Case Number: 2203363/2021

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS C MARSTERS**
MR B FURLONG

BETWEEN:

Ms J Edwards

Claimant

AND

London Borough of Camden

Respondent

ON: **25, 26, 27, 28 and 31 January 2022**
(In Chambers on 31 January 2022)
Appearances:
For the Claimant: **In person**
For the Respondent: **Mr B Uduje, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claim fails and is dismissed.

REASONS

1. By a claim form presented on 11 May 2021 the claimant Ms Janet Edwards brings claims of disability discrimination. She is employed by the respondent as a customer service officer. Her employment began on 8 June 2005 and is continuing.

This hybrid hearing

2. This hearing was originally listed as an in person hearing at the claimant's request because she said she did not have adequate IT equipment or a strong enough wifi connection. The hearing was converted to a hybrid with the three-person tribunal, the claimant and the respondent's solicitor attending in person and all other participants by video. The reason for the hybrid hearing was because a participant had tested positive for Covid, but was still able to proceed remotely.

3. All witnesses save for the claimant gave evidence by CVP (video).

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. On day 2 a member of the public attended briefly in the morning and again briefly in the afternoon.

5. The parties and the member of the public were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance. No requests were made by the member of the public to inspect any witness statements or for any other written materials before the tribunal.

6. The participants were told that is was an offence to record the proceedings.

7. The tribunal were satisfied that each of the witnesses appearing by video, who were in different locations, had access to the relevant written materials. In the case of witness Ms Hedvat a relevant document was read to her. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

8. The issues were identified at a Case Management Hearing before Employment Judge Adkin on 20 September 2021 and were confirmed with the parties at the outset of the hearing as follows:

9. The claims are for direct disability discrimination and failure to make reasonable adjustments. The disability relied upon is diabetes and in Amended Grounds of Resistance dated 11 October 2021 disability was admitted.

Time limits

10. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 20 December 2020 may not have been brought in time.

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

    - Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    - If not, was there conduct extending over a period?
    - If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
    - If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

i. Why were the complaints not made to the Tribunal in time?
ii. In any event, is it just and equitable in all the circumstances to extend time?

Direct disability discrimination (Equality Act 2010 section 13)

12. The claimant's disability is diabetes and she compares herself with those who are not so disabled.

13. Did the respondent do the following things:

- Fail to notify the claimant to return to work with other members of her team (Housing) on 6 July 2020;
- At a stage 1 attendance procedure meeting in November 2020, the claimant's line manager Mr Éanna Bell assumed that she did not want to return to face to face work, when the claimant had not ever said this;
- From August 2020 Mr Bell communicated through the union when the claimant had not requested this;
- Mr Bell told OHU that the claimant appeared unapproachable in Oct/Nov 2020;
- The claimant was moved from the Housing team to the Citizenship team, requiring her to work in two different areas;
- Mr Bell refused to discuss removal of reasonable adjustments between 7 July 2020 until stage 2 attendance procedure meeting in April 2021;
- Mr Bell falsely alleged in the stage 2 meeting in April 2021 that the claimant had said she was self-isolating;
- Mr Bell falsely alleged that the claimant had requested "unusual equipment" whereas in fact she had just requested a monitor and mouse;
- Mr Bell falsely alleged that the claimant had called him 27 times one day and 16 times another day;
- Tracey Chamberlain, the claimant's second line manager, falsely alleged that the claimant was so terrified by Covid-19 she had to request a taxi.

14. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

15. Did the respondent's treatment in each case amount to a detriment?

16. If so, was it because of disability?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

17. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability of diabetes? Knowledge of disability was conceded by the respondent in submissions.

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

- Requiring the claimant to work one day a week in the office face to face. In its Amended Grounds of Resistance paragraph 21 (page 35) the respondent admitted that it permitted the claimant to work this pattern, because it was accommodating her request. It did not admit applying a PCP.
- Requiring the claimant to work in two different teams housing and citizenship. The respondent denied requiring the claimant to work in two areas and said it was a consequence of accommodating the claimant's request to work on the face to face team which was the housing team on her return to work in April 2021.

19. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that (a) it did or would negatively affect her health; (b) requiring the claimant to cover two different areas, namely housing and citizenship.

20. Did the lack of an auxiliary aid, namely lack of a monitor and mouse in the period June-August 2020, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that it prevented her from working? The claimant concedes that at this time she did not have a working laptop.

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

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

- Reverting to the back to the claimant's pre-Covid era work pattern first week 3 days in the office and 2 days at home and second week 2 days in the office and 3 days at home.
- Discussing with the claimant, proposed solutions.

23. Was it reasonable for the respondent to have to take those steps?

24. Did the respondent fail to take those steps?

<u>Remedy for discrimination</u>

25. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

26. What financial losses has the discrimination caused the claimant?

27. If not, for what period of loss should the claimant be compensated?

28. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

29. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

30. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it by?

31. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

32. Should interest be awarded? How much?

Witness and documents

33. There was a bundle of 413 pages. On day 2 the respondent introduced a GP letter dated 15 June 2011 and a covering email dated 21 March 2017. The claimant objected to its introduction. We admitted it as it was clearly a relevant document and was necessary for us to consider for the fair disposal of the matters in issue. We were given a chronology by the respondent on day 3 at our request; it was not an agreed chronology.

34. For the claimant the tribunal heard from three witnesses (i) the claimant, (ii) Ms Claire Marriott, her union representative and (iii) Ms Sonia Hedvat, her former line manager. Ms Hedvat left the respondent's employment in October 2019.

35. For the respondent the tribunal heard from three witnesses (i) Mr Éanna Bell, Customer Services Team Manager and the claimant's line manager, (ii) Ms Sarah Sedley, Stage 2 sickness absence review officer and (iii) Ms Tracy Chamberlain, Customer Service Manager.

36. On day 1 the claimant applied for leave to call her former manager Ms Sonia Hedvat. An unsigned and undated document appeared in the trial bundle at page 285 which the claimant described as Ms Hedvat's witness statement. We did not have this statement in the bundle of witness statements and neither the tribunal nor the respondent understood that the claimant proposed to call her. The claimant said she wished to call Ms Hedvat when she was cross-examined as to her contention that she had provided the respondent with a letter from her GP recommending the working pattern which had been agreed for her in 2012.

37. The respondent opposed the application to introduce this witness so late in the day and said that the arrangements for witness statements were

made clear in Employment Judge Adkin's Case Management Order of 20 September 2021 at paragraphs 18-23. We had some sympathy with this but the claimant relied on being a litigant in person and we took account of the content of the statement being known to the respondent as being within the bundle. We gave the claimant leave to call Ms Hedvat to give evidence.

38. We had a written submission from the respondent to which counsel spoke and an oral submission only from the claimant. The claimant read from a written document that she did not wish to submit. All submissions were fully considered whether or not expressly referred to below. Neither side cited any case law.

Findings of fact

39. The claimant commenced work with the respondent on 8 June 2005. She became a customer service officer in 2011. This is a public facing role either through face to face work or telephone work. The claimant's substantive role was in telephony. She liked face to face work and was given the opportunity to do this as we set out below.

