EMPLOYMENT TRIBUNALS

Claimant: **Ms Laura Kirkman**

Respondent: **HCRG Care Services Limited**

Heard at: **Bristol** **On: 3, 4, 5 and 6 August 2026**

Before: Employment Judge Midgley
Mrs M Metcalfe
Mr C Williams

Representation
Claimant: Mr D Patel, Counsel
Respondent: Miss G Corby, Counsel

RESERVED JUDGMENT

1. **The claim that the Respondent failed to make reasonable adjustments is not well founded and is dismissed.**

2. **The claim that the Respondent failed to deal with a flexible working application in accordance with ss.80G and 80H of the Employment Rights Act 1996 is not well founded and is dismissed.**

REASONS

Claims and Parties

1. By a claim form presented on 4 October 2024, the Claimant brought claims of disability discrimination against her employer, the Respondent, alleging that it failed to make reasonable adjustments, and failed to deal with a flexible working request within a 2 month timescale and/or in a reasonable manner contrary to section 80(1)(aa) and (1B), and 80(1)(a) of the Employment Rights Act 1996.

2. The Respondent disputes those allegations and so defends the claims.

Procedure, Hearing and Evidence

3. We were provided with an agreed bundle of 637 pages, and a witness statement bundle containing the following witness statements:

3.1. The Claimant, Mrs Kirkman

3.2. Mrs Sally Milverton, Team Lead for the Respondent with oversight responsibility of its Bath South operation

3.3. Mrs Roanna Ellis, the Professional Lead for School Aged Immunisations for the Respondent with oversight responsibility for Bath & North East Somerset, Swindon and Wilthsire.

4. We took the time to read the documents from the bundle referred to in the statements and others from an agreed reading list provided by the parties, and the statements themselves. During evidence we were referred to further documents which we also took time to read. We heard evidence from each of the witnesses, all of whom answered questions from counsel and from the Tribunal.

5. During the hearing, the Judge alerted the parties to the issues relevant to time which arose from the decisions in Matuszowicz v Kingston upon Hull City Council [2009] EWCA Civ 22 and Fernandes v Department for Work and Pensions [2023] UKEAT 114; and separately from whether the decision which was the subject of scrutiny for the section 80G claims were the decision on appeal or the earlier decision. In consequence, the parties' counsel provided detailed written arguments which they expanded orally at the time of the hearing, addressing those points. Given the time taken for the parties to develop their arguments and the need for careful consideration of the legal points we reserved our judgment.

6. Pressure of other judicial work, periods of annual leave and a period of ill-health have regrettably delayed the completion of the Reserved Judgment and Reasons, for which the Judge extends his apology, recognising the anxiety and frustration which the parties may have experienced as a result.

Factual Background

7. We make the following findings of fact on the balance of probabilities in light of the evidence we heard and the documentary evidence we read.

8. The Respondent is one of the largest community health and care service providers in the UK, commissioning community health and care, primary care, urgent care, sexual health, social care and wellbeing services across the UK. The Respondent contracts with various Councils, NHS Trusts and other organisations to deliver the services in accordance with the terms of service agreements ratified with them.

9. The Claimant is and was at all material times employed by the Respondent as a Health Visitor (a Band 6 role). Her employment commenced in April 2016 following her transfer to the Respondent from the Great Western Hospitals NHS Foundation Trust ("GWH"). She had been a Health visitor from approximately 2001.

10. The Respondent provides services to families and children aged 0-19 on behalf of Bath and Northeast Somerset Council ("Banes") as part of the delivery of the Health Child Programme, focusing upon the children's health and developmental needs, improving school readiness, supporting parental

emotional wellbeing, and liaising with other professionals including GPs, midwives and perinatal mental health services. The Respondent must deliver that service within the terms of the Service Provision Agreement made with BANES which requires it to provide the service between 9am and 5pm on Monday to Friday.

11. The Respondent operates teams of Health Visitors, School Nurses and Early Help Support Workers to provide those services.

12. A health visitor works with children aged 0 – 5 undertaking health and development reviews to identify their health needs. Habitually, Health Visitors attend the children's home addresses to weigh them and assess their health, and support, counsel and assess their parents, and secondly attend hubs in the community where parents can bring their children to be weighed and assessed.

The duties of a health visitor

13. Each health visitor has a designated case load of such children. Their duties in respect of those children and others at the material time were as follows:

    13.1. Home visits: these are statutory-mandated visits to mothers of newly born children which must be conducted within specified periods, including five core contacts at specified stages in the child's development. They are scheduled for an hour and were rarely (if ever) undertaken before 9am and then not before 8:30am, the last might be undertaken at approximately 4pm after children had been collected from school. A full-time health visitor would conduct four to five such visits a day, depending on their complexity, occupying approximately 3 to 4 hours of their daily working hours. Such visits are the primary and critical role of health visitors, to which all of their other duties are subordinate.

    13.2. HUB sessions: these are 90-minute sessions conducted monthly from a variety of locations in the community such as churches, village or community halls, and other similar locations and are attended by two Health Visitors who weigh babies and examine them etc. They were run on Tuesday, Wednesdays and Thursdays from three community locations in the mornings and afternoons.

    13.3. Client reviews – these are prebooked 45-minute consultations with 3-4 clients each month for each health visitor in designated centres, containing consultation rooms, offices and other facilities.

    13.4. Attending Special Education Need meetings every 3-6 months for those children with such needs.

    13.5. Single Point of Access ("SPA") duty work – this is essentially a health enquiry line for members of the public operated between 9am and 5pm. The health visitors man the lines and provide remote support, making referrals to GPs, safeguarding teams and SEND where necessary.

    13.6. Duty work, involving SPA (above), triaging A&E and police reports

and other referrals into the Respondent (which normally arrived at 9am), actioning tasks (often from phone calls) from GPs, social workers and child protections teams, and preparing referrals to GPs, child protection teams and social workers (all of which operate services from 8 am), and completion of child protection plans. A health visitor would be scheduled 1 duty day a week.

14. The Nursing and Midwifery Counsel require all records from child visits, discussions and meetings to be completed contemporaneously on the day of the visit or meeting (such as child visits, child protection meetings, and welfare meetings) in the Personal Child Health Record and elsewhere, where that was not possible and explanation had to provided in the Record as to why it had not happened. This administrative work was undertaken where opportunity arose across each working day working around scheduled meetings and visits.

15. A health visitor's duty and administrative tasks would take between 3 and 4 hours a day approximately.

The Claimant's back condition

16. The Claimant had longstanding issues connected to a back condition. In 2018 she underwent a spinal fusion to alleviate some of her ongoing symptoms. Although the procedure was successful the Claimant continues to experience chronic pain. The Respondent accepts that the Claimant was a person with a disability within the definition in section 6 of the Equality Act 2010 as a consequence, and further that it knew of her disability at all times which are material to these claims.

The terms of the Claimant's employment

17. The Claimant's contract of employment with GWH provided for 30 hours work worked between 9am and 5pm on five days a week (Monday to Friday). However, following the operation on her spine in 2018, the Claimant reduced her hours to 22.5 working three days a week, Monday, Tuesday and Thursday between 8am and 4pm. She returned to work on 1 August 2018; the reduced hours were agreed as a permanent contractual change on 2 July 2019. The reduction was made following a review of an Occupational Health assessment which specified that the Claimant:

    17.1. Reported difficulties in driving long distances,

    17.2. Reported worsening pain when performing heavy or repeated manual handling

    and made the following recommendations:

    17.3. Allowing the Claimant to work only short periods of time in alternative office sites where adaptive chairs and other auxiliary aids could be provided and to avoid the need to drive for long distances,

    17.4. The clamant should not weigh babies, and

    17.5. The Claimant should avoid carrying her scales to client locations or other locations.

18. The Claimant met with her manager to discuss the report. The Claimant was told that the Respondent could not offer reduced hours beyond the reduction to 22.5 hours, and that the Respondent would endeavour to use the 'surrendered' hours from her contract to fund the creation of a new Health Visitor role to help to cover the work that the Claimant could no longer perform as a result of her reduced hours. Pro-rata, the Claimant was required to undertake 3 to 4 home visits a day but by agreement this was reduced to 2 to 3 a day or fewer (on days the Claimant was scheduled for training or meetings). It was further agreed that the Claimant would not be required to carry her scales to home visits, would not be required to weigh babies on home visits (but would be accompanied by a health visitor assistant who would undertake the task) and would not be required to attend Health Visitor Hubs.

19. In 2020 the Respondent, as with many other services, was forced by the COVID-19 pandemic to conduct an increasingly high percentage of visits online and to make a great reduction in home visits. During that period the Claimant worked after 3pm conducting assessments when it was required.

20. On 6 October 2022 the Respondent conducted a series of consultation meetings with its staff as they were raising concerns they were consistently working beyond their contractual hours. The Claimant was spoken to as part of that consultation and reported that she would often exceed her contractual hours by 2 hours a week, often skipping her lunch break. She then reported that she had been unable to carry her laptop on visits and so had had to type up her notes on returning home rather than at the consultation itself. Finally, at the end of the meeting the Claimant informed Helene Gibson (the Professional Lead) that she had been working 7am until 3pm; Ms Gibson told her that 8am was the earliest the Respondent could permit its staff to start work. Mrs Gibson emailed the Claimant the following day to confirm that and encouraged her to make a flexible working request requesting an earlier start (beyond her contractual 9am start time) to formalise her working practice.

