EMPLOYMENT TRIBUNALS

Claimant:	**Miss S Green**		
Respondent:	**DFS Trading Limited**		
Heard at:	**Sheffield**	**On:**	**1, 2 and 3 September 2020**
			24 September 2020
		In chambers:	**30 October 2020**

Before:	**Employment Judge Brain**
Members:	**Mr P Kent**
	Mr D Fields

Representation

Claimant:	In person
Respondent:	Mr H Zovidavi, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was not constructively dismissed by the respondent. It follows therefore that her complaint of constructive unfair dismissal fails and stands dismissed.
2. The respondent was not in breach of the duty to make reasonable adjustments. It follows therefore that the claimant's complaint brought under sections 20 and 21 (when read in conjunction with section 35) of the Equality Act 2010 fails and stands dismissed.
3. The respondent did not treat the claimant unfavourably for something arising in consequence of disability. It follows therefore that the claimant's complaint brought under section 15 (when read in conjunction with section 39(2)) of the 2010 Act fails and stands dismissed.
4. The claimant's complaint that the respondent was in breach of the duty to make reasonable adjustments and which compliant is referred to in 5.1 of paragraph 7 of the Reasons below was presented within the time limit prescribed by section 123 of the 2010 Act.

REASONS

Introduction and the issues

1. This case was heard upon 1, 2, 3 and 24 September 2020. At the conclusion of the hearing the Tribunal reserved its Judgment. We now set out our reasons for the Judgment that we have reached following our chambers deliberations held on 30 October 2020.

2. The claimant presented her claim form on 12 February 2020. She pursues the following complaints:
   2.1. Constructive unfair dismissal. This claim is brought under the Employment Rights Act 1996.
   2.2. Disability discrimination. This is a complaint brought under the Equality Act 2010. The claimant says that the respondent was in breach of the duty to make reasonable adjustments and that she was unfavourably treated because of something arising in consequence of disability.

3. The relevant disability is the physical impairment of hearing loss. The respondent concedes that the claimant falls within the definition of disability set out in section 6 of the 2010 Act because of that physical impairment.

4. Following receipt of the respondent's notice of appearance in answer to the claim, the case was listed for a preliminary hearing to take place on 1 April 2020. Due to the *Covid-19* pandemic the preliminary hearing was cancelled. The case was then reviewed by Employment Judge Wade who issued case management orders without hearing the parties. These were sent to the parties on 19 March 2020. A copy of her Order is in the hearing bundle at pages 23aa to 23ae.

5. Employment Judge Wade identified the issues. These are set out in the annex at pages 23ad and 23ae. At paragraph 2 of her Order, she directed that if a party disagreed with the list of issues set out in the annex then the parties must write to the Tribunal and the other party by 1 April 2020. Neither party did so.

6. At the outset of the hearing the Tribunal sought the parties' confirmation that the issues to be decided remained those set out in the annex to Employment Judge Wade's Order. The parties confirmed this to be the case.

7. Accordingly, it is opportune to set out the issues here:

   1. <u>Employment Rights Act: Constructive unfair dismissal</u>

   1.1. The factual allegations of unfair treatment/failing to assist:

      1.1.1. Failing to refer the claimant to occupational health or purchase hearing aids for the claimant within weeks of her employment starting (August 2017);

      1.1.2. Failing to permit her to take holiday when she wished;

      1.1.3. Withdrawing an email role because she applied for it, and/or failing to appoint her to it (date unclear);

1.1.4. Shouting at her, threatening disciplinary action (in late August or 1 or 2 September 2018 – Harry, the head of customer services);

1.1.5. Taking an unreasonable time to obtain and discuss occupational health advice (until 12 November);

1.1.6. Taking an unreasonable time to address her grievance (2 September to 4 November).

1.2. The issues (including legal issues):

1.2.1. Did the respondent engage in the treatment above?

1.2.2. Was it without reasonable and proper cause?

1.2.3. Was it likely to destroy or seriously damage trust and confidence?

1.2.4. Did the claimant affirm her contract?

1.2.5. Did the claimant resign at least in part in response to any breaches found or for another unconnected reason (her hours of work).

1.2.6. If unfair constructive dismissal, what remedies by way of reinstatement/reengagement, basic or compensatory awards are to be given?

2. <u>Equality Act – alleged failures to make reasonable adjustments</u>

2.1. Not in dispute: the claimant has a hearing condition which put her at a disadvantage in being able to hear and take part in telephone conversations, in comparison with colleagues.

2.2. The allegations: failing to provide the claimant with an auxiliary aid (hearing aid) from the start of her employment; and/or failing to appoint her to the email role.

3. <u>Equality Act – alleged unfavourable treatment because of something arising in consequence of disability</u>

3.1. Allegation 1.1.4: did "Harry" shout at her, or speak inappropriately to the claimant because of: her hearing, her inability to hear, her inability to [do] a work task, her request for a different role, her request for referral to occupational health?

3.2. Having established the reason for "Harry's" conduct, was the reason something arising because of the claimant's disability?

3.3. Does that conduct amount to a contravention of section 15?

3.4. Did Harry know or ought Harry, to have reasonably known that the claimant was disabled by reason of hearing impairment?

4. <u>Equality Act – discriminatory constructive dismissal</u>

4.1. If any of the three discriminatory allegations are upheld, and are found to have contributed to the claimant's resignation, was that dismissal also a contravention within section 39(7)(b)?

5. Time limits

5.1. The first allegation about the provision of hearing aids may have been presented outside the relevant time limits; the Tribunal may dismiss it on that basis if it decides it was not part of a continuing discriminatory conduct or it is not just and equitable to decide it.

8. In the course of her evidence the claimant confirmed that she wished to withdraw the allegation at 1.1.6 (that the respondent took an unreasonable time to address her grievance). It will still be necessary to make factual findings about the claimant's grievance and the respondent's handling of it. However, the claimant withdrew her allegation that the respondent's handling of her grievance was such as to constitute a fundamental breach of the contract of employment.

9. The Employment Judge observed that the list of issues (in so far as it relates to the second limb of the reasonable adjustments complaint in paragraph 2.2 above) did not identify any provision, criterion or practice (PCP) which the claimant said caused her a substantial disadvantage in comparison to non-disabled comparators because of her hearing loss. When this was raised, the parties agreed that the relevant PCP was the respondent's requirement for the claimant to undertake her duties as customer service manager.

10. The Tribunal heard evidence from the claimant. She also called Andrea Leach to give evidence on her behalf. Miss Leach is a former employee of the respondent.

11. The respondent called evidence from the following:

11.1. Harry Yunis. He has been employed by the respondent for 12 years and is currently employed as the head of customer services. (Mr Yunis is *"Harry"* identified in Employment Judge Wade's Order).

11.2. Diane Hogg. She has been employed by the respondent for 27 years. She is currently employed as the head of administration.

11.3. Lauren Siviter. She has been employed by the respondent for six years and is currently employed as a customer service department manager.

12. The Tribunal shall set out its finding of fact. We shall then go on to consider the relevant law and then apply the relevant law to the facts in order to reach our conclusions upon the issues.

13. Towards the end of the claimant's employment, there were a number of overlapping events. It is, we think, helpful in order to orientate the reader to set out here a brief chronology of those events: (there is no factual dispute that these events took place) –

2 September 2019- the claimant raised a grievance about workplace issues.
11 September 2019- the claimant was interviewed about her grievance.
7 October 2019- the claimant attended an occupational health appointment arranged by the respondent.
9 October 2019- the occupational health report was sent to the respondent.
21 October 2019- 31 October 2019 - the claimant was on annual leave.

1 November 2019- the claimant commenced a period of sick leave and did not return to the workplace.
4 November 2019- the claimant was notified of the grievance outcome.
12 November 2019- the claimant and respondent met to discuss the occupational health report.
25 November 2019- the claimant was interviewed for a customer services manager role.
1 December 2019- the claimant emailed the respondent expressing unhappiness in the workplace.
23 December 2019- the claimant's employment with the respondent ended.

Findings of fact

14. The respondent is a well-known retail outlet which sells sofas and furniture to the public. The claimant worked for the respondent as a customer service manager. Her place of work was at the respondent's head office in Doncaster. The claimant worked for the respondent between 22 August 2017 and 23 December 2019.

