The request was sent to Ms Caroline McShane, Sheriff Clerk at Kilmarnock Sheriff Court.
12. Ms McShane, prior to meeting with the claimant on the 27th March to discuss the flexible working request, met with the claimant on the 10th February, for a weekly check-in during the claimant's absence, and on the 19th February to conduct a return to work interview. The discussion on both occasions focussed on a phased return to work and which days might be worked. The phased return to work included working from home on two days each week.
13. The respondent temporarily continued the arrangement whereby the claimant worked two days per week at home whilst the flexible working request was being considered.
14. Ms McShane met with the claimant on the 27th March to discuss the flexible working request. The notes of that meeting were produced at page 248. The purpose of the meeting was to allow the claimant to expand on the reasons for the application and whether there were any alternatives should it not be possible to grant the application. The claimant confirmed there were no alternatives and focussed instead on the benefit of having had 2 days working from home during her phased return to work.
15. The claimant, at the start of the meeting, drew the respondent's attention to the ACAS code of practice and the timeframe of 2 months for conclusion of the

process of making a decision regarding the application and any appeal. The claimant referred to the respondent's Flexible Working policy wrongly referring to a 3 month period.

16. Ms McShane acknowledged this but referred to having been on a period of annual leave and to having to seek HR advice because there were different processes for flexible working and reasonable adjustments and she had had to clarify with the claimant which process was to be followed.
17. The claimant then had an opportunity to explain to Ms McShane the benefits of working from home and the issues of fatigue arising from when she was in the office.
18. Ms McShane met with the claimant again on the 11 April to advise her she was going to refuse the application for flexible working, but that reasonable adjustments would be put in place for 1 day per week working from home. Ms McShane, by letter of the 14 April (page 254) confirmed her decision in writing and gave reasons for her decision. The reasons related to the need to manage and provide a level of service to users and to meet customer demands and the needs of the business and in particular, if the claimant worked at home two days per week, there would be an inability to re-organise work among existing staff; an inability to recruit additional staff; a damaging impact on performance and it being inappropriate because of planned structural changes involving the rotation of staff.
19. The claimant appealed against the decision made by Ms McShane (page 257) and her appeal was heard by Ms Danielle Blue, (who at that time held the position of) Sherifffdom Business Manager for Tayside and Fife.
20. The appeal hearing took place on the 7th May 2025 and the claimant was accompanied by her trade union representative Mr Young. The notes of that meeting (which were agreed) were produced at page 266. Ms Blue had, prior to the appeal hearing, had regard to the original flexible working request, the decision of Ms McShane as set out in the letter of the 14th April, the claimant's letter of appeal and the OH report which had been requested in February 2025.
21. The claimant, at the appeal hearing, confirmed she had benefitted from working two days per week from home during the six week phased return to work. The claimant did not consider one day working from home to be reasonable and told Ms Blue that it was not sufficient to support her needs. The claimant confirmed her opinion that there was sufficient work for her to do at home and that working from home two days a week did not impact the business.
22. Ms Blue had a number of questions for Ms McShane which she set out in an email dated 7th May (page 272). Ms Blue wanted to know how the claimant's working at home two days per week during the phased return had been accommodated by the business and whether it had presented any challenges. Ms Blue also wanted to

know whether working at home two days per week doing administrative duties was feasible in Kilmarnock. She also asked for further information regarding the reasons for refusing the request.

23. Ms McShane responded by email dated 9th May (page 271). Ms McShane explained the claimant's two days of working from home had been accommodated by other Deputes covering additional tasks that had been put in place during the claimant's long term sickness absence. The claimant's duties had been restricted and her workload had been gradually increased during the phased return.
24. Ms McShane confirmed her belief that to accommodate two days per week working from home, a bespoke role would need to be created and administrative tasks would have to be removed from other Deputes in order to generate 14 hours of work for the claimant to do at home.
25. Ms McShane also confirmed that the office had many staffing issues and that supervision was vital: when the claimant worked from home she could not oversee staff attending the public counter or staff answering telephone calls and could not offer support or guidance. This would need to be covered by other colleagues in the office. There was also the issue of staff rotation whereby Deputes covering civil work would be undertaking training to allow them to cover criminal work.
26. Ms McShane considered one day per week working from home was a reasonable adjustment which would allow flexibility, whereas the permanent change to her contract requested by the claimant would have meant the respondent could not insist she worked in the building on two days per week.
27. Ms Blue, at the conclusion of the appeal hearing, considered all of the papers and consulted HR and the legal team. Ms Blue was of the view that a permanent change to the contract provided no flexibility for either the claimant or the respondent. The needs of the respondent's business are fluid, depending on court usage. There needs to be flexibility regarding staffing to cover the needs of the Courts. The Court programme is the same in each court, but there are also ad hoc and emergency hearings. There is a requirement for the staffing level to be able to cope with these hearings, which are over and above the usual court business. Ms Blue also had regard to the need for the claimant to support administrative staff and deal with enquiries at the public counter. Ms Blue acknowledged that in the first instance the administrative staff dealt with the public counter, but some queries were complex and an executive officer required to be present to assist or take over.
28. Ms Blue had regard to Ms McShane's response and in particular to her opinion that to accommodate two days working from home each week, a bespoke role would need to be created and administrative duties would require to be removed from others in order to create enough work to be done at home on those days.

29. Ms Blue also had regard to Ms McShane's comments regarding rotation and this was in line with what she expected of Clerks. Rotation was not a new plan: EOs were expected to rotate and if this was not already in place in Courts, then training for it should be in place. Ms Blue described rotation as being fundamental to achieving resilience and development, which allowed the respondent to meet the needs of the business. The business had to be able to move staff to cover where they were needed.
30. Ms Blue advised the claimant, by letter of the 19th May (page 274) that her appeal had been refused. The reasons for refusal were that the claimant's role was a face-to-face role covering Courts and hearings and there was a need for flexibility. There was also a need to support the judiciary: this was a key duty. Ms Blue confirmed a reasonable adjustment of one day per week working from home would be made on a temporary basis for 6 months, and that additional days working from home would be allocated depending on the business needs. This would not be every week and could not be guaranteed.
31. The claimant has, since the outcome of her appeal, written to Ms McLellan each week asking to work from home on two days per week. The respondent has accommodated a second day working from home where it is operationally possible to do so. The claimant has worked from home two days per week each week with the exception of the week commencing 9th June, and the weeks of 23rd October to 23rd December. The claimant worked at home two days per week in 18 of the 28 weeks in the period June to December 2025.
32. Ms McLellan initially provided the claimant with the business reasons why a second day working from home could not be accommodated. The claimant challenged each decision and sent numerous emails to Ms McLellan regarding her decision and the reasons for it. Ms McLellan eventually stopped providing reasons for her decision because she found the claimant's constant emailing to be stressful.
33. Ms McLellan met with the claimant on the 9th June to confirm that the claimant and two other civil Deputes would have to undertake basic criminal training. The fourth civil Depute did not need to undergo criminal training because she had already completed it. Ms McLellan emailed the claimant on the 10th June (page 299) to confirm she was asking all civil deputes to book on to basic criminal courses, and that this request was being made due to the gaps identified by the skills audit which had been undertaken. The claimant responded to this the same day (page 300) making reference to her tribunal claim and asking that the matter was put on hold pending the outcome of the case.
34. The civil deputes were then invited to a Teams meeting regarding changes to criminal case management. The claimant declined the invitation and again asked for the matter to be put on hold. Ms McShane replied on the 11th June (page 304)

to say rotation of staff in 2026/27 required training and learning to be undertaken by all relevant staff, which included the claimant, and that it would not be possible to simply put the matter on hold pending the outcome of a tribunal claim. The respondent did subsequently agree to put this on hold pending the outcome of this tribunal claim.

35. The claimant attended her GP on the 12 June and obtained a Fit Note stating she was unfit for work due to urinary symptoms. The Fit Note was for a period of three months. The Fit Note stated the claimant may be fit for work if permitted to work from home full time for the next three months. Ms McLellan sent a holding response in which she acknowledged the Fit Note and said she would be in contact with the claimant regarding allocation of work. Ms McLellan wanted to speak to HR and to Ms McShane for guidance because she had no authority to make a decision regarding the request for home working for this period of time.
36. Ms McLellan emailed the claimant on the 16th June (page 311) to confirm the earlier telephone conversation. Ms McLellan stated that given the nature of the fit note, she had taken HR advice, and a referral was going to be made to occupational health. Ms McLellan confirmed that in the meantime, and as the Fit Note stated the claimant was unfit for work, she was to refrain from working and her absence would be treated as sickness absence.
37. The claimant challenged this and received an email from HR (page 314) confirming that as the Fit Note had advised the claimant was fit to work with adjustments, it was appropriate to obtain an OH report regarding her current fitness for work and clarity regarding adjustments. The claimant's absence until that OH report was received would be treated as sickness absence.
38. The respondent instructed an OH report on the 18th June and Ms McLellan emailed the claimant on the 1st July (page 325) arranging a wellbeing meeting on the 15th July. The delay in meeting was due to holidays and work commitments.
39. The claimant attended a meeting with Ms McLellan on the 15th July and the notes of that meeting were produced at page 353. The meeting discussed wellbeing, the OH report and the stress reduction plan.
40. The claimant was advised the respondent could not accommodate the OH recommendation of working at home full time for 6 weeks. This decision was made because the claimant's role is office-based and for all the reasons previously set out above.
41. Ms McLellan had a period of annual leave in August 2025. Ms McLellan was informed by the management team that there was no requirement for any temporary promotion to cover her holiday because both Ms McShane and her equivalent in criminal would be in the office. Ms McLellan advised the claimant and

Ms Clover that there would be no requirement for them to cover her role whilst she was on holiday and she explained the reason.