<u>The November 2022 Flexible Working Request</u>

21. Consequently, the Claimant made a flexible working request on 14 November 2022, requesting altered hours of 7am to 3pm. Within the request she identified that the altered hours allowed her to pace her working week and manage her pain. She referenced the fact that she used exercise and stretching each day to manage her pain levels; later in the request she provided some further detail,

> *"In the past, altered hours have had agreement from team leaders due to booking restrictions on swimming pool access."*

22. She suggested that the team then had vacancies and that altering rather than reducing her hours would not have an adverse effect on her colleagues and service delivery. She confirmed she had been able to work 22.5 hours and manage her pain to avoid sick leave.

23. The request was refused on the grounds that it would have a detrimental impact on service delivery, it being noted that 7am was "outside the health visiting commissioned hours and does not meet service needs" but revised hours of 8am to 4pm were offered to the Claimant and an updated OH report was suggested.

24. On 5 January 2023 the Claimant appealed seeking revised hours of 7:30am to 3:30pm; she argued that the proposed adjustment of 8am to 4pm would "limit her ability to optimally manage her condition." She did not, however, articulate how or why the 30-minute change in start and end time would have that effect.

The January 2023 OH report

25. An Occupation Health referral was made, and an assessment occurred on 21 January 2023. The resulting report set out a history taken from the Claimant, noting that the Claimant's pain became progressively worse as the day progressed. It recorded that she used physiotherapy, exercises and swimming to manage her condition. Specifically, it recorded:

> *"working past 3pm aggravates the symptoms as the day progresses sitting in traffic or for extended period [sic] of time which then impacts her sleep patterns, causes fatigue and exacerbates the pain cycle."*

26. The report recommended that "if operationally feasible and business support [sic] to consider the requested hours for her to manage her condition" and a complete risk assessment of all physical aspects of her work, such as "lifting, travel time, fire doors, disabled parking, computer work, and carrying her laptop." In the main, if not in their entirety, those matters had been addressed by the adjustments made in 2019; to the extent that they were not always enforced before January 2023, we find that they were from January 2023 onwards - the Claimant was no longer required to carry her laptop to home visits or conduct visits without an assistant where the home had to be accessed via heavy fire doors or multiple stairs. She was allocated more admin time after such visits to produce the notes

27. On 9 February 2023 Ms Morris emailed the Claimant, confirming the Respondent's decision that they could not offer work hours before 8am as the Respondent's core hours were 9am to 5pm, but proposing alternative, compromised options to the Claimant, such as working 8am to 3:30pm. The Claimant rejected that proposal.

The Claimant's first appeal

28. The Claimant took a further period of sick leave between 20 February 2023 and 25 September 2023 which was caused by the Claimant's experience of dealing a parent who was very threatening and made her feel unsafe; the Claimant completed a DATIX in relation to it. Mrs Milverton's employment began during that period of sickness absence, in July. During the same period, on 6 March 2023, the Claimant appealed against the rejection of her flexible working request.

29. The appeal meeting took place on 25 April 2023, the Claimant attended supported by Nick Bailey, a Unite representative, and the meeting was chaired by Jane Arundell, The Public Health Clinical Team Leader for a different delivery area. During the appeal hearing, Mr Bailey and the Claimant argued that the earlier start would enable the Claimant to better manage the pain connected to her back and that there was sufficient work for her to carry out, such as admin tasks, between 7am and the core hours of 9am. Mrs Arundell noted that finishing early in the afternoon would reduce the time available to complete the SPA introduction.

30. Mrs Arundell took time to consider the points raised, but on 2 May 2023 wrote, rejecting the appeal. She set out her reasons and her recommendations, specifically concluding that:

    30.1. Any flexible working request necessarily had to support service delivery within the contracted hours whilst retaining sufficient flexibility within the service to meet the needs of service users, such as working parents who might have need for a visit at later times (such as, we infer, after school hours).

    30.2. The lone working policy required lone working staff to receive managerial support and no manager, Team Leader or Professional Lead worked before 8am.

    30.3. In consequence, the Claimant should reconsider the offer of working from 8am to 4pm but have increased 1:2:1s with her manager at which she could identify any need for increased breaks if her pain increased or her condition worsened. A further referral to OH could be made to consider any further adjustments beyond those implemented following the report in 2019.

31. The Claimant did not accept the proposed compromise and remained absent with ill health (identified as work-related stress) or annual leave from May until 25 September 2023. During that period, Ms Morris was also absent with work related stress. The Respondent conducted welfare meetings with the Claimant on a monthly basis from April onwards.

32. At a long-term absence meeting on 8 June 2023, held by Lisa Hobbs, a Clinical Team Lead, the Claimant asked for a disability workplace passport to be established to record the agreed adjustments for her. This was due to frustration with having to inform each new manager of adjustments which had been agreed with her previous manager. Ms Hobbs agreed to the proposal for a disability workplace passport. Mr Bailey argued that the refusal to permit the Claimant to start at 7am was in breach of the Equality Act and was an act of disability discrimination. Ms Hobbs suggested as an alternative that she could review the extent to which the Claimant's workload, specifically her GP, maternity and restorative supervision, could be shared to a greater degree amongst her colleagues to assist her. The Claimant and Mr Bailey flatly rejected that proposal, requesting that it be minuted that they regarded that the Respondent was discriminating against the Claimant by refusing a 7am start time.

33. In consequence, the Respondent sought a further workplace assessment and OH report before the Claimant's return to work. Although a report was produced on 11 May 2023 it was not released to the Respondent until late July.

34. On 23 June 2023, a second long term absence meeting was held by Ms Hobbs, again the Claimant attended and was supported by Mr Bailey. Ms Hobbs confirmed that the requested start time of 7am could not be agreed to and again encouraged the Claimant to consider an 8am start with a shorter hours to manage her pain. There was a discussion about auxiliary aids which the Claimant required to enable her to perform her role and the need for them to be in place in each of the locations where the Claimant worked; Spa and First

Steps, Twerton. The Claimant stated that she struggled with the fire doors at Twerton and Southdown (one of the Hubs). It was agreed that the Claimant would not be required to attend home visits that were more than 30 minutes by car from her home address and her allocated share of children with special educational needs or in respect of whom safeguarding concerns had been raised would be reduced to minimise the Claimant's stress; she would not be required to attend Hubs because of the need to travel and to weigh children, and she was permitted to manage her diary to ensure there was time after each home visit to complete the necessary notes. Her duty work was to be limited to 9am to 1pm only. A disability workplace passport reflecting those changes was completed and agreed.

The first tribunal claim

35. On 21 June 2023, the Claimant initiated ACAS conciliation in relation to her ongoing discontent with the rejection of her request to start at 7am. A certificate was issued on 2 August 2023, and the Claimant presented a claim on 8 August 2023, raising a claim of disability discrimination in relation to the refusal of her flexible working request.

36. A further long-term absence meeting was held on 4 September 2023 prior to the Claimant's return to work. It was agreed that the Team Lead and other health visitors would consult with the Claimant before making entries in her diary and that she would be permitted to book admin time in her diary so as to allow her better to space her activities across the day to enable her to perform exercise to manage her pain. The Respondent also permitted her to attend counselling during her work hours in the afternoon to complete the course.

37. On 13 September 2023, the Claimant withdrew the First Tribunal claim. It was subsequently dismissed. In evidence, she stated she withdrew the claim on advice from the Union although she now believed that advice had been incorrect.

38. She returned to work on 25 September 2023 on a four-week phased return, increasing from 25% of her contractual hours to 100% over that period. The Claimant had at that stage accumulated nearly 100 hours of annual leave which needed to be taken by the end of March 2024. By agreement with Mrs Milverton between 16 October and 18 April 2024, the Claimant used an hour of annual leave each day to end her working time at 3pm. The practical consequence was that she could not be allocated work after 2:30pm.

39. On 2 October 2023, a workplace assessment was undertaken. During the assessment the Claimant reported that she tried to swim 5 times a week and to walk 1 to 2 miles two to three times a week.

The Second Flexible Working Request (2024)

40. On 14 February 2024, the Claimant met with Mrs Milverton; she did not raise any concerns about her hours at that meeting. However, on 27 February the Claimant presented a further flexible working request seeking revised contractual hours of 7am to 3pm. In the request the Claimant stated that

> "[she] *experience[s] fatigue throughout the day, making it impossible for me to sustain attendance beyond 3pm on a regular basis.*

Regularly working beyond 3pm would have a detrimental effect on my ability to manage my pain and would also remove my ability to undertake therapeutic measures that allow me to sustain my attendance at work, as later finishes leaves me unable to exercise."

41. Again, she did not specify how or why a later finish would have the effect that she could not exercise or perform her stretching and mobilisation exercises.

42. The request referred to the content of the OH report in January 2023. The Claimant referred to the fact that she had used her annual leave to reduce her hours so that she finished work at 3pm each day and suggested that she would use the earlier start time to complete her administrative tasks.

43. Mrs Milverton referred the Claimant for an OH report on 20 February 2024. The resulting report did not identify any further adjustments beyond those already then in place. Throughout March and April Mrs Milverton consulted with Pippa Sparks, the Professional Lead Public Health Nursing (and her line manager) and Jude Sellars, the Head of Operations, during Clinical Team Lead meetings in relation to the impact of the proposed changes on the team, service users and service delivery.

44. During that period, Mrs Milverton conducted supervisions on a regular basis with the Claimant's colleagues in the team, all of whom reported feeling burnt out, and many of whom asked, repeatedly, what was happening with the Claimant's hours and because of the stress they were experiencing. In the same period the Claimant agreed to undertake some child in need work (children with social workers but not necessarily a child protection plan); Mrs Milverton intended that that that might reduce a degree of the Claimant's colleagues' stress in respect of one aspect of their duties. The work involved creating a child in need plan if one did not exist and conducting a review of any child protection plan in conjunction with other professionals every six months.