40. The respondent admits that the claimant has the condition of diabetes and disability is admitted. Knowledge of disability was admitted during the respondent's submissions. Although the claimant has other medical conditions, the condition relied upon as her disability for the purposes of this claim was diabetes.

41. For much of the material time, the claimant's line manager was Mr Éanna Bell, who managed the respondent's Face to Face (F2F) team, dealing with queries from visitors to the main Council building. He has been a manager for at last 25 years, managing different teams across the respondent Council. Mr Bell became the claimant's line manager in 2017, even though her substantive role was telephony and not F2F. Since March 2021 the claimant has a new line manager.

42. The F2F team was set up in 2010 with initially more than 20 customer support officers in the team. Over the years due to a reduction in numbers of visitors to the Council, the size of the team has reduced.

<u>The claimant's working pattern</u>

43. From 2012 a change to the claimant's work pattern was agreed as follows: she was to work one week of 3 days in the office and 2 days at home and the second week of 2 days in the office and 3 days at home. The claimant said this was as a result of an OH report. The claimant said her adjustments were agreed by her then line manager Ms Sonia Hedvat, who no longer works for the respondent. We noted from Ms Hedvat's statement that she said it was agreed by her line manager, Mr Watson. We are unable to find who it was who made such an agreement with the claimant.

44. Prior to the pandemic the F2F team was staffed by 5 full time customer service officers sitting behind the front desk dealing with public enquiries and then about 3 more officers in mobile roles in the public area, assisting people in different ways. The claimant wanted the ability to move around and swap between the static and mobile roles.

45. The claimant referred to her working pattern as her "*reasonable adjustment*". It was hard to find the origins of this. The claimant said that it came from an OH report in 2012 or 2013. She said in evidence that she was not absolutely certain about the timing of this report.

46. We did not see an OH report from 2012. There was an OH report dated 12 March 2013 (bundle page 313) which did not make any recommendation of one week of 3 days in the office and 2 days at home and the second week of 2 days in the office and 3 days at home. The OH report said at point 7 (page 314) "*Based on my understanding of Ms Edwards's capabilities and her job requirements that the business support 1- regular stretches from desk, (every 20-30 minutes), 2- allow to attend the toilet as and when needed*." The claimant agreed that the OH report of 12 March 2013 did not recommend the working pattern that had been agreed for her.

47. The claimant then said the recommendation came from a letter from her GP, which had not been produced in evidence. The claimant said she gave the letter to her former manager Ms Hedvat who passed it on to her subsequent line manager Mr Bell. The claimant said that the respondent paid £25 for this letter so she thought they must have it. Despite it not being in the bundle, the claimant had not asked her GP surgery to provide her with a copy.

48. On day 2 of this hearing, the respondent introduced a letter from the claimant's GP dated 15 June 2011 and a covering email dated 21 March 2017 by which Ms Hedvat sent the 15 June 2011 letter to Mr Bell, saying only "*fyi*". This letter said:

> *"[The claimant] has Type 2 Diabetes Mellitus and is on regular medication for this chronic condition. She has regular appointments with us and the Practice Nurse. In order to manage her work schedule and her diabetes is would be helpful if her hours were 10am to 6pm Monday to Wednesday and 8am to 4pm Thursday to Friday."*

49. We heard from Ms Hedvat. Her evidence was that she passed a file of the claimant's papers to her manager Mr Watson. In her statement (fourth paragraph) she said she gave the letter in question to Mr Bell. We find that the claimant's personal file was brought to the attention of both managers and it contained the GP letter of 15 June 2011.

50. The letter of 15 June 2011, did not say that the claimant needed to work one week of 3 days in the office and 2 days at home and the second

week of 2 days in the office and 3 days at home – or that this was recommended. We saw no medical evidence recommending the adjustment that was actually put in place for the claimant and the origins of this working pattern were not clear either to those who managed the claimant in 2020 and 2021, or to this tribunal. The claimant described it in her witness statement (paragraph 6) as an adjustment made "*to my work/life balance*".

51. Ms Hedvat left the respondent's employment in October 2019. Although she thought the claimant had a GP letter setting out the arrangement that was put in place, she no longer has access to the claimant's personal file. We find that she cannot be expected to remember word for word, correspondence from the claimant's GP sent around 10 years ago, in respect of one individual she line managed.

52. The claimant's evidence on day 2 was: "*My GP just backed up what the OHU report said, the 20 minutes breaks and backed it up with a letter that Camden asked for";* she said that her GP was "*not in a position to tell Camden what to do*" and that she was to be "*off the system for 20 minutes*".

53. We find that there was no express medical recommendation for working one week of 3 days in the office and 2 days at home with the second week of 2 days in the office and 3 days at home. The recommendation was for "*regular stretches from desk, (every 20-30 minutes)".* We find that the working pattern of half at home and half in the office was the arrangement that was put in place for the claimant, which she described as her "*reasonable adjustment"* but it was not because of an express medical recommendation to alleviate any disadvantage caused by the diabetes.

54. Despite the lack of any medical recommendation for the claimant's working pattern, Mr Bell was content to accommodate the arrangement.

<u>The claimant's absence from work</u>

55. The claimant was off sick from 3 February 2020 for about 9 weeks due to an accident unconnected with the workplace. The claimant sustained a head injury in this accident.

56. From 24 April 2020 to 7 August 2020 efforts were made to set the claimant up working from home doing telephone work, with a laptop to enable her to do this. The claimant had such substantial problems with the laptop that she was unable to carry out much work at all. She said she was able to do some emails. She was paid in full throughout this 3.5 month period.

57. Attempts were made to deliver a laptop to the claimant on 29 April, 7 May, 9 July and 3 August. The pandemic and high demand on IT resources at the respondent caused some of the delay. The claimant

said that the problem was she could not be logged on once she received the laptop. The respondent and the courier company had great difficulty in making contact with the claimant. The claimant did not wish to touch any laptop delivered to her for 3 days because of the risk of Covid infection (we saw reference to this in Ms Chamberlain's email at page 127).

58. The claimant went off sick again on 7 August 2020 with stress and anxiety.

Changes to service requirements

59. In May 2020 Mr Bell began planning the reopening of the F2F service, aiming to keep it as Covid safe as possible. Mr Bell required only one customer service officer doing F2F work, sitting at the front desk behind a screen and the remainder of the team to work on telephones. The mobile customer service officer role, which the claimant had carried out and liked, was no longer required. Footfall to the Council's offices had reduced dramatically as a result of the pandemic and there was a need to keep staff and public socially distanced.

60. We find that the one required F2F officer was a static role behind the desk and this was not a mobile role. One of the benefits to the claimant of a mobile role was it allowed her to move about and stretch and this helped her manage her diabetes symptoms. As we have found above the claimant's substantive role was telephony and not face to face. Mr Bell's evidence was that a telephone role gave her far more opportunity for mobility (statement paragraph 25) than sitting at a static desk behind a screen.