15. The claimant underwent two interviews before the position was offered to her. The first interview was conducted by Mr Yunis and Matt Howarth. The second interview was conducted by Mr Howarth and Lauren Hully. Mr Howarth was the claimant's line manager until 1 October 2018. (Thereafter, Mrs Siviter became her line manager).

16. The respondent did not produce any notes at all of the first interview for the benefit of the Tribunal. No comprehensive note of the second interview was produced. What we have at page 23s is a copy of what appears to be a *"sales first interview assessment"* upon which there are some handwritten annotations. Perhaps confusingly, one of these annotations refers to a *"second interview".* At all events, page 23s was presented by the respondent as being the best available contemporaneous evidence as to what was discussed at the claimant's second interview.

17. The claimant's account is that she told the respondent about her hearing loss at the first interview. In paragraph 2 of his witness statement Mr Yunis says, *"this is not true – Miss Green did not mention her hearing at interview and her hearing aids are not noticeable".*

18. In paragraph 1 of her witness statement, the claimant complains that, *"There is nowhere on the application form I can log that I have a disability (application form 163-166 of the bundle). Therefore, the first opportunity to disclose this is at the interview. The interview wasn't minuted and the questions or answers have not even been logged".*

19. She goes on to say that*, "without doubt I advised them of my disability. I would not apply for a job that would be practically impossible to do without the assistance of speciality equipment".*

20. There is some merit in the points that the claimant makes. We can see from her application form at pages 23q and 23r and her CV at pages 23t to 23x that she has significant experience of working in customer services which entails a significant amount of telephone work. The Tribunal therefore accepts that she applied for the job with the respondent as she felt that she was able to do it (with adjustments for her hearing loss).

21. The Tribunal's acceptance of the claimant's case that she applied for the role as she thought that she was able to perform it does not of course assist her upon the question of the issue between the parties as to whether she informed the respondent of her hearing loss at either of the interviews. It was put to the claimant by Mr Zovidavi that the note at page 23s makes no reference to disability. It was suggested to the claimant that it would be odd for the interviewer to note the fact the claimant had a pre-booked holiday in Vietnam but not to make a note of something as significant as a physical impairment which may well impact upon the duties which the claimant was expected to undertake. The claimant maintained that, *"I did [mention it]. It would be a mistake not to. If I'm going on the telephone I'd be rumbled straightaway. I inform any potential employer."*

22. In her claim form (in particular, the grounds of complaint at page 7 of the bundle) the claimant says that she had informed the respondent *"at interview stage"* of her disability and that she would require assistance. She goes on to plead that*, "within the first week and many weeks after I kept asking for help. Harry said he would raise with occupational health. After no assistance I purchased private hearing aids at a cost of £2500."*

23. In paragraph 3 of her witness statement, the claimant says that, "*After approximately five weeks into the role I was really struggling mentally and emotionally as I was being pushed and pushed to go on calls and knew I wouldn't be able to cope with this. So I made the decision to look at sourcing private hearing aids which would give me the facility to hear people whilst on the phone. The NHS hearing aids have the speaker at the top rear of the ear where it is impossible to place a headset or handset making it impossible to hear people".* The tenor of the claimant's evidence before the Tribunal was that she found using the respondent's headsets much more commodious after she acquired hearing aids privately from Amplifon Ltd.

24. At page 38 of the bundle is a customer receipt for the hearing aids which she bought. The receipt was issued to the claimant by Amplifon who provide a service to assist those with hearing difficulties. This is undertaken by registered health professionals at Amplifon who are regulated by the Health Professions Council. The receipt is dated 7 September 2017 and shows a delivery date of 25 September 2017. There is then listed five items of equipment provided to the claimant (presumably upon the delivery date). The claimant is recorded as having paid £500 cash and then funded the balance of £1895 through a finance agreement (copied at pages 96 to 98). The total paid by the claimant for the equipment set out on the invoice is therefore £2395. However, the total payable by her for the hearing aids inclusive of interest is £3424.28. On any view, this is a significant outlay.

25. Mr Zovidavi asked the claimant about the process that she had gone through in order to obtain the equipment from Amplifon. She explained that her hearing had unfortunately got worse such that her old NHS hearing aids which she had had for some years had become outdated. She then said that she acquired some new NHS hearing aids about three weeks into her role with the respondent. (The claimant's evidence was that she acquired the new NHS hearing aids around mid-September 2017). She said that she used the new NHS hearing aids for a period of around three

weeks before, at the suggestion of her partner, contacting Amplifon for a week's trial of their hearing aids. Her trial period was between 25 September and 2 October 2017. She found the Amplifon appliances to be better. The claimant said that her NHS hearing aids were more visible than the ones that she acquired privately. The NHS ones fit over the ear and have tubing into the ear canal. The privately acquired ones sit in the earlobe. The claimant said that the NHS hearing aids were visible even if she wore her hair long.

26. The Employment Judge asked the claimant whether she was going to acquire the Amplifon hearing aids anyway to assist her with day-to-day activities. The claimant replied, *"probably not. I'd used the NHS ones for the past 18 years for everyday life. They were fine".*

27. The claimant commenced work on Tuesday 22 August 2017. She worked for the respondent five days a week between Monday and Friday. Her hours of work were either from 0815 to 1315 or 1545 to 2100 (depending upon to which shift she was allocated). The claimant was expected to deal with customer service calls between 0800 and 0900 or, if on a late shift, between 1730 and 1830. The predominant part of her role was to deal with customer issues arising on social media. The claimant fairly accepted that she seldom worked the middle shift which was the busiest time and that the 0800 to 0900 and the 1730 to 1830pm slots were generally quiet.

28. Even assuming the claimant to have worked on the bank holiday Monday 28 August 2017 she did (at most) 14 shifts between 22 August and 7 September 2017 (the date that she made the appointment with Amplifon) inclusive.

29. It was suggested to the claimant by Mr Zovidavi that the Amplifon equipment had been ordered by her on 7 September 2017. The claimant said that she opened an account with Amplifon that day and arranged a hearing test on 18 September 2017. She then took delivery of the equipment on 25 September 2017 upon a week's trial. The finance agreement had been entered into on 25 September 2017. She then took delivery of the equipment with the benefit of a trial period of seven days. Had the trial period been unsuccessful she had the right to return the equipment by 2 October 2017.

30. The Amplifon equipment was customised for her. A moulding was taken of each ear in order that the appliances could be customised. This process took place when she had the hearing test on 18 September 2017.

31. The claimant said that she had purchased the equipment from Amplifon privately because she was unable to hear customers when speaking to them on the telephone. It was put to the claimant by Mr Zovidavi that this was not correct because there was an initial training period of approximately six weeks during which time there would be little if any customer contact. Evidence to this effect was given by the claimant's witness Andrea Leach in the course of Miss Leach's cross-examination.

32. The claimant accepted this to be the case generally but said that during her training she had worked on the telephones and was asked to do so two weeks into her employment. The claimant's evidence given under cross-examination was that because of the difficulty she was experiencing

with a particular call at this early stage of her career with the respondent, Mrs Siviter had to take over and deal with it. Further, she said that Mr Yunis was in the vicinity at the time, that Mrs Siviter alerted him to the claimant's problem and that the she had been informed that the respondent would deal with the issue and there being the possibility of an occupational health referral.

33. This incident was referred to in paragraph 12 of her witness statement. The claimant's account there is that Mr Yunis happened to walk by at the time of the call and there then following a discussion involving her, Mr Yunis and Mrs Siviter about an occupational health referral. The claimant's evidence is that, "*Harry agreed and said they would raise this with HR/occupational health. I heard nothing from HR or occupational health in relation to this matter, not until more than two years later as a result of raising the grievance".*

34. Mrs Siviter's evidence was that the claimant would not have been asked to deal with a customer call so early into her employment. She found insensitive the claimant's suggestion that she (Mrs Siviter) had remarked that the claimant had *"nearly deafened"* her when the claimant turned up the volume on the call. Mrs Siviter commented that such would be an inappropriate exclamation to make in front of a person with a hearing impairment.

35. Mrs Siviter denied that Mr Yunis had become involved in any issue around the claimant's hearing loss at around this time. She said that it was not her place, as a fellow customer services assistant (as she was at that time) with no managerial responsibility for the claimant, to take it upon herself to draw a matter so personal to the claimant to anyone else's attention.