45. The two senior managers did not support the proposed change, fearing its impact on service delivery, service users and the Claimant's colleagues. Specifically, they considered that the proposed hours reduced the Claimant's availability to perform the core function of her role, home visits by 6 hours out of a total of 22, resulting in a 26.6% reduction in her ability to perform home visits. Furthermore, they determined that 'fixing' the Claimant's admin tasks would further reduce her flexibility and, by extension, her colleagues' flexibility to attend and move appointments. In that context they considered that the Claimant's team members were already stretched given their need to cover the Claimant's Hub visits and that requiring them to cover more home visits or appointments after 2pm would not be sustainable for them, restricting their ability to take annual leave, and would result in some home visits being cancelled, negatively effecting service delivery and service users' experience of the services. Furthermore, they considered that it would reduce the availability of appointments to service users.

46. At that time there were 11 health visitors, two of whom were newly qualified, and three of whom (in addition to the Claimant) were on adjusted duties, equating to 8.27 whole time equivalent ("WTE") staff against a weighted caseload of 8.39 WTE, with a 0.64 WTE vacancy. Against that staffing matrix, the Respondent determined that it was not possible to redistribute the

Claimant's visits, which she would be unable to conduct due to the altered hours to other staff.

47. However, the Respondent was prepared to offer as a compromise two alternative working patterns: the first 8am and 2pm on 4 days a week, or, secondly, 8am to 4pm three days a week with the requirement that the Claimant took her lunch break at the end of the day at 3:30pm, or lastly a 7 day week worked across a fortnightly pattern, any of which the Respondent believed might permit it to maintain home visits and more easily manage the annual leave requests of the Claimant's team.

48. Mrs Milverton met with the Claimant and Mr Bailey on 29 April to discuss the application. Ms Hobbs took a note. Mrs Milverton informed the Claimant that her request could not be supported and was declined and explained the rationale for each concern as detailed above and the compromise proposals. She had anticipated that there would be a discussion with the Claimant in relation to the concerns to see whether they could be allayed and/or the compromise proposals, but she found the manner in which Mr Bailey responded to be needlessly aggressive and accusatory, precluding cooperative discussion. His response that the proposal of compressed hours was unlawful because the Claimant would not be permitted a paid rest break within each period of 6 hours, and that he would be raising it with HR upset Mrs Milverton.

49. The Claimant rejected the proposal for reduced hours worked over 4 days a week because it did not permit her a recovery day between working days. Mrs Milverton proposed a further alternative which she had discussed with Mrs Sparks and Mrs Sellars, namely working a two-week pattern; week 1: 8am to 3pm for 3 days a week and week 2: 8am to 3pm for 3 days a week and a further day of 8am to 2pm. There was a discussion as to what the Claimant required and whether the Respondent's service could sustain it. Mrs Milverton discussed each of the proposed administrative tasks that the Claimant suggested that she could undertake between 7am and 9am if the flexible working request were granted, carefully considering whether it was a function which could realistically be completed at that time.

50. Mrs Milverton informed the Claimant that the Respondent was unwilling to conduct a trial of the hours proposed by the Claimant because the hours were not in its core hours, starting at 7am would reduce the teams total available visiting time by a further two hours, and would reduce the Claimant's ability to offer any flexibility to cover visits and consequently the team's ability to cover hubs between themselves, and there would be a lack of supervision or support for triggering cases which the Claimant might encounter between 7am and 8am.

51. On 2 May 2024, Mrs Milverton wrote to the Claimant rejecting the Claimant's request and repeating the rationale detailed above.

<u>The appeal against the Second Flexible Working decision.</u>

52. On 16 May 2024 the Claimant appealed against that decision. She argued that completing her administrative work between 7am and 9am would increase her flexibility to undertake other duties between 9 and 3pm. She further argued that if the Respondent were willing to permit her to finish work at 3:30pm then

finishing 30 minutes earlier would not affect service provision significantly. She repeated the allegation that the refusal to grant her flexible working request was a breach of the duty to make reasonable adjustments and/or discrimination arising from disability and requested a trial period working 7am to 3pm.

53. In the period between that date and the determination of her appeal, the Respondent permitted the Claimant to work 8am to 3pm without any reduction in pay, pending the determination of the appeal. It was that experience that led the Respondent to conclude that the Claimant could not in reality be scheduled for visits after 2:30pm.

54. Mrs Roanna Ellis, the Professional Lead for School Age Immunisations, was appointed to hear the appeal. On 22 May she emailed the Claimant with whom she exchanged messages trying to agree a date for the appeal. On 23 May Mrs Ellis proposed 1 June. Mr Bailey, who was copied into the exchange, given the Claimant's desire for him to attend as her representative, responded, stating that he was on annual leave that week, but would be available on 6 or 7 June. Mrs Ellis noted that she was available on either, but the result would be that the hearing would be outside the prescribed time scales and asked the Claimant and Mr Bailey to confirm that they were content with that.

55. Neither Mr Bailey nor the Claimant responded directly to that request; the Claimant stated she was on annual leave and so rejected those two dates and proposed 10 June; Mr Bailey suggested any of 11, 12 or 13th June. It was agreed that the meeting would take place on the first of those dates, 11 June. In her evidence, the Claimant accepted that neither she nor Mr Bailey expressly raised any concern, far less a complaint, that the result was that the appeal would be heard outside the statutory period of [2 months]; nor that she was reserving her rights in respect of any breach of that period, and that it was open to each to have done so if they wished.

56. During the meeting the Claimant and Mr Bailey were able to discuss the basis of the Claimant's appeal and the detail of it, and to challenge and ask questions about the Respondent's rationale regarding the impact of the changes to the Claimant's contractual hours which she had proposed. The Claimant's primary argument was that she should be permitted a trial of the proposed change in hours; Mr Bailey stated that the Claimant was not able to work 4 days a week or 7 days a fortnight.

57. The Claimant explained that she needed to perform her exercises through the day to prevent her pain from building up to an unsustainable level. Mrs Ellis took care to understand how the Team operated and shared work collaboratively, covering periods of sickness and annual leave.

58. On 14 June 2024, Mrs Ellis wrote to the Claimant rejecting her appeal on the grounds of the detrimental impact on the Respondent's ability to meet customer demand by reducing the flexibility for offering a choice of times for visits, including in the afternoon when a child had returned from nursery, to the parents, and reducing the flexibility to conduct meetings with other professional in the afternoon during the services and the professionals' core working hours. Secondly, Mr Ellis concluded that it would not be reasonably feasible to reorganise the Claimant's work among existing colleagues. In that context, she noted that it was no part of the on-call manager's duties to provide pastoral or

other support to colleagues outside of core hours (in contrast to providing a service to the parents and children outside core hours, which was part of the duties and purposes of the role). Secondly, Mr Ellis was concerned about the additional impact of reducing the Claimant's ability to undertake afternoon visits, placing further burden on her colleagues, who were already covering the Claimant's duties to attend Hubs.

59. In July 2024 the Claimant requested to reduce her hours to 8am to 3pm. Although the Respondent's policy was not to agree contractual hours for Health Visitors of less than 22.5 hours, Mrs Milverton took the request to the Respondent's Operational and Professional Leads to see whether an exception might be made for the Claimant as a reasonable adjustment and to try to keep her within the service The request was approved and the change was affected from 1 August 2024. The Respondent directed the savings from the Claimant's role towards additional hours for other staff in the team.

60. In the winter of 2024, the Claimant applied to take on the responsibility of a Professional Nurse Advocate, which was a pastoral and mentoring role. The Claimant undertook training to achieve the necessary qualification over a 12-week period simultaneously with her work as a Health Visitor. She also needed to undertake additional study outside of the training hours to achieve the qualification during that period. She did not, however, experience any spike in her symptoms so significant as to require her to take sickness absence and reported no significant deterioration in her ability to manage her pain through exercising or mobility exercises as a consequence of those additional hours.

The proceedings

61. The Claimant initiated ACAS conciliation on 24 July 2024 and a certificate was issued on 4 September 2024. She presented the claim in these proceedings on 4 October 2024.

The Issues

Failure to make reasonable adjustments (s.20 EqA 2010).

62. The Respondent admits that it operated the following PCPs:

    62.1. A requirement for Health Visitors to work their contractual hours (being 22.5 hours a week between 8am and 4pm)

    62.2. A practice that Health Visitors normal hours could not commence at 7am.

63. The Respondent further accepts that those PCPs put the Claimant at a substantial disadvantage in relation to her back condition because the Claimant was put at an increased risk of:

    63.1. Suffering an intolerably high degree of physical discomfort and/or pain during the working day;

    63.2. Becoming intolerably fatigued during the working day; and

    63.3. Needing to take sickness absence.

64. The remaining allegation of substantial disadvantage is in dispute; the Respondent puts the Claimant to proof that she was unable to perform her full number of weekly contracted hours (22.5).

65. The Respondent accepts that it knew that the Claimant was likely to have been placed at the admitted disadvantages but denies that it knew or ought reasonably to have known that the Claimant could not work her full number of weekly contractual hours.

66. The Claimant asserts that permitting her to work her contractual hours between 7am and 3pm would have removed the disadvantage and that it would have been reasonable for the Respondent to make that adjustment. The Respondent asserts that it was not reasonable for it to have made that adjustment.

Flexible working

67. The following issues fall to be determined in relation to the flexible working request claims:

    67.1. Did the Respondent fail to deal with the application in accordance with s.80G(1) in that it is alleged that the Respondent did not:

        67.1.1. Deal with it in a reasonable manner?

        67.1.2. Notify the employee of the decision within 3 months?

The Relevant Law

68. The Claimant brings a single claim under the Equality Act 2010 that the Respondent failed to make reasonable adjustments (contrary to s.20 EqA 2010).