61. We make further findings below as to the changes that took place as a result of the pandemic.

OH report 1 June 2020

62. The claimant saw Occupational Health on 27 May 2020 and a report was produced by OH Adviser Ms K Baxter on 1 June 2020 (page 326). The OH report detailed the accident in February 2020 which resulted in concussion and whiplash. This was said to be "*slowly improving*" and that "*up until March of 2020 she was sleeping a lot throughout the day and had significant nausea and headaches*". The report said that in April 2020 her symptoms started to improve and she returned to work on 17 April and was working from home providing telephone services. It mentioned issues with her IT equipment. The report said that the claimant found she could only manage around 3 hours work without symptoms. We find that this section of the OH report related to the symptoms arising from concussion and whiplash.

63. The conclusion arising from this was put as "*Ms Edwards sustained a head injury on 1st February 2020 resulting in significant concussion.*

Since then she has slowly improved but her nausea and headaches persist, especially when she has been working on the computer for 3 hours. She returned to work on 17th April 2020 but due to IT issues she is unable to function effectively in her role".

64. The OH Adviser said that the claimant was fit for work bearing in mind the advice below. The report said the following (page 327):

> *"Do they need any adjustments to their role and if so, for how long?*
>
> *I would advise that she be provided with suitable and adequate DSE equipment and this includes a full size monitor, separate mouse and keyboard. I understand her current mouse is broken although she has a functioning keyboard to enable her to work effectively and build up to her usual hours. She is currently working from her laptop which is not 100% functional and this is causing her nausea and headaches. She finds she can only manage to work at her laptop for around 3 hours without her symptoms reaching a point where she cannot work."*

65. The OH Adviser said "*Her condition with regards to her concussion is unlikely to be covered by the Equality Act, however I understand she is also diabetic and this is a condition that it is likely to be covered by the Equality Act 2010*"

66. This OH report of 1 June 2020 mentioned the claimant's conditions of diabetes and asthma and also mentioned work related stress. It's primary focus was on the head injury and the return to work following her accident. The claimant had been off sick from 2 February 2020 to 3 April 2020 and she did not return to work until 24 April 2020 because of a period of annual leave. The OH appointment was on 27 May 2020. The report did not deal with the management of diabetes symptoms.

The allegations of direct disability discrimination

67. The claimant relies on 10 incidents as less favourable treatment because of her disability of diabetes. We deal with these by way of points (a) to (j) below.

68. **Allegation (a)** was that the respondent failed to notify her to return to work with other members of her team (Housing) on 6 July 2020;

69. It is not in dispute that the F2F team returned to the office on 6 July 2020. This was in line with the lifting of a number of pandemic restrictions at that time. The Contact Camden telephony teams, including the Housing Team, remained working from home as there was Council guidance to continue to work from home if you could. Mr Bell as the manager did not require the full team to be in as the cover they required at that time was low.

70. The claimant is very protective of her personal information, as she is

entitled to be. In 2017 the claimant told Mr Bell not to email her on her personal email address. She told him in an email of 7 September 2017 "*My best response to you is do not email me on my personal email. It is not for Camden's use".* She did not say in that email, the reason she gave in evidence to the tribunal, which was that she did not want him to use it because she did not monitor it. She simply said it was "*not for Camden's use*".

71. The claimant said she had not given Mr Bell her mobile number. The claimant said that in 2018 there had been some efforts to have a mediation and she was asked to provide her mobile number for this purpose. She replied that the "*mediation people*" did not need her mobile number, they were internal and they could email her. She did not want to provide her mobile number.

72. When the claimant was working from home, she wanted communication to be by phone to her landline. Mr Bell had enormous problems with this as did the courier company tasked with delivering a laptop to her. In a letter dated 14 July 2020 (page 102) Mr Bell set out five occasions in July when he had called her home number and received no reply; he had left messages, but with no response. He also said that the courier company called her 7 times on 9 July when they were trying to deliver the laptop. The claimant's position was that she did not receive the messages and by implication, she also did not hear her landline ringing.

73. We find that the claimant did not make it easy for the respondent to contact her.

74. On 19 July 2020 the claimant replied by email to Mr Bell's letter of 14 July (page 104). She said nothing in that email about not receiving his messages. When this was put to her in cross-examination she said she had a conversation with him about it. When Mr Bell replied by letter on 20 July 2020, there was no mention of a telephone conversation. The claimant then said that she could not remember if she had a conversation with him about it or not. We find that there was no such conversation.

75. Mr Bell admits that he did not ask the claimant to return to work on 6 July 2020. His evidence was that one of the reasons he did not invite her to return to work on that date, was because she had told him that spending more than 3 hours per day on her laptop made her feel unwell. In evidence the claimant denied saying this to Mr Bell.

76. We saw an OH report dated 1 June 2020 (page 326) in which the OH Adviser twice recorded that the claimant had said she felt too unwell to work after 3 hours. The OH report said on page 326 "*I understand she has a laptop at home and when she logged onto this she found her nausea and headaches increased and she finds she can only manage around 3 hours without her symptoms reaching a point where she cannot work*" and on page 327: "*At present Ms Edwards finds that 3 hours is the maximum she can manage before her headache and nausea start".* The

claimant said in evidence that she was not working at the time so "*I don't know how I would have said that".* This appeared to us to be a denial that she had said this to OH.

77. We find that the claimant was working at the time; she was not off sick. She saw OH on 27 May 2020 and Mr Bell's log of the time spent by the claimant on Mitel, the business phone system, was that she logged on to the system on 27 May 2020 and a number of days prior to that. We find that she did tell OH that she could only manage 3 hours work at the time, it was in the OH report and Mr Bell was entitled to take account of that.

78. The claimant asserted that her GP had told her on about 6 April 2020 that she should go back to work to see how she got on. We saw no medical evidence of this. The claimant said there was no letter from her GP because she had not been asked for one. She relied upon a verbal conversation between herself and her GP. If this conversation took place, the claimant did not mention it to OH on 27 May 2020 and she did not tell the respondent about it.

79. At no point in or around 6 July 2020 did the claimant make contact with the respondent to say *"I am fit to return to work and I would like to come back into the office".*

80. There was also a dispute between the parties as to whether the claimant had told Mr Bell, or given him the impression, that she was concerned about attending work due to the Covid risk and whether or not it was safe for her to return to work. The claimant said that she had been told by her GP that she was "*middle risk*" for Covid. Again, there was nothing in writing from the GP to this effect. What Mr Bell did have in writing was an OH report dated 21 January 2021 (page 356) "*With regard to the current pandemic, Ms Edwards is at <u>high risk</u> of becoming hospitalised and seriously ill if infection occurs hence the risk in the workplace would need to be kept as low as reasonably practical*" (our underlining). We accept that this report was six months after many of the claimant's colleagues had returned to work.

81. Mr Bell also recalled a conversation with the claimant in February 2020, before lockdown but as the pandemic was emerging. She expressed her fears due to having asthma and he told her he would not expect her to come to the office if things got worse. He said this to the claimant and others to allay their immediate concerns for their health.