36. Mrs Siviter accepted that she had informed Mr Yunis at around this time of concerns she entertained that the claimant did not appear to know the difference between Twitter and Facebook but justified doing so upon the basis that was a business issue whereas the claimant's disability issue was one personal to her. Mrs Siviter said she did not know how it was that Mr Yunis became aware of the claimant's disability and that she thought that he only became aware of it at a later stage in to the claimant's career with the respondent when he happened to walk by the claimant's desk and saw her phone there (which is used for Bluetooth connectivity with her hearing aids).

37. There is merit in the claimant's evidence that Mrs Siviter became aware of the claimant's hearing loss early into her employment. In paragraph 4 of her witness statement Mrs Siviter says that, *"A few weeks into her role it came to light that Miss Green wears hearing aids and could not work with too much background noise".* Mrs Siviter was asked by the Employment Judge how the issue came to light. Mrs Siviter said that she *"cannot say. I assume the claimant brought it up."*

38. For Mr Yunis' part, he maintains that he did not become aware of the claimant's condition until around three months into her role. In paragraph 3 of his witness statement, Mr Yunis says*, "I first became aware of Miss Green's condition around three months into her role. When I was walking around the department I noticed that Miss Green had her telephone on the desk; telephones are not allowed out for data protection reasons. The*

colleague who I was with asked Miss Green about this and she explained that she used her phone to control the volume on her new hearing aids. As soon as I became aware of this I talked to about Ms Siviter about this and HR were made aware in case Miss Green needed any support."

39. Mrs Siviter says (in paragraph 4 of her witness statement) that when the incident there referred to arose a few weeks into her employment, the claimant told her that, *"she would not require any further support in this area other than having her phone on her desk … this was because she had bought some hearing aids at the outset of her employment with the company and controlled them using an app on her phone. We allowed Miss Green to do this as soon as she asked. Normally employees are not allowed to have their personal mobile phone out whilst they are working. During all the time I worked with Miss Green she did not raise any concerns about her hearing until she put in her grievance. If she had raised concerns, I would have ensured that she was referred to occupational health to see if we could do anything to help."* (By way of reminder, Mrs Siviter did not become the claimant's line manager until 1 October 2018. Mrs Siviter was also employed at that time as a customer service manager until then).

40. Under questioning from the Employment Judge, Mrs Siviter confirmed that the claimant was permitted the use of her phone on her desk *"after a few weeks*".

41. The claimant took issue with paragraph 4 of Mrs Siviter's witness statement. She put to Mrs Siviter that she struggled with customer calls throughout and that customers would frequently get frustrated in their dealings with her. The claimant suggested that Mrs Siviter ought to have listened to samples of the calls. Mrs Siviter maintained that the claimant did not alert her at any point (before and after she became the claimant's line manager) to any concerns of this nature. Mrs Siviter had been able to observe the claimant and hear her side of the calls and did not observe anything amiss with the claimant's performance when call-handling. *(There were, she said, some performance issues. One such was around the claimant spending too much time dealing with 'the wrap': this is the after-call note making exercise. Another concerned errors made by the claimant giving rise to data protection issues which led to the claimant being put on to a performance improvement plan).*

42. Mrs Siviter emphatically rejected the claimant's suggestion that she (the claimant) was regularly upset when at work. She said that she recalled one occasion when the claimant had been upset because of an issue with her son and Mrs Siviter had taken her from the shop floor to comfort her in a private room. Mrs Siviter's account is that this was not a customer-related incident.

43. It was put to Mrs Siviter by the claimant that she (Mrs Siviter) had offered the claimant the use of an inner ear headset early into her employment and that was consistent with her having knowledge of the hearing impairment and of an expectation that the claimant would deal with customer calls. Mrs Siviter replied that it was usual to *"have a conversation"* with new employees about headset preference and that the claimant would need to speak to the stores department which required the

issue of a headset: being issued with a headset was not therefore necessarily indicative of a customer-facing role.

44. In paragraph 11 of her witness statement the claimant says, *"My employment started on 22 August 2017. My Bluetooth compatible hearing aids were purchased on 25 September 2017 approximately five weeks after my start date. I did not use these on calls until three to four weeks later after Harry [Yunis] had discussed this with my partner. This is eight to nine weeks after my start date. I did not have these new hearing aids at the three weeks that they claim they first became aware of my hearing aids. Prior to this I had NHS hearing aids where use of my phone was not required so the requirement they stipulated allowing me to have my phone on my desk does not fit in the time frame".* The claimant said that it was at around this time (some nine weeks into her employment) that she was permitted the use of her phone on her desk: she therefore puts the date of this permission at several weeks later than Mrs Siviter (in paragraph 40 above)).

45. The claimant replied in the affirmative to a question from the Employment Judge that the Amplifon synched to her mobile telephone whereas the NHS hearing aids did not do so.

46. The claimant was asked by Mr Zovidavi why (according to paragraph 11 of her witness statement) she had waited four weeks or so before using the privately acquired hearing aids in the workplace. She said that this was because she thought she would be referred to occupational health. She said that she had in fact used them in the workplace when dealing with calls to stores and other departments but had not used them for customer service calls.

47. That said, the claimant said that she had offered to work the middle shift on several occasions. Mrs Siviter, while accepting that she had once asked the claimant so to do, perceptively observed that this was inconsistent with the claimant's claim that she found telephone work difficult. The claimant defended her position upon the basis that she was seeking to be helpful to the team.

48. The claimant put to Mr Yunis that he had become aware of her hearing loss at interview and that he had discussed the matter with Lauren Siviter several weeks into the claimant's employment in the course of the incident referred to in paragraph 4 of Mrs Siviter's witness statement (referred to in paragraphs 36 to 38 above). Mr Yunis stood by paragraph 3 of his witness statement cited in paragraph 38) that he had not become aware of the claimant's condition until around three months into her role. (Mrs Siviter's evidence of course was that said that she had not told Mr Yunis about the issue at any stage).

49. The claimant put to Mr Yunis that, when interviewed in connection with the claimant's grievance (to which we shall come in due course) he had told Diane Hogg that he had found out of the claimant's hearing disability <u>three weeks</u> into the claimant's employment. Mr Yunis was taken to the note of interview at pages 50 to 58. There, it can be seen that at page 57 Mr Yunis said to Mrs Hogg that the claimant had not disclosed *"any of that in interview [ie the hearing loss] and found out three weeks into her employment and I have encouraged her and spoke with Lauren [Siviter] to*

encourage her to speak with HR to see if there is anything we can do further via occupational health but this was 100% not disclosed at interview and Lauren will be able to confirm that".

50. When this was put to him in cross-examination, Mr Yunis maintained that there was a typographical error and that *"three weeks"* should have read *"three months".* Mr Yunis reiterated his account that he only became aware of her hearing loss three months into her employment when he had walked past the claimant's desk accompanied by Mr Howarth. Mr Yunis said that Mr Howarth asked her why the phone was on her desk and upon it being explained, the claimant was allowed to have her phone out as an adjustment. Mr Yunis reminded the claimant that he was not her direct line manager at the time. This was Mr Howarth. He said that he can recall the incident as he and Mr Howarth were walking out at the end of the working day.

51. The claimant put it to Mrs Siviter that in its grounds of resistance, the respondent accepted that it had knowledge of the disability a few weeks after she started: *(see paragraph 2 of the ET3 at page 21).* It is perhaps unfortunate that this point was not put by her to Mr Yunis. In his closing submissions, Mr Zovidavi was unable to assist the Tribunal upon the question of to whom within the respondent this knowledge was imputed and in respect of whom this concession had been made.

52. It was also put to Mr Yunis by the claimant that Mr Yunis had discussed the claimant's hearing issue with her partner. The claimant's partner is an employee of the respondent. Mr Yunis said that, *"the conversation never happened from my memory".* When she gave evidence in cross-examination, the claimant said that she, Mr Yunis and her partner had discussed the matter across their desks.

53. The claimant suggested to Mr Yunis that the version of events which he gave to Mrs Hogg was undermined by his reference at the same interview with Mrs Hogg to Mrs Siviter being able to corroborate his position that no mention was made by the claimant of her hearing loss at her job interview. Interview. This is because Mrs Siviter did not interview the claimant. Mr Yunis accepted that he may have made *"a mistake"* when saying this.

54. We shall come to the claimant's grievance dated 2 September 2019 chronologically in due course. It is at pages 26 to 29. It raises three issues:

    (1) A complaint about an issue which arose over the Christmas period in 2018.
    (2) An issue that arose in the workplace between the claimant and Miss Leach.
    (3) An incident which arose in the workplace between her and Mr Yunis on 30 August 2019.