69. The relevant law is contained in sections 20, 21 and 39 of EqA 2010 which provide respectively (in so far as is relevant) as follows:

    39 – Employees and applicants

    (2) An employer (A) must not discriminate against an employee of A's (B)—
    (a) as to B's terms of employment;
    (d) by subjecting B to any other detriment.

    s. 20 Duty to make adjustments
    (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
    (2) The duty comprises the following three requirements.
    (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
    (4) The second requirement is a requirement, where a physical feature puts

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

70. A tribunal must consider: (1) the Provision, Criterion or Practice ("PCP") applied by or on behalf of the employer, or the relevant physical feature of the premises occupied by the employer, (2) the identity of non-disabled comparators (where appropriate), and (3) the nature and extent of the substantial disadvantage suffered by the Claimant (Environment Agency v Rowan [2008] ICR 218, EAT.)

71. The burden of proving the PCP, the substantial disadvantage and the steps necessary to remove them rests on the Claimant (see HM Prison Service v Johnson [2007] IRLR 951, confirmed in Project Management Institute v Latiff [2007] 579). What a Claimant must do is raise the issue as to whether a specific adjustment should have been made, not prove a prima facie case of breach (see Jennings v Barts and the London NHS Trust EAT 0056/12) and the adjustment can be identified, in exceptional circumstances, during the hearing (PMI v Latiff). The Tribunal must, therefore, identify with some particularity the step which an employment should take to remove the disadvantage (HM Prison Service v Johnson)

Provisions, Criterions and Practices

72. The purpose of the PCP is to identify what it is about the employer's operation that causes disadvantage to the employee: General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, EAT.

73. In most cases where an employee contends that an employer failed to make reasonable adjustments to a PCP, the employee will be contending that the relevant PCP was applied to him or her. Technically, however, it is not a requirement of the EqA 2010 that the PCP be applied to the disabled employee, as long as the PCP is applied to some employees and that places the disabled employee at a substantial disadvantage when compared with persons who are not disabled: Roberts v North West Ambulance Service [2012] ICR D14, [2012] EqLR 196, EAT.

74. A policy, criterion or practice must have an air of repetition about it, and cannot be a one off (see Nottingham City Transport Ltd v Harvey EAT 0032/12, confirmed in Fox v British Airways plc EAT 0315/14), unless there is an indication that it will be repeated (Ishola v Transport for London [2020] EWCA Civ 112, CA.).

Substantial disadvantage

75. If the substantial disadvantage complained of is not because of the disability, then the duty to make reasonable adjustments will not arise: Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11, [2012] EqLR 634.

76. Tribunals should "set out what it was about the disability of the [Claimant] which gave rise to the problems or effects which put him at the substantial disadvantage identified": Chief Constable of West Midlands Police v Gardner EAT 0174/11, para. 53.

The steps to remove the disadvantage

77. The word 'steps' must not be construed unduly restrictively, as the Court of Appeal made clear in Griffiths v Secretary of State for Work and Pensions [2017] ICR 160, CA. 'In my judgment, there is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of S.20(3). Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.'

78. Para. 6.28 of the EHRC's Employment Statutory Code of Practice gives guidance as to the kind of factors which a tribunal might take into account in deciding whether it is reasonable for a person to have to take a particular step in order to comply with the duty to make reasonable adjustments. Tribunals are not under a duty to address every factor set out in the Code, but would be wise to address directly those factors that they find to be relevant: Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341, EAT. The factors include:

    78.1. whether taking any particular steps would be effective in preventing the substantial disadvantage;

    78.2. the practicability of the step;

    78.3. the financial and other costs of making the adjustment and the extent of any disruption caused;

    78.4. the extent of the employer's financial or other resources;

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

    78.6. the type and size of the employer.

79. An employer cannot make an objective assessment of the reasonableness of proposed adjustments/steps unless it appreciates the nature and extent of the substantial disadvantage imposed on the employee by the PCP, physical feature or lack of access to an auxiliary aid, and an adjustment to a work practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage — Lamb v Business Academy Bexley EAT 0226/15.

80. The duty to comply with the reasonable adjustments requirement under s.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA). However, the duty is not 'triggered' unless and until the Claimant indicates that he or she was intending or wishing to return to work NCH Scotland v McHugh EATS 0010/06 approved in Doran v Department

for Work and Pensions EAT 0017/14. However, where the absence is caused by the Respondent's conduct (which is discriminatory) the duty may arise London Underground Ltd v Vuoto EAT 0123/09.

81. There is no duty to consult in relation to the adjustment that should be made, but it will potentially jeopardise an employer's position if it does not consult (see Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT):

> 'any employer would be wise to consult with a disabled employee in order to be better informed and fully acquainted of all the factors which may be relevant to a determination of what adjustment should reasonably be made in the circumstances. If the employer fails to do that, then he is placing himself seriously at risk of not taking appropriate steps because of his own ignorance. He cannot then pray that ignorance in aid if it is alleged that he ought to have taken certain steps and he has failed to do so.'

82. A proposed adjustment will not amount to a 'reasonable' adjustment if it has "no prospect" of removing the substantial disadvantage: Romec v Rudham [2007] All ER (D) 04 (Sep), EAT per HHJ McMullen; however, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be "a prospect" (as opposed to "a good prospect" or "a real prospect") of the adjustment removing the disadvantage (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

83. A step which, on its own, may be ineffective might nevertheless be one of several adjustments which, when taken together, could remove or reduce the disadvantage experienced by the disabled person: e.g. Shaw and Co Solicitors v Atkins EAT 0224/08.

Time limits

Conduct extending over a period

84. Section 123 EqA 2010 provides as follows (in so far as is relevant):

> (1) …proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

The just and equitable discretion

85. While employment tribunals have a wide discretion to allow an extension of time under the 'just and equitable' test in S.123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA at para 25, that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.' The onus is therefore on the Claimant to convince the tribunal that it is just and equitable to extend the time limit.

86. These comments were endorsed in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

87. Before the Employment Tribunal will extend time under section 123(1)(b) it will expect a Claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was (Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan).

88. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - Pathan v South London Islamic Centre EAT 0312/13.

89. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors *1997 IRLR 336, EAT*, at para 8). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

90. However, although, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220 at para 33, per Peter Gibson LJ).

91. In Department of Constitutional Affairs v Jones 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a ‘valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a Claimant’s failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice.

92. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the Claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the Respondent on the one hand and to the Claimant on the other: Pathan v South London Islamic Centre EAT 0312/13 and also Szmidt v AC Produce Imports Ltd UKEAT 0291/14.

93. It is always necessary for tribunals, when exercising their discretion, to identify the cause of the Claimant's failure to bring the claim in time (Accurist Watches Ltd v Wadher UKEAT/0102/09, [2009] All ER (D) 189 (Apr)). In Wadher Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form.

94. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents.

95. A delay caused by a Claimant invoking an internal grievance or disciplinary

appeal procedure prior to commencing proceedings is just one factor to be taken into account by a tribunal when considering whether to extend time: Robinson v Post Office [2000] IRLR 804, EAT, approved by the Court of Appeal in Apelogun-Gabriels v London Borough of Lambeth [2002] ICR 713. As the EAT said in Robinson (para. 25, per Lindsay P): "as the law stands an employee who awaits the outcome of an internal appeal and delays the launching of an [ET1] must realise that he is running a real danger."

Discussion and Conclusions

Failure to make reasonable adjustments

Did the PCP put the Claimant at a substantial disadvantage because she was unable to work her weekly contractual hours 22.5?

96. In one sense, this issue is immaterial given that the Respondent accepts that the Claimant was placed at the pleaded other substantial disadvantages (being caused intolerable pain and fatigue, and putting the Claimant at an increased risk of needing to take sickness absence) by the PCPs.

97. However, given the interrelation between the contractual hours and the adjustments proposed by the Respondent, particularly working reduced hours on 4 days a week or a fortnightly shift pattern involving 22.5 hours, it is necessary to determine the issue.

98. We start our consideration with the medical evidence and the Claimant's contemporaneous account. The 2019 OH report identified that long periods in a seated position (whether driving or at a desk) would exacerbate the Claimant's condition and that carrying heavy items or repeated manual handling would have the same effect, and so recommended they should be avoided.

99. To accommodate those matters, the Respondent agreed to reduce the Claimant's contractual hours to 22.5 hours, and to reduce the number of home visits from 3-4 to 2-3 a week. Further it removed the requirement for the Claimant to attend Hubs (because of the need for travel and for weighing babies) and to weigh babies or carry scales.

100. When the Claimant next alerted the Respondent to issues connected to her back in 2022, she did not suggest that working 22.5 hours caused her any difficulty, rather she identified that she had been unable to carry her laptop to visits and so had had to write up the notes after the event. In the consequent Flexible Working Request the Claimant confirmed that she had been able to work 22.5 hours.

101. The request led to the January 2023 OH report. That report recorded:

> *"working past 3pm aggravates the symptoms as the day progresses sitting in traffic or for extended period [sic] of time which then impacts her sleep patterns, causes fatigue and exacerbates the pain cycle."*

102. That appears to be a record of what the Claimant reported to the OH practitioner; it is a typical example of a history taken from a patient. It is, however, difficult to understand precisely what it meant as it is poorly written.

