EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104289/2022

Final Hearing held at Dundee remotely by Cloud Video Platform on 8 – 10 February 2023

Employment Judge A Kemp
Tribunal Member L Grime
Tribunal Member A Smith

Mrs Karen Quin	**Claimant** **Represented by:** **Mr M Quin** **Husband**
Falkirk Council	**Respondent** **Represented by:** **Ms L Usher** **Solicitor**

JUDGMENT

The unanimous Judgment of the Tribunal is that the claims are not within the jurisdiction of the Tribunal, and are dismissed.

REASONS

Introduction

1. This was the Final Hearing into claims of discrimination on the ground of disability under sections 15 and 20/21 of the Equality Act 2010 ("the Act").

2. The respondent accepted that it had dismissed the claimant, and that the claimant was a disabled person under the Act. It also accepted that it had knowledge of that status at all material times, save in one respect set out in the issues below. It argued that there had been no unlawful discrimination.

3. There had been Preliminary Hearing in the case on 27 September 2022 and 7 December 2022, and in the latter of which the Tribunal granted Orders in relation to the present hearing.

4. The claimant was represented by her husband and the respondent by Ms Usher. They had co-operated in a Chronology, List of Issues and the documentation. They both conducted the hearing most helpfully and appropriately and are to be commended for doing so.

Issues

5. The following is the agreed List of Issues referred to, with some slight amendments made at the start of the hearing, and by the Judge thereafter:

Preliminary issues

a. Disability status

   i. When did the respondent have actual or imputed knowledge of the claimant's hearing impairment? The respondent contends that it was from September 2020. The claimant contends that it was from January 2020.

b. Time limits

   i. Are any of the claimant's complaints of disability discrimination out of time under section 123 of the Equality Act 2010 ("the Act")?

   ii. Did the respondent's alleged discriminatory treatment of the claimant amount to conduct extending over a period within the meaning of Section 123(3) and, if so, when was the end of that period?

iii. If any of the complaints of disability discrimination which the claimant has submitted are out of time, is it just and equitable for the time period to be extended (section 123(1)(b)?

Discrimination arising from disability (s15 of the Act)

c. Was the claimant treated unfavourably by the respondent because of something arising in consequence of the claimant's disability?

Mental health impairment

d. The claimant alleges that the "something arising in consequence" of her disability is: -

an inability to separate her home life from her work life when required to work from home. Is that established?

e. The claimant relies on the following alleged acts or omissions as unfavourable treatment:-

i. "failing to comply with local policy and carry out a Risk Assessment prior to the introduction of new hybrid working practices in June 2020."

ii. "In September 2020 by again failing to comply with local policy relevant to carrying out a Risk Assessment once they became aware she was experiencing increased occupational stress and anxiety relevant to the hybrid working practices being incompatible for home working."

f. If there was such unfavourable treatment because of that something, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim under section15(2)?

Hearing impairment

g. The claimant alleges that the "something arising in consequence" of her disability is: -

an inability to carry out her allocated duties of audio typing and managing calls on the main office phone. Is that established?

h. The claimant relies on the following alleged acts or omissions as unfavourable treatment:-

i. failing to comply with local policy and carry out a risk assessment once" the respondent "became aware that she had been fitted with two hearing aids in September 2020.

ii. removing her allocated duties of audio typing and managing calls on the main office phone and… failed to inform her when they would reintroduce these duties.

i. If there was such unfavourable treatment because of that something, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim under section 15(2)?

Failure to make reasonable adjustments (s20 & s21 of the Act)

Mental health impairment

j. Did the respondent apply the following provision, criterion and/or practice (the "PCP"), namely:-

In September 2020, omitting to comply with the local Risk Management Policy and current legislation relevant to carrying out a necessary Risk Assessment with the claimant.

k. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

The substantial disadvantage relied upon is failure to consider any existing relevant information on previous conditions reported in the workplace or identify what concerns and difficulties the claimant was experiencing.

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

m. Did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid the disadvantage? The claimant

alleges that the following adjustment to the PCP would have been reasonable:-

carrying out a Stress Risk Assessment questionnaire.

Hearing impairment

n. Was the claimant put at a substantial disadvantage compared to someone without the claimant's disability, as a result of the respondent's failure to provide an auxillary aid?

The substantial disadvantage relied upon is the claimant's inability to carry out her allocated duties of audio typing and managing the calls on the main office phone.

o. Did the respondent fail to take such steps as it was reasonable to have taken to provide the auxillary aid?

6. There was also prospectively an issue as to the remedy to be awarded to the claimant if her claims, or one of them, succeeded, which included (i) the extent of her financial losses and (ii) an injury to feelings award.

Evidence

7. The parties had prepared a single Inventory of Documents extending to 490 pages. Most but not all of the documents were spoken to in evidence. The parties had also helpfully agreed a Chronology, and it was confirmed that the details of the same were agreed facts. Evidence was given orally by the claimant herself and by her husband who might have given evidence decided that he did not wish to do so, and for the respondent by Ms Amanda Wilson, Team Leader and Ms Jenny Simpson, also Team Leader.