82. Mr Bell kept a log of his calls from the claimant (starting at page 154). On 30 March 2020, a few days into the first lockdown, Mr Bell said the claimant told him she was a member of a vulnerable group and that she had decided to postpone planned shoulder surgery because of the risks of Covid.

83. At a return to work meeting on 24 April 2020 they had a discussion about her health. Mr Bell asked the claimant if she was self-isolating, he now

knows the correct terminology was "*shielding*". He followed this up with an email on 28 April (page 95) saying "*I need to check with you if you received an NHS letter telling you that you are a member of a vulnerable group and you need to self-isolate*".

84. He recorded that on 20 May the claimant told him that she could not do more than 3 hours on screen without feeling nauseous. We find that she did say this, because she said the same to OH a week later on 27 May 2020.

85. On 2 June 2020 the claimant told Mr Bell that because she is black and diabetic that made her more vulnerable to Covid. Mr Bell's note of that conversation was at page 98. We find that she did say this.

86. Mr Bell accepted in evidence that at no time did the claimant tell him that she did not want to return to work. Mr Bell said to the claimant in evidence: "*I never stopped you returning to work at 5PS, it was my assumption that you would come back when you felt safe".*

87. We find that the reasons Mr Bell did not invite the claimant back to work on 6 July 2020 were (i) because both she and OH had told him that she was unable to work for more than 3 hours without headaches and nausea, related to the concussion; (ii) she had told him on a number of occasions about her fears related to Covid and (iii) there was Council Guidance in place to say that if you could work from home, you should. The claimant was able to work from home. We find that these were reasons Mr Bell did not invite her to return to work in July 2020, it was not because of her disability of diabetes.

88. The claimant was not included in a WhatsApp Group that was used for the F2F team who were returning to the office on 6 July 2020. A requirement for being included in a WhatsApp Group is the use of the employee's mobile telephone number, something which the claimant did not want Mr Bell to use. His evidence was that during the attempts to deliver the laptop, he had sent her a text on 29 April 2020 and the claimant was surprised that he was using her mobile number (his statement paragraph 59). We can understand Mr Bell's reticence to include her in a Whatsapp Group.

89. We find that it would have been good practice to inform the claimant that members of the F2F team were returning to work, but we find that the failure to do so was not an act of direct disability discrimination. We find that Mr Bell would have treated anyone in the same circumstances as the claimant in the same way. This means an employee recovering from a head injury who was unable to work for more than 3 hours day, who was able to work from home, who had expressed fears about Covid and who was not prepared to permit communication via a mobile phone.

Comparator M

90. Although no named comparator was identified in the issues, during the hearing we heard about a potential comparator to whom we refer as "M".

91. "M" was a substantive member of the F2F team, she was not part of the telephony team like the claimant and she was unable to work from home. In order to work, she had to come into the workplace. M had a medical condition which was not diabetes. The respondent carried out a risk assessment and in the light of this M was able to return to work.

92. We find that M was in materially different circumstances to the claimant in that she was a substantive member of the F2F team. She was not part of the telephony team. In addition M was unable to work from home. For the purposes of comparison we find that they were in materially different circumstances.

93. **Allegation (b)** was that at a Stage 1 attendance procedure meeting in November 2020, Mr Bell assumed that the claimant did not want to return to face to face work, when the claimant had not ever said this.

94. The Stage 1 attendance meeting was held on 6 November 2020 to review the claimant's sickness absence as she had been off sick since 7 August 2020. Mr Bell's notes of the meeting were at page 161. Mr Bell agreed that the claimant did not say in the meeting that she did not want to return to face to face work.

95. We have considered firstly whether Mr Bell made the assumption that the claimant did not want to return to face to face work. In his witness statement (paragraph 81) Mr Bell said: "*My assumption was always that she was too worried about Covid to come in to work in 5PS up to that point but I believed she would return at some point in the future when she felt it was safe to do so and she was comfortable again on public transport*". The reference to 5PS is to the Council's main building at 5 Pancras Square.

96. We find that Mr Bell took the view that the claimant was concerned about returning to the workplace based on the conversations he had with her as we have set out above. We find that she did express concern to him about her risk of catching Covid and he took this into account.

97. We find Mr Bell did not make an assumption that she did not want to return to face to face work because of her disability of diabetes. The claimant had told him for a number of reasons she had concerns about Covid, as did large numbers of people in 2020 in the early stages of the pandemic and before the vaccination roll out. This was not an act of direct disability discrimination.

98. **Allegation (c)** was that from August 2020 Mr Bell communicated through the union when the claimant had not requested this.

99. Mr Bell's evidence was that he thought that by communicating with the claimant's union representative Ms Marriott, he was assisting the claimant.

100. During the summer of 2020 when the respondent was trying to deliver a laptop to the claimant, Mr Bell, who was on leave at the time, received an email from Ms Marriott saying:

> *"I have been contacted by Janet Edwards, regarding various laptop issues, delivery, monitor etc.*
> *I would like to suggest, to avoid the recent situation, (when Janet was unaware of when exactly the laptop was due to be delivered), that this time before it is despatched, you give Janet the contact details of the member of staff who arranges for deliveries(Business Support?) so she can liaise with them directly to ensure that the laptop is successfully delivered to her?*
> *Janet has now received the monitor, but as you know her mouse is no longer working, so she requires a new one, so please can a new mouse be included with the laptop?"*

101. On 24 July 2020 Ms Marriott emailed Ms Marie Martin, senior customer service officer, saying:

> *Thanks for the information and getting back to us so quickly.*
> *I have been in touch with Janet and she will go ahead and purchase a mouse on the basis you outlined.*
> *Regarding the laptop, she has asked me to ask you if it would be possible for her laptop to be delivered on Monday morning (27th)?* (Our underlining).

102. It is clear from this email and we find that the claimant had asked Ms Marriott to correspond on her behalf. There was a further email from Ms Marriott to Ms Chamberlain, copied to Mr Bell on 4 August 2020 (page 128) about arrangements for the laptop.

103. Ms Marriott's evidence (statement paragraph 5) was that she was *"involved*" in 2020 trying to "*help the claimant get the IT equipment she needed*". She said this included "*ongoing communications*" with Mr Bell, Ms Chamberlain and Ms Martin. Ms Marriott did not say that the claimant had not asked her to do this. Ms Marriott did not say that she expected Mr Bell's replies to go direct to the claimant.

104. It is hard to see from this email correspondence, how Mr Bell could have understood that the claimant did not wish him to communicate with her union representative. Mr Bell was entitled to take the correspondence from Ms Marriott at face value that she was acting in her capacity as the claimant's union representative and communicating on the claimant's behalf.