It appears to suggest that if the Claimant worked after 3pm or was required to sit for long periods whether at work or in traffic, she could experience pain, making it more difficult for her to sleep, with a consequent effect on her the following day. However, in the period from November 2022 to January 2023 the Claimant was rarely required to drive or to sit for long periods: she was not required to attend Hubs and so avoided travel to them; she was conducting afternoon home visits, but on balance we are not persuaded that the majority of these occurred after 3pm or required travel after 3pm. In her witness statement, she stated that she trailed working 7am to 3:30pm from December 2022; she was not therefore conducting afternoon visits which required her to attend after 3pm. We do not accept her evidence that she performed that trail with the knowledge and approval of Mrs Morris; that would have been entirely contrary to Miss Morris' stance during the flexible working request process and, secondly, the Claimant never made any contemporaneous reference to the practice in her subsequent appeal and second flexible working request. In her evidence she explained that she tried to swim before approximately 3pm to avoid school traffic. Given that she endeavored to swim five days a week, and was able to manage her own diary, we conclude that she was managing her appointments so that she avoided afternoon visits wherever possible and where it was not, she would not schedule an appointment that finished much after 2pm, seeking if possible to avoid it (just as she sought to avoid team meetings in the afternoon). The Claimant would then swim, return home and write up her notes.

103. The Claimant did not say either to the OH practitioner, or later to Mrs Morris in the meeting to discuss the flexible working request, or during her return to work meetings with Mrs Milverton that she could not work 22.5 hours. Between the rejection of the flexible working request in November 2022 and the commencement of the Claimant's sickness absence in February 2023 the Claimant did not suggest that she could not work those hours. In the appeal heard by Mrs Arundell, Mr Bailey suggested it was the *start time* and <u>not</u> the hours which was the issue.

104. The flexible working request presented in February 2024, read objectively, does not identify that the Claimant could not work 22.5 hours, but rather suggested that it was the time she *finished* which was the issue

> *"Due to the nature of my condition, irrespective of my start time, I will experience fatigue throughout the day, making it impossible for me to sustain attendance beyond 15:00 on a regular basis."*

105. She stressed that one basis for that view was that working after 3pm would prevent her from taking her therapeutic exercise and exercises. She did say that if the earlier finish were not granted, she would reduce her hours, but that must be read in the context of what the Claimant was saying she did after 3pm - therapeutic exercises, the need to perform such exercise at that time was the cause of her stance, not the total number of hours worked..

106. Critically, the OH report produced in March 2024 did not suggest that the Claimant could not work 22.5 hours.

107. Having considered that evidence, we are not persuaded that the Claimant has shown that she could not work 22.5 hours. She has not therefore

established the substantial disadvantage said to have been caused by that aspect of the PCP. The consequence is that the assessment of the proposed adjustments must be made in the context of a PCP that Health visitors had to work between 8am and 4pm which caused the Claimant to experience pain and fatigue and put her at an increased risk of needing to take sickness absence.

108. Doing the best we can, we find on balance that the Claimant experienced that pain and fatigue cumulatively, building over the Claimant's working days Monday and Tuesday, reducing through Wednesday, increasing on Thursday and reducing through Friday and the weekend. It was greatest in the afternoon, particularly a Tuesday afternoon. In the event the Claimant did not require any sickness absence; that does not mean however that she was not placed at a disadvantage – she still experienced the anxiety of worrying that she might need to take it if her symptoms became acute.

109. The fact that the Claimant was able to work without taking sickness absence between 2020 and February 2023 and without any issue as to her performance does, however, suggest that the pain was not "intolerable." Furthermore, the Claimant did not suggest in any meeting that her pain levels were intolerable whether as a result of her working pattern or hours at any stage in her employment before the presentation of her second claim. We therefore reject that aspect of the asserted PCP.

When did the Respondent have knowledge of that disadvantage or when ought it reasonably to have known of that disadvantage?

110. The Respondent accepts that it was put on knowledge of the disadvantages by the OH report of 23 January 2023. The Claimant does not argue for an earlier date. We are content to accept the conceded date of 23 January 2023.

Would the step of permitting the Claimant to work between 7am and 3pm have removed the disadvantage?

111. We remind ourselves that the Claimant need only prove that the step would have had 'a' chance of preventing the disadvantage; she does not need to prove that it was a 'realistic' chance or a 'probable' chance at this stage (see Leeds Teaching Hospital NHS Trust v Foster (supra); South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley EAT0341/15)

112. The Claimant was able to work without taking sickness absence between 2020 and February 2023 and, following her phased return, between 16 April and the presentation of the claim in October 2024. In the former period the Claimant was reducing her hours by self-scheduling to avoid appointments in the afternoon and by finishing work by 3pm, and in the latter period using annual leave and, between May and October 2024, through an agreed temporary reduction in hours.

113. That is cogent and persuasive evidence that altering the hours at least to finish by 3pm would have a chance of preventing the disadvantage.

114. We therefore conclude there was a chance that altering the Claimant's hours to 7am to 3pm would have prevented the disadvantage.

Was it reasonable for the Respondent to have altered the Claimant's hours to

7am to 3pm?

115. The Claimant argues that it was because it would remove the disadvantage and when she had trialed the altered hours or worked reduced hours, she had done so without complaint or issue from the Respondent. The Respondent argues that it was not reasonable to have altered the Claimant's hours as proposed because of the impact on service delivery and on the Claimant's colleagues.

116. In our view, it was not reasonable for the Respondent to have permitted the Claimant to alter her hours to 7am to 3pm for the following reasons:

116.1. The primary and critical function of health visitors was to conduct home visits. The Claimant accepted that home visits could not be scheduled before 8am and were generally, if not always, scheduled after 9am. She further accepted that afternoon visits were often scheduled after children returned from nursery, around 3pm. Other visits could be scheduled between those hours, but we accepted Mrs Milverton's evidence that many were scheduled in the morning and after nursery hours.

116.2. There was also a need to conduct home visits at short notice, whether because of weekend births, referrals from A&E, the police or otherwise. Again, those visits had to be conducted within statutory mandated time frames, there were KPIs built into the SPA with BANES relating to them. That required health visitors to be flexible in permitting visits to be placed in their diaries that had not been scheduled extensively in advance and for other visits they had scheduled to be moved to accommodate them.

116.3. One constraint on the requisite degree of flexibility in the health visitors' diaries was the need to conduct Hubs. The Claimant's inability to perform Hubs whether as a lone worker or because of the need to weigh babies at them, or because of the need to access them via stairs or heavy fire doors, had the effect that her colleagues' flexibility was reduced because of their need to cover the Claimant's hub sessions.

116.4. A further restraint on the Claimant's flexibility to conduct visits was the restriction on her travelling more than 30 mins or visiting a home which did not have parking in a close vicinity to it or which had to be accessed through fire doors or by stairs. Similarly, the Claimant could not conduct visits where she was alone and had to weigh babies. Either those visits had to be allocated to another health visitor, or a health assistant had to accompany the Claimant to open doors, carry scales and weigh the babies. Again, any visit involving those features had to be scheduled to the Claimant's colleagues in the main if not in their entirety.

116.5. An additional constraint was the staffing levels in the team. At the time of the Claimant's second flexible working request the Respondent was understaffed; there 11 health visitors, two of whom were newly qualified, and three of whom (in addition to the Claimant) were on adjusted duties, equating to 8.27 whole time equivalent ("WTE") staff against a weighted caseload of 8.39 WTE, with a 0.64 WTE vacancy. We found Mrs Milverton's evidence that the Claimant's colleagues were raising concerns

about burn out during their supervisions with her and were specifically asking when the Claimant's hours would be resolved to be both credible and compelling. It is true that the Respondent might, in a perfect world, have produced records from the supervisions to support Mrs Milverton's account but we found Mrs Milverton to be candid, entirely honest and balanced in her evidence. We therefore accepted her evidence on this point; the Claimant could not challenge it as she was not present in the meetings. She did not seek to challenge Mrs Milverton's evidence about the Respondent's staffing levels.

116.6. The effect of the proposed change in hours, with the Claimant in effect ring fencing the time between 7am and 9am daily for administrative duties, would have been to create a further reduction in her ability to cover visits at 9am (because of the need to travel to them in advance) and to cover afternoon visits (because of the need to finish by 3pm and so she would have been unable to attend a home visit much after 1:30pm, allowing for an hour's visit and 30 minutes' travel home.) That latter restriction had had that effect during the period when the Claimant 'trialed' working 7am to 3pm and later when she used her annual leave to stop work at 3pm. It was, we find, at least an effective cause (but not the only cause) of her colleagues' questions as to when her hours would be resolved and a part of their complaints of burnout.

117. Those matters, we find, caused a significant impact on the delivery of the service and upon the Claimant's colleagues. The Claimant did not directly experience or have knowledge of that impact, but that does not mean that it did not occur.

118. The Claimant argues that each of the following matters 'clearly' demonstrates it was practicable for the Respondent to make the adjustment and/or or that the impact on the Respondent, its staff and service was 'minimal', the Respondent, Mr Patel right reminds us:

118.1. Permitted the Claimant to take annual leave between 3pm and 4pm in the period October 2023 to April 2024;

118.2. Agreed to the Claimant not working between 3pm and 4pm from May 2024 to June 2024, pending the determination of her appeal; and

118.3. Agreed to a request made on 9 July 2024 to reduce the Claimant's contractual hours from August 2024 so that she did not work after 3pm.

119. We do not however accept either the broader argument or the characterization of the lack of impact on the service or team members; we have already made findings (above) as to the impact on the service and staff. Furthermore, the Respondent provided explanations which we have accepted as credible and plausible for each of those decisions which explain why the decision was made *despite* their impact on the service and the Team. First, the Claimant had accrued significant annual leave during her sickness absence between February and September 2023 which she would lose if it were not taken within the leave year in question or within an agreed period after it. As Mrs Milverton stated, employees had the right to take their annual leave when they wished, and could do so in periods of hours, unless it had the effect that

the Respondent could not provide the service levels required because too many staff were off on a single day. In any event the Respondent was sympathetic to the Claimant because her sickness absence was caused by an incident at work which for which she had required counselling.