55. Significantly, in our judgment, there is no reference to any failure upon the part of the respondent to refer the claimant to occupational health or of a failure to provide an auxiliary aid or other assistance for the claimant's hearing loss over the preceding two years. It was suggested by Mr Zovidavi that in reality the claimant had been able to cope in the workplace for a period of two years between August 2017 and 2019 and was

managing in her post. The claimant said that she was raising verbal complaints about the issues.

56. From all of this, the Tribunal reaches the following conclusions.

57. The Tribunal finds on balance that the claimant did mention the fact of her hearing loss at the two job interviews. Firstly, it is difficult to understand why she would not have done so. It is evident from her CV that she has long experience of working in an environment involving significant amounts of telephone work. She would know what to expect when carrying out such a role. There is much merit in what she says about the possibility of being *"quickly rumbled"* were she to have omitted to mention it and then been found wanting.

58. Secondly, the respondent's documentation is very poor. The claimant is right to say that there is nowhere for her to make a declaration of disability upon the application form. (We should say that as telephone work is intrinsic to the job this will be a permitted enquiry pursuant to section 60(6)(b) of the 2010 Act).

59. Thirdly, we accept that at the time of the interview the claimant was wearing NHS hearing aids which are more visible than the privately purchased aids. At the time of the interview, the claimant only had NHS hearing aids. We accept that she wore the NHS aids when being interviewed. She needed to wear them. The interview pre-dated her acquisition of the Amplifon aids. The claimant wore her hair long during the course of the hearing before us. Her ears were nonetheless plainly visible. Accordingly, even if the claimant did not mention her hearing impairment the fact of it would be or ought to have been visible to the interviewers as the hearing aids were there to be seen.

60. Fourthly, the credibility of Mr Yunis' account of the interview is undermined by him having wrongly said to Mrs Hogg that Mrs Siviter was present.

61. Fifthly, the respondent admitted in its grounds of resistance knowing of the disability within a few weeks of the commencement of the claimant's employment. The respondent's position was that Mrs Siviter's knowledge could not be imputed to the respondent's management as Mrs Siviter did not become part of the respondent's management until 1 October 2018. That is on any view more than a few weeks from 22 August 2017. It follows from the concession that someone within the respondent's management was aware within a short time of the claimant's commencement.

62. Sixthly, there is much merit in the claimant's case that the respondent's timelines are flawed. The claimant's NHS hearing aids were not capable of being synched with her mobile telephone. Her phone would not be on her desk until she acquired hearing aids where synching was possible. The claimant did not acquire the Amplifon aids on trial until 25 September 2017 and did not buy them until 2 October 2017. This renders incorrect Mrs Siviter's timeline that the claimant was synching her hearing aids with her phone after just a *"few weeks."*

63. It is difficult to understand why the claimant did not use the Amplifon aids at work until four weeks after buying them. However, she had started so to do well before the end of November 2017, thus casting doubt on Mr Yunis' timeline of an awareness only towards the end of November 2017.

64. It is the Tribunal's conclusion therefore that the respondent knew or ought to have known of the claimant's hearing impairment prior to her starting work on 22 August 2017 and did so by mid-September 2017 at the latest.

65. In reaching this conclusion, the Tribunal observes that some of the claimant's evidence is illogical. The timeframe in paragraph 25 only makes sense if one credits the three weeks' trial period for the new NHS hearing aids as being from a little before mid-September 2017 to 2 October 2017. If it began in mid-September and yet the claimant completed the purchase of private ones from Amplifon on 25 September, it would be fair to say that she had hardly given the new NHS hearing aids chance. This being said, when weighing that illogicality against the issues with the respondent's evidence, we prefer the claimant's account.

66. The Tribunal finds that there was no substantial disadvantage to the claimant in dealing with customer calls after she had acquired the Amplifon hearing aids and that upon their acquisition she was able to use the headset provided to her by the respondent and carry out her duties satisfactorily (with the adjustment of being permitted to use her phone to synch with the new hearing aids). That she was able so to do after the training period is evidenced by her failure to raise any complaint about any difficulties that was experiencing with customer calls.

67. We accept the respondent's case that customer telephone work was limited during the training period of around six weeks by which time the claimant had acquired the Amplifon hearing aids anyway. Lauren Siviter's account that there is no customer contact during the training period was corroborated by the claimant's own witness. On balance, the Tribunal accepts the claimant's account that she did speak to a customer shortly in to her employment. We prefer the claimant's account because of the credibility issues with the respondent's version of events as described in paragraphs 56 to 64. That said, we accept that when Lauren Siviter saw the claimant struggling with the call early into her employment, the claimant was relieved of the duty to take that particular call, she was assigned other duties by way of adjustment and that customer contact was very limited during the training period, that being the respondent's normal procedure. There was thus only a minor and trivial disadvantage and no substantial disadvantage during this early period of employment by the claimant being expected to deal with customer calls.

68. We do not find as a fact that the claimant was substantially disadvantaged because of her disability for a period of around two years from the date of commencement of her employment.

69. Firstly, she raised no grievance about having any difficulty in undertaking her work.

70. Secondly, if the claimant thought that the respondent was going to take steps to provide her with an auxiliary aid to deal with the impact of the hearing loss in the workplace then the decision to go ahead and spend a significant amount of money on hearing aids is puzzling.

71. Thirdly, it is difficult to understand why the claimant did not use the Amplifon hearing aids once she had acquired them at the end of September 2017 for customer service calls but used them for calls to

stores and other departments. Her explanation that she thought that there would be an occupational health referral is not convincing for the reason given in paragraph 70.

72. From this, the Tribunal concludes that the claimant decided to purchase the Amplifon hearing aids because they were better than the NHS hearing aids and would assist the claimant with her day-to-day activities and not because of work needs. If the NHS hearing aids were good enough to assist her with day-to-day activities then why would the claimant commit her own money for a need that arose from work and which then may be the employer's responsibility? This is of course no criticism at all of the claimant. That is a lifestyle choice for her. If the Amplifon hearing aids make life better for her then plainly she is perfectly justified in her decision to buy them.

73. The Tribunal does not find it credible that the claimant decided to buy the Amplifon hearing aids because of work demands so soon into her employment in circumstances where (even on her case) the respondent had hardly had an opportunity to obtain occupational health recommendations about the claimant's reasonable work-related needs and the claimant had very little experience at this point of work for the respondent (in particular, of dealing with customer calls and how her hearing would impact upon her work). At this stage the claimant will have undertaken no more than 14 shifts.

74. Lauren Siviter was not the claimant's line manager at the date upon which she became aware of the claimant's hearing loss. Even though, on our findings of fact, Mr Yunis and the respondent's management were aware of the hearing loss from the outset of employment (or a few weeks into it at the latest) it is our judgment that the claimant was not substantially disadvantaged by reason of the hearing loss in the initial stages when she was going through training and having minimal telephone contact with customers particularly at the peak time.

75. Then, when the claimant had gone through training and was able to undertake customer service work she was, in our judgment, able to cope with the demands of the job. By this stage she had bought the Amplifon hearing aids. They helped her enormously with her day-to-day life as well as in work. The respondent allowed her to have her phone on her desk to synchronise with them.

76. Further, the claimant was only expected to work taking customer calls during the two quietest periods of the day and had only limited exposure to the busiest period. Had she not been capable of doing her work then one would have expected the claimant to have availed herself of the grievance procedure. It is significant in our judgment that when she did so two years into her employment no mention was made by her of the respondent's alleged failure to refer her to occupational health or acquire auxiliary aids or appliances which had a prospect of obviating any difficulties caused to her by her hearing loss within the workplace.

77. As we shall see, the claimant availed herself of the grievance procedure very quickly after the incident between her and Mr Yunis at the end of August 2019. The claimant impressed the Tribunal during the course of her evidence and her cross-examination of the respondent's witnesses as

someone who is not afraid to stand up for herself and take action to protect her own position. In those circumstances, it is simply not credible that the claimant would have soldiered on for two years, experiencing difficulty and great upset day-in-day-out without taking action about it.