8. Prior to the evidence being heard the Judge explained how the hearing would be conducted, including as to examination in chief, cross-examination, and re-examination. He explained that any relevant document in the Bundle should be referred to by a witness, as otherwise it would not be taken into consideration and that all relevant evidence was

to be presented at the hearing as further evidence was allowed only in exceptional circumstances. He explained about making submissions. Mr Quin stated that he had not expected to have to ask questions, and that the claimant had prepared a written statement she wished to speak to. Ms Usher, most helpfully, did not object to that. In the circumstances, including taking into account the claimant's disability, she was permitted to do so. During the course of her evidence the Judge asked her a number of questions to clarify detail, and to elicit the facts material to the issues, under Rule 41. The Tribunal also questioned the claimant after cross examination. The evidence of the respondent's witnesses was given in the normal manner for examination in chief.

9. The claimant's line manager Ms Allyson McKinnon had sadly died, as was intimated to the Tribunal by Ms Usher at the commencement of the hearing. The respondent had also sought the full terms of the claimant's mood diary, some parts of which she had provided in the documentation for the hearing. When that was formally intimated as an application for an order the claimant destroyed her diary, considering that its contents were sensitive and private. The respondent did not wish to seek a strike out because of that act, but wished it noted that that had been the position. Mr Quin stated in reply that he had offered to withdraw the notes that were in the Bundle, which had not been accepted.

Facts

10. The Tribunal found the following facts to have been established from the evidence led before it:

Parties

11. The claimant is Mrs Karen Quin. Her date of birth is 5 February 1967.

12. The respondent is Falkirk Council. It is a local authority.

Claimant's role

13. The claimant was employed by the respondent in the period from 7 July 1989. The clamant worked for about eleven years as a Customer and Business Support Assistant, initially for 37 hours per week and from about

2017 for 30 hours per week after she had made a flexible working request. Her work included clerical and administrative duties within the respondent's Justice Services department. That included preparing documents drafted by Social Workers and others for use in courts, both by preparing documents from sight, and by audio typing. It included organising material for use in court, answering emails and telephones, and similar administrative tasks. She worked in an office with four colleagues doing similar work. Her line manager was Ms Allyson McKinnon for most of the material period. Ms McKinnon has since died.

Disability

14. The claimant was a disabled person under the Equality Act 2010 at all material times. She suffered from anxiety and depression, and had a hearing impairment. She had periods of absence for mental health issues, including one for three months or thereby in 2016. The claimant had a GP appointment in January 2020, after which she was referred for audiology assessment, which Ms McKinnon was aware of. The claimant told her about it, and that she found it increasingly difficult to hear especially if there was more than one person in the room. It affected her ability to answer the telephone in the office, and to do audio typing. Ms McKinnon suggested in February 2020 reducing the time spent on each, and mentioned that a loop system might be required for the claimant. She said that another member of staff used that. Ms McKinnon did not progress that possibility at that time, but a loop system is utilized with hearing aids, which at that time the claimant did not have.

15. The claimant was on anti-depressant medication, Fluoxetine, at all material times, which she continues to take at the same dosage of 40mg per day.

Pandemic effects

16. Following the commencement of the Covid-19 pandemic restrictions on 23 March 2020 the respondent identified those such as the claimant as essential workers, as they provided work to enable courts to function. Initially working in the office continued. On 19 May 2020 the respondent published guidance about working from home. From around June 2020

arrangements were put in place described as hybrid working. For the claimant that meant working from home on Mondays and Fridays, and in the office on Tuesdays and Thursdays. She did not work on a Wednesday. The office had been one based on paper prior to the pandemic. Home working required new arrangements and equipment, including a laptop which the claimant was provided with, but had not used before for work purposes.

17. There were some practical difficulties in such hybrid working. For example, documents were sent to a printer in the office after being prepared at home, but on occasion could not be printed as memory limits were exceeded or it was necessary to wait to do so in light of confidential information within the document that ought not to be left on an open printer. Some work had to be done in the office, such as checking previous convictions which was done on a computer in the office linked to a police database, which was then checked. Some in the office did audio typing work, including the claimant, but others did not.

18. The claimant increasingly found working from home in this manner difficult, and stressful, such that it impacted her mental health. She increasingly found it difficult to separate her home and working lives. She had thought of her home as a safe space, and that was affected by doing work from it.

Personal circumstances outside work

19. The claimant's father died in August 2019. In around March 2020 the claimant's mother was diagnosed with dementia. Ms McKinnon was aware of both matters as the claimant told her of them. Initially the claimant's mother remained in her own home, but she was moved into a care home on I November 2020, where she remains. The claimant's mother-in-law was also diagnosed with terminal cancer. In the period leading up to the move of the claimant's mother into a care home the claimant was concerned not to catch Covid-19 lest that infect her mother, and affect her being able to do so. Ms McKinnon was aware of that also, and she assisted by providing the claimant with time off work to attend meetings in relation to her mother. The claimant's mental health deteriorated from the

stresses caused by these matters. She became anxious and with a low mood, and suffered from depression. She consulted her GP.

Risk Assessment

20. The respondent had a policy with regard to carrying out risk assessments. That included a provision as to carrying out a stress risk assessment. It also introduced a practice of carrying out a risk assessment in relation to Covid-19 arrangements, one for those shielding, another for those not, which did not arise from the general risk assessment policy but was based on a form provided to managers. On 31 August 2020 Ms McKinnon prepared such a Covid-19 risk assessment document in relation to the claimant. She did so without consulting the claimant, and she did not show it to her thereafter. The risk assessment form did not identify any adjustments required for the claimant.