120. Secondly, the Respondent offered the Claimant the adjustment in the two month period between her flexible working appeal and its determination as a gesture of good will and good practice so that the Claimant was not disadvantaged whilst her rights were being determined through that process. The change was therefore for a specific and limited period.

121. Lastly, the Respondent agreed to a permanent reduction in the Claimant's hours to hours lower those normally permitted because she had stated that if the request was not granted she could no longer work for the Respondent. The Respondent was therefore faced with a situation where it could either lose 22.5 hours of service cover, in a team that was already complaining of burnout and which was understaffed, or agree to a reduction in the hours of one of its staff. It is true, as Mr Patel argues, that the Respondent could not show that it used those 'surrendered' hours to recruit to a specific post, but again we accepted Mrs Milverton's evidence that the rationale of the decision was as above, and that the funding connected to the reduced hours could be put towards another post.

122. However, despite the fact that those three periods did not include the proposed ring fencing of the period between 7am and 9am each day for the Claimant's admin, the combined effect of them was that the Respondent had evidence through its experience of the impact on the flexibility that it could offer in terms of its service delivery, and the impact on the team tasked with delivering those services if the adjusted hours were permitted. The affected team members reported feeling burn out and stress.

123. For that reason, it was not reasonable for the Respondent to have to conduct a trial of the proposed hours; as at May and June 2024 it already had ample evidence on which to make the assessment of the impact on the service and staff members. It did not need evidence of the Claimant's ability to perform her role in the proposed manner: even assuming that she could, the position was then unsustainable for the service and the Claimant's colleagues.

124. We pause to note that what the Respondent has done since the presentation of this claim to manage and resolve the issue caused by the permanent reduction in hours is not a matter for us, nor was the evidence before us concerning it; we should therefore neither speculate nor comment upon it. Rather, the assessment we must make is of the position as at the time of the refusal of the second flexible working request on 2 May 2024, at the rejection of the Claimant's appeal against that decision on 14 June 2024, or at the very latest at the point the claim was presented. That is what we have done.

125. It is necessary, for completeness, to address the parties' arguments as to how the hours between 7am and 9am could have been filled by the Claimant.

126. We accept that there was some work which could have been completed between 7am and 9am. The Claimant accepted that she would not call parents

or conduct visits before 8am, and only about 5% of parents would request a visit before 9am. She further accepted that most GP surgeries, Social Work teams and Special Education Needs practitioners were not at work before 8am. It follows that the Claimant would have to use the period between 7am and 8am to review emails, to complete writing up records in the Patient Record (which should have been completed the previous day), for making referrals and preparing or responding to reports, and to review care plans etc. Whilst the Claimant could on occasion prepare referrals to be sent at 8am, that was not a daily task, and the need to produce a report or review a care plan was less regular still.

127. Furthermore, the Claimant accepted that the Respondent had reasonable grounds to be concerned about permitting her to work between 7am and 8am on files where that work might be triggering to her at a time when she would be without management support, given her history of stress and the incident which had led to her period of work related stress between February and September 2023 and the need for counselling. There was an on-call duty manager working daily between 7am and 8am, when no other manager was working, but it formed no part of their contractual duties or job description to provide pastoral support to employees in that period; their role and responsibility was to clients who were referred in to the service out of hours, making urgent triaging and other similar decisions.

128. We therefore concluded that the Respondent was correct to consider that there was limited work that the Claimant could undertake on a daily basis before 8am, that therefore that element of the proposed change offered very limited benefit to the service or its client, and that that was a factor to weigh in the balance against making the proposed adjustment.

Conclusion on the reasonable adjustments claim

129. We have therefore found that it was not reasonable for the Respondent to make the adjustment of altering the Claimant's hours to 7am to 3pm, and the claim of failure to make reasonable adjustments is therefore not well founded and is dismissed for that reason.

Was the claim for breach of section 20 EqA 2010 presented in time?

130. In the event we are found to have erred in that conclusion, we have gone on to consider whether the claim was presented in time. There is some dispute as to the applicable law and its interpretation to this point and we address that first.

131. Claims under section 20 EqA 2010 are of a different category and nature to other claims under the Act. This was first articulated in Humphries v Chevler Packaging Ltd [2006] 7 WLUK 626, EAT at [24]:

> "The failure to make adjustments is an omission. The Respondents are omitting to do what (on the Appellant's case) they are obliged to do. They are not doing any act, continuing or otherwise."

132. This issue was carefully considered by the Court of Appeal in Matuszowicz v Kingston upon Hull City Council [2009] EWCA Civ 22. In that case, the Court of Appeal was referred to Barclays Bank v Kapur [1991] ICR 208, Humphries,

to Cast v Croydon College [1998] ICR and Coutts & Co Plc v Cure [2005] ICR 1098 EAT. As the Claimant relies upon Cast it is necessary to address briefly the line of authority the Court was concerned with before considering the Judgment in Matuszowicz.

Acts extending over a period

133. In Barclays Bank v Kapur the House of Lords considered the point at which time began to run for the purposes of sections 68(1) and 68(7)(c) of the Race Relations Act 1976 (which is in near identical language to its successor section, 123 of the EqA 2010). In the case the Respondent bank had a policy which was applied to the Claimants requiring them to return to the UK or adopt the nationality of the country within which they worked, and to treat the date of their transfer to the UK as the commencement date for their continuity of employment. On appeal the Respondent argued that the policy of refusing to permit their previous service to count towards their continuous employment was a "deliberate omission" within the definition in section 68(7)c) RRA, and could not constitute "an act extending over a period" for the purposes of section 68(7)(d) RRA, and that time therefore began to run from the date on which the policy was decided upon. At 208 the Court observed:

> "It would probably be unwise to attempt to define a "deliberate omission" but I get the distinct impression that it was included by the draftsman as a sweeping-up provision intended for the protection of employees and addressed to activities peripheral to the employment rather than to the terms of the employment itself and intended to cover a one-off rather than a continuing situation: for example, a deliberate failure to notify a coloured employee of a vacancy for a better job in the company when all his white comparators were invited to apply for the job."

134. We observe that the decision was made before the Disability Discrimination Act 1995 came into force; it is impossible to see how it can have any application to claims of failure to make reasonable adjustments; the provisions creating that obligation were not in the Statute book at that time.

135. In Cast v Croydon College the Court of Appeal was asked to consider whether an employee's repeated requests to reduce her hours operated to create separate and later causes of action to the first (and each subsequent) request for the purposes of the time limit provisions in the Sex Discrimination Act 1976. Again, the relevant provisions provided for the time limit to run from the last of any acts which extended over a period (section 76(1)(b) SDA). The Court considered Kapur and Rovenska v General Medical Council [1998] ICR 85, CA (which Mr Patel relies upon in his arguments in addition to Cast). It noted at 508G-H having considered Rovenska that:

> "the authorities make clear—at least in the case of discrimination in the field of employment under section 6 of the Act of 1975 and section 4 of the Race Relations Act 1976 (see Brooke L.J. in Rovenska v. General Medical Council [1998] I.C.R. 85, in particular at pp. 92D-H, 94G-95C and 95F-H)—that it is the existence of a policy or regime, not a specific act of an employer triggering its application to the complainant, that matters…. If the "act extending over a period" required a specific act by an employer to give it effect there would be no need or room to "treat ... it as done at the end of

the period"

136. In Hendricks v The Commissioner of Police for the Metropolis [2003] IRLR 96, CA the Court of Appeal extended the basis on which an 'act extending over a period' might be found. Mummery LJ held at paras 51-52 that the circumstances would not be limited solely to the continuing application of a policy, rule, scheme, regime or practice but would extend to 'an ongoing situation or continuing state of affairs' (an approach later approved by the Court of Appeal in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA).

137. In Coutts & Co plc v Cure [2005] ICR 1098, EAT, the Employment Appeal Tribunal (HHJ McMullen QC presiding), set out categories into which the factual circumstances of alleged discrimination may fall, and found (albeit obiter) that there are two types of situation in which alleged discrimination may constitute an 'act extending over a period':

137.1. where there is a discriminatory rule or policy, by reference to which decisions are made from time to time; and

137.2. where there have been a series of discriminatory acts, whether or not set against a background of a discriminatory policy.

138. In the former case, the EAT observed that an act will be regarded as extending over a period and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant (applying Barclays Bank plc v Kapur).

139. In the latter case, the main issue for the Tribunal tends to be whether it is possible to identify some fact or feature linking the series of acts such that they may properly be regarded as amounting to a single continuing state of affairs rather than a series of unconnected or isolated acts (applying Hendricks).

140. Humphries was decided after all of those cases and was the first to consider the provisions of the DDA 1995; it must therefore be understood as having limited the application of the principles for which the earlier cases are authority, preventing their application to the DDA.

141. The Court of Appeal was fully aware of the jurisprudence we have detailed above when it gave its Judgment in Matuszowicz. In that case, the Court had to consider the application of the time limit provisions in paragraph 3(3)(b) of the DDA 1995 (which were in identical terms to those in the SDA and RRA) in relation to claims for failure to make reasonable adjustments contrary to s.4A DDA.

142. There is no dispute in this case that Matuszowicz is of equal application to the EqA.

143. At [13] the Court noted that the duty under what is now s.20 EqA was of a different nature to those in the SDA and RRA:

"That duty, the nature of which is central to the disability discrimination legislation, is altogether different from the duties imposed by other anti-

> discrimination legislation. It has no counterpart in, for example, the Race Relations Act 1976 and other such legislation. Mr Toms, for the employee, pointed out that the duty to make reasonable adjustments is one which it is inherently possible that an employer may fail to comply with by way of either deliberate conduct or inadvertent omission. Decided cases establish that the subjective attitude of the employer is irrelevant to the question of whether the duty to make the reasonable adjustments has been complied with or not."
>
> (emphasis added).