78. The next issue that arises chronologically concerns entitlement to time off over the Christmas period in 2018. The claimant explains in the grievance of 2 September 2019 (at pages 26 to 29) that, *"Last Christmas time [2018] my day off was due on the Wednesday as this was my weekend to work. This was subsequently Boxing Day when everyone was off anyway and I asked if I could move my day off to the following Thursday. I was told I was unable to have this as my day off as Tara had requested a holiday. I'm sure this was after I made the request as this was requested back in November and this was given to Tara which resulted in me having to work my day off. I further tried to request a holiday for this year in December, just one day at the start of the month and was told that holidays are not able to be taken in December".*

79. Boxing Day in 2018 fell on a Wednesday. The claimant accepted that generally the respondent's employees are not able to take days off in December as, for obvious reasons, this is the respondent's busiest time.

80. Mrs Siviter, when she gave evidence upon this matter, provided a helpful clarification of matters. There were two issues at play which had become conflated. The first issue was that the claimant was entitled to a lieu day as her day off fell on Boxing Day. She did not need to book a day off for her lieu day. As said, the claimant accepted that she had received a day off in lieu of Boxing Day. The second issue was that of booking 27 December 2018 as a day of annual leave.

81. In paragraph 5 of her witness statement Mrs Siviter says that the claimant had made a request to take a day off on Thursday 27 December 2018. Her request had been made on 29 November 2018. Mrs Siviter says that that day had already been requested by another member of the team (Tara). (Mrs Siviter also gave evidence that the claimant and her partner had made adverse postings on Facebook about her because of her decision. For so doing, the claimant was spoken to by Mrs Siviter and Mr Yunis).

82. Mrs Hogg, who dealt with the claimant's grievance, was unable to conclude that Mrs Siviter had dealt with the issue unfairly. Mrs Hogg said however that she had *"shared my view [with Mrs Siviter] on how to deal with this more transparently moving forward".* Plainly, therefore, there was an issue about Mrs Siviter's handling of the claimant's request. Mrs Siviter acknowledged before the Tribunal that she could have handled the situation better than she did. In particular, she did not tell the claimant until 17 December that she could not have 27 December off. The claimant did not appeal Mrs Hogg's grievance decision.

83. The claimant's witness statement, at paragraph 21, deals with this issue. It is plain that the claimant remains dissatisfied with the grievance outcome as she says that there was no evidence that Tara had asked to take 27 December off first. The claimant says that her concerns were not investigated thoroughly. In particular, Tara's holiday booking form was apparently not seen by Mrs Hogg as part of her investigation.

84. The next matter chronologically concerns an incident which occurred involving the claimant and Mr Yunis late in the working day on Friday 30 August 2019. In paragraph 27 of her witness statement, the claimant describes discussions that had taken place around working on Saturday 31 August 2019. The claimant says that she was due to take her daughter to university that day but was prepared to come into work between 9am and 12 noon. The claimant's case is that she heard nothing further and understood that Mrs Siviter was going to work the shift on 31 August. There had also been a suggestion of Tara working that day.

85. The claimant's evidence is that she then found out late on the evening of Friday 30 August that she had been rostered to work on Saturday 31 August after all. Her evidence is that Mr Yunis approached her late on 30 August to ask if she was going to come in to work on 31 August. The claimant says that she informed Mr Yunis that she had offered to work the morning, had not received confirmation but then had been told by Mrs Siviter that she was working that day after all. The claimant says that, "*it was at this time that Harry raised his voice in an aggressive manner and said he was "sick of issues on social" and them being me, if I was saying I could not work tomorrow I risked facing disciplinary".* The claimant says that this was said in front of the whole of the office.

86. Mr Yunis' account is in paragraph 5 of his witness statement. He says that, "*On 31 August 2019 it became apparent that there was an issue regarding cover for the following day, which was a Saturday. I had been provided with a rota that showed that Miss Green had agreed to cover 9 to 12 on this date. I did not usually have involvement in the rota process and had only been provided with a copy as Mrs Siviter was away. This was not the first time that Miss Green had agreed to do shifts and then backed out at the last minute leaving the department in the lurch".*

87. Mr Yunis goes on to say in paragraph 6 of his witness statement that, *"Late on the Friday afternoon it transpired that, contrary to the rota I had been given, Miss Green was not planning to cover the Saturday shift the following day. She came to me and said that she had not been provided with the updated rota. This was not the first time that there had been issues within the social media team regarding shifts and I was frustrated about it. Miss Green was standing near to my desk and I said something along the lines of "I'm sick and tired of having issues with the social media team". This was not directly aimed at Miss Green and I do not recall saying that she would face disciplinary action if she did not work the following day – although I cannot be sure that I did not say this. I also do not believe that I shouted at Miss Green but I accept that I may have spoken at higher than normal volume. I accept that the conversation should not have happened in that way with others present. My behaviour was driven by my passion for the business and to get things right, as well as frustration as it was Friday afternoon and we did not have sufficient cover for Saturday. However, I accept that this was not appropriate*".

88. About this incident, Mrs Siviter says (in paragraph 7 of her witness statement) that, "*I am aware of the incident that occurred between Miss Green and Mr Yunis on 30 August 2019. I was not present at the time of the incident, but received a text to say that Miss Green had spoken disrespectively to Mr Yunis about whether or not she was rostered for the*

following day, which was a Saturday. It had previously been agreed with Miss Green, by Tara the team leader, that she would work on Saturday 31 August 2019, and we had then informed Mr Yunis of this as well as giving him a copy of the rota showing this. It turned out that Miss Green had not been given a copy of the updated rota, which was an error on our part. I believed that she was fully aware that she was working on that day. However, as there was a number of conversations about it (and it was clear that Miss Green was concerned that she would be asked to work more Saturdays as a result of her colleague Andrea leaving the business)".

89. This was one of the three issues raised by the claimant in her grievance of 2 September 2019. The Tribunal has already remarked upon the alacrity with which the claimant raised a grievance about this issue (which finding corroborated our conclusion that the claimant had not had cause to raise issues about the respondent's actions around the claimant's hearing loss).

90. As we have already seen, Mrs Hogg investigated the claimant's grievance. In the course of so doing, during the course of her interview with Mr Yunis she asked him about the incident of 30 August 2019. The salient parts of the interview are at pages 51 to 53 of the bundle. Mrs Hogg asked Mr Yunis to comment upon the claimant's grievance that Mr Yunis had said that he was *"sick of issues with the social media team and them being with you, and if you can't work Saturday, you risked facing disciplinary".* Mr Yunis, when asked whether he had said these words, replied, "*I can't remember, I did say I am sick and tired of having these issues with the social media team. Sally had agreed with Lauren and Tara to be working the Saturday from 9 to 12 having the Monday off and working the Wednesday and the following Saturday as per the rota I was given, then Sally completely denied this in the conversation with me and said she had never been given the rota.*" Mr Yunis was then asked by Mrs Hogg whether it was appropriate to make these comments in a public forum. Mr Yunis said that the claimant *was "stood at my desk. I don't remember screaming at her or at a volume for anyone else to hear. I was addressing the situation".*

91. Mrs Hogg interviewed Kelly Turner (pages 73-78). She said that she was not present when the conversation took place as she had visited the toilet. Miss Turner said that, *"I came back to everyone with their heads down, Sally stood at his [Mr Yunis'] desk, he was on the phone and I realised he was on the phone to Tara. I didn't hear anything appropriate when I got there but the tone of his voice was not particularly pleasant I don't think."* Miss Turner said that she had been told by others that Mr Yunis had said that he was *"sick of issues with the social media team".* She herself had not heard him make that remark.

92. For her part, Tara accepted there to be some confusion about the rota but denied that Mr Yunis had behaved inappropriately. We refer to the notes of her interview with Mrs Hogg at pages 79 to 83.

93. Sue Bower did not hear anything untoward (pages 89 and 90). However, Laura Hulley (page 91) said that she had heard Mr Yunis say to the claimant that if she did not work the next day then he would have no choice

but to give her a disciplinary. She said that Mr Yunis spoke in forceful terms *"like a telling off".*

94. Mrs Hogg reached the conclusion (as set out in her letter to the claimant of 4 November 2019 at pages 132 to 134) that there was some evidence to suggest that Mr Yunis had behaved inappropriately and told the claimant that appropriate action had been taken against Mr Yunis.