Events up to absence on 7 December 2020

21. On or around 1 September 2020, on the day of an audiology assessment when the claimant was told that she needed hearing aids for both ears, the claimant informed Ms McKinnon of the difficulties that she was experiencing with hybrid working, particularly her inability to separate home and working lives and the increasing hearing losses she experienced. She gave Ms McKinnon a leaflet for employers addressing issues to do with hearing loss and what could be done to improve the position, including by a loop system (that leaflet was not before the Tribunal). About a week after their discussion the claimant received those hearing aids. They made her unable to hear audio tapes properly, and made hearing someone on the telephone more difficult. The claimant told Ms McKinnon of those issues. Ms McKinnon told her that month to cease to carry out audio typing work. In October 2020 after the claimant's hearing aids had been adjusted Ms McKinnon told the claimant to cease to carry out telephone answering work. The claimant did so, but felt that as others required to undertake those duties she was letting the team down. She did not articulate that feeling to the respondent.

22. The claimant continued to work on the said basis, but found it increasingly difficult to do so. She was not asked to carry out work on a Scottish

Government audit that was required, but others in the department did so. There was more than sufficient work for the claimant to do.

23. On 18 November 2020 Ms McKinnon became absent because of illness. On 26 November 2020 Ms Amanda Wilson, Ms McKinnon's line manager, wrote to staff including the claimant to inform them of that fact and to invite them to contact her with any questions or concerns. The claimant replied to ask about Ms McKinnon and did not raise issues of a hearing loop or similar, or about her working conditions.

24. On 4 December 2020 the claimant was asked to assist in a trial of a new system. She found that that was another source of stress for her, which she did not feel able to cope with on top of all the other stressors she was experiencing. She consulted her GP, and was signed off work on 7 December 2020. The fit note issued did not refer to workplace stress.

Events during absence period

25. On 18 January 2021 Ms Wilson called the claimant to discuss what was happening in the office and changes to procedures. The claimant did not mention a hearing loop or similar issue. The claimant was referred to Occupational Health on 15 February 2021 by Ms Wilson on account of her continuing absence from work. Ms McKinnon returned to work on 15 February 2021, and resumed her role as the claimant's line manager. A report was issued dated 25 February 2021. It referred to sources of stress including bereavement and having to place her mother in a care home, but also related to work and difficulties in separating work from home. It did not suggest any adjustments for the claimant as at that stage the claimant was not in a position to consider a return to work. The claimant continued to be off work, and signed as such by her GP.

26. Ms McKinnon emailed the claimant on 2 September 2021 in relation to a discussion that they had had, which the claimant replied to on the same date.

27. A further occupational health (OH) report was instructed in September 2021, and a report was issued on 6 October 2021. It did not indicate that

the claimant was in a position to return to work. Her mental health condition continued.

28. On 3 November 2021 the claimant was invited by letter to attend a meeting to discuss the OH report. That meeting took place on 11 November 2021 to discuss the said report. The terms of the meeting were summarised in a letter from Ms Wilson sent on 16 November 2021, which is a reasonably accurate record of the discussions. Prior to that letter being sent, on 12 November 2021, Ms Wilson emailed the claimant confirming what was to happen. Mr Quin replied on the same date to set out arguments as to the position, which included allegations that the respondent was in breach of the Equality Act 2010 in relation to its duties to disabled persons in relation to the claimant.

29. Ms Wilson wrote further to the claimant on 23 November 2021 in relation to the meeting. Mr Mel Quin, the claimant's husband, replied to the email of 23 November 2021 on the same date commenting on the same, and setting out what he considered to be corrections to the understanding Ms Wilson had on matters. Ms Wilson did not reply to that. A further OH report was issued on 20 February 2022.

Termination of employment

30. A report was issued in relation to the claimant by Occupational Health on 25 May 2022 that indicated that the claimant was not fit for her contracted role, but was likely to be able to undertake other gainful employment before her normal pension age, known as a Level 2 Certificate of Permanent Ill Health. In June 2022 arrangements were made to hold a capability meeting with the claimant to discuss that report. It took place on 15 June 2022. The claimant attended with her husband. A further meeting took place on 29 June 2022 to discuss the claimant's employment position. It was agreed that the claimant would be dismissed for capability reasons related to her being able to take ill health retirement on the basis of Level 2, which meant a reduced pension on the basis that she was able to undertake other work but not that she was contracted for. The position was summarised in a letter to the claimant dated 1 July 2022. The claimant

had a right of appeal in relation to that termination of employment, which she did not exercise.

31. The claimant appealed the Level 2 decision, arguing that she should have been awarded Level 1 on the basis that she would not be able to undertake gainful employment before normal pension age, and did so successfully. She was awarded Level 1 retirement as a result, retrospectively to the date of her retirement on 15 June 2022, which meant that she had full access to pension as if she had retired at the due date for that.

Pay and related matters

32. The claimant earned £1,269 per month gross from the respondent, £871 per month net. She also was entitled to pension benefits.

33. When absent from work from 7 December 2020 the claimant had an initial period of six months on full pay. The claimant then had a period of six months on half pay.

34. The claimant's entitlement to pension is to £9,098.12 per annum. She also received a lump sum payment of £60,654.09. The level of her pension benefits includes the result of Advanced Voluntary Contributions that she had made.