144. The basis for finding that distinction is recorded at [14]:

> "the duty to make reasonable adjustments does give rise to the possibility that there may be inadvertent and non-deliberate omissions on the part of the employer which are breaches of the duty to make reasonable adjustments and therefore acts of discrimination."

145. The RRA and SDA only addressed deliberate omissions. The issue for the Court was whether section 3 of Schedule 3 DDA requires a court to treat as a deliberate omission something which would not otherwise be regarded as deliberate. Lloyd LJ observed at [15]

> "In terms of identifying an act of discrimination giving rise to a substantive remedy it is unnecessary to consider whether an omission to comply with the duty to make reasonable adjustments is deliberate or not. Either the duty is complied with or it is not. The classification of the omission, if it is an omission, becomes necessary only for the purposes of the time limit under paragraph 3 of Schedule 3."

146. The Judge referred to paragraph 3(1) which provided:

> "(1) An employment tribunal shall not consider a complaint under section 17A or 25(8) unless it is presented before the end of the period of three months beginning when the act complained of was *done*." (emphasis added)

147. At [19] the Court held that when a deliberate omission was to be treated as 'done' was to be determined in accordance with paragraph 3(3)(c), namely: "*a deliberate omission shall be treated as done when the person in question decided upon it*."

148. As paragraph [19] of the Court's Judgment makes clear, it is only where there is no evidence to demonstrate when a decision has been taken that the provisions in paragraph 3(4) are engaged; but paragraphs 3(1) and 3(3) and 3(4) cannot be construed to create separate legal regimes for deliberate and inadvertent omissions, such that one can be regarded as an act to which the previous line of authority relating to the RRA and SDA applies and the other cannot. That is clear from [22], where the Court observed that:

> "There may of course be positive acts that are inconsistent with the duty but the failure to make the adjustments is in its nature an omission."
>
> (Emphasis added)

149. In other words, failures to make reasonable adjustments are not "acts" which can form conduct extending over a period for the purpose of what was then paragraph 3(3)(b) (now section 123(3)(a) EqA 2010). In reaching that conclusion, the Court had regard both to Humphries and to Kapur, but observed in relation to the latter and its consideration of deliberate omissions;

> "that, valuable as that observation is in the context of the race relations legislation, it is of less assistance under the 1995 Act because of the existence of the duty to make reasonable adjustments and the consequent much greater likelihood that there will be omissions which will constitute acts of discrimination under that Act."
>
> (Emphasis added)

150. The reference to 'acts' in the last clause is, we conclude, a reference to 'an actionable claim' within what was then in paragraph 3(1) to Schedule 3 of the DDA, and nothing more. Furthermore, it follows that the Court did not accept that positive acts and deliberate omissions were to be treated as two distinction categories for the purposes of the consideration of time limits, so as to permit one to be considered in accordance with the line of authority represented by Kapur and Cast, and the other to be determined in accordance with Humphries and the decision the Court was to hand down in Matuszowicz. Rather the Court held that both were caught within paragraph 3, and was expressing its view in the case in relation to both deliberate and inadvertent omissions.

151. The Court considered and rejected the employee's argument that its proposed interpretation of paragraph 3 was unsatisfactory because it would impose a starting date for the three-month period at a time when the employment was still continuing and when the employer might well be still be trying, even if not as diligently as it should, to make the necessary adjustments, and the employee might be happy to go along with that, and observed at [24]:

> "…it seems to me that it is part of the policy of the legislation in the area of discrimination to impose relatively early cut off dates for claims of discrimination, many of which are brought at a time when the employment relationship is still subsisting."

152. As Sedley LJ put it at [35]:

> "*The point of general importance which emerges from his judgment, and is worth stressing, is that the effect ----- is to eliminate continuing omissions from the computation of time by deeming them to be acts committed at a notional moment. The evident purpose is to prevent a situation of neglect from dragging on indefinitely, and to do this, where no overtly inconsistent act has set time running, by putting the onus on the Claimant to decide when something should have been done about the omission and to bring his or her claim within 3 months of that date*."
>
> (Emphasis added)

153. The consequence was expressly set out at [37]:

> "Claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to

issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission."

154. The construction of s.123 EqA and its stated effect of eliminating continuing omissions was applied by the Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 1995, CA. In that case the Court noted that the date on which the duty to make reasonable adjustments arises may be a separate and distinct date to that on which any breach occurred, given the provisions of section 123 EqA 2010, commenting at [14]:

> "Pursuant to section 20(3) of the Equality Act 2010, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a Claimant *might* be unfairly prejudiced. In particular, the Claimant *might* reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the Claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired."
>
> (emphasis added)

155. We pause to observe that there can be no such prejudice to a Claimant where a Respondent expressly states that it will not take the step which the Claimant argues was necessary as a consequence of the duty. Again, in Morgan, the Court was considering the application of section 123(3) and (4) EqA where there was no evidence demonstrating when the decision was taken. Hence, its conclusion that in that scenario the breach occurs either when the Respondent does an act inconsistent with the duty, or if it does not do such an act, at a point when objectively, viewed from the employee's perspective from the facts known (or which reasonably ought to have been known) to them, it became clear that the employer was not taking steps to comply and could have reasonably have been expected to have taken the step (see [15]).

156. The Court in Morgan relied upon the decision in Matuszowicz solely for the purpose of supporting its conclusion that the date of the breach need not be the same date as the date on which time limits began to run. It did not hold, however, that it *could* not be the same date. As the Court put it at 15 (1200D):

> "This illustrates, first of all, that the date by which the employer might reasonably have been expected to comply with a duty to make reasonable adjustments for the purpose of the test in what is now section 123(4)(b) of the Equality Act 2010 *may* be different from the date when the breach of duty began."
>
> (emphasis added).

157. Consequently, nothing in the decision challenged or had the effect of undermining the rationale of Matuszowizc detailed above, or persuades us of a different interpretation of the authority to that which we have articulated.

158. Matuzowicz was considered most recently in Fernandes v Department for Work and Pensions [2023] UKEAT 114. There, in weighing the arguments as to the application of the time limits the EAT observed, albeit obiter at [34]

> "In the absence of a finding that the employer has made a specific decision not to alleviate a disadvantage there must be judicial analysis to identify the notional date."
>
> (Emphasis added)

159. What we glean from that is that the court was adopting the distinction, identified in Matuszowicz, between refusals to make an adjustment (which fall within section 123(3)(b)), and circumstances where there was no express refusal, and therefore no direct evidence of when the decision was taken, in which case the provisions in section 123(4) apply. The EAT's rationale in Fernandes is therefore entirely consistent with our understanding of the application of Matuszowizc.

160. Additionally, the court considered (obiter) whether a finding that a claim was presented out of time had the effect of extinguishing the right to bring a claim for failure to comply with the duty in the future; in other words, whether it extinguished the duty under s.20 EqA 2010. One would have thought that there was a short answer to that, which was it was only the right of action which was extinguished, not the duty, on the basis of the statutory language in section 123 which expressly states "proceedings on a compliant… may not be brought" and does not refer to the duty, but the Court nonetheless addressed the point more broadly at [38-39] and noted at [39]:

> "It can be imagined that all the elements required to establish a failure to make adjustments are changeable. A claim based on sufficiently changed circumstances would be a new claim and not an attempt to revive the earlier claim. For example, a move to a different building would be a notable change which might mean a new cause of action has arisen. The purpose of the legislation is to remove barriers so that a disabled person may work. If there is no sufficient change in circumstances that would make it difficult to argue that there is the basis for a new claim. A judge considering such circumstances would be applying the principles set out in Bon Groundwork Ltd v Foster [2012] IRLR 517 where Elias LJ summarised res judicata as:
>
> > *"where an issue has been litigated before a judicial body and determined as between the parties it cannot be reopened. It is binding as between them, and the parties are estopped from reopening it. The issue may be one of fact or of law. However, the parties are only bound by an issue which it was necessary for the court to determine in the earlier claim""*

161. At [40] the Judge considered the argument that a request for a review would create the necessary sufficiently changed circumstances and largely but not entirely rejected it:

> "Miss Garner also argued that a request by the Claimant for a review would, in effect, revive the consideration of an adjustment so as to create the basis for a new claim. I am sceptical that this would be the case, although I do not rule it out as a possibility in the right circumstances."

162. It is to be presumed that the Judge was indicating that it would be a matter of fact for determination by the first instance court as to whether there was a sufficient change in circumstances, and further was implying that the change in circumstances would give rise to a new and distinct duty under s.20 EqA which could be the subject of the claim. If it were otherwise, it is difficult indeed to understand how the issue of the duty and its breach had not already been litigated in the proceedings which had been found to have been presented out of time.

163. Turning then to the facts of this case, we have found that the Claimant was put at the necessary disadvantage by the PCP from 17 October 2022. The duty to make reasonable adjustments therefore arose on that date. The Respondent refused to make the proposed adjustment on 22 November 2022; it did so in ignorance of the substantial disadvantage but that is immaterial to whether there was an actionable claim – paragraph 20(1)(b) of schedule 8 to the Equality Act 2010 creates a defence to a claim, it does not affect the creation of an actionable right. The actionable claim for breach of the section 20 duty therefore arose on 22 November 2022 when the Respondent refused to comply with the duty. Any claim therefore had to be presented by 21 February 2023. The Claimant's first tribunal claim was presented in August 2023; over five months out of time. The claim which forms the subject of these proceedings was presented on 4 October 2024, 20 months out of time.