105. On 11 January 2021 Mr Bell told Ms Marriott that he would like to contact the claimant direct; he said (page 184): "*I have addressed this email to you on Janet's behalf but I am wondering if in the light of Janet feeling better and her potential return if it would be more practical to liaise directly with Janet….*". On page 187, email dated 22 January 2021, he asked Ms Marriott if the claimant was well enough to speak to him – said "*can you ask her please".*

106. Mr Bell's correspondence with Ms Marriott as the union representative had nothing to do with the claimant's disability of diabetes. It would be unusual in our experience for Mr Bell not to have replied to Ms Marriott. Mr Bell made enquiries of Ms Marriott about communicating with the claimant direct. We find that this allegation had no foundation and it fails as an allegation of direct disability discrimination.

107. **Allegation (d)** was that Mr Bell told OHU that the claimant appeared unapproachable in Oct/Nov 2020.

108. In an OH Referral made on 10 January 2021 under the heading: "*Any other questions you would like answered or any other notes regarding this form. Please give any other information you think may be helpful*", Mr Bell said: "*Janet has complained that she doesn't feel part of the F2F team. I have tried to explain that she can appear less approachable than I know she is and equally can appear less supportive of colleagues. I have explained that if she appeared more supportive and welcoming that might assist in breaking down these perceived barriers."*

109. Mr Bell also noted to OH that "*Janet feels work and more especially that I am the cause of her stress".*

110. The claimant was sent a copy of the referral so she saw this at the time in January 2021. The comment relied upon was also quoted in the OH report itself (page 355) dated 20 January 2021.

111. Mr Bell accepted in evidence (statement paragraph 145) that his language in this respect was "*clumsy".* He said that this was not just his own perception but that his view came from comments made to him by the claimant herself. He admits that he told her that she could appear unapproachable and working in a team was a two way process.

112. It was put to the claimant that she did not raise this with Mr Bell at the time. She said she raised it with him in a telephone conversation; she said he told her he thought it was relevant to her health and she disagreed. The claimant accepted in evidence that Mr Bell did not say that he considered her less approachable because of her disability and we find that he did not. This allegation fails as an act of direct disability discrimination.

113. **Allegation (e)** was moving the claimant from the Housing team to the Citizenship team, requiring her to work in two different areas;

114. The claimant's job description was at page 251. It was a generic job description for the Job Family of Customer Service, Level two. There are 8 Contact Camden teams. Senior managers can decide to move staff around if there is greater demand in a certain area or their skills warrant the move.

115. Ms Chamberlain is Mr Bell's manager and she allocates staff according to business need. The claimant's Job Description and contract did not tie her to one particular service, it was generic across 12 services. The claimant said she did Housing for 16 years and after her return to work from her absence from August 2020 to March 2021 she was told she was returning to Citizenship. She said she was given online training which she considered was "*not appropriate*". She considered it refresher training on an area she had not dealt with before

116. The claimant was asked why she considered this an act of direct disability discrimination. The claimant said "*I wouldn't say it was disability discrimination, but it is still discrimination all the other officers had done Citizenship for a long time and I was only just receiving training".*

117. When the claimant returned from sick leave in March 2021, Ms Chamberlain wished to place her where the need arose. The claimant said that Ms Chamberlain was entitled to do this, if there was proper training. Training was provided, but the claimant did not consider it suitable.

118. The claimant said she was required to work in two different areas. The claimant agreed that she wanted to work in F2F and to meet her request, she was allowed to work on Housing one day per week. We find this was not less favourable treatment, it was an accommodation of her wishes.

119. Our finding of fact is as follows. Ms Chamberlain joined the respondent in January 2020. She managed 108 full time equivalent members of staff plus 9 managers and in 2021 she was looking at business demand. In March 2021 she established that the staffing for Housing was incorrect. When the claimant was due to return to work the need had changed due to the pandemic; the demand had increased in supporting citizens, so she set out to align supply with demand.

120. Ms Chamberlain was aware of the claimant's generic job description (page 251) and knew she could place her across all services and channels. There was more demand in telephony, call handling time had increased because of the pandemic. Ms Chamberlain made the decision to move the claimant to Citizenship and to give her a new manager for a fresh start. It was clear to Ms Chamberlain that the relationship between the claimant and Mr Bell was not good at that stage.

121. As to the training, this is allocated by the Training Performance Manager

and Ms Chamberlain was not aware until she heard the claimant's evidence in this tribunal, that she considered that it was not suitable. As to the claimant's complaint that it should have been classroom training and not online, we have no difficulty in accepting Ms Chamberlain's evidence that online was the default position in the pandemic. Ms Chamberlain said that if the claimant had a problem with the training, she would have expected her to raise it at the time, with her new manager Ms Jones.

122. We find that the claimant's move to the Citizenship team, whilst retaining some work in F2F, was a service-based decision made by Ms Chamberlain. It fell within the scope of the claimant's Job Description. It had nothing to do with her diabetes. The claimant also accepted that this was not disability discrimination, even though she regarded it as "*discrimination*" of some sort. Her claim was for disability discrimination. This allegation fails.

123. **Allegation (f)** was Mr Bell refusing to discuss removal of reasonable adjustments between 7 July 2020 until a Stage 2 attendance procedure meeting in April 2021. That meeting took place on 29 April 2021.

124. We have found above that on five occasions in early to mid-July 2020, Mr Bell tried unsuccessfully to contact the claimant. He set this out in his letter of 14 July. On 20 July 2020 he wrote to her (page 105) to say "*I have decided to respond in writing because you told me not to use that email address or your mobile number and you have not been responding to my phone calls"* Mr Bell was then on leave until 10 August 2020 by which point the claimant was again off sick.

125. On 23 July and 4 August, senior customer service officer Ms Marie Martin was emailing the claimant's union representative Ms Marriott. On 11 August 2020, on his return from leave, Mr Bell said to Ms Marriott, "*I am happy to contact Janet directly but as she is suffering from stress and anxiety I wondered if you approaching her would be less stressful for her*." (page 134) and Ms Marriott replied: "*due to how unwell [the claimant] is at the moment, she is unable to engage over this*". We find that Mr Bell took a considerate approach over contacting the claimant direct and we find that it would have been wrong for him to press the point when he had been told by Ms Marriott that she was not well enough to engage with him. The claimant was off sick until 1 March 2021.

126. Nevertheless, the claimant was well enough to participate in a Stage 1 sickness review meeting on 6 November 2020 held by Mr Bell and she was accompanied by her union representative Ms Marriott. There was a full discussion of her situation at this meeting including her adjustments.

127. Mr Bell and the claimant spoke on 29 January 2021 about her most recent OH report On 15 February 2021 she emailed Mr Bell requesting a meeting to discuss her most recent OH report (email page 190, OH report page 353) which indicated that she was fit to return from 2

February 2021 although she was not signed fit for work until the beginning of March 2021. Mr Bell wrote to the claimant on 15 February 2021, having been on leave since their telephone conversation of 29 January (letter page 191). The letter of 29 January 2021 is an important one as it sets out the position which we find was an accurate reflection of the situation and we set out the full content of this letter.