Early Conciliation

35. The claimant commenced Early Conciliation on 13 July 2022.

36. The Certificate for Early Conciliation was dated 25 July 2022.

37. The Claim Form was presented on 30 July 2022.

Claimant's submission

38. The following is a very basic summary of the submissions made. Mr Quin most helpfully prepared a written submission which we read, after an adjournment to do so, with the opportunity for further oral submission thereafter. Mr Quin did not wish to do so. The claimant argued that the claim was within the jurisdiction of the Tribunal, and that there had been

breaches of both sections 15, and sections 20 and 21, of the Act. There ought to have been a risk assessment before hybrid working was commenced, and in September 2020 after issues with it were disclosed by the claimant. The key steps that should have been undertaken were providing an auxiliary aid such as a loop system, and taking account of the difficulties in working from home by providing a room to work alone in the office. The claimant had done her best to explain her arguments.

Respondents' submission

39. The following is again only a very basic summary of the submissions made. Ms Usher had also most helpfully prepared a written submission and the authorities relied upon, and this was addressed on the same basis. She also did not wish to elaborate on them, but confirmed that Ms McKinnon had died in 2022, the precise date not being known to her. She argued that the claim was out of time, and that it was not just and equitable to extend jurisdiction. She argued that there was no breach of section 15, as there was no unfavourable treatment as that is understood, and that the treatment was not because of disability. She also argued objective justification. There had been no breach of the duty of reasonable adjustments either in respect of a loop system or in respect of working in the office.

Law

(i) Statute

40. Section 4 of the Equality Act 2010 ("the Act") provides that disability is a protected characteristic. The Act re-enacts large parts of the predecessor statute, the Disability Discrimination Act 1995, but there are some changes.

41. Section 15 of the Act provides as follows:

> "**15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

42. Section 20 of the Act provides as follows:

"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……
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.

39. Section 21 of the Act provides:

"**21 Failure to comply with duty**
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…."

43. Section 39 of the Act provides:

"**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;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.
……."

44. Section 123 of the Act provides

"**123 Time limits**
(1) Subject to section 140A and 140B 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."

45. Section 136 of the Act provides:

"**136 Burden of proof**
If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

46. Section 212 of the Act states:

"**212 General Interpretation**
In this Act - …….
'substantial' means more than minor or trivial".

47. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5 as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

48. The Directives referred to are retained law under the European Union Withdrawal Act 2018.

(ii) Case law

(i) Discrimination arising from disability

Something arising

49. The EAT held in ***Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893*** that the requirement for knowledge under section.15 was not that the putative discriminator knew that something arose in consequence of the disability; once the discriminator knew of the disability, and objectively the something which caused the unfavourable treatment arose in consequence of the disability, the terms of the section were satisfied. That "something" did not need to be the sole or principal cause of the treatment, but required to be at least an effective cause, or have a significant Influence on, the treatment.

50. The process applicable under a section 15 claim was explained by the EAT in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305****:*

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words 'because of something', and therefore has to identify 'something' – and second upon the fact that that 'something' must be 'something arising in consequence of B's disability', which constitutes a second causative (consequential) link. These are two separate stages."

51. In ***City of York Council v Grosset [2018] IRLR 746****,* Lord Justice Sales held that:

> "it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability".

52. The EAT held in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** *that:*

> "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage

(i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

53. In ***iForce Ltd v Wood UKEAT/0167/18*** the EAT held that there could be a series of links but required that there was some connection between the something and the disability.

54. In ***Dunn v Secretary of State for Justice [2019] IRLR 298*.** the Court of Appeal held that "it is a condition of liability for disability discrimination under s 15 that the claimant should have been treated in the manner complained of because the 'something' which arises in consequence of that disability". This will typically involve establishing that the disability or relevant related factor operated on the mind of the putative discriminator, as part of his conscious or unconscious mental processes. This is not, in this context, the same as examining 'motive'.

55. In ***Robinson v Department of Work and Pensions [2020] EWCA Civ 859*, *[2020] IRLR 884*** the Court of Appeal held it is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably – the unfavourable treatment must be because of the something which arises out of the disability.

(ii) Unfavourable treatment

56. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. That was undisturbed by the Supreme Court when it later considered the case ***Trustees of Swansea University Pension and Assurance Scheme v Williams [2019] 1 WLR 93***. There are two questions to ask (i) what is the relevant treatment and (ii) was that unfavourable to the claimant?

57. The term "suggests the placing of a hurdle in front of, or creating a particular difficulty or disadvantage for, a person because of something arising in consequence of their disability. It will be for an ET to assess, but treatment that is advantageous will not be unfavourable merely because it might have been more advantageous." (***Private Medicine***

Intermediaries Limited v Hodkinson UKEAT/0134/15. The Equality and Human Right's Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage." Reference to the measurement against an objective sense of that which is adverse as compared to that which is beneficial was made in ***T-System Ltd v Lewis UKEAT/0042/15.***

Justification

58. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons plc v Lax [2005] IRLR 726****,* heard in the Court of Appeal, it was held that the test of justification, essentially the same for a section 19 claim of indirect discrimination under the statutory provisions then in force. requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. The position was summarised in ***MacCulloch v Imperial Chemical Industries plc [2008] ICR 1334***. The EAT in ***Hensman v Ministry of Defence UKEAT/0067/14*** applied the test set out in that case to a claim of discrimination under section 15 of the 2010 Act. It held that when assessing proportionality, while an employment tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

59. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the tribunal was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the tribunal. The Court of Appeal in ***Grosset [2018] IRLR 746*** upheld this reasoning.