42. Mr Kerr, an Administrative officer, substituted for Ms McLellan for two days whilst she was on holiday. Mr Kerr did so in order to check the confirmations, which then provided work which he could process. This was a more cost-effective way to ensure Mr Kerr had work to process, rather than have an Executive Officer given temporary promotion and being taken away from their own work.
43. The claimant complained about this and ultimately the respondent agreed the claimant, who was on annual leave during the first week of Ms McLellan's holiday, would have temporary promotion in the second week for 3 days and Ms Clover for one day.
44. The claimant met with Ms McShane on the 29th and 30th September during which the claimant made a request that Ms McLellan not continue as her line manager because of this tribunal claim. Ms McShane emailed the claimant on the 2nd October (page 379) to confirm she did not intend to remove Ms McLellan as the claimant's line manager. Ms McShane acknowledged the claimant felt her relationship with Ms McLellan had changed, but she considered both had to maintain a professional relationship at work.
45. The claimant did not accept Ms McShane's decision and emailed Ms Jackie Powell, Sheriffdom Business Manager, North Strathclyde about this (page 380). The claimant advised that the tribunal claim, and in particular the complaint of victimisation, had placed a strain on her relationship with Ms McLellan both professionally and personally. The claimant requested the change to a new line manager be made as a reasonable adjustment.
46. Ms Powell responded (page 382) to say that being involved in an employment tribunal claim was not a reason to change the line manager; further, Ms Powell did not consider it to be a reasonable adjustment. The claimant's request was refused.
47. All court users must, when wishing to leave the court, seek the permission of the Sheriff to do so.
48. The claimant, when clerking in court, will ask for a comfort break as and when required. The claimant, because of her condition, cannot wait or delay having a break. The claimant finds it embarrassing to have to ask for a break because the Court has to rise.
49. The claimant can use a private internal chat facility to ask for someone to come and cover her, but someone does not always come immediately and the claimant cannot wait for the person to arrive.

50. Ms McShane has consulted with the Sheriff Principal regarding the issue of breaks for the claimant and has written to also raise the issue. All Sheriffs are aware of the issue and the claimant's need for breaks and seek to accommodate it.

Credibility and notes on the evidence

51. The claimant's case was that she needed to work from home two days a week because of the effects of her disability, and in particular fatigue. This was the adjustment the claimant wanted/needed, and nothing else was acceptable. The claimant was very upset when her flexible working request was refused and she was offered one day per week working from home. The claimant challenged the business reasons put forward by the respondent for refusing the flexible working request and thereafter, on each occasion Ms McLellan refused a second day working from home, the claimant challenged those reasons too.
52. The claimant believed she was targeted for doing a protected act and that the respondent deliberately raised the threat of rotation to criminal work, which they knew she could not do and deliberately refused to allow her temporary promotion to cover Ms McLellan's annual leave.
53. The tribunal found the claimant to be a credible witness but found it necessary to treat the claimant's evidence with some caution for the following reasons. First, in giving her evidence it was apparent she was completely blinkered by what she wanted and how unfair it had been for the respondent to refuse it. The claimant, for example, accepted that Courts must be clerked in order to run and that operational flexibility was vital for the running of the Court programme. The claimant also accepted that if the flexible working request was granted there would be two days each week when the respondent could not ask her to clerk physical courts: they would, in effect be one person down two days each week for the purposes of clerking physical courts. The claimant also acknowledged that the EOs usually clerked one court each week, but did more in periods of annual leave and sickness absence. However, against that background the claimant would not accept (at any level) the reasons for refusing the flexible working request.
54. Second, the claimant's mindset was revealed when she accepted she viewed everything said and everything done post the refusal of the flexible working request as harassment or victimisation. The claimant has, essentially, dug in and tried every way possible to challenge the respondent's decision and force them into changing their mind.
55. Third, the claimant minimised the duties of her role which required to be done in the office, for example, the claimant's evidence was that she required to clerk a court once a week, but in cross examination and by reference to the documents, she had to accept that in the period April to November 2025, she clerked mostly two to three courts a week. Furthermore, the claimant acknowledged that part of

her role included line managing the AOs and in particular being on hand to answer questions or give advice. The claimant in her evidence in chief maintained this could be done whilst she was at home because AOs could email her, but in cross examination she accepted that AOs did not contact her as much when she was not working in the office; and, if she was not there to manage the AOs in the office, then this had to be done by one of the other EOs.

56. Fourth, the claimant accepted that she had a different view of the operational needs of Kilmarnock Sheriff Court to that of Ms McShane and Ms McLellan, notwithstanding the fact Ms McShane and Ms McLellan have responsibility for the operational needs and to ensure courts are sufficiently staffed.
57. Fifth, the claimant's challenges to the decisions taken by Ms McShane and Ms McLellan were made with the benefit of hindsight. So, for example, Ms McLellan made a decision each week, based on the weekly court planner and staffing requirements, whether a second working from home day could be granted for the claimant. Ms McLellan's decision was made on the basis of the number of staff available to cover courts, having regard to sickness absence, holidays and training. There was, by the very nature of the exercise, a degree of planning for what might happen. The claimant, when challenging the decisions of Ms McLellan, did so with the benefit of hindsight regarding what had actually happened, rather than noting what had been within the knowledge of Ms McLellan at the time she made her decision.
58. The claimant's witness Mr Alistair Young, branch secretary of the Public and Commercial Services trade union, gave evidence. Mr Young's evidence was to the effect he disagreed with the respondent's decision regarding the flexible working request and considered that more should have been done in respect of reasonable adjustments. The tribunal did not consider Mr Young's evidence added anything to the evidence given by the claimant.
59. The tribunal found Ms McShane to be a credible and reliable witness who gave her evidence in a straightforward manner. Ms McShane was able to respond fully to all of the questions put to her by the claimant. Ms McShane explained the difficulties which had been experienced with staff turnover and the need to train new staff, which had in turn meant the plan to commence training for rotation had not progressed. Ms McShane also spoke at length regarding flexibility being the key to covering the Courts, so that having to pull resources from other Courts could be avoided. The issue regarding the flexible working request was the inflexibility of not being able to ask the claimant to come in on two fixed days each week.
60. The tribunal also found Ms McLellan to be a credible and reliable witness. She gave detailed evidence, by reference to the weekly court planning documents, regarding the reasons why a second day working at home could not be accommodated. The reasons for refusing a second working at home day were all

operational so, for example, there was no second working from home day in the period 23 October to 23 December because one EO (civil) was off on long term sickness absence; there was planned annual leave; there was training for two EOs (civil); one AO was off sick from August and there was an unfilled AO vacancy.

61. Ms McLellan also had experience in Paisley Sheriff Court of rotation being in place. Her evidence was that rotation should happen and in Kilmarnock a rotation plan had been in place with the previous Sheriff Clerk but had not happened due to Covid. Ms McShane then took up post but could not progress with rotation because the skills matrix had highlighted a lack of experience and so there was a need for training to take place before further training for the purposes of rotation. The tribunal accepted Ms McLellan's evidence, supported by Ms McShane, that current plan was for EOs in civil to do rotation and two of the EOs had attended training for this, and one EO had already done the training.
62. Ms Blue was also a credible and reliable witness and she was willing to acknowledge points made by the claimant where appropriate. Ms Blue spoke generally at times rather than specifically regarding Kilmarnock Sheriff Court. An example of this was with regards to rotation. Ms Blue acknowledged she did not know rotation had not been in place in Kilmarnock Sheriff Court for 10/15 years, but she explained that notwithstanding this, rotation was an expectation of the respondent and should have been in place. The staffing of each Court was based on the volume of business in the courts, and flexibility of staff was the key to covering these needs.

Claimant's submissions

63. The claimant submitted the main issue was whether it was reasonable for the respondent to allow her to work from home 2 days per week. She invited the tribunal to find the respondent's objections to the adjustment based on disruption and operational reasons were not a barrier to making reasonable adjustments. Ms Fergusson also invited the tribunal to find her job is not office based, and that the claimant should be allowed to work two days from home on a permanent basis.
64. Ms Fergusson referred to the PCPs she had identified (and as set out in the List of Issues) and submitted they put her at a substantial disadvantage because she needed frequent toilet breaks and had impaired concentration due to fatigue throughout the day. It was submitted Ms McShane, Ms Blue and Ms McLellan had only been concerned with operational matters and did not adequately consider her disability.
65. Ms Fergusson suggested the evidence of Ms McShane, Ms Blue and Ms McLellan should be treated with caution because Ms Blue had not known key facts about Kilmarnock Sheriff Court (for example, the fact staff there had not rotated for years); Ms McShane admitted she had not had training in the Equality Act and Ms

McLellan admitted she had no knowledge of the ACAS Codes or the Equality Act. Ms Fergusson invited the tribunal to find the respondent's witnesses were opposed in principle to flexible working from home as demonstrated by stating the job was office based.

66. Ms Fergusson's submission in respect of each of the legal claims covered the same points.

Respondent's submissions

67. Ms Smith invited the tribunal to find the respondent's witnesses had been credible and reliable and had honestly stated when they could not recall details or if they could not answer a question. This was in contrast to the claimant who had made a number of assertions which proved to be untrue: for example, the claimant stated she clerked one court per week, but the documents demonstrated she frequently did more than this; the claimant stated management never discussed OH reports with her, but the notes of the meetings demonstrated the OH report was discussed with the claimant and the claimant stated that because of her condition she could never clerk criminal courts, but she accepted in cross examination that she had on at least two occasions clerked criminal courts.
68. The remainder of Ms Smith's submissions are set out and considered below.

Discussion and Decision

Flexible Working Application

69. The issues for determination in respect of the refusal of the claimant's flexible working application are:-
- (i) did the respondent deal with the claimant's application in a reasonable manner;
 - (ii) did the respondent notify the claimant of the decision of the application within the decision period;
 - (iii) did the respondent refuse the claimant's application because they considered that one or more of the grounds, as per section 80G(1)(b) of the ERA applied and
 - (iv) did the respondent reject the claimant's application based on incorrect facts.
70. The tribunal had regard to the terms of section 80F, 80G and 80H Employment Rights Act (ERA) regarding the flexible working application. Section 80F provides that a qualifying employee may apply for a change in the terms and condition of

their employment, including (iii) where, as between his home and a place of business of his employer, he is required to work.

71. Section 80G ERA sets out the employer's duties in relation to an application, and it provides that an employer to whom an application under section 80F is made:-

(a) shall deal with the application in a reasonable manner;

(aa) shall notify the employee of the decision on the application within the decision period;

(b) shall only refuse the application because he considers that one or more of the following grounds applies –

(i) the burden of additional costs;

(ii) detrimental effect on ability to meet customer demands;

(iii) inability to re-organise work among existing staff;

(iv) inability to recruit additional staff;

(v) detrimental impact on quality;

(vi) detrimental impact on performance;

(vii) insufficiency of work during the periods the employee proposes to work;

(viii) planned structural changes and

(ix) such other grounds as the Secretary of State may specify by regulations.