> *I am writing to you following our recent phone call on Friday 29 January. I think it makes sense to clarify exactly what we discussed and what I said to you during the call so there is less room for misunderstanding. I had a period of leave immediately after our phone call so it has taken me longer to get back to you than I had originally planned.*
>
> *I said I was glad you sounded more positive and healthy than when we last spoke. I explained that I was confused about your return to work date. Claire told me on 5 January that you had said to her that you intended to return to work on 2 February. When I finally received your med cert on 22 January, I noticed that it was dated 30 December and prior to your conversation with Claire so I just assumed that you felt well enough to work before the end date of the cert (28 February).*
>
> *When we spoke on 29 January, you weren't very clear about the date you were planning n coming back to work, however you implied it would not be 2 February and on a few occasions explained to me that you couldn't come back then because your daughter was sick with Covid. I left it with you explaining to me that you would be back on 1 March or before then.*
>
> *I explained during the meeting that the OHU report (copy attached) said that you were well enough to return to work, specifically: "My opinion is that Ms Edwards has improved enough in order to consider her return to work". That was qualified with the following support and adjustment recommendations to help you back to work:*
>
> *Phased returned to work. The report suggested a 6 week gradual phased return staring with 50% hours.*
> *A stress risk assessment.*
> *New manager on your return*
> *"It would also be beneficial for Ms Edwards if she could be allocated at least one day per week to work in the office as that will most likely help her with her overall wellbeing."*
>
> *With regards to the phased return, i.e. starting with 50% hours, I suggested working 5 X 3.5 hour days in your first week back and building up to full-time hours in week 7. You wanted to do a compressed week, i.e. do 2½ days. I suggested that might be a lot for you to start with but that only you can confirm how well you are and how you are managing. I provisionally agreed this with you but suggested it might be better to have that conversation with your new manager.*
>
> *The stress risk assessment is a self-assessment form and I think it would be beneficial to you if you completed it once you are actually back at work and can better identify sources of stress and anxiety. In the past you have explained that it is your relationship with me that is causing these issues so I am hoping that having a new manager will assist you in your recovery.*
>
> *Tracy Chamberlain will be able to confirm your new manager nearer the time of your return to work. It will be one of the Housing Telephony managers.*

I also reminded you again that because of the length of absence your laptop will have fallen off the network and will need to be brought into 5PS to fix. I also reminded you that your user too had been deleted from the Camden network but that I have been given access to a backup copy of your OneDrive documents. You explained to me that you would not deal with the laptop until you are back at work.

Much of our conversation on 29 January revolved around your desire to return to work in 5PS and specifically your preference to work on the front desk at 5PS. You have always insisted that you have a "reasonable adjustment" agreeing to this and explained it was to allow you to move around and take breaks from work to help you manage your health problems. I explained again that I have been unable to find anything official and that no paperwork exists confirming this. I believe it was an informal decision made at the time to assist you in managing your reported health problems.

I explained the following to you:

- *There is no role for you on the front desk at 5PS.*
- *I feel that telephony work regardless of whether it is in 5PS or at home gives you far greater freedom to move around and take breaks. When facing a customer on the front desk, you cannot stand up, move around or stretch as you can when on the phones. I also explained to you that my experience of your work on the front desk was that you were very static and that you didn't use your perceived freedoms of the role.*
- *I also explained that service demand in Contact Camden is currently on the phones with little or no demand for face to face work.*
- *I said the F2F team are currently all working on the phones now. 3 members of F2F have been moved to the Coronavirus support line team. Only one member of staff is required to cover the front desk.*
- *I am sure that your new manager will assist you to work in the most productive environment and if that is 5PS then there is plenty of capacity for phone work at 5PS.*
- *I further explained that we do not yet know what the face to face service will look like post pandemic. Services have very successfully managed their client interactions by phone and electronically, so the face to face service of the future is likely to be very different and possibly reduced.*

To help try and resolve your concerns about your "reasonable adjustments" I asked OHU again to help look into this and I asked for clarity around your desire to work on the face to face team and specifically on the front desk.

The OHU response seems quite clear to me in that it refers to a need for a face to face role purely from a well-being point of view, i.e. interacting with other people. "With regard to Ms Edwards' face to face role, I believe that Ms Edwards would benefit from having face to face tasks in order to be able to interact and communicate with other people which would be beneficial for her wellbeing."
And again
"It would also be beneficial for Ms Edwards if she could be allocated at least one day per week to work in the office as that will most likely help her with her overall wellbeing."
I am sure, when it is safe to do so that you can be accommodated at 5PS to support your well-being but it does not need to be on the front desk and a telephony role at 5PS will accommodate OHU's recommendations.

The OHU report also reminds us that in the current climate, working at 5PS, interacting with members of the public and using public transport would I believe not be in your best interests. I suggest that once you are well enough to be back at work, your new manager can do a Covid risk assessment with you and

together you can determine how safe it is for you to work in 5PS and make decisions accordingly.

Your med cert expires in 2 weeks or so. I hope you are still well enough and still intend to return to work. Can you please clarify when exactly you intend to return as it was not clear when we last spoke? I am happy for you to respond by phone, email or via Claire. If unfortunately you are not well enough to return to work, are you able to say when you think you might be able to return and please provide a new med cert.

Given the extended length of absence I will shortly be inviting you to attend a stage 2 absence review meeting.

128. The key points from this letter were as follows:

- The claimant's wish and preference was to return to work at 5PS on the front desk. This was what she liked doing.
- No official record could be found to document the claimant's previous working pattern which she described as her "*reasonable adjustment".* We agree with Mr Bell and find that this was likely to have been an undocumented arrangement with a previous manager. There was no OH or GP recommendation to back this up and the claimant, despite having the ability to obtain records from her GP, did not produce anything to this effect.
- During the pandemic and when she returned to work at the beginning of March 2021 there was no role for her on the front desk.
- Telephony work gave her opportunity to get up, move around, stretch and take breaks.
- The OH advice was that the recommendation for face to face work was for wellbeing reasons, in terms of interaction with other people, rather than moving and stretching, which was the recommendation for managing the diabetes.

129. We find that Mr Bell did not refuse to discuss the removal of reasonable adjustments between 7 July 2020 and 29 April 2021. This allegation fails on its facts.

130. **Allegation (g)** was Mr Bell falsely alleging in a Stage 2 meeting in April 2021 that the claimant had said she was self-isolating;

131. On 22 April 2020 just before the claimant's return to work on 24 April, Mr Bell sent the claimant the following email (page 95):

"Good morning Janet.
I hope you are feeling well and making the best use of your annual leave, though in this climate your hands are somewhat tied as to what you can do.
You are due to return to work on Friday 24 April and given your ongoing health issues I need to check with you if you received an NHS letter telling you that you are a member of a vulnerable group

and you need to self-isolate. Can you drop me a line and let me know please."