60. In ***Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918*** the claimant was dismissed for unsatisfactory performance after eight

months of absence. He had been in a serious motorcycle accident whilst responding to an emergency call, and developed post-traumatic stress disorder which had prevented a return to work. The respondent accepted that the officer had been treated unfavourably because of something arising from his disability – namely his absence – but relied on the application of the Police Performance Regulations by way of justification. The EAT held that the Tribunal had erred in accepting justification on the basis that the police force's general procedure had been justified. The EAT drew a distinction between cases where A's treatment of B is the direct result of applying a general rule or policy, to cases where a policy permits a number of responses to an individual's circumstances. In the former the issue will be whether the general rule or policy is justified. In the latter, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim.

61. In the case of ***Browne v Commissioner of Police of the Metropolis UKEAT/0278/17*** the EAT held, in brief summary, that the employment tribunal were entitled to find that the individual treatment of the claimant was justified because the employer had given the claimant an opportunity to make representations asking for an extension of sick pay but had not accepted them.

Reasonable adjustments

62. The first issue is the provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In ***Hampson v Department of Education and Science*** **[*1989] ICR 179*** it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in ***Essop v Home Office [2017] IRLR 558***.

63. In ***Ishola v Transport for London [2020] IRLR 368*** Lady Justice Simler considered the context of the words PCP and concluded as follows:

> "In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally

> treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

64. Guidance on a claim as to reasonable adjustments required was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, and in ***Newham Sixth Form College v Saunders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill***. The need to focus on the practical result of the step proposed was referred to in ***Ashton***. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14***.

65. The Court in ***Saunders*** stated that:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

66. The duty to make reasonable adjustments does not extend to a duty to carry out any kind of assessment of what adjustments ought reasonably to be made. A failure to carry out such an assessment may nevertheless be of evidential significance. In ***Project Management Institute v Latif [2007] IRLR 579*** the EAT stated that:

> "… a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified."

67. In ***Tarbuck v Sainsbury Supermarkets Ltd UKEAT/0136/06/*** stated that "the only question is, objectively, whether the employer has complied with his obligations or not… If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant."

68. The duty may however involve treating disabled persons more favourably than those who are not – ***Redcar v Lonsdale UKEAT/0090/12.*** When considering the issue of reasonable adjustments, the Tribunal can consider those made as a whole – ***Burke v College of Law and another [2012] WECA Civ 37****.*

69. The EAT has emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in ***Newcastle City Council v Spires UKEAT/0034/10.*** The adjustment proposed can nevertheless be one contended for, for the first time, before the Tribunal, as was the case in ***The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16.*** Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it emerges for the first time at a hearing – ***HM Land Registry v Wakefield [2009] All ER (D) 205****.*

(viii) Burden of proof

70. There is a two-stage process in applying the burden of proof provisions in discrimination cases, arising in relation to whether the decisions challenged were "because of" the disability, but which may be relevant to the issue of whether the respondent applied a PCP to the claimant for the reasonable adjustments claim, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that

the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

71. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from those authorities. The law on the shifting burden of proof was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal, which said the following (in a case which concerned direct discrimination on the protected characteristic of disability):

> "In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

72. The application of the burden of proof is not as clear in a reasonable adjustments' claim, in particular, as in a claim of direct discrimination. In ***Project Management Institute v Latif [2007] IRLR 579***, Mr Justice Elias, as he then was, gave guidance of the specification required of the steps relied upon.

73. ***Jennings v Barts and the London NHS Trust UKEAT/0056/12*** held that ***Latif*** did not require the application of the concept of shifting burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as to whether the adjustment contended for would have been a reasonable one.

Jurisdiction

74. Whether there is conduct extending over a period was considered to include where 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 - ***Barclays Bank plc v Kapur [1989] IRLR 387.*** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the

context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner*, *[2003] IRLR 96***).

75. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***).

76. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal held**:**

> "First, it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see ***British Coal Corporation v Keeble [1997] IRLR 336***), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see ***Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800***, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see ***Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728***, paras [30]-[32], [43], [48]; and ***Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72***, para [75].
>
> 19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

77. That was emphasised more recently in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23,*** which discouraged use of what has become known as the **Keeble** factors as form of template for the exercise of discretion. Section 33 of the Act referred to is in any event not a part of the law of Scotland.

78. Some cases at the EAT held that even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any

other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.***

79. The EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14***. There it was held, in brief summary, that a failure to provide a reasonable explanation for the delay in raising the claim was fatal to the issue of what was just and equitable.

80. In ***Ratharkrishnan***. there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded:

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

81. In ***Edomobi v La Retraite RC Girls School UKEAT/0180/16*** a different division of the EAT (presided over by a different Judge) in effect preferred that approach, with the Judge adding that she did not "understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay."

82. In ***Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801*** the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason". A more recent authority from the EAT – ***Concentrix CVG Intelligent Contact Ltd v Obi [2022] EAT 149***, supported that same conclusion, although that authority is another at the same level as those in the ***Habinteg*** line, such that it does not resolve the matter finally.