95. Mr Yunis was in fact subjected to disciplinary action because of what had occurred on 30 August 2019. The allegation against Mr Yunis was that, *"At approximately 5.15 on Friday 30 August 2019, you spoke to Sally Green, customer service manager, in an inappropriate and unprofessional manner, on the open floor. Specifically, it is alleged you said the following: "I am sick of issues on the social media team, and them being with you, and if you can't work Saturday, you risk facing disciplinary"".*

96. Mr Yunis was frank and candid at the disciplinary hearing which took place on 22 October 2019. He accepted that it was inappropriate to conduct the conversation with the claimant at his desk in front of others. Mr Yunis said that this was *"a massive and very rare misjudgement by myself".* He accepted that it was possible *"in the heat of the moment at the end of a long week on Friday afternoon"* that he had said that he was *"fed up of all these issues in the social media team".* He said he could not recall whether he did or did not say that the issues were particularly with the claimant and that she may face disciplinary action if she did not work the next day. He said, "*either way, it's a massive misjudgement for having a conversation with Sally. Sally wears hearing aids and you have to look directly at her and speak louder to her than somebody without hearing aids and to have a conversation like that in front of everyone was wrong by me".* Mr Yunis said that there was no excuse for what had occurred albeit that he was presented with the rota issue only around 10 minutes before the end of the working day.

97. Mr Yunis was served with a written warning. This was confirmed on 25 October 2019. The individual with conduct of the disciplinary hearing noted Mr Yunis' acknowledgement that he had spoken to the claimant in an inappropriate manner on the open floor.

98. When asked about this incident during cross-examination, Mr Yunis apologised to the claimant. He accepted having spoken to her louder than normal but denied having shouted at her. Mr Yunis denied (when asked about the incident by the Employment Judge) threatening the claimant with disciplinary action if she did not work the next day. When taken to Laura Hulley's interview (in particular at page 91) Mr Yunis accepted that it was possible that he had intimated that as a possibility. When questioned further by the Employment Judge about the incident Mr Yunis said that he raised his voice with the claimant *"because of the pressure of the situation with seven minutes to go before the end of the working day. We had no one to work for the entire weekend. It was after a long week."* Mr Yunis said that he would normally speak in a normal tone with the claimant.

99. The Tribunal finds as a fact that Mr Yunis did speak to the claimant in a louder tone than usual and said the words to the effect that he was *"sick of issues on the social media team, and them being with you [the claimant]*

and if you can't work Saturday, you will be facing disciplinary". The claimant's account upon this was clear. Mr Yunis accepted that he may have threatened the claimant with disciplinary action (both at the disciplinary hearing and in evidence before the Employment Tribunal). That he had made a threat of disciplinary action is corroborated by the account of Laura Hulley. On balance therefore, we find as a fact that these words were said and that Mr Yunis raised his voice when uttering them. From the claimant's perspective, it was reasonable for her to take the view that she had been shouted at by him.

100. The Tribunal concludes that the claimant was therefore unfavourably treated by Mr Yunis on 30 August 2019. On any view, being shouted at in front of others and threatened with disciplinary action where the employer was at fault for being disorganised when arranging the rota is unfavourable treatment.

101. It is significant that Mr Yunis did not have to raise his voice in normal circumstances when speaking to the claimant.

102. We find that Mr Yunis raised his voice on this occasion because of his frustration at being presented with a difficult situation shortly before the end of a working day at the end of a busy working week. Mr Yunis was under pressure because he needed to make sure that there was cover to work upon the next day. This was a Saturday and was anticipated to be a busy day. Mr Yunis was of course in the wrong (as the respondent determined at the disciplinary hearing) to raise his voice and upbraid the claimant in a public arena. However, the reason he did that was because he attributed the situation to the claimant. The Tribunal is not saying that the claimant was at fault. Indeed, Mrs Siviter accepts there to have been some confusion on the part of the respondent with the rota. However, the fact of the matter is that Mr Yunis' actions that day arose in consequence of workplace pressure and management confusion over the rota.

103. The next issue chronologically arises out of a job opportunity which arose in October 2019. Mrs Siviter says in paragraph 16 of her witness statement that*, "On the morning of 8 October 2019 we made the team aware that Jane, a customer service manager, was transferring to another department. Although I did not suggest that I was recruiting to replace this colleague, that afternoon Miss Green emailed me to let me know that she was aware that a position had become available (please see pages 99 to 100 of the bundle). In her email, she requested to be considered for the position of "sole responder to emails" as she felt that it would solve a number of issues for her including her childcare situation, the fact that she was looking to increase her hours and the fact that the position was largely email based rather than telephone based".*

104. Mrs Siviter has summarised accurately the contents of the claimant's email of 8 October 2019 to this effect which is at pages 99 and 100 in which she intimates that her son was showing *"signs of distress at being left alone when I'm on the late shift."* In relation to the issue around telephone work, the claimant said in the email that *"going back to the aforementioned regarding my current position with my disability and calls being difficult and responding to the emails would reduce this problem. I understand that calls are still required to be made but speaking is so much less stressful*

when talking to stores and admin and other departments than it is customers".

105. The *"aforementioned"* referred to by the claimant in her email of 8 October 2019 is to her having been referred to occupational health in September 2019. The reason for the referral arose because, at her grievance meeting held on 11 September 2019 with Mrs Hogg and Lucy Hollingsworth, the claimant mentioned that she wore hearing aids and had referred to so doing at interview. She also said that she had asked Mr Yunis to see if the respondent could offer any further help. There was nothing from the respondent in the grievance outcome letter at pages 133 and 134 to rebut what the claimant said about the job interviews and Mr Yunis' knowledge of her hearing loss. This corroborates the Tribunal's earlier findings in claimant's favour upon these points (in paragraphs 57 to 64). That the claimant raised difficulties with her hearing in September 2019 and not before corroborates the Tribunal's finding that for the first two years of her employment she was able to manage her duties but was then encountering difficulties. That her difficulties came on incrementally is underscored by the letter that she sent on 1 December 2019 (pages 177-179) where she says that more than two years had passed from her commencement of employment and that she had "<u>now</u> hit breaking point" *[emphasis added].*

106. Lucy Hollingsworth, who was present at the meeting of 11 September 2019 in order to make notes and who is a member of the respondent's HR department, mentioned an opportunity for the claimant to be referred to occupational health. The claimant agreed for a referral to be made. The claimant said (in the note at page 47) that her hearing aids have Bluetooth and that she was sure there would be a device available in order to connect the hearing aids with her work computer. The claimant mentioned, in paragraph 40 of her witness statement, that her current employer has installed such a device. It is the claimant's view that such assistance could and should have been offered by the respondent. The claimant noted that her current employer had installed the device upon her computer within two weeks of her commencing work with them. Her evidence is that this "*should have been offered by DFS within a similar time frame and not more than two years".*

107. The claimant said, towards the end of the interview with Mrs Hogg of 11 September 2019, that she dreaded going into work. This was because of a number of issues in addition to the three points set out in the grievance email at pages 26 to 29 and referred to in paragraph 54 above. It is not necessary to go into any detail about these. Suffice it to say that, in broad terms, the issues raised by the claimant were:

107.1. Being treated differently from other members of staff.

107.2. Being wrongly being accused of bullying Miss Leach. (The claimant fairly accepted that emails that she had sent to Miss Leach may have appeared unnecessarily "brash" as the claimant put it).

107.3. Issues around the claimant's alleged misuse of the respondent's social media site (concerning alleged inappropriate remarks made about Mrs Siviter).

108. The claimant was seen by Yvette Stables, occupational health advisor, on 7 October 2019. Yvette Stables' report dated 9 October 2019 is at page 103.

109. Yvette Stables recorded that the claimant had informed her that *"she continues to undertake her usual hours and duties at work however, she has difficulty hearing callers due to background noise at work. Sally says she manages well when there is no background noise and in one to one situations. She says adjusting the volume on either the telephone headsets or her hearing aids increases the distortion of the conversation. Sally tells me she enjoys her job and believes the current area she is sitting in is the quietest location within the open plan work environment. She informs me that she feels very anxious not being able to hear conversations correctly and she perceives this as not doing the best for* her customers".

110. Ms Stables opined that the claimant *"appears to have adjusted well to her condition in her home life. However, having completed a well validated mental health evaluation I believe Sally would benefit from a referral to counselling in order to support her to remain in work. I have also suggested she contact Access to Work in order to have specialist input in aids which may help her to better manage this condition at work".*

111. Ms Stables then suggested, by way of management advice, that a stress risk assessment be carried out by the claimant together with management in order to identify any sources of stress and make a plan of action to address those issues. She said that the claimant would benefit *"from written agendas and minutes from meetings and if possible one person should speak at a time in meetings in order to ensure Sally is included".* A link was then provided to furnish the respondent with further information on assistive technology and Bluetooth devices. Finally, Ms Stables said that the claimant was likely to be considered to have a disability for the purposes of the 2010 Act.