132. Mr Bell had spoken to the claimant on 30 March 2020, almost at the beginning of the first national lockdown, when she told him that her GP certificate ran out the previous day. Mr Bell's note of his conversation with the claimant (page 90) said that the claimant told him: "*GP needs to confirm it is OK to return. Told me GP has to let her know if she can use computers and has to sign her back. She is not currently allowed in surgery as she is a member of vulnerable group".*

133. Mr Bell said in his witness statement (paragraph 169) that he wanted to determine whether the claimant was shielding under the Covid measures in place in 2020. Mr Bell held a return to work meeting with the claimant on 24 April 2020. The claimant had been on 3 weeks leave after the end of her sickness absence. Mr Bell made a note of the meeting on 28 April 2020 (page 93) in which he recorded that the claimant told him "*Needs to self isolate because of diabetes, asthma, etc*".

134. Terminology such as self-isolating and shielding was brand new to everyone in April 2020, being one month into the pandemic. The terminology was new to Mr Bell who agreed that he should have asked if the claimant was shielding rather than self-isolating. We accepted that he was making these enquiries to safeguard her health.

135. We find that Mr Bell did not "*falsely allege*" that the claimant was self-isolating and we can think of no reason why he would make a "*false allegation*" of this nature. He was not making an allegation. He used the wrong terminology when he should have used the word "*shielding*". We find that he did not make this mistake because of the claimant's diabetes. We find he made a genuine mistake in the use of terminology that had only arisen in recent times with the pandemic.

136. It was a mistake in terminology. It was not less favourable treatment because of the claimant's diabetes. This allegation fails as an act of disability discrimination.

137. **Allegation (h)** was Mr Bell falsely alleging that the claimant had requested "*unusual equipment*" whereas in fact she had just requested a monitor and mouse;

138. Mr Bell did not recall using this terminology. He did not and does not regard a monitor or a mouse as unusual equipment. The claimant said this was said at a Stage 2 sickness review meeting on 29 April 2021 chaired by Ms Sarah Sedley, Test, Trace and Isolate Service Manager. Mr Bell was present at the meeting. We did not see in Ms Sedley's notes of the meeting (starting at page 245) any reference to Mr Bell saying that the claimant had requested "*unusual equipment*". The claimant said she complained about this and mentioned it in her grievance. We did not find

this in her grievance at page 206-209.

139. It was put to the claimant that he did not say this because of her disability of diabetes and the claimant replied that she had "*no idea*" why he said it. She did not contend in evidence that this comment about "unusual equipment" was said to her because of her disability of diabetes.

140. We find that Mr Bell did not allege, let alone falsely allege, that the claimant had requested "*unusual equipment".* We found no record of this in the notes of the Stage 2 hearing or in the claimant's grievance. This allegation fails on its facts.

141. Even if he did say it, which we find that he did not, we find it hard to see how this amounts to a detriment or less favourable treatment of the claimant because of her disability of diabetes.

142. **Allegation (i)** was Mr Bell falsely alleging that the claimant had called him 27 times one day and 16 times another day;

143. Mr Bell created a screen shot from Microsoft Teams of 16 missed calls from the claimant's landline on Tuesday 16 February 2021 (page 194), made between 11:06 and 11:31 hours. The last three digits of the claimant's phone number were the same as those numbers appearing in the call record at page 194. She accepted that it was her number but said there was something wrong as she could not have made three calls in one minute – as there were three calls at 11:30 and 8 calls at 11:07. She said her phone did not have a redial function.

144. We find that Mr Bell made a reasonable assumption based on the call record. We find it was his point of view based on the call record, even if the claimant did not actually make that number of calls. The record showed her phone number. It was not a false allegation, it is what Mr Bell reasonably concluded based on the records in front of him.

145. Mr Bell said that he had 27 missed calls from the claimant from 5pm on 2 September 2020 to 1pm on 3 September 2020. He does not have a record because he did not know that Teams only keeps 1 month of phone records. The claimant denied this and said there were problems with IT. The claimant believed it was an issue with the system. The claimant said she rarely used her house phone and her mobile provider said they had no record and she did not have speed dial on the home phone.

146. The claimant confirmed in evidence that this was not disability discrimination, it was just "*discrimination".* We agree that it was not disability discrimination. We find it was not an act of direct disability discrimination and this allegation fails.

147. **Allegation (j)** was that Ms Chamberlain, Customer Service Manager for Contact Camden and the claimant's second line manager, falsely alleged that the claimant was "*so terrified by Covid-19 she had to request a taxi*".

148. Ms Chamberlain denied making the comment that the claimant was "*so terrified by Covid-19 she had to request a taxi*" either verbally or in writing. The email correspondence on the matter was at pages 127-145. We did not see Ms Chamberlain use these words in the correspondence and she was clear in her denial of saying it verbally. The issue of the taxi related to the arrangements for ensuring that the claimant had a functioning laptop so she could carry out work from home.

149. The claimant relied upon the notes of the Stage 2 Sickness Absence Review meeting on 21 April 2021, a meeting Ms Chamberlain did not attend. The notes of the meeting (page 246) set out a number of reasons why Mr Bell had understood that the claimant was at high risk from Coronavirus. One such reason was put as: "*In Aug 2020 when asked to come in a collect a laptop JE informed TC she had a fear of public transport so TC agreed to pay for a taxi to and from 5PS*."

150. We find that Ms Chamberlain did not make the comment attributed to her. The claimant had a second-hand report of something allegedly said 8 months before the Stage 2 hearing. We find Ms Chamberlain did not say this and the allegation fails on its facts.

The reasonable adjustments claim

<u>The first provision, criterion or practice relied upon</u>

151. This was put as requiring the claimant to work one day a week in the office face to face. In its Amended Grounds of Resistance paragraph 21 (page 35) the respondent admitted that it permitted the claimant to work one day per week face to face, because it was accommodating her request. It does not admit applying a PCP.

152. Post Covid the claimant agreed that she wished to continue to work on F2F. She agreed that the respondent did not "*require her*" to work on F2F. Her substantive role was in telephony. It was at her request. The claimant was clear in her evidence that post Covid, what she wanted was one day per week in the office face to face.

153. The respondent submitted that it would be "*irreconcilable*" for the claimant to contend that this arrangement which she requested, placed her at a substantial disadvantage compared to her colleagues without a disability.

154. We are clear based on the claimant's evidence and we find that the requirement to work on the F2F team was an arrangement she wanted. We find firstly that it was not a provision, criterion or practice applied by the respondent. Even if it was a provision, criterion or practice, it did not put her at a substantial disadvantage with her diabetes, because it was something she wanted and it was an arrangement that suited her.

155. The claimant's case was that the PCP's negatively affected her health, but we were not told how working one day per week on F2F negatively affected her health. We find that if it did, she would not have wanted the arrangement.

The second provision, criterion or practice relied upon

156. This was put as requiring the claimant to work in two different teams Housing and Citizenship. The respondent denied requiring the claimant to work in two areas and said it was a consequence of accommodating the claimant's request to work on the F2F team which was the Housing side, on her return to work in April 2021.