83. In ***Accurist Watches Ltd v Wadher UKEAT/0102/09*** the EAT stated that, whilst it is 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. 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.

84. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has no time bar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provision provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the

conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

(ix) The EHRC Code

85. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, the following provisions in particular, but not exhaustively:

Provision, criterion or practice

"4. 5 [referred to in paragraph 6.10 below]:

"The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision…….

What is proportionate?

4.30

Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts.

4.31

Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the

provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

4.32

The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision, criterion or practice if there are other good reasons for adopting it.

Example: A food manufacturer has a rule that beards are forbidden for people working on the factory floor. Unless it can be objectively justified, this rule may amount to indirect religion or belief discrimination against the Sikh and Muslim workers in the factory. If the aim of the rule is to meet food hygiene or health and safety requirements, this would be legitimate. However, the employer would need to show that the ban on beards is a proportionate means of achieving this aim. When considering whether the policy is justified, the Employment Tribunal is likely to examine closely the reasons given by the employer as to why they cannot fulfil the same food hygiene or health and safety obligations by less discriminatory means, for example by providing a beard mask or snood……"

Reasonable adjustments

"6.2

The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.

6.3

The duty to make reasonable adjustments applies to employers of all sizes, but the question of what is reasonable may vary according to the circumstances of the employer……..

6.10

> The phrase “provision, criterion or practice” is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions (see also paragraph 4.5)
>
> 6.28
> The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:
> a. whether taking any particular steps would be effective in preventing the substantial disadvantage;
> b. the practicability of the step;
> c. the financial and other costs of making the adjustment and the extent of any disruption caused;
> d. the extent of the employer's financial or other resources;
> e. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
> f. the type and size of the employer.
>
> 6.29
> Ultimately the test of the ‘reasonableness’ of any step an employer may have to take is an objective one and will depend on the circumstances of the case……
>
> 6.33
> [Provides a list of examples of steps it might be reasonable for an employer to take]”

Observations on the evidence

86. The Tribunal considered that all of the witnesses were seeking to give honest evidence. They stated the position as they understood it to be. The **claimant** gave evidence as we have described, using notes that are referred to, and in general we accepted her as reliable. **Ms Wilson** and **Ms Simpson** were both we considered reliable witnesses, who explained matters clearly and in a manner that we considered to be reliable. Ms McKinnon had sadly died, which meant that some points that she might have been able to explain were not. Ms Wilson did seek to explain some of the issues from discussions she had had with Ms McKinnon or her understanding of matters more widely. That is hearsay evidence, but evidence we are able to consider. There was little that was factually in dispute between the parties on what had happened, the focus was on what analysis should be applied to the facts having regard to the statutory

provisions engaged. We required to address matters from the evidence we heard.

Discussion

87. We start with what this case is not about. It is not about what was argued to be a breach of the Health and Safety at Work etc Act 1974, or the Management of Health and Safety Regulations 1999. Those provisions are not directly within our jurisdiction. There may be issues to address within our jurisdiction, but we must address the law under the Equality Act 2010, as that is the Claim that the claimant has presented to us, and is within our jurisdiction. It is also not a claim of unfair dismissal, as that has never been the claimant's argument for entirely proper and understandable reasons. The termination of her employment was agreed, and not appealed. This is a claim under the Equality Act 2010. We must apply the provisions of the Act relevant to the claims made, having regard to authority and other guidance, to the facts as we have found them to be.

Knowledge of disability regarding hearing impairment

88. In the event it was not disputed that this was in January 2020.

Jurisdiction

89. An issue of jurisdiction was raised, for any matter that arose prior to 13 April 2022, which was prior to the dismissal. The claimant had been absent from 7 December 2020 and did not return to work from that date. The Tribunal was not satisfied that there was conduct extending over a period up to the point of dismissal, given what was pled by the claimant and the facts as we found them to be. The decisions to remove audio and phone answering duties from the claimant were taken in September 2020 and October 2020 respectively. They continued up to the point of her absence on 7 December 2020. Nothing in relation to them was ever "triggered" thereafter, in that the claimant was not fit to return to work and no suggestion was ever made that she was, or might be if those arrangements were changed in any way. It did not appear to us that the argument made by the claimant of conduct extending over a period was correct. That conclusion was supported by the occupational health reports

indicating that issues of adjustments should be deferred until return to work was possible. That stage was not reached. It appeared to us that the claims made were outwith the primary time limits. By 7 December 2020 any argument as to conduct extending over a period had, we concluded, ended.

90. That left the issue of what was just and equitable. We concluded that there had been no sufficient reason put forward in evidence for the delay in commencing the claim. In truth little evidence was led about that, although some points were made in submission. We do accept that the claimant had mental health difficulties including stress, anxiety, low mood and depression. But reference to breaches of the Act were made by Mr Quin, acting for his wife the claimant, in his email to Ms Wilson on 17 November 2021. That indicated a knowledge of such an issue at that point in time. A claim could have been submitted then or shortly afterwards, and indeed one could have been raised earlier, after the claimant started her absence from work in December 1990. There was no real evidence before us of what knowledge the claimant had as to her rights at that stage, or in the periods firstly to November 2021, and secondly to her commencing Early Conciliation.