112. The claimant met with Mrs Siviter and Mrs Hogg on 12 November 2019. The notes of the meeting are at pages 137 to 141. Mrs Siviter says in paragraph 25 of her witness statement, that the purpose of the meeting was to discuss the occupational health report so that more could be learned about the claimant's condition. Mrs Siviter asked the claimant how often she undergoes audiology reviews. She said that she went to see the audiologist shortly after obtaining her job with the respondent. It was at such a consultation that she was informed that her hearing had changed and she required new hearing aids. She then said that, *"they didn't work so I sourced my own hearing aids from Amplifon, I bought these and they are a million times better than the NHS."* During her cross examination of Mrs Siviter, the claimant said that the Amplifon hearing aids were *"a vast improvement"* upon her NHS aids. This is corroboration of the Tribunal's earlier finding (in paragraphs 68 - 72) that the claimant did not find the NHS-prescribed hearing aids to her satisfaction and she that she acquired the Amplifon hearing aids not because of issues within the workplace but rather to assist her with her day-to-day activities.

113. The claimant confirmed at the meeting of 12 November 2019 that she struggles with conversations across the office. The claimant was receptive to the idea of undergoing counselling as recommended by Miss Stables.

114. Upon the question of auxiliary aids and making contact with Access to Work, the claimant is recorded as having said (during the meeting of 12 November 2019) that according to the Access to Work website the employee needs to speak to the employer first. She gave evidence before the Tribunal much to the same effect. There was then a discussion about assistive technology and Bluetooth devices. From this, it appears that the respondent was willing to look at the question of obtaining auxiliary aids to assist the claimant.

115. Mrs Siviter was asked by the claimant why she had reneged on an agreement to meet with the claimant on 7 October 2019 in order to discuss the meeting with occupational health. Mrs Siviter said that a meeting had been arranged for that day to discuss the occupational health meeting and that a separate meeting also had been arranged to discuss issues with the claimant's performance. Mrs Siviter said that she was advised by HR not to have any meetings with the claimant pending the outcome of the grievance and hence both meetings were postponed. She accepted that she had not given this as an explanation for the postponement and had simply told the claimant that *"something had cropped up."* The performance issues were not, she said, sufficiently serious to warrant anything more than an offer of support around *"system issues"*.

116. Mrs Siviter was also asked to justify the delay from 9 October 2019 (when the occupational health report was received) until 12 November 2019. She justified the delay upon the basis of: HR advice not to meet with the claimant until the grievance outcome was communicated to her (which happened on 4 November 2019); the claimant's annual leave from 21 October 2019; and the claimant's sickness absence from 1 November 2019. She said that she harboured the hope at around this time that she and the claimant had turned a corner, describing how she and the claimant had worked well together upon two evenings in October 2019 when Mrs Siviter had bought pizza for the team.

117. Mrs Siviter says in paragraph 28 of her witness statement that following the meeting of 12 November 2019 she sent an email to Miss Hollingsworth (at pages 142 to 143) in which Mrs Siviter asked for assistance in researching and sourcing the necessary equipment.

118. Mrs Siviter then says in paragraph 29 of her witness statement that in the light of Miss Hollingsworth's advice she needed to liaise with IT to find out what assistance could be provided. IT asked her to contact the claimant to find out the kind of hearing aids she wore. Mrs Siviter's evidence is that IT had told her that the claimant's computer would be able to connect directly to her hearing aids through Bluetooth but further information was needed about the kind of hearing aids she used.

119. Mrs Siviter did not know the kind of hearing aids worn by the claimant but said that she would find out. For her part the claimant said that she would let Mrs Siviter know the Bluetooth capabilities of her hearing aids and inform her of this over the weekend. Mrs Siviter then contacted IT on 25 November, the claimant having provided the necessary information.

120. The correspondence between Mrs Siviter and Miss Hollingsworth (pages 142 and 143) is dated Wednesday 20 and Thursday 21 November 2019. 25 November was a Monday. From this, the Tribunal infers that the claimant kept her word to find out the information over the weekend of 23 and 24 November and provided the information to Mrs Siviter by 25 November at the latest.

121. Mrs Siviter rejected the claimant's suggestion before the Tribunal that Bluetooth connectivity through her computer could have been implemented much sooner. She accepted that the facility had been there throughout but that she had not been made aware by the claimant of such a need until late 2019.

122. We now revert to the issue of the job opportunity of which the claimant became aware of 8 October 2019. It appears from paragraphs 16 and 17 of Mrs Siviter's witness statement that she (Mrs Siviter) had to some degree jumped the gun and perhaps created a misleading impression that Jane's resignation provided an opening for the claimant as a *"sole responder to emails".* Mrs Siviter forwarded a copy of the claimant's email (at pages 99 and 100) to Mr Yunis. The email said simply *"help me".*

123. Mrs Siviter accepts that she had *"panicked as [the claimant] was asking for a position that did not exist and was clear that she could not do a full-time role (due to her childcare arrangements)".* The claimant maintained that she could maintain a full-time position, that she was able to manage her childcare issues and that quite simply the new role was preferable for her than working late shifts for the respondent in her substantive role and being at work while her family were at home.

124. It is not clear what if any assistance Mr Yunis provided to Mrs Siviter in reply to her request for help. Although Mr Yunis touches upon the issue of the vacancy in paragraph 12 of his witness statement (corroborating Mrs Siviter's evidence that there was no *"sole email responder"* vacancy) he does not say what help he gave to her to extricate her from the position that she had got herself into. Mrs Siviter does not give any evidence about this either.

125. At all events, Mrs Siviter emailed the claimant on 8 October 2019 to say that *"this vacancy only arose this morning, but I'm keen to fulfil the role quickly. The position will be advertised and open to applicants both internally and externally".* Mrs Siviter therefore does not agree with the claimant that the role was withdrawn once the claimant expressed an interest in it. Rather, Mrs Siviter says that recruitment was simply delayed for several weeks. She says that, *"it was never the case that there was a role of "sole responder to emails" nor could have one have been recruited as the team often dealt with the same customers by both email and phone and it was important that there was continuity in this respect (for example it would not have been appropriate for one of the team to be dealing a customer on the phone but then have to ask a specific team member to follow up with the email)."*

126. Mrs Siviter goes on to say that, "*On 4 November I received the go ahead to recruit for two positions, a part-time customer service manager for the social media team and a full-time customer service manager. I immediately contacted [the claimant] to make her aware of this and offered*

to send her the job specification. She replied to say that she was interested in the full-time role and I sent her the job specification accordingly."

127. It was put to the claimant in cross-examination that it was not the case that Jane exclusively worked upon emails. The claimant maintained that she did. However, the claimant conceded at least that Jane used the telephone to contact stores but said that she was not dealing with customers by phone. It was put to her by Mr Zovidavi that Jane was managed by Lauren Siviter who was therefore more likely to know Jane's job content than was the claimant.

128. Mrs Siviter's evidence is that at around 4 November 2019 only two vacancies arose. There was the full-time customer service manager position to replace Jane. Further, an opportunity had arisen to replace Katie who had left the respondent. This was the part-time social media role referred to in paragraph 126. Mrs Siviter confirmed the position to the claimant in an email dated 4 November 2019 (timed at 17:00).

129. The claimant maintained that there were three roles namely the part-time social media role to replace Katie, what the claimant described as the "*sole responder to emails"* role to replace Jane and then the full-time customer service manager role referred to in Lauren Siviter's email of 4 November 2019.

130. The Tribunal accepts the respondent's account. Mrs Siviter sent two job advertisements to the claimant on 6 November 2019 (at 1.27pm). This is consistent with there only being two available jobs. Further, the claimant applied only for the full-time customer service role. It is noteworthy that she did not apply for a role as sole email responder. Mrs Siviter's evidence (which we accept, as she is the line manager for the position) is that the job content of the full-time role is not concerned solely with responding to emails.

131. The claimant was interviewed on Monday 18 November 2019. Unfortunately, the claimant was unsuccessful. She was notified of this by Lauren Siviter on 27 November 2019 (at 12.52). Copies of the interview notes and relevant emails were produced for the benefit of the Tribunal by the respondent during the course of the hearing.