72. Section 80H provides that an employee who makes an application under section 80F may present a complaint to an employment tribunal that (a) his employer has failed in relation to the application to comply with section 80G(1) or (b) a decision by his employer to reject the application was based on incorrect facts. A final decision (which includes any appeal process) has to be notified to the employee within 2 months, unless any extension to that period was agreed between the parties.

Did the respondent deal with the claimant's application in a reasonable manner

73. The claimant submitted the respondent had failed to deal with her request in a reasonable manner because it had failed to carefully assess the effect of the requested change for both the employer and employee, insofar as the potential benefits for the claimant of accepting the application. Ms Blue's letter focussed

only on the business needs of the employer. The respondent also failed to make reasonable adjustments in line with the recommendation of OH.

74. The claimant also submitted that Ms Blue was not impartial and held the inflexible belief that the claimant's role had to be carried out face to face within the office building.
75. The tribunal, in considering whether the respondent dealt with the claimant's request in a reasonable manner, had regard to the ACAS Code of Practice which sets out the basic requirements of a reasonable procedure in relation to a flexible working request. It recommends that employers adopt the following basic steps:-
 - discuss the request with the employee;
 - consider the request carefully and
 - deal with the request promptly.
76. There was no dispute regarding the fact the respondent arranged to meet with the claimant to discuss her request and that meeting took place on the 27th March. The claimant suggested, at that meeting and in her evidence to the tribunal, that in her previous meetings with Ms McShane, there had been discussion of two days per week working from home and the claimant had taken from this that her request had been granted. Ms McShane disagreed and clarified that any prior discussion had been in relation to the arrangements for the phased return to work. The tribunal noted there had, in addition to this, been some confusion whether the claimant was making a flexible working request or a request for reasonable adjustments. The respondent wished to clarify this because different procedures apply.
77. The tribunal noted the claimant, in cross examination, accepted Ms McShane did not ever agree two days working at home (which was put in place for the phased return to work) would continue. The tribunal, in addition to this, accepted Ms McShane's evidence regarding this point because it was clear that the phased return to work included working from home days and those arrangements had to be discussed and agreed prior to the phased return being put in place. The tribunal further noted that Ms McShane had confirmed to the claimant, at the return to work meeting on the 19th February, that a meeting to discuss the flexible working request would be arranged.
78. The meeting to discuss the flexible working request gave the claimant an opportunity to explain to Ms McShane why she was making the request and the benefits to her of having two days working from home each week. The benefits were all to do with fatigue, not having to travel to and from work and not having to be up early to prepare her lunches for work.

79. The tribunal noted the claimant and her representative confirmed at the end of the meeting, that they had had an opportunity to share all information relevant to her request.
80. Ms McShane informed the claimant that she would receive a response within 14 days. Ms McShane complied with that timescale by meeting with the claimant again on the 11th April to inform her of the decision. The tribunal accepted Ms McShane's evidence that she had approached this with a completely open mind and that after the meeting she gave careful consideration to the request and genuinely considered whether one or more of the section 80G(1)(b) grounds for refusing the request applied. The tribunal also accepted that Ms McShane had looked at the benefits of the requested change and weighed them against any adverse business impact. Ms McShane had also explored with the claimant whether there were any alternatives she may consider, but the claimant only wanted two days per week working from home.
81. The third point set out above is an obligation on the respondent to deal with the request promptly. The claimant, at the start of the meeting on the 27th March, informed Ms McShane that the time limit for doing so was two months and not three as stated in the respondent's policy. Ms McShane had been unaware of this. There was no dispute regarding the fact the respondent did not deal with the claimant's request within the two month timescale.
82. The tribunal, in considering whether the respondent dealt with the claimant's request in a reasonable manner, concluded they had done so. The tribunal reached this conclusion because the respondent had met with the claimant to fully discuss the reasons for the request and had carefully considered that request and allowed the claimant the right to appeal against the decision to refuse the application. The tribunal acknowledged the respondent did not comply with the two month timescale, but concluded this did not undermine the fact the respondent dealt with the matter reasonably. This was particularly so in circumstances where any delay was not lengthy and was not deliberate and the issue of not meeting the timescale is dealt with separately below. The tribunal decided, for these reasons, to dismiss this aspect of the claim.

Did the respondent notify the claimant of the decision of the application within the decision period?

83. There was no dispute regarding the fact the respondent did not notify the claimant of the decision (and appeal outcome) within the decision period of two months. The request was made on the 4th February 2025; Ms McShane notified the claimant of her decision on the 11th April and confirmed it in writing on the 14th April; the claimant appealed on the 22nd April and the appeal decision outcome letter was dated 19th May 2025. There was no express agreement to extend the time limit.

84. The tribunal had regard to the terms of section 80I ERA which provides that where an employment tribunal finds a complaint under section 80H to be well founded, it shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the employee. The amount of compensation shall be such amount as the tribunal considers just and equitable in all the circumstances (however this shall not exceed eight weeks' pay).
85. The respondent, in its submissions, invited the tribunal to have regard to Ms McShane's evidence that the reason for the delay in meeting with the claimant was due to her taking time to seek advice from HR regarding whether the request was best dealt with under the respondent's flexible working policy or the respondent's reasonable adjustments policy, and also due to a period of annual leave. Further, whilst the application and subsequent appeal were being considered, the claimant was not required to work in the office five days per week and accordingly any negative impact on the claimant was mitigated to a significant extent.
86. The tribunal, in considering these submissions, accepted there had been a degree of confusion in this case (on both sides) whether the request was proceeding as a flexible working request or a request for reasonable adjustments. Ultimately the claimant wished it considered as a flexible working request because if the request was granted it would agree a permanent change to her contract.
87. The tribunal also had regard to the fact Ms McShane was wholly unaware that the time limit was two months. The tribunal took from this that there had been no deliberate delay or attempt to delay on the part of the respondent.
88. The tribunal noted the claimant agreed she had not been required to work in the office five days a week whilst the request was being considered. The respondent had agreed the claimant could continue to work two days per week at home whilst the flexible working request was being considered.
89. The tribunal, having had regard to each of the above points, concluded the breach on the part of the respondent was technical with little impact on the claimant other than having to wait longer for the decision. The tribunal placed considerable weight on the fact the claimant was not working five days per week in the office whilst waiting for the decision. The claimant, in effect, enjoyed what she had asked for, whilst waiting for the respondent's decision. The tribunal decided, in those circumstances, that it would not be just and equitable to make an award of compensation.

Did the respondent refuse the claimant's application because they considered that one or more of the grounds as per section 80G applied?

90. The claimant submitted that because Ms Blue had used the word “damaging” rather than “detrimental” it showed she had not based her decision on any statutory ground. I did not consider there was any merit in that submission.
91. The tribunal had regard to the outcome letter sent by Ms McShane (page 254) where she set out the reasons for refusing the request. The reasons were :-
- inability to re-organise work among existing staff;
 - inability to recruit additional staff and
 - inappropriate because of planned structural changes.
92. The tribunal was satisfied that those reasons fell within section 80G(b)(iii), (iv) and (viii) as set out above. The tribunal decided the respondent did refuse the claimant's request because they considered one or more of the grounds set out in section 80G applied.
93. The tribunal acknowledged that Ms Blue framed her reasons for refusing the appeal differently to Ms McShane, but the substance of the reasons was the same as those relied upon by Ms McShane. (see below)
94. The tribunal decided to dismiss this aspect of the claim.

Did the respondent reject the claimant's application based on incorrect facts?

95. The claimant, in her submission, invited the tribunal to focus entirely on Ms Blue's letter of outcome of the appeal (page 274) because she considered this superseded Ms McShane's letter of the 14th April (page 254). The claimant submitted Ms Blue included four reasons in her letter which were inadmissible as a flexible working request may only be refused on the statutory grounds. The inadmissible reasons were (i) the need for a sheriff clerk depute to be in the building for court hearings/ad hoc hearings, sickness, annual leave and emergency applications; (ii) the need to be on hand to answer legislative and procedural questions from customers; (iii) the need to support the judiciary in chambers and in the court building and (iv) the need to be a line manager to staff members and to be physically present to carry out this role.
96. The claimant submitted Ms Blue did not uphold Ms McShane's reasons for refusing the request and instead relied on three other reasons related to the statutory list. The claimant argued there was no evidence to support her request having a damaging effect on ability to meet customer demands because she would meet customer demand working from home two days per week and there was no

evidence to support that it had a damaging impact on performance because the respondent had failed to consider her performance, which would improve if she was able to get more sleep. Lastly the place of work had no impact on the sufficiency of work. The claimant, for these reasons, challenged that Ms Blue had relied on incorrect facts.

97. The tribunal, in considering these points, firstly had regard to the fact that Ms Blue's role in this was to hear the claimant's appeal against the decision of Ms McShane. Ms Blue's role was not to consider the flexible working request afresh. Ms Blue told the tribunal that the purpose of the appeal was to decide whether Ms McShane's decision had been appropriate.
98. The tribunal considered that Ms Blue carried out a very fair and thorough appeal process and I say that because Ms Blue posed a number of questions to Ms McShane inviting her to provide further information whether two days working from home was feasible and also in respect of the three points relied upon in refusing the request.
99. Ms Blue asked Ms McShane how the claimant working two days per week during the phased return to work had been accommodated. Ms McShane explained that it had been accommodated by other deputes covering additional tasks and limited work had been given to the claimant whilst working from home.
100. Ms Blue asked the same question in relation to working from home one day per week. Ms McShane replied that this was being accommodated through the civil ordinary court that day being done by Webex, meaning the claimant could cover this from home, albeit the afternoon part of the court was in person and this had to allocated to another member of staff.
101. Ms Blue next asked whether it was feasible for Kilmarnock to allow the claimant to work from home two days per week and whether there were enough administrative duties for two days working from home each week. Ms McShane responded that she believed to accommodate this, they would have to make a bespoke role and remove administration tasks from other deputes to generate 14 hours of work.
102. Ms Blue asked Ms McShane to provide further information regarding the statutory reasons for refusing the request. Ms McShane explained that if the claimant worked from home two days per week it amounted to 14 hours of a full time equivalent EO role permanently working from home performing administrative duties and this would inhibit the respondent's ability to recruit additional staff if business needs changed and there was an insufficient workforce available in person to cover programmed courts.
103. Ms McShane confirmed the office had many staffing issues and that supervision was vital. The claimant, when working at home, would not be able to oversee staff attending at the public counter or staff answering telephone calls, offering

support/guidance in other ways. This would fall to other colleagues who were in the office. Ms McShane lastly noted the claimant was due to rotate from civil to criminal.