91. The difference that was likely to have prompted the commencement of early conciliation was that there was an agreed termination of employment in June 2022, but we did not think that sufficient. This was not a case about dismissal, as there was no claim of unfair or unlawful dismissal pursued. The reason for delay was not sufficiently explained in our view.

92. That is not however sufficient of itself to exclude the just and equitable extension. We consider that we should take into account all of the circumstances. Another factor to weigh in the balance is prejudice. Here a material witness, Ms McKinnon has died. We understand that that occurred during 2022, but the precise date, or a month, was not given to us. Had early conciliation commenced by March 2021, and a Claim Form presented in or around May 2021, there is either a possibility of the hearing taking place before Ms McKinnon died, or arrangements might have been taken to preserve her evidence. We cannot be sure of that, but there is at least a material possibility of the evidence being preserved and available.

The delay in our view is most likely to have caused prejudice to the respondent, quite apart from the overall passage of time. The prejudice was, at the least potentially, evidential in nature. There is much that Ms McKinnon might have explained in evidence, from the events of January 2020 onwards. Another factor that is to be taken into account is the prospects of success, which we address below. We consider that in this respect it is preferable to proceed on the basis that the claimant has at least a statable case. We also take into account the claimant's health, and the fact of her absence from work. She did not have legal advice. We balanced all these considerations, but did not consider that the claimant had established that it was just and equitable to permit jurisdiction in all the circumstances. The delay was material, not sufficiently explained, and during that delay material prejudice was caused to the respondent. These considerations were we considered greater than those which favoured the claimant. We concluded that the Tribunal did not have jurisdiction to consider the claims made as the claimant has not established that she falls within the terms of section 123. We then proceeded to address matters lest we were wrong in that.

Discrimination arising from a disability

93. The Tribunal was satisfied that the claimant's difficulties in separating home from work life, as she explained in her evidence, were something that arose from her disability. It was also satisfied that her hearing difficulties, especially from January 2020 when she consulted her GP, were also something that arose from her disability.

94. The next question is whether there was unfavourable treatment of the claimant by the respondent. The claimant relies on the failure to carry out a risk assessment prior to the hybrid arrangements being introduced in June 2020, or again in September 2020. There are fundamental difficulties with that approach. Firstly, not carrying out a risk assessment is not, in our view, unfavourable treatment under the Act. There may be issues under other provisions for risk assessments, such as the Management of Health and Safety Regulations 1999 for example, but these are not within our jurisdiction. Unfavourable treatment is more focused on what is or is not done which may follow any risk assessment or be identified had one been

done. It is not the risk assessment that matters in this context, but what should have been done thereafter. Secondly, a risk assessment was prepared on 31 August 2020. It was prepared without input from the claimant, and had some inaccuracies as a result, but one was done. It was for the purposes of Covid-19 arrangements, and more informal than one under the policy for risk assessments more generally.

95. Thirdly, a major source of the claimant's concerns as she expressed in her evidence was that she was not able to carry out the tasks of answering phones or audio typing as she had wished to, and felt that she had let the team down. But Ms McKinnon told her not to do them because of her difficulties with hearing impairment, as she had explained, and the claimant did not articulate any concerns over that to her. There was also a discussion about the position being under kept under review. But despite that the claimant did not raise the issue again. Ms McKinnon was obviously trying to help the claimant when she decided to remove those duties, and what she did, given all the circumstances, we do not consider falls within the definition of unfavourable treatment in all the circumstances. That is supported by the fact that when Ms Wilson emailed to say that she was available during Ms McKinnon's absence the claimant did not contact her about the issue of a hearing loop or similar, nor did she raise that when called in January 2022.

96. Fourthly, the claimant did not mention working in a room alone to Ms McKinnon or otherwise. She had been working on a rota of two days at home and two days at work. When the issue of not separating home and working lives was mentioned, Ms McKinnon offered her to work from the office. That itself was not unfavourable treatment, but an offer to seek to improve matters. The claimant just said that she did not wish to do that, or words to that effect. Again, these are not the circumstances of unfavourable treatment in our view. What was striking was that the claimant did not suggest that she had told Ms McKinnon that she could work in the office full time if she had her own room, or words to that effect. Others did work in the office full-time, such as Ms McKinnon herself and one other member of staff. It may or may not have affected the rota, as the claimant had assumed, but for all that is known some may have preferred to work from home full time, and such a solution may have suited

everyone. What is significant in this context is that not working on a hybrid basis was offered to the claimant, and she rejected it. Working in a separate room was the only practicable step that the claimant could refer to in her evidence, although it had not been suggested either to the respondent at the time or in any of the pleadings. We did not consider that in any event any of these matters could be said to be something that arose because of the disability. The disability was the context, but there is not the causation necessary for a breach of the Act.

97. Even if the claimant had proved the first part of the test we consider that the respondent has proved the defence of objective justification. The aim was effective use of resources, to paraphrase. In all the circumstances we concluded that what was done was proportionate. As that point is academic however we do not address it in further detail.