164. We are not persuaded that the appeal or the second flexible working request and appeal constituted a sufficient change in circumstance so as to give rise to a new duty under section 20 EqA 2010. The nature of the PCP had not changed, nor had the arguments relating to the adjustments the Claimant proposed in relation to it. Indeed, the Claimant stated in her witness statement that the reason she withdrew her first tribunal claim and presented a second flexible working request was because she had been told that any claim in respect of the first flexible working request was out of time and she should present a second claim to avoid that issue.

165. Given that the Claimant knew of her rights and the time limits applicable to them and had the benefit of advice from her Trade Union, Unite, and Thompsons solicitors throughout the period from 21 February 2023 to October 2024, she cannot and does not argue that she could not have presented the claim in time. She has however provided no good explanation as to why the claim was not presented in time. Rather, the Claimant has candidly accepted that the second claim was presented because it was realised that the first claim was out of time. It would therefore be, in one sense, an abuse of process to permit the Claimant to circumvent the statutory time limits in relation to the first claim by presenting a second claim out of time. The Respondent would experience significant prejudice were that abuse to be permitted. Conversely the Claimant can, if she wishes, bring a claim in negligence against the Union or the solicitors, for the loss of chance to succeed in her claim which reduces the prejudice caused by any refusal to exercise discretion to extend time.

166. Had it been necessary to decide whether to exercise our discretion to extend time so as to have jurisdiction to hear the reasonable adjustments claim, we would have refused to do so for those reasons.

167. We stress that the position is different where the claim presented is under

section 80G of the ERA 1996, because in that case time is specified to run for a different trigger event; our conclusion on this issue does not therefore apply equally to the s.80G Claim.

The flexible working request

168. Again, there is an initial legal point which requires determination before we address the substantive claim – that is whether the claim is limited to the appeal or whether it permits consideration of the underlying request. Mr Patel argues that it is the former. Miss Corby agrees. For the following reasons, we have concluded that our enquiry is limited to the appeal alone.

169. The right to present a claim to the Tribunal in relation to a decision on a flexible working request is provided by section 80H of the Employment Rights Act 1996 which provided with effect form 1 April 2024:

> **80H Complaints to employment tribunals**
>
> (1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—
>
> > (a) that his employer has failed in relation to the application to comply with section 80G(1),
> >
> > (b) that a decision by his employer to reject the application was based on incorrect facts, or
> >
> > (c) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b).
>
> (2) No complaint under subsection (1)(a) or (b) may be made in respect of an application which has been disposed of by agreement or withdrawn.
>
> (3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under subsection (1)(a) or (b) may be made until—
>
> > (a) the employer notifies the employee of the employer's decision on the application, or
> >
> > (b) if the decision period applicable to the application (see section 80G(1B)) comes to an end without the employer notifying the employee of the employer's decision on the application, the end of the decision period.
>
> (**3A) If an employer allows an employee to appeal a decision to reject an application, a reference in other subsections of this section to the decision on the application is a reference to the decision on the appeal or, if more than one appeal is allowed, the decision on the final appeal.**
>
> (3B) If an agreement to extend the decision period is made as described in section 80G(1C)(b), subsection (3)(b) is to be treated as not allowing a complaint until the end of the extended period.

(3C) A complaint under subsection (1)(c) may be made as soon as the notification under section 80G(1D) complained of is given to the employee.

170. The objective construction of the statutory language in section 80H(3A) is that where an appeal has been made against the rejection of an application the decision which the actionable right relates to is the decision on appeal. Whilst the section refers to "the decision on the application" those precise words are not used elsewhere in the section but are used separately.

171. Mr Patel argues that the statutory language in section 80G has the effect that section 80H(3A) must be construed to be limited to a claim where it is alleged that an employer has failed to comply with the obligation to notify the employee within the statutory decision period in sections 80G(1B).

172. We will set out the statutory provisions in section 80G shortly, but it is necessary to observe beforehand that section 80G creates rights for the employee, it does not create the mechanism by which such rights can be enforced. Thus the rights provided by section 80G may be broader than the actionable claims in respect of them; a similar distinction exists in the Working Time Regulations 1998 by way of example, there will be others. It might be said that that is self-evident from the titles of sections 80G and H – one refers to the employer's duties the other to complaints to the Tribunal.

173. Section 80G provided in relation to a flexible working request or an appeal against a decision made on an appeal after 6 April 2024 as follows:

80G Employer's duties in relation to application under section 80F

(1) An employer to whom an application under section 80F is made—

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

(aza) shall not refuse the application unless the employee has been consulted about the application [applying to decisions after 6 April 2024]

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

(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 demand,

(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.

(1A) If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to—

(a) the decision on the appeal, or

(b) if more than one appeal is allowed, the decision on the final appeal.

(1B) For the purposes of subsection (1)(aa) the decision period applicable to an employee's application under section 80F is—

(a) the period of two months beginning with the date on which the application is made [applying to decisions made after 6 April 2024], or

(b) such longer period as may be agreed by the employer and the employee.

(1C) An agreement to extend the decision period in a particular case may be made—

(a) before it ends, or

(b) with retrospective effect, before the end of a period of three months beginning with the day after that on which the decision period that is being extended came to an end.

(1D) An application under section 80F is to be treated as having been withdrawn by the employee if—

(a) the employee without good reason has failed to attend both the first meeting arranged by the employer to discuss the application and the next meeting arranged for that purpose, or

(b) where the employer allows the employee to appeal a decision to reject an application or to make a further appeal, the employee without good reason has failed to attend both the first meeting arranged by the employer to discuss the appeal and the next meeting arranged for that purpose,

and the employer has notified the employee that the employer has decided to treat that conduct of the employee as a withdrawal of the application.]

(1E) The steps which an employer must take in order to comply with subsection (1)(aza) include, among others, any steps specified in regulations made by the Secretary of State.

174. The combined effect of subsections 80G (1A) and (1(aa)) is that the right for a decision within 2 months is limited to the decision on the appeal, where an appeal has been presented. Mr Patel argues that in consequence the right of action contained in section 80H, which refers to the right bring a complaint to the Tribunal for an employer’s failure to comply with other obligations in section 80G(1) is broader and permits consideration of failures to comply with the duty to deal with the original application in a reasonable manner or to refuse

it only for reasons permitted by section 80G1(b).

175. It is worthy of note that in its original formulation, s.80H provided for the right to present a complaint to the Tribunal after an appeal, or separately for breach of s.80G(1)(a) with time limits specified to run from different points for each claim (see section 80H(6) as it then was). There was therefore a deliberate statutory intent to alter that provision through the revisions of s.80H in each subsequent amendment of the provision. Thus, the scope of the permissible actionable rights was increased to include a rejection on incorrect facts (s.80H(1)(b)), and there was a specific decision to limit the decision in respect of which a claim could be presented to the Tribunal. That change was affected on 30 June 2014 as a result of section 133(5) of the Children and Families Act 2014.

176. We therefore conclude that whilst an employer is placed under the obligations in section 80G in relation to a flexible working application, the employee's right to complaint (and therefore the extent of the Tribunal's enquiry) is limited to the decision on appeal when an appeal has been made, in accordance with section 80H(3A).

Did the Respondent fail to deal with the application within the period specified in section 80G(1)(1B)?

177. As recorded above, the relevant period was 2 months. Each counsel has referred to a three-month period. It is unclear why; in the event nothing turns on it.

178. The Claimant presented her appeal on 16 May 2024. The appeal was conducted on 11 June 2024. The appeal was therefore determined within the two-month period. The claim is not well founded and is dismissed.

Did the Respondent fail to deal with the appeal in a reasonable manner?

179. We remind ourselves that there is no requirement that a decision in relation to a flexible working request should be substantively and objectively reasonable; the extent of the right is limited to the procedural and other safeguards set out in section 80H – requiring consultation before a decision is made or refusing the application only on one of the permissible grounds in section 80G(1)(b) (see Singh v Pennine Care NHS Foundation Trust [2016] UKEAT/0027/16 referring to Commotion Ltd v Rutty [2025] UKEAT/0481/05 at [15] "*Commotion makes clear that it is not for the Employment Tribunal to judge the reasonableness of an employer's rejection to provide flexible working*."

180. That must be right, given the changes introduced by s.9(3) of the Employment Rights Act 1996 specifically introduced that requirement through the changes to the content of section 80G(1)(b) and the introduction of section (1ZA). It is binding on us in any event.

181. Again, the decision we have to consider is limited to that at the appeal. In this case, there was consultation with the Claimant before the decision was made – that was the effect of the appeal hearing on 11 June 2024 and the decision was made on 14 June 2024. The appeal was rejected on two of the permissible statutory grounds in section 80G(1)(b).

182. The Claimant has argued that the decision was not made in a reasonable manner because it constituted a breach of section 20 of the Equality Act 2010. It is a moot point whether such an argument could of itself succeed within the limited scope of enquiry permitted by section 80G(1)(b) (as opposed to the broader scope in section 80G(1)(b) and (1ZA)), but we do not have to determine that given those amended provisions were not in force at the time and we have found there was no breach of the duty.

183. The claim that the flexible working request was not dealt with in a reasonable manner is therefore not well founded and is dismissed.

184. For the sake of completeness, any claim in respect of the appeal had to be presented by 13 September 2024. The Claim was presented on 4 October 2024 but as a consequence of the 42 day extension consequent to section 140B EqA 2010 and the period of ACAS conciliation, the time limit was extended to 25 October 2024. The claim was presented in time.

Approved by

Employment Judge Midgley

Date 3 November 2026

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
10 November 2026

FOR THE TRIBUNAL OFFICE