104. Ms Blue gave the appeal outcome in a letter dated 19th May (page 274). In that letter Ms Blue stated the role of Sheriff Clerk Depute required to be carried out face to face from within the court building and she set out a number of reasons for this, which included the points provided by Ms McShane. Ms Blue then went on to say the reasons for refusing the flexible working request were:

- damaging effect on ability to meet customer demands. Ms Blue explained that working from home damaged the respondent's ability to meet customer demands;
- damaging impact on performance. Ms Blue explained there must be enough clerks of court to cover the basic court programme and in addition to this, enough provision to allow for ad hoc courts, annual leave, sickness etc. An inability to do this would have a damaging impact on performance. Ms Blue went on to say that court programmes were fluid and could change, and that clerks required to match those changes with flexibility around working when courts were programmed. Working from home two days per week on a permanent basis would not allow the Sheriff Clerk to ensure that there was enough flexibility to cover the courts where there were changes and this would inevitably affect performance in a negative way. Ms Blue also noted that the EO grade was a rotational one and that it was a requirement of the role to continuously develop technical knowledge and experience by working in different roles as part of planned rotation. Working from home two days per week would impact on the ability of the business to rotate her;
- not enough work during the periods the employee wants to work. Ms Blue noted the OH report had asked the respondent to look at the feasibility of carrying out administrative work two days per week from home. Ms Blue further noted the EO role was not an administrative role and therefore there would not be enough work to carry out this function from home permanently.

105. The claimant firstly submitted that Ms Blue had given four reasons for refusing the application which were not statutory reasons. The tribunal could not accept that submission because, having had regard to the outcome letter from Ms Blue, it was clear that the four reasons referred to by the claimant were not reasons for refusing the request, but rather were the reasons why Ms Blue described the role of Sheriff Clerk Depute as requiring to be carried out face to face from within a court building.

106. The claimant next submitted that Ms Blue had not upheld the reasons for refusing the request given by Ms McShane. The tribunal could not accept that submission because, having reference to the outcome letter and the evidence of Ms Blue, it

was clear that Ms Blue accepted Ms McShane's reasons, albeit she may have expressed them somewhat differently. Ms Blue told the tribunal that she had wanted to be really clear on the reasons why permanent working from home could not be accommodated and had wanted to make very clear what Ms McShane had said. Ms Blue stated her reasons were the same as Ms McShane's reasons but under slightly different headings. The tribunal accepted this evidence.

107. The claimant also sought to challenge the reasons given by Ms Blue, primarily because there was no evidence to support what had been said, and also because there had not been rotation in Kilmarnock Sheriff Court in all the time the claimant had been employed there. The tribunal considered there was no onus on the respondent to produce "evidence" to support their reasons for refusing the request. The tribunal considered that the onus on the employer was to demonstrate they had given reasonable consideration to the request, and the tribunal was satisfied the respondent had done this (see above).
108. The tribunal understood and accepted that a critical factor for the respondent was being able to utilise the Sheriff Clerk Deputes to cover the court programme, which included ad hoc courts and emergency courts and which would be impacted by human factors such as sickness absence, holidays and training days. There was only a small number of Sheriff Clerk Deputes covering the civil courts and if the claimant worked from home two days per week on a permanent basis, it restricted the ability of the respondent to move staff to where they were needed to cover the court programme.
109. The tribunal also understood and accepted that the responsibility of the Sheriff Clerk Deputes to line manage the AOs meant that on the days the claimant was not working in the office, that would have to be done by a colleague who was in the office. The tribunal acknowledged the claimant's evidence that the AOs could contact her at home but, by her own admission, they contacted her less when she was at home than when in the office.
110. The tribunal accepted that this was what was being explained by Ms Blue under the headings of "damaging effect on ability to meet customer demands and damaging impact on performance".
111. The issue of rotation was one where the tribunal understood that the respondent expected rotation of those at EO grade to improve flexibility so that Sheriff Clerk Deputes covering civil work, could also be asked to cover criminal work (and vice versa). The tribunal accepted that due to various factors (staff turnover and covid) rotation had not happened in Kilmarnock. The fact it had not happened did not detract from the fact it should have been happening and was always the intention of the respondent for it to happen. The tribunal accepted the evidence of Ms McLellan that there had been a plan for it to happen, but this had been curtailed because of covid. The tribunal also accepted the evidence of Ms McShane that

rotation had had to be put on hold because staff turnover and recruitment of new staff meant training had to be completed before training for rotation could be undertaken. The key point was whilst the claimant may not have been aware of these factors, the issue of rotation and the planning for it to happen, were live issues going on at management level.

112. The tribunal could not accept the claimant's position that because it had not happened it was an "incorrect fact" to refer to the role as a rotational one. The tribunal accepted the role was a rotational one albeit this had not previously been put into place during the time the claimant had been employed.
113. The tribunal, for all the reasons set out above, concluded the respondent did not reject the claimant's application because of reliance on incorrect facts.
114. The tribunal, for all the reasons set out above, decided to dismiss this claim.

Failure to make reasonable adjustments

115. The tribunal had regard to the terms of section 20 Equality Act which provides that where a provision, criterion or practice (PCP) applied by the employer puts a disabled person at a substantial disadvantage in comparison to those who are not disabled, the employer must take such steps as it is reasonable to take to avoid the disadvantage.
116. The issues to be determined by the tribunal are:-
- (i) did the respondent apply the provision, criterion or practice of requiring employees to be physically present in the office, at the respondent's demand or discretion;
 - (ii) did the respondent apply the PCP to the claimant;
 - (iii) if so, did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability;
 - (iv) if so, did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage;
 - (v) did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid the disadvantage (the adjustment wanted by the claimant was to work two days per week from home on a permanent basis) and
 - (vi) if so, by what date should the respondent have reasonably taken that step.
117. The claimant submitted there had been a requirement for her to be physically present in the office and that this had placed her at a substantial disadvantage

because of her need to take frequent toilet breaks and her increasing fatigue and impaired concentration throughout the day. The claimant considered allowing her to work from home two days per week would have been a reasonable adjustment which would have reduced the substantial disadvantage of working in the office. The claimant invited the tribunal to treat the evidence of Ms McShane, Ms Blue and Ms McLellan with caution because some of the examples given to support why this was not reasonable were inaccurate or incorrect: for example, the reference to the claimant's role being office based.

Did the respondent apply the provision, criterion or practice of requiring employees to be physically present in the office, at the respondent's demand or discretion

118. The first issue for the tribunal to determine was whether the respondent applied the PCP of requiring employees to be physically present in the office at their demand or discretion. The tribunal noted that in the respondent's submissions, it was accepted that there was a requirement for staff to be physically present in the office at the respondent's demand or discretion. I however considered there was a lack of clarity regarding the PCP and I say that because there had been an adjustment to the claimant's working base, whereby she worked one day each week at home, and the issue of discretion arose only in relation to a second working from home day. Accordingly, the practice which the claimant wished to have adjusted was the exercise of discretion in relation to the second day, because this would achieve her objective of working from home two days each week.
119. The importance of clearly identifying the PCP was raised in the case of **Griffiths v Secretary of State for Work and Pensions 2017 ICR 160**. In that case the Court of Appeal emphasised the importance of identifying not only the relevant PCP but also the precise nature of the disadvantage it created for a disabled person by comparison with a non-disabled person. Unless the disadvantage is properly identified, it is not possible to determine what steps the employer might reasonably be expected to take to eliminate it.

Did the respondent apply the PCP to the claimant

120. The next issue for the tribunal was whether the respondent applied this PCP to the claimant, and there was no dispute regarding the fact they did. The claimant was required to be physically present in the office four days each week unless the respondent exercised its discretion to allow a second working from home day.

If so, did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability

121. The next issue for the tribunal was whether the PCP put the claimant at a substantial disadvantage in comparison to those who were not disabled. The

respondent's primary position was that the PCP did not put the claimant at a substantial disadvantage in comparison to those who were not disabled. The respondent adopted that position because, it was submitted, there had been a lack of evidence to allow the tribunal to make such a finding.

122. The claimant's position was that the PCP put her at a substantial disadvantage because she wanted to work from home two days per week and the exercise of discretion meant she did not always get this. The tribunal acknowledged it heard evidence from the claimant regarding the benefits to the claimant of working from home: for example, the claimant did not have to travel to and from work, she did not have to prepare lunches to take with her and she was able to take a rest to help her deal with fatigue and deteriorating concentration as the day progressed. The tribunal however considered there was very little evidence regarding the disadvantage to the claimant of having one rather than two working from home days each week.
123. The tribunal acknowledged the exercise of discretion each week in relation to a second working from home day, meant there were weeks when the claimant did not have a second working from home day. The issue of disadvantage arising from this practice is dealt with in the above paragraph. In addition to this, the tribunal had regard to the fact the evidence demonstrated that the discretion to allow a second working from home day had been granted more often than not in the period considered. Accordingly, in the period considered, the claimant had had a second working from home day on more than half of the occasions where she had asked for it. The tribunal considered this undermined the claimant's position that the PCP subjected her to a substantial disadvantage.
124. The tribunal concluded the PCP did not subject the claimant to a substantial disadvantage and I reached that conclusion because of a lack of evidence and the fact the employer had exercised its discretion to give the claimant a second working from home day on more than half the occasions it had been requested, which I considered undermined any suggestion of "substantial" disadvantage.
125. The tribunal decided, notwithstanding this conclusion, to continue to address the issue which was the essence of the claimant's case and that was that if the PCP put the claimant at a substantial disadvantage, did the respondent fail in its duty to make reasonable adjustments when it refused to allow the claimant to work from home two days per week on a permanent basis.
126. The tribunal, before turning to that issue, noted there was no dispute regarding the fact the respondent did put adjustments in place, and they were (i) a phased return to work; (ii) an additional afternoon comfort break; (iii) adjustment to the absence management process; (iv) flexibility with start and finish times; (v) arrangements for the claimant to take breaks as and when required when clerking courts; (vi)

working from home one day per week and (vii) working from home on a second day each week when operationally feasible.