157. We refer to our findings of fact above on allegation (e) of direct disability discrimination. We find that the respondent did not apply a PCP of requiring the claimant to work in two different teams. The respondent only required her to work in one team, the Citizenship team. It was the claimant who wanted to work on the F2F team because she liked the face to face element of the work and working F2F involved answering questions on Housing, in which she had more expertise. The claimant was clear in her evidence that the respondent did not require her to work in F2F, it was her request. Had the claimant not requested working on F2F she would only have been required to work on one team.

Auxiliary aids

158. We have considered whether the lack of an auxiliary aid, namely the lack of a monitor and/or mouse in the period June-August 2020, put the claimant at a substantial disadvantage compared to someone without the condition of diabetes, in that it prevented her from working? She concedes that at this time she did not have a working laptop.

159. The OH report of 1 June 2020 (page 327) said as follows:

> *I would advise that she be provided with suitable and adequate DSE equipment and this includes a full size monitor, separate mouse and keyboard. I understand her current mouse is broken although she has a functioning keyboard to enable her to work effectively and build up to her usual hours. She is currently working from her laptop which is not 100% functional and this is causing her nausea and headaches. She finds she can only manage to work at her laptop for around 3 hours without her symptoms reaching a point where she cannot work.*

160. As we have found above, the primary focus of this OH report was the claimant's head injury, not her diabetes. At paragraph 41 of her witness statement the claimant said: "*I telephoned Eanna Bell on the same day as the report 29 May 2020 to ask him to supply me with a monitor and a mouse as was recommended in the OHU report as necessary for me to function efficiently working from home, due to a head injury I had*

previously received" (our underlining). We find that in her statement the claimant accepted that this OH recommendation was related to her head injury. Our finding is that the recommendation of the provision of these auxiliary aids was to assist the claimant with her head injury. She made a mistake as to the date of the OH report, her appointment was on 27 May and the report was dated 1 June 2020.

161. We find that there was no initial failure to provide her with a mouse, the OH practitioner records that the mouse was broken, so it was a case of providing her with a new one.

162. We saw from an email dated 23 July 2020 from Ms Marriott to Mr Bell that the claimant had received the monitor and from a note made by Mr Bell (page 112) that she received it on 22 July 2020. Ms Marriott said (page 107) "*Janet has now received the monitor, but as you know her mouse is no longer working, so she requires a new one, so please can a new mouse be included with the laptop".* We saw that on 9 July 2020 (page 101), the day on which an unsuccessful attempt was made to deliver a new laptop to the claimant, Mr Bell made a note to contact a colleague about the monitor.

163. Also on 23 July 2020 Ms Martin emailed Ms Marriott with a copy to the claimant's work email address, saying that the claimant could buy the mouse herself and claim back the cost. Ms Martin provided a link to allow the claimant to do this. On 24 July Ms Marriott confirmed that the claimant would go ahead and purchase the mouse on the basis outlined.

164. We find that there was a period in which the claimant was awaiting the monitor and mouse, which was dealt with by 22/23 July 2020. In any event these were auxiliary aids recommended by OH in relation to the head injury and not the condition of diabetes. There was no failure to provide these items, it took a few weeks to provide them, during a pandemic when so many people were working from home for the first time. The scheme for providing monitors had ceased (page 158) and Mr Bell obtained HR agreement to supply the claimant directly with a monitor (his statement paragraph 179).

165. We find that the claimant was not placed at a substantial disadvantage with the condition of diabetes in being without these items, from the beginning of June to 22/23 July 2020. We find that the items were in any event provided by 23 July 2020 which was a reasonable period in the circumstances of the pandemic.

The relevant law

Direct race discrimination

166. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would

treat others.

167. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

168. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA).***

The duty to make reasonable adjustments

169. The duty to make reasonable adjustments is found under section 20 of the Equality Act. The duty comprises three requirements of which two are relevant to this case.

170. Subsection (3) is as follows:

> *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.*

171. Subsection (5) deals with auxiliary aids and says as follows:

> *(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.*

172. The EAT in ***Royal Bank of Scotland v Ashton 2011 ICR 632*** held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment.

173. This case was considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ*** on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

174. Under section 21 of the Equality Act a failure to comply with section 20 is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

175. In deciding whether an employer has failed to make reasonable adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

176. On the burden of proof, the EAT in ***Project Management Institute v Latif 2007 IRLR 579*** (Elias P as he then was) held that the claimant must not only establish that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It is necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

The burden of proof

177. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. This does not apply if the respondent can show that it did not contravene that provision.

178. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

179. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

180. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held

that the burden does not shift to the respondent simply on the claimant establishing a different in status and a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

181. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

182. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

183. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

Time limits

184. Section 123 of the Equality Act 2010 provides that:

> *(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.*
>
> *(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.*

185. The just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the

claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant - ***Bexley Community Centre (t/a Leisure Link) v Robertson 2003 IRLR 434***.

186. When exercising discretion under section 123(1)(b) EqA 2010, Tribunals should assess all relevant factors in a case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of and reasons for, the delay – see ***Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23*** (judgment paragraph 37).

187. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96.*** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: "*The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*" (paragraph 52).

188. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

189. The tribunal can find that some acts should be grouped into a continuing act, while others remain unconnected: ***Lyfar v Brighton and Sussex University Hospitals NHS Trust 2006 EWCA Civ 1548***.

190. In ***Aziz v FDA 2010 EWCA Civ 304*** the Court of Appeal said that one relevant but not conclusive factor was whether the same or different individuals were involved in the incidents. The CA said that the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs (paragraph 36 of the judgment).

191. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

Conclusions

Direct disability discrimination

192. We have found as follows on the claim for direct disability discrimination:

193. Allegations (a) (b) (c) (d) and (e) failed because the reason for the treatment was not the disability relied upon.

194. Allegations (f) (g) (h) (i) and (j) failed on their facts.

The reasonable adjustments claim

195. The first claim for failure to make reasonable adjustments: The claimant did not show that the respondent applied the PCP relied upon of being required to work in the office face to face one day per week. It was an arrangement she wanted. She also failed to show that this placed her at a substantial disadvantage, for the very reason that it was an arrangement or an adjustment that she wanted. The respondent did not fail to make a reasonable adjustment in this respect.

196. The second claim for failure to make reasonable adjustments: The claimant did not show that the respondent applied the PCP relied upon of being required to work in in two different teams. The claimant was required to work in one team, the Citizenship Team. She was accommodated in terms of her request to continue with some work on F2F in the Housing team. The respondent did not fail to make a reasonable adjustment in this respect.

Auxiliary aids

197. Our primary finding is that the recommendation for the two auxiliary aids of a mouse and a monitor were to avoid disadvantages caused by the head injury and not the condition of diabetes. The claimant's existing mouse had broken and she needed a new one. Both the monitor and the mouse were provided by 22/23 July 2020. Our finding is that the claimant was not placed at a substantial disadvantage in those few weeks with the condition of diabetes, which was the disability relied upon.

The time point

198. As the claims above failed, there was no need for us to deal with the time point.

Employment Judge Elliott
Date: 31 January 2022

Judgment sent to the parties and entered in the Register on: 31/01/2022

OLu_____ For the Tribunal