Reasonable adjustments

98. Again, we consider that there are fundamental difficulties with the claimant's approach. Firstly, the PCP she seeks to rely on is not, we consider, a PCP as that term is explained in authority. Secondly, even if it were to be, not carrying out a risk assessment is not sufficient. As the ***Latif*** case explains, it may be evidence of something but is not a claim under these provisions by itself. Thirdly again as noted above, issues of risk assessment of themselves are not within our jurisdiction. Fourthly, however, at the hearing, the claimant said that she would have sought to work from the office in a room on her own and was a matter that we considered given the authority to the effect that the step can be identified during the hearing. That is also in the context that the duty to make the adjustments lies with the respondent, and it is for it to identify that, not (at least not necessarily) the claimant.

99. We did not consider that such a step was a reasonable one required of the respondent to avoid the disadvantage created by the PCP. The first issue is that of actual or imputed knowledge of the disadvantage. We did not consider that there was any evidence of this. Separately, there was no indication from the claimant at the time, to the respondent, that she would

find that acceptable, her stated concerns being to avoid Covid 19 transmission for perfectly understandable and appropriate reasons. She was offered a return to working in the office all the time. She said that she did not wish to do so. That was not further explained by her at the time, and she did not, as we state above, mention working in a separate office. There was no medical or other evidence that had a sole room been offered to the claimant, that would have avoided the disadvantage from any PCP. It appeared to us that that issue, of working in a room alone, was not a disadvantage from the PCP but was related to concerns for the claimant's mother, and herself, if she caught Covid. That was not therefore a matter falling within section 20. It was not easy to identify such a PCP as the claimant herself had only relied on the risk assessment issue, which as discussed above had the factual difficulty that a form of risk assessment had been undertaken, however imperfectly. It did not appear to us from the evidence we heard that the sole room issue was one that was relevant to mental health matters, or hearing impairment. Indeed, one advantage the claimant spoke to of being in the office was the ability to discuss difficult work issues in reports and other documents with colleagues, and working alone would not assist that but hinder it. Whichever way we looked at the matter, we could not identify a disadvantage from a PCP within the terms of the statutory provisions in this context. We concluded that we could not in any event make a case for the claimant that she herself had not pursued. That would have been to enter the arena impermissibly. We did not have a basis to find for the claimant in this respect.

100. That leaves the issue of a loop system or similar aid. That is the strongest of the claimant's arguments. The claimant we consider did mention that possibility initially to Ms McKinnon in January 2020 but did so in general terms. Such a system could not be actioned until the claimant had received hearing aids, which she did on or about 8 September 2020. The leaflet she gave to Ms McKinnon on 1 September 2020 was not before us, but we accept that that too had been done. The position was to be reviewed, as we accepted from Ms Wilson's evidence on that issue, but that in the context that duties were taken from her without objection, there was a review of her aids from an audiologist in early to mid October 2020 with changes made, and time for that to be worked with, and at no stage in the

period to 7 December 2020 did the claimant ask Ms McKinnon or Ms Wilson about a loop system or similar. The claimant was latterly absent from work on account of sickness, which was related to her mental health. We do accept that she had genuine feelings of letting the team down by not being able to do the audio or phone work, and not being able to do so may have affected her self-esteem for example, but that had been taken from her in an effort at responding to the difficulties she had as explained above.. The issue that Ms McKinnon had knowledge of was the hearing impairment. She did not have actual or imputed knowledge of the concern over not letting the team down, which might be within the mental health category of impairment. In the absence of such knowledge there is no breach of the sections, but in any event in all the circumstances we do not consider that it was a reasonable adjustment, in that period from 8 September 2020 to 7 December 2020, to make arrangements to provide a loop system or similar to enable the claimant to do those tasks. Thereafter that issue was never engaged, as the claimant was not able to return to work.

101. Whilst the claimant's concerns as to letting others down are understandable, they are in our view minor ones in all the circumstances. That is supported by the fact that the claimant did not raise them with anyone at the time, but also as some in the office did not do all tasks, such as that not all did audio typing and not all did the Scottish Government audit work. There was no suggestion of complaints by colleagues or similar. The audio work was reducing substantially. In the circumstances, the claimant was not letting the team down. She was doing her share of the work. She had more than enough to do, and did so. We do not consider that had the claimant been provided with such a system, or told specifically that it would be, that would have made any difference to the events that took place. She would still have retired through ill health, for the same reasons. There was no substantial disadvantage in this respect but even if there could be said to be such, we did not consider that providing a loop system or similar to the claimant was a reasonable step required of the respondent in all the circumstances.

102. What was in fact done by the respondent was in our view all that was reasonably required of them, and we did not identify any breach of the Act.

In our assessment we took into account the terms of the Code of Practice from the EHRC. As ever in such cases more might have been done, in a perfect world. The respondent might have asked the claimant more about her circumstances in the latter part of 2020, and Ms Wilson might have responded to Mr Quin's email of 23 November 2021 with her comments, for example, but these are details which do not affect our assessment of the application of the law to the facts.

103. As a result of the analysis above, even if there had been jurisdiction, the claims would fail. In the event therefore no issue of remedy arises.

Conclusion

104. For the reasons given above the claim must be dismissed as outwith the jurisdiction of the Tribunal. Even if there had been jurisdiction they would have been dismissed on their merits. The decision is unanimous. We do however wish to acknowledge that the claimant's feelings that she could have been assisted more than she was are genuine, and we were sorry to hear the evidence of the mental health issues that she experienced, which led to her being permanently unable to work.

Employment Judge: **A Kemp**
Date of Judgment: **20 February 2023**
Entered in register: **22 February 2023**

and copied to parties