127. The key issue between the parties was whether the respondent's refusal to allow the claimant to work from home two days per week on a permanent basis was a failure in the duty to make adjustments, or whether it was not a reasonable adjustment for the respondent to have to make.
128. The tribunal had regard to the case of ***Smith v Churchills Stairlifts plc 2006 ICR 524*** where it was confirmed that the test of reasonableness in relation to adjustments is an objective one and it is ultimately the employment tribunal's view of what is reasonable that matters. An example was given that where the employer opposed an adjustment on the grounds it would be disruptive, it was for the tribunal to determine objectively the extent to which the step would have caused disruption.
129. The tribunal acknowledged that it must look at the proposed adjustment from the point of view of both the claimant and the respondent and then make an objective determination as to whether the adjustment was a reasonable one to make.
130. The tribunal also had regard to the Equality and Human Rights Commission Code of Practice and the points set out to which it is helpful to have regard when considering the issue of reasonableness. Those points are:-
- the extent to which taking the step would prevent the effect in relation to which the duty was imposed;
 - the extent to which it was practicable for the respondent to take the step;
 - the financial or other cost that would be incurred by the respondent in taking the step and the extent to which it would disrupt any of its activities;
 - the extent of the respondent's financial and other resources;
 - the availability to the respondent of financial or other assistance in respect of taking the step and
 - the nature of the respondent's activities and the size of its undertaking.
131. The tribunal, in considering these points, accepted that if the respondent had taken the step of allowing the claimant to work from home two days each week, it would have prevented the uncertainty of not knowing whether a second working from home day was going to be granted each week.
132. The key issue for the respondent was the extent to which it was practicable for the respondent to grant the claimant working from home on two set days each week and the extent to which that would disrupt its activities. The tribunal, in considering this point, had regard firstly to the evidence of Ms McShane which it accepted.

133. Ms McShane confirmed the staff structure (doing civil work) at Kilmarnock Sheriff Court, with there being 4 Sheriff Clerk Deputes (EOs) and 5 Administrative officers (AOs). The claimant was an experienced Sheriff Clerk Depute able to do all civil work. One Sheriff Clerk Depute could cover all civil and criminal work, and the Cashier work. There had been a large turnover of staff since 2020 and the AOs were not very experienced and relied heavily on the EOs (that is, the Sheriff Clerk Deputes) to answer their queries and monitor their work and the accuracy of the information being provided to the public.
134. The job description for a Sheriff Clerk Depute was produced at page 134 and the key responsibilities were noted as being to be the Clerk of Court in either criminal or civil and to line manage, develop and monitor the work of administrative officers and bar officers. The job description was supplemented by a description of the role and Ms McShane spoke to each of the points set out in the description and the tribunal accepted her evidence that although the public counter at the Court was manned by the AOs, an EO would, if there was a shortage of staff, be expected to provide cover. The EO also required to be present to see how the AOs dealt with enquiries and to check the information being provided to the public was correct. The EO also had a supportive role when AOs were dealing with challenging members of the public. Ms McShane acknowledged the footfall at the public counter was less than it used to be, but party litigants still attended with procedural difficulties or questions.
135. The tribunal accepted Ms McShane's evidence that a skills matrix had been completed in January 2025, coded red, amber and green. Only one EO ticked everything green (indicating an ability to understand and clerk civil and criminal courts) and this demonstrated there was a skills gap in respect of the other EOs. Ms McShane acknowledged that there had not been rotation between civil and criminal court work for many years at Kilmarnock Sheriff Court, but rotation was what the respondent desired because it provided the greatest flexibility in the workforce. Ms McShane had been directed by the Sheriff Principal at Kilmarnock Sheriff Court to commence training of staff for rotation, but this had had to be put on hold because there had been a large turnover of staff and new staff must firstly be trained and the backlog of work in solemn cases must be addressed before any training for rotation can take place. There appeared to be no dispute regarding the fact that the claimant would be unable to cover criminal work if she was working from home because criminal courts are conducted in person.
136. The tribunal also accepted that although EOs may allocate themselves to the courts to be covered, there was a requirement for each EO to cover all of the different civil courts to ensure skills and knowledge were maintained. The EOs usually covered one court per week, subject to the business needs and volume of work and the evidence demonstrated the claimant (and others) had been required to cover two or three courts during certain periods.

137. Ms McShane did not consider the adjustment sought by the claimant to be reasonable because if the claimant worked from home on two days each week, it would raise concerns regarding the sufficiency of staff to cover work and the courts. For example, on occasions when the claimant was working at home and there were only three EOs, it would be very difficult to cover annual leave or instances which would further reduce the available number of EOs, for example, sickness absence and training.
138. Ms Blue echoed the evidence of Ms McShane and the tribunal understood from her evidence that the key issue for the respondent was flexibility in terms of being able to use and move staff to where they were needed, particularly in terms of clerking courts. There were only four Sheriff Clerk Deputes and having the claimant working from home two days each week, meant that she could not be utilised should the need arise (as it often did). The tribunal accepted the respondent did not have the ability to ask Sheriff Clerk Deputes from criminal to cover civil work, because rotation had not yet started. This meant that if there were not enough civil clerks to cover the courts, Ms McLellan and/or Ms McShane had to cover them (if they were available) or they could seek relief staff from elsewhere (which was not readily available).
139. The tribunal also accepted that the function of the EOs in managing the AOs and overseeing their work could not be done by the claimant when she was working at home. The claimant, if not working in the office, would not be able to provide supervision and support to the AOs manning the public counter, and would not be able to oversee the accuracy of information being provided over the telephone/online to members of the public. This meant that this duty would fall to one of the EOs who was in the office.
140. The tribunal balanced all of the above with the fact the respondent had facilitated working from home two days each week during the phased return to work. The tribunal accepted this was different to granting a permanent change to the claimant's contract and that during the phased return the claimant had been given less work to do, and the respondent had taken some administrative tasks from other EOs in order to give them to the claimant. The tribunal did not consider the fact the respondent could facilitate a short period of working from home two days each week undermined their decision that they could not grant a permanent change to the claimant's contract.
141. The tribunal next had regard to the evidence of Ms McLellan and whilst she played no part in deciding whether the adjustment of working two days each week from home could be granted, her evidence regarding the basis of deciding each week whether a second working from home day could be granted was helpful. Ms McLellan took the tribunal through the documents at pages 365 – 372. These documents were weekly sheets showing each day of the week, the courts that

were scheduled to run, the clerks and remarks at the bottom noting reception cover, criminal EO cover, civil EO cover, cashier and other such matters. The documents were subject to change depending on, for example, sickness.

142. Ms McLellan used the documents to explain when the claimant had/had not been granted a second working from home day. The documents supported that one of the EOs (civil) started to do criminal training on a Tuesday and another EO had a period of sickness absence in November. Both Ms McLellan and her opposite in criminal had had to cover courts during that time due to shortages of staff.
143. The tribunal considered the evidence of Ms McLellan, and the documents referred to, demonstrated the pressures of ensuring there was sufficient available staff to cover the courts and the fact that plans were subject to change for a variety of reasons, most of which were outwith Ms McLellan's control. The tribunal took from this that flexibility and the ability to move staff to where they were needed, was a key issue for the respondent. The tribunal was satisfied, having regard to all of the evidence, that it was not practicable for the respondent to grant the claimant two days working from home each week and that such an adjustment would have disrupted the activities which are all part of the EO role.
144. The tribunal acknowledged the claimant was set on having two days each week working from home and she did not consider there was any alternative to this, or any compromise. The tribunal also acknowledged the claimant did not consider the respondent's decision reasonable nor did she accept the respondent's decision-making in respect of whether a second working at home day was possible in any particular week. The claimant challenged Ms McLellan robustly regarding this matter. The tribunal however preferred the evidence of Ms McLellan, and I say this because Ms McLellan had to look at what was planned for the week ahead and, on the basis of the information available, made a decision. The claimant, on the other hand, had the benefit of hindsight when it came to challenging the decision. So, for example, if something planned for the following week did not materialise, or if someone did not attend the training they had been due to attend, the claimant relied on this to argue that Ms McLellan had been wrong in the basis for making her decision. This clearly was not correct because Ms McLellan had to make her decision on the basis of the information available at the time.
145. The claimant was also loathe to acknowledge that up until October 2025 she had been granted a second working from home day each week with one exception. The respondent accepted this changed because in the period October to December one EO was off on long term sick; there was planned annual leave; another EO was on training; an AO was off sick and there was an AO vacancy.
146. The claimant invited the tribunal to find that her job was not office based and to treat the evidence of the respondent's witnesses with caution because they were opposed in principle to flexible working from home. The tribunal could not accept

that submission because the statement that the role of Sheriff Clerk Depute being office based was correct. The tribunal considered that was the starting position and any home working may be permitted under the respondent's various policies or as a reasonable adjustment.

147. The tribunal did not find the respondent's witnesses opposed in principle to flexible working at home and this was demonstrated by the fact the respondent put in place one day each week working at home, with a second day being permitted subject to operational requirements.
148. The tribunal, having considered all of the points set out above, concluded the respondent did not fail in its duty to make reasonable adjustments when it refused to allow the claimant to work from home two days each week. The tribunal reached that conclusion because it accepted all of the evidence regarding the disruption such an adjustment would have on the respondent's ability to utilise staff as required to cover courts. The respondent's key duty is to ensure courts are clerked and the respondent required the flexibility to be able to move staff as required to achieve this. The respondent's ability to do this would be severely impacted and restricted if the claimant worked from home two days each week and could not be utilised to clerk physical courts.
149. The tribunal further concluded that the adjustment which was put in place was a reasonable adjustment because it allowed the claimant to work from home one day each week, with a second day being permitted subject to operational requirements. This adjustment benefitted the claimant (because the evidence demonstrated that in the period June to December, the claimant was granted a second working from home day on more occasions than not) and allowed the respondent to respond weekly to the needs of the business and to minimise disruption.
150. The tribunal decided, for all of these reasons, to dismiss this complaint.

Indirect discrimination

151. The issues for the tribunal to determine are:-

(i) Did the respondent operate the following PCPs –

- the requirement to be physically present in the building five days per week;
- the requirement to rotate to the criminal department and
- the Movement and Mobility policy.

(ii) If so, did the respondent apply or would it apply the PCPs to the claimant and those who do not share the claimant's particular disability;

- (iii) If so, did the PCPs put or would put persons with the claimant's disability at a particular disadvantage when compared to those who do not share the claimant's disability;
 - (iv) Did the PCPs put the claimant at that particular disadvantage and
 - (v) If so, can the respondent show that the PCPs were a proportionate means of achieving a legitimate aim (being the aim of ensuring that Kilmarnock Sheriff Court had sufficient EO grade staff to cover programmed courts; ensuring that AO staff receive sufficient supervision and on the job support and ensuring that it can efficiently meet service demand of a public counter.
152. The tribunal firstly had regard to the provisions of section 19 Equality Act where it is stated that an employer discriminates against an employee if the employer applies a PCP which is discriminatory in relation to a relevant protected characteristic of the employee. A PCP is discriminatory if the employer applies or would apply it to persons with whom the employee does not share the characteristic; it puts, or would put, persons with whom the employee shares the characteristic at a particular disadvantage when compared with persons with whom the employee does not share it; it puts or would put the employee at that disadvantage and the employer cannot show it to be a proportionate means of achieving a legitimate aim.
153. The tribunal next had regard to the issue of whether the respondent applied the PCPs to the claimant. The claimant was asked about this in cross examination and accepted each of the PCPs had not been applied to her. The requirement to be physically present in the building five days per week had been adjusted and accordingly was not applied to the claimant. The requirement to rotate to the criminal department had not been applied to the claimant in circumstances where the respondent agreed to the claimant's request to put this on hold pending the outcome of these proceedings. The Movement and Mobility Policy had not been applied to the claimant.
154. The tribunal decided to dismiss this claim for this reason. I should state that if the tribunal had not dismissed the claim for this reason, it would have been dismissed in any event because the claimant did not provide any evidence of group disadvantage. Complaints of indirect discrimination concern group disadvantage, with a person being able to argue that as part of that group, they were also put to a substantial disadvantage. The protected characteristic in this case is disability because of the impairment of kidney disease. The claimant did not provide any evidence to support that people with kidney disease would be placed at a particular disadvantage because of the application of the PCPs.
155. The tribunal dismissed the complaint of indirect discrimination for these reasons.

Discrimination arising from disability

156. The issues for determination are:-

- did the respondent subject the claimant to unfavourable treatment when it refused to grant the flexible working request;
- if so, was the unfavourable treatment because of something arising in consequence of the claimant's disability and
- if so can the respondent show that the treatment was a proportionate means of achieving a legitimate aim.

157. The tribunal had regard to section 15 Equality Act which provides that a person discriminates against a disabled person if they treat the disabled person unfavourably because of something arising in consequence of the disabled person's disability and cannot show that the treatment was a proportionate means of achieving a legitimate aim.

158. The claimant invited the tribunal to find the respondent had treated her unfavourably because of something arising in consequence of her disability, namely her fatigue and frequent visits to the bathroom whilst at work.

159. The respondent referred the tribunal to the case of ***Pnaiser v NHS England and another 2016 IRLR 170*** where the EAT summarised the approach to be taken in claims for discrimination arising from disability:

- *the tribunal must first identify whether the claimant was treated unfavourably and by whom;*
- *it then has to determine the cause of that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the motive of the alleged discriminator in acting as s/he did is irrelevant;*
- *the tribunal must then determine whether the reason was something arising in consequence of the claimant's disability which could be described as a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator;*
....
- *There is an objective justification defence that unfavourable treatment must be a proportionate means of achieving a legitimate aim.*

160. The tribunal first asked whether the refusal of the flexible working application was unfavourable treatment and concluded that it was. It was unfavourable treatment

because the claimant wished to change her place of work to two days each week working from home and this was refused by the respondent.

161. The tribunal next asked what was the cause of that treatment and noted that in this type of claim (that is, a claim under section 15 Equality Act) the rejection of the flexible working application must have been motivated by something arising in consequence of the disability. The claimant's submission in this respect misunderstood the basis of a section 15 complaint. The claimant submitted that the something arising in consequence of her disability was fatigue and impaired concentration but those factors had no influence whatsoever on the respondent's decision to refuse the application. The reasons why the respondent rejected the claimant's flexible working application had nothing to do with the claimant's health condition. The respondent rejected the application for operational and business reasons.

162. The tribunal decided, for these reasons, to dismiss this claim.

Harassment

163. The issues for determination are:-

- did the respondent require the claimant to request frequent comfort breaks from sheriffs and
- did the alleged conduct have the purpose or effect of either violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

164. The tribunal had regard to the terms of section 26 Equality Act which provides that a person harasses another if he engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The section goes on to say that in deciding whether the conduct has the effect (set out above) each of the following must be taken into account (a) the perception of the claimant; (b) the other circumstances of the case and (c) whether it was reasonable for the conduct to have that effect.

165. The tribunal also had regard to the case of ***Richmond Pharmacology v Dhaliwal 2009 ICR 724*** where it was stated that it would be a healthy discipline for a tribunal, in any claim alleging harassment, to specifically address the three essential elements of a harassment claim, which are (i) unwanted conduct; (ii) that has the proscribed purpose or effect and (iii) which relates to a relevant protected characteristic.

166. The claimant, in her submissions, simply asked the tribunal to make a finding in her favour.

167. The claimant's evidence regarding the issue of comfort breaks whilst clerking was that she could not just simply leave the court to take a break, she had to ask the Sheriff for a break and, in response to the request, the court would usually have to rise. The claimant found this embarrassing.
168. There was no dispute regarding the fact that anyone involved in court proceedings is required to ask for the court's permission to leave the court, be that for a comfort break or another reason.
169. The tribunal, in addition to this evidence, also had regard to the fact the respondent had put in place that the claimant could use the Cisco Jabber function to alert either Ms McLellan or colleagues to the fact she needed a break and request someone to cover her.
170. Ms McShane told the tribunal that all Sheriffs were aware of the claimant's condition and the need for breaks and that if the claimant was clerking a virtual hearing, she could contact the Sheriff privately using instant message, or if in person, she could speak to the Sheriff privately in advance so as to avoid any embarrassment.
171. The tribunal found as a matter of fact that the respondent did require the claimant to request frequent comfort breaks from a Sheriff. This was unwanted conduct because the claimant found it embarrassing.
172. The tribunal next considered whether that unwanted conduct had the purpose or effect of violating the claimant's dignity or creating a humiliating environment. The tribunal concluded the unwanted conduct did not the purpose or effect of violating the claimant's dignity because anyone involved in court proceedings must seek the permission of the Sheriff to leave the court room. The claimant painted a picture of having to stand up and ask for permission to take a comfort break and explaining why this was necessary. The tribunal did not find this aspect of the claimant's evidence to be credible in circumstances where the Sheriffs at Kilmarnock had been made aware of the claimant's condition and the need for frequent comfort breaks and accordingly there was no requirement for the claimant to explain her need for a break.
173. The tribunal considered whether the unwanted conduct had the effect of creating a humiliating environment for the claimant. The tribunal in considering this must have regard to the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. The tribunal acknowledged the claimant's perception was that this was embarrassing. The tribunal next had regard to the other circumstances of the case and in particular the fact the Sheriffs were aware of the claimant's condition and the fact the respondent had put measures in place to assist the claimant in seeking breaks.

174. The claimant told the tribunal that visiting Sheriffs would not know of her condition and that sometimes, during a hearing, it would not be convenient for a Sheriff to immediately rise when she requested a break. The tribunal accepted both of those points but considered they could be managed within the measures referred to above.
175. The tribunal next asked whether it would be reasonable for the conduct to have that effect and concluded it would not be reasonable for the conduct to have that effect. The tribunal reached that conclusion because of the measures which had been put in place to assist the claimant and the fact resident Sheriffs were aware of the claimant's need for frequent breaks and the reason, and this removed the need for the claimant to explain this in open court.
176. The tribunal, in conclusion, found there was unwanted conduct but that it did not have the proscribed purpose or effect. The tribunal dismissed this claim for that reason.

Victimisation

177. The issues for the tribunal to determine are:-

- did the claimant do a protected act when she (a) made a flexible working request; (b) alleged, during the course of the internal appeal against the decision to refuse the flexible working request, that the respondent had breached the Equality Act by failing to make reasonable adjustments for her and (c) brought these proceedings.
- did the respondent subject the claimant to the following detriments because she had done a protected act –
 - (a) make an implied threat that the claimant would be removed to clerk criminal courts in her flexible working outcome letter dated 14 April 2025 and appeal outcome letter dated 19 May 2025;
 - (b) not permit the claimant a second working from home day week commencing 9 June 2025;
 - (c) insist the claimant attend a case management meeting in relation to legislative changes to criminal proceedings;
 - (d) insist the claimant, alongside Kitty McLaughlan and Gillian McClymont be included in criminal training;
 - (e) not permit the claimant to work from home full time following the submission of a fit note dated 12th June 2025;

- (f) delayed meeting with the claimant to discuss the OH report dated 24th June 2025;
- (g) temporarily promoted Graeme Kerr to cover Ms McLellan's annual leave in August 2025 instead of the claimant or Fiona Clover;
- (h) refuse the claimant's request for Ms McLellan to be removed as the claimant's line manager and
- (i) not permit the claimant a second working from home day between 23 October and 23 December 2025.

178. The tribunal had regard to section 27 Equality Act which provides that a person victimises another if they subject that other person to a detriment because they do a protected act, or s/he believes the person has done, or may do, a protected act. A protected act is (a) the bringing of proceedings under the Equality Act and (d) making an allegation that a person has contravened the Equality Act.

179. The claimant, in her submissions, noted she had submitted her claim to the Employment Tribunal on the 6th June 2025 and that Ms McShane had been well aware of the claimant's intention to make a claim because she had told her so in emails dated 21st May and 5th June. The claimant also relied on the fact that she had, in the appeal, alleged her employer had breached the Equality Act by not making reasonable adjustments, which also arose in the context of the flexible working application.

180. The claimant submitted the respondent had raised the issue of rotation because she had done a protected act. The claimant considered this conclusion was inescapable because the issue of rotation had never happened before and the respondent used rotation as a way to defeat the flexible working application and giving two days each week working from home.

181. The claimant further submitted that she was subjected to a detriment when the respondent refused to allow her to work from home for 6 weeks in line with the GP and OH recommendations.

Did the claimant do a protected act

182. The tribunal firstly noted the respondent, in its submissions, accepted the claimant's current claim to the Employment Tribunal was a protected act. The respondent made no such concession regarding the two other alleged protected acts, and accordingly the first issue for the tribunal to determine was whether those acts were protected act.

183. The claimant alleged that during the course of the internal appeal against the decision to refuse the flexible working request, she alleged the respondent had

breached the Equality Act by failing to make reasonable adjustments for her. The tribunal was satisfied this fell within the list of protected acts as set out in section 27, subsection (d), that is, making an allegation that a person has contravened the Equality Act. The tribunal noted, in reaching this conclusion, that there was no dispute regarding the fact the claimant had made this assertion during the appeal hearing.

184. The claimant also relied on the fact she had made a flexible working application. The tribunal noted the terms of section 27, subsection (c) “doing any other thing for the purposes of or in connection with this Act” and asked whether the flexible working application fell within this category. The tribunal had regard to the claimant’s flexible working request form (page 219) where the claimant gave details of her kidney failure and stated “*I am making this application as a request for a reasonable adjustment, taking into account my disability*”. The tribunal concluded that given the wording of the flexible working request, the request was “in connection with this Act” and was, accordingly a protected act.
185. The tribunal accordingly decided that the claimant did a protected act when she:-
- made a flexible working request on the 4th February 2025;
 - alleged, during the course of the internal appeal against the decision to refuse the flexible working request on the 25th March 2025, that the respondent had breached the Equality Act and
 - brought these proceedings on the 9th June 2025.

Was the claimant subjected to a detriment

186. The tribunal, before turning to look at each of the incidents alleged by the claimant, had regard to the EHRC Employment Code which provides that generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. However, an unjustified sense of grievance alone would not be enough to establish detriment.
187. The tribunal also had regard to the case of ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337*** and ***Derbyshire v St Helens Metropolitan Borough Council 2007 ICR 841*** which clarified that the test of detriment has both subjective and objective elements. The situation must be looked at from the claimant’s point of view but his/her perception must be reasonable in the circumstances.
188. The tribunal next considered whether the incidents alleged by the claimant occurred and if so, whether she was subjected to a detriment.

First alleged incident (a) make an implied threat that the claimant would be removed to clerk criminal courts in her flexible working outcome letter dated 14 April 2025 and appeal outcome letter dated 19 May 2025

189. The claimant alleged that, in the flexible working request outcome letter dated 14th April 2025 and the appeal outcome letter dated 19th May 2025, the respondent made an implied threat that the claimant would be removed to clerk criminal courts. The tribunal had regard to the letters relied upon by the claimant. The flexible working request outcome letter dated 14th April 2025 was produced at page 254. Ms McShane, in that letter, stated “*Granting a permanent change to your contract would impact on our ability to rotate you to all available EO roles within Kilmarnock Sheriff Court.*” It was further stated “*The impact on staff rotation would be affected as stated above all EO roles within Kilmarnock Sheriff Court will be subject to rotation*”.
190. The appeal outcome letter was produced at page 274 and Ms Blue stated “*.. the role of EO is a rotational one and it is a requirement of the role to continuously develop technical knowledge and experience by working in different roles as part of planned rotation. This is to ensure that SCTS delivers good service to customers and that we address workforce and succession planning. Working from home two days per week permanently would impact on the ability of the business to rotate you within your grades roles at Kilmarnock and would have a damaging impact on performance.*”
191. The tribunal could not accept the claimant’s description of these statements as an “*implied threat that the claimant would be removed to criminal courts*”. The tribunal accepted the respondent’s evidence that rotation of EOs was a requirement of the role although it appeared that rotation was actively in place in some courts (Ms McLellan, in her evidence, referred to rotation being in place in Paisley Sheriff Court) whilst in other courts it was not in place for a number of reasons. There was no dispute regarding the fact that rotation had not been in place in Kilmarnock Sheriff Court and Ms McShane explained the reasons for this. The fact that rotation had not occurred does not defeat the fact that rotation was always the intention of the respondent and was always the intention of the Sheriff Principal and Ms McShane at Kilmarnock Sheriff Court once the necessary training of new staff had been completed.
192. The tribunal accepted the claimant may not have known rotation was being planned, but the tribunal accepted the evidence of Ms McShane, Ms Blue and Ms McLellan that the principle of rotation was not new, it did happen in other courts and it was planned for Kilmarnock prior to the claimant raising her flexible working request.
193. The tribunal considered the key issue to be that the reference in the letters from Ms McShane and Ms Blue was factual in terms of the impact two days working

from home would have on their ability to rotate the claimant. There was no reference, direct or implied, that the claimant would be selected for rotation if she persisted with the request. The tribunal concluded there was no implied threat, as alleged by the claimant, and in those circumstances the tribunal concluded there was no basis for this allegation and accordingly no detriment.

Second alleged detriment (b) not permitting the claimant a second working from home day in the week commencing 9 June 2025

194. The next alleged detriment was that the claimant was not permitted a second working from home day in the week commencing the 9th June. The respondent accepted it had not permitted the claimant a second working from home day that week due to operational reasons. The tribunal accepted this had happened and that it amounted to a detriment because the claimant's request had been refused.

Third alleged detriment (c) insisting the claimant attend a case management meeting in relation to legislative changes to criminal proceedings

195. The next alleged detriment was that the respondent insisted the claimant attend a case management meeting in relation to legislative changes to criminal proceedings. The tribunal noted the respondent accepted that all AOs in the criminal department and all EOs in Kilmarnock Sheriff Court (criminal and civil) were invited to the meeting. The tribunal did not accept the respondent "insisted" the claimant attend the meeting: rather, the respondent invited the claimant to attend a meeting, which ultimately she did not attend. The tribunal did not accept that a mere invite to a meeting amounted to subjecting the claimant to a detriment, particularly in circumstances where the claimant did not in fact attend and the respondent accepted this.

Fourth alleged detriment (d) insisting the claimant, alongside Kitty McLaughlan and Gillian McClymont be included in criminal training

196. The next alleged detriment was insisting the claimant and two other EOs be included in the criminal training. The tribunal noted the respondent accepted it had asked the claimant and two other EOs to attend criminal training, but rejected any suggestion it had "insisted" the claimant do so. The tribunal also had regard to the fact the claimant asked the respondent to put this on hold pending the outcome of this tribunal and they agreed to do so. There was no insistence by the respondent that the claimant undertake the training in circumstances where the claimant had the option of declining the invite. The tribunal concluded in the circumstances that the respondent did not "insist" the claimant be included in the criminal training.

Fifth alleged detriment (e) not permitting the claimant to work from home full time following the submission of a fit note dated 12th June 2025

197. The next alleged detriment was that the respondent did not permit the claimant to work from home full time following submission of a fit note dated 12th June 2025. The tribunal noted the respondent accepted it had not permitted the claimant to work from home full time following the submission of the fit note in June 2025. The tribunal accepted this was a detriment because the claimant expected the respondent to follow the advice of the GP and she considered it would have been of benefit for her to have worked from home full time for a period. The claimant was also in receipt of sick pay rather than wages during this period.

Sixth alleged detriment (f) delaying meeting with the claimant to discuss the OH report dated 24th June 2025

198. The next alleged detriment was the delay in meeting with the claimant to discuss the OH report dated 24th June 2025. The tribunal noted there was no dispute regarding the fact there was a period of 14 days between Ms McLellan receiving a copy of the OH report and meeting with the claimant to discuss it. The tribunal acknowledged the claimant considered the delay indicated a lack of importance on the part of the respondent but it was not clear from the claimant's evidence what the detriment was of having to wait some days longer for the meeting.

Seventh alleged detriment (g) temporarily promoting Graeme Kerr to cover Ms McLellan's annual leave in August 2025 instead of the claimant or Fiona Clover

199. The next alleged detriment was that the respondent temporarily promoted Graeme Kerr to cover Ms McLellan's annual leave in August 2025 instead of the claimant or Fiona Clover. The tribunal accepted this amounted to a detriment because of the loss of opportunity to have temporary promotion and the loss of payment for doing so.

Eighth alleged detriment (h) refusing the claimant's request for Ms McLellan to be removed as the claimant's line manager

200. The next alleged detriment was the respondent's refusal of the claimant's request to have Ms McLellan removed as her line manager. The tribunal accepted this amounted to a detriment in circumstances where the claimant felt her personal relationship with Ms McLellan had deteriorated.

Ninth alleged detriment (i) not permitting the claimant a second working from home day between 23 October and 23 December 2025

201. The next alleged detriment was that the respondent did not permit the claimant a second working from home day between 23 October and 23 December 2025. The tribunal accepted this amounted to a detriment because the claimant had hoped to secure a second working from home day.

Did the respondent subject the claimant to detriment because she had done a protected act

202. The tribunal firstly had regard to the essential question to be asked when determining the reason for the claimant's treatment and that is: what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment? In the majority of cases this will require an inquiry into the mental processes of the employer.
203. The tribunal also had regard to the case of **Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065** where it was said that the tribunal was required to identify the real reason, the core reason, the causa causans, the motive for the treatment complained of. Further, in the case of **Nagarajan v London Regional Transport 1999 ICR 877** it was stated that if protected acts have a significant influence on the employer's decision making, discrimination will be made out. The subsequent case of **Igen Ltd v Wong 2005 ICR 931** clarified that for an influence to be significant it did not have to be of great importance. A significant influence was rather an influence which was more than trivial.
204. The EHRC Employment Code which came into being after the above cases, noted the protected act need not be the only reason for detrimental treatment for victimisation to be established.
205. The tribunal next had regard to the claimant's submissions where she invited the tribunal to find that she had been subjected to requirements to rotate to criminal and to the movement and mobility policy and to criminal training because she had done the three protected acts. The claimant submitted this was an "inescapable" conclusion because this had never happened before and the threats were a direct means of preventing her from obtaining reasonable adjustments.
206. The claimant also invited the tribunal to find that refusing to allow her to work from home in line with the GP fit note dated 12 June 2025 and the OH report dated 24 June 2025, and instead putting her on sick leave was a detriment which happened because she had done the three protected acts.
207. The tribunal next had regard to each of the detriments which it found to have been established and asked what the reason/motive was for each of those decisions by the employer.

208. The first alleged act which the tribunal decided was a detriment was (b) above, that is not permitting the claimant a second working from home day in the week commencing 9th June 2025. The claimant made the request for a second working from home day by email of the 6th June (page 292) and Ms McShane responded to this the same day (page 293) saying *“As it stands looking at the staffing this should be ok but I will confirm on Monday in case there are any staff that phone in unwell and I have to swap any duties which could result in asking you to work different days at home.”*
209. Ms McShane told the tribunal that after her initial reply she had spoken to the office managers and staff commitments meant that a second day working at home for the claimant was not possible. The claimant did not challenge this evidence in cross examination. The claimant, in her evidence, did not suggest what Ms McShane had told the tribunal was untrue or inaccurate, but simply that she felt management were trying to block her day off.
210. The tribunal, in considering the real reason for refusing the second working at home day, had regard to the background to all of this which was that the claimant wanted to work two days per week from home, and the respondent had refused this but put in place that she would work one day per week at home, with a second day being permitted subject to operational requirements. The tribunal noted the respondent responded to each request for a second day of home working, by considering the operational requirements of the week. Ms McShane responded to the claimant’s request in this way.
211. The tribunal accepted the claimant would not be granted a second working from home day on a Monday because this was the day where there was the greatest likelihood of change. Ms McLaughlin undertook criminal training on a Tuesday and the claimant worked at home on a Wednesday. The tribunal took from this that the window for finding a second working from home day was relatively narrow.
212. The tribunal noted there was no issue Ms McShane knew of the claimant’s flexible working request because she dealt with it. Ms McShane accepted she was aware of the claimant’s claim to the Employment Tribunal, although she was not sure when the claim was made or received. There was, however no evidence to suggest Ms McShane knew about the reference to a failure to make reasonable adjustments made during the course of the appeal hearing. Accordingly the tribunal had to consider whether the flexible working request or making a claim to the Employment Tribunal was/were the reason/s for, or were a significant influence in, refusing the second working from home day.
213. The flexible working request was made on the 4th February 2025. The refusal of the second working from home day was made on the 6th June 2025, some four months later. The period of time between the two was not significant, but it was a factor to consider.

214. The tribunal found Ms McShane to be a credible and reliable witness. Ms McShane was asked whether the second working from home day was refused because the claimant had made a claim to the Employment Tribunal, and she replied “*No, not at all...*” The claimant, in cross examination, asked Ms McShane why she had not been able to get a second working from home day and Ms McShane explained that Ms McLaughlin was learning criminal work on the Tuesday and this day had been selected by the Sheriff Clerk for criminal work because of the variety on that day. The claimant questioned whether she could have worked on the non-executive account at home and Ms McShane responded that it was not possible to do the work at home because the sheets have to be checked and cannot leave the office.
215. The tribunal concluded, having had regard to the evidence, that there was no evidence to support the claimant’s position that the protected act was the reason for the refusal of the second working from home day: furthermore, there was no evidence from which to draw such an adverse inference. The tribunal was satisfied that Ms McShane’s refusal of the second working at home day was motivated by staffing and operational reasons and not because the claimant had done a protected act.
216. The tribunal next considered detriment (e) that is, not permitting the claimant to work from home full time following submission of a fit note dated 12 June 2025. There was no dispute regarding the fact the claimant obtained a fit note dated 12 June (page 308) in which the doctor had stated the claimant may be fit for work if allowed to work from home full time due her current symptoms. The tribunal noted the fit note made clear that “*If available and with your employer’s agreement, you may benefit from ...*” This is advice for the employer to consider and which they may, or may not, be able to accommodate: it is not an instruction, as suggested by the claimant in her email of the 13 June (page 307) where she stated “*As it stands per the doctor’s instructions I will be working from home commencing Monday 16th June*”.
217. There was no dispute regarding the fact Ms McLellan dealt with this matter in Ms McShane’s absence on holiday. Ms McLellan responded to say she would contact the claimant on Monday regarding allocation of work and would discuss it with Ms McShane on Tuesday. The tribunal noted that Ms McLellan has no authority to make a decision regarding this matter and had to seek advice from HR and also from Ms McShane. Ms McLellan’s initial view, however, was that such a lengthy period of working from home would not be possible because of the claimant’s role.
218. Ms McLellan subsequently advised the claimant that given the claimant was unfit for work, a referral to OH would be made and that she should refrain from work and her absence would be treated as sickness absence. An OH report was obtained and discussed with the claimant and thereafter Ms McLellan advised the claimant that working from home 5 days a week could not be granted because the

claimant's role was office based and did not allow for working from home 5 days per week.

219. Ms McLellan was asked if the decision not to give her home working for the duration of her sickness was because the claimant had brought a tribunal claim. Ms McLellan responded "*that's absolute nonsense ... it made no difference to my relationship with the claimant or her work or managing her*". There was no challenge to Ms McLellan's evidence in cross examination.
220. The tribunal, in considering the reason for the refusal, had regard to the fact the respondent made all decisions regarding the claimant working from home based on operational requirements and Ms McLellan's refusal of a period of continuous working from home was no different. The request could not be accommodated because of operational reasons. The tribunal acknowledged the Fit Note and the OH report made reference to a period of home working, but this is no more than advice for the employer to consider: it does not trump the employer's authority to decide whether the adjustment proposed can be put in place.
221. The tribunal was satisfied the employer considered the Fit Note and the OH report, but decided it could not accommodate the proposed adjustment for operational reasons. The tribunal was further satisfied that this decision was not influenced to any degree by the fact the claimant had done protected acts.
222. The tribunal next considered detriment (g), that is temporarily promoting Graeme Kerr to cover Ms McLellan's annual leave in August 2025 instead of the claimant or Fiona Clover. The tribunal noted there was no dispute regarding the fact the usual arrangement was for the claimant and Fiona Clover to be temporarily promoted to cover Ms McLellan's role whilst she was on annual leave and they received vouchers to the sum of £15 for this. The claimant and Ms Clover were advised by Ms McLellan that they were not required to cover her post whilst she was on annual leave in August 2025 due to cost cutting.
223. The tribunal accepted Ms McLellan's evidence that she was told by management that there was no requirement for temporary promotion in August 2025 because both Ms McShane and her equivalent in criminal would be in the office.
224. Mr Graeme Kerr, an AO, substituted for Ms McLellan on two days of her annual leave for the purposes of doing confirmations, which then provided him with work to process in his substantive role. Mr Kerr was paid £10 per day.
225. The tribunal accepted Ms McLellan's evidence that no-one was required to cover the managerial aspect of her role because Ms McShane and her criminal counterpart were in the office. There was a shortage of some staff in the office at the time and it was felt more efficient for the EOs to remain in the office and to ask an AO cover the confirmation work because it created work for him. The tribunal

also accepted that Ms McLellan's practice was to arrange cover for confirmation work when she was on annual leave, and August 2025 was no different.

226. The tribunal noted Ms McLellan was not asked whether she had made the decision because of the protected acts, or whether this had been an influence in her decision-making. The tribunal further noted that this was August 2025 and six months after the flexible working request and two months after the claim had been presented.
227. The tribunal was satisfied Ms McLellan was not motivated or influenced by the protected acts and I say that because there was no evidence to support the claimant's position that this happened because she had done protected acts. The tribunal accepted the respondent's explanation (as above), added to which was the fact Ms McLellan had not made the decision regarding cover for her post, and the fact the claimant was on holiday for the first week of Ms McLellan's annual leave and could not have covered the post in any event.
228. The tribunal next considered detriment (h) which was the respondent's refusal of the claimant's request for Ms McLellan to be removed as her line manager. The claimant told the tribunal that she made the request because she had been told that Ms McLellan had been "bad mouthing" her and their relationship (which had been very friendly) had deteriorated. Ms McShane told the tribunal that the reasons why the claimant made the request were "*all a bit vague*". She acknowledged the claimant told her that her friendship with Ms McLellan had come to an end, but she considered there was a duty on all staff to be professional and she refused the request for this reason. Ms McShane was asked if she refused the request because the claimant had made the claim to Employment Tribunal and responded "*No, that could not be further from the truth*".
229. The tribunal acknowledged Ms McShane's description of the reason for the claimant's request to move line manager as being "*all a bit vague*" because that mirrored the claimant's evidence at the hearing in relation to this point. The tribunal also noted that this issue arose at the end of September 2025 and was accordingly seven months after the flexible working request and three months after the claim to the employment tribunal. The timing is not determinative of the issue, but it is a factor to consider because things had moved on from the time of the protected acts.
230. The claimant did not, in cross examination, challenge Ms McShane that the reason for her decision had been the protected act/s or that she had been influenced by that. The claimant, instead, focussed more on justifying that she was right to ask for a change to her line manager. The tribunal had no reason not to accept the evidence of Ms McShane regarding her reasons for the decision.

231. The tribunal was satisfied Ms McShane's decision was not motivated, or influenced, by the protected acts and I considered this conclusion was supported by the fact there was no evidence (or evidence from which to draw an adverse inference) to support the claimant's contrary position. The tribunal, for all of these reasons, decided to dismiss this aspect of the claim.
232. The tribunal next considered detriment (i), which was not allowing the claimant a second working from home day between the 23 October and 23 December. There was no dispute that a second working from home day had not been allowed during that period and Ms McLellan gave detailed evidence, by reference to the weekly court planning sheets (page 365 – 373), to explain the operational reasons which meant a second working from home day could not be granted. The tribunal accepted that the key difficulty during that period was caused by one EO and several AOs being on long term sickness.
233. The claimant, in cross examining Ms McLellan, did not challenge that she had made the decisions because of the claimant having done the protected acts, or her being influenced by that, but rather she challenged the details of the weekly court planning sheets by reference to what had happened.
234. The tribunal, having regard to the very detailed evidence of Ms McLellan, supported by the weekly court planning sheets, accepted there were operational reasons for refusing a second working from home day in that period: the reason related primarily to the fact the available number of EOs to cover the courts was already impacted by the absence of an EO on long term sickness absence.
235. The tribunal, for all of these reasons, was satisfied Ms McLellan's decision each week regarding a second working from home day was not motivated or influenced by the claimant having done a protected act.
236. The tribunal decided, for all of the reasons set out above, to dismiss the complaint of victimisation.
237. The tribunal, in conclusion and for all of the reasons set out above, decided to dismiss the claim.