132. Mrs Siviter gave evidence before the Tribunal that the position which the claimant applied for was open to external candidates and that two of them performed better in interview than had the claimant. She said that the position was offered to one of the external candidates whom Mrs Siviter said was a stronger candidate than the claimant. She rejected the claimant's suggestion that the claimant's childcare issues played a part in the decision making.

133. If, as the claimant contends, the respondent was seeking to thwart her in obtaining another role within the respondent, it would be an odd thing to do for Mrs Siviter to draw the claimant's attention to the two available vacancies. The Tribunal is satisfied therefore that the respondent did not withdraw any role after the claimant had expressed an interest in it. Matters were certainly not helped by Mrs Siviter jumping the gun (as she herself accepts in paragraph 18 of her witness statement). That was

unfortunate and may have given rise to false hope upon the part of the claimant. However, it is clear that the respondent then wrote the job advertisements for the positions that were available and notified them to the claimant on 6 November. Neither of the roles available were exclusively to deal with email correspondence. The claimant was offered an interview for one of the roles.

134. The claimant was not in fact present in the workplace after 21 October 2019. She was on annual leave for two weeks and then was absent on sick leave after 1 November 2019 with an ear infection. It is this context in which has to be viewed the claimant's contention that the respondent took an unreasonable amount of time to obtain and discuss occupational health advice. By way of reminder, the grievance hearing took place on 11 September 2019. The claimant was then referred to and seen by occupational health on 7 October. The report was circulated on 9 October and a meeting took place to discuss it on 12 November 2019. It is the Tribunal's judgment that on any view these are reasonable timescales.

135. The Tribunal has already mentioned the claimant's new position. This is working as a customer experience advisor with Polypipe Building Products in Doncaster. The claimant's case is that she resigned on 22 December 2019. Her resignation was notified via *"My Place"* (which is the respondent's internal messaging system). This notification was acknowledged by the respondent who treated the claimant as having resigned with effect from 23 December 2019.

136. It was suggested by Mr Zovidavi that the claimant had in fact resigned on 1 December 2019. On this date, the claimant emailed the respondent (pages 177 to 180). The claimant said that she had been caused a great deal of anguish and upset and had lost faith in the respondent. She referred to a number of issues. In summary these are:

136.1. That the computer she was currently using for the respondent was Bluetooth enabled and her hearing aids may be linked directly to it. The claimant was upset to discover that this was an issue that could have been resolved over two years ago. (It is not clear <u>when</u> the computer was Bluetooth enabled).

136.2. The claimant was unhappy about the issue around the customer service manager post which had been advertised following Jane's departure.

136.3. There were domestic issues. The claimant's daughter had taken up a place at university. The claimant said that she did not wish to be working in the evening when her son was at home.

137. The claimant said*, "As a result [of these issues] I have now decided that after 28 months of working for the company I am left with no choice but to give my notice in and look for another job elsewhere with hours of 9 to 5.30 so I am home for my son. I have tried to exhaust many avenues for the problems I have faced and have not been assisted on any of these occasions. I am deeply saddened to explain this to you as I thoroughly enjoyed working on social media. Therefore, I feel I have no alternative and I will be notifying the company of that. I have been forced to terminate my contract on the grounds of constructive dismissal."*

138. The claimant denied that she had resigned on 1 December 2019. She said that she simply intimated the possibility of doing so. Michelle Neil, head of HR for retail and operations, acknowledged the claimant's email and asked her to reconsider her decision. Michelle Neil then emailed the claimant on 11 December 2019 (page 185). She said that she had looked into the issues raised by the claimant on 1 December and had concluded that the claimant had not been discriminated against because of her disability. Michelle Neil said, *"I am pleased to learn that IT have been able to support with setting your equipment up to support your hearing aids and I apologise if you feel that we could have acted on this sooner."* Michelle Neil concluded that, "*if you still feel that leaving is the right thing for you, we will accept your resignation and process your final payments".*

139. It was suggested to the claimant that she had in fact left the respondent's employment at this stage. This was upon the basis of an email sent by the claimant to her partner on 3 December 2019. This email is from the claimant at a Polypipe email address and describes the claimant as a customer experience advisor of Polypipe. It appears from the email at page 182 that the claimant had been offered a position with Polypipe on 1 November 2019.

140. Upon the basis of this, it was suggested to the claimant by Mr Zovidavi that the claimant had lied to the respondent when she said in her email of 1 December that she intended to look for another job elsewhere and that in fact she had already done so as a position had been offered to her by Polypipe. The claimant said in reply, "*that's my business. I'm not going to tell the respondent what I'm doing. At this point I'm still hoping for the customer service job with the respondent. Lauren Siviter could have discussed this with IT before 25 November 2019."* The claimant said she was also awaiting the outcome of Michelle Neill's investigation when she sent her email of 1 December 2019.

The law

141. The Tribunal now turns to a consideration of the relevant law. We shall start by considering the claims brought under the Equality Act 2010. The relevant provisions as to prohibited conduct for the purposes of this claim are to be found in section 15 and sections 20 and 21. Section 15 is the relevant provision which deems it to be discriminatory conduct to unfavourably treat a disabled person because of something arising in consequence of their disability. Sections 20 and 21 deal with the duty imposed upon employers to make reasonable adjustments where workplace systems put a disabled person at a disadvantage because of their disability.

142. The prohibited conduct referred to in paragraph 141 is unlawful in the workplace. By section 39(2) of the 2010 Act an employer must not discriminate against an employee by (amongst other things) dismissing the employee or subjecting the employee to any other detriment. In this context, the concept of dismissing the employee extends to a constructive dismissal. By section 39(5) of the 2010 Act the duty to make reasonable adjustments applies to an employer.

143. By section 15 of the 2010 Act it is unlawful for an employer to treat a disabled person unfavourably not because of the disability itself (which would of course amount to direct discrimination) but because of something arising from, or in consequence of, a person's disability. An employer may defend such a complaint upon the basis that the employer did not know or could not reasonably be expected to know that the disabled person has a disability. Further, an employer has a defence to a complaint brought under section 15 of the 2010 Act where the employer can justify the unfavourable treatment upon the basis that it is a proportionate means of achieving a legitimate aim.

144. Unfavourable treatment means in this context putting the employee at a disadvantage. The consequences of the disability which give rise to that disadvantage includes anything which is the result, effect or outcome of a disabled person's disability.

145. The Equality and Human Rights Commission's *Code of Practice on Employment* provides guidance upon the objective justification defence available to employers when seeking to defend a complaint brought under section 15. The legitimate aim in question must be legal and should not be discriminatory. It must also present a real objective consideration. Where an employer has failed to make reasonable adjustments which would have prevented or minimised the unfavourable treatment then it will be very difficult for the employer to show that the treatment was objectively justified. Even where an employer has complied with the duty to make reasonable adjustments in relation to the disabled person, the employer may still subject a disabled person to unlawful discrimination arising from disability. This can arise where the adjustment is unrelated to the unfavourable treatment complained of.

146. To be proportionate, the measure has to be both an appropriate means of achieving the aim and reasonably necessary in order to do so. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. This is an objective test. It is not enough that a reasonable employer might think that the action is a proportionate means of achieving the legitimate aim. The Tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirements. It is necessary to consider the particular employee in question in order to consider whether that treatment was a proportionate means of achieving a legitimate aim.

147. We now turn to the reasonable adjustments complaint. In considering a claim that an employer has discriminated against an employee by failure to comply with the duty of reasonable adjustment, the Tribunal must firstly identify the provision, criterion or practice applied by or on behalf of the employer or the lack of the auxiliary aid which puts the claimant at a substantial disadvantage. The Tribunal must then identify the disadvantage caused to the disabled person by reason of the application to the employee of the relevant provision, criterion or practice or by the want of provision of the auxiliary aid and the extent to which that disadvantage is caused by the disability in comparison to non-disabled comparators. The comparison exercise is so that the Tribunal can be

satisfied that the disadvantage is materially caused by the disability and not because of another reason.

148. This process then enables the Tribunal to judge whether any proposed adjustments are reasonable to prevent the provision, criterion or practice or that the provision of an auxiliary aid has a prospect of ameliorating the disadvantage in question. There must be some evidence of some apparently reasonable adjustments that could be made or that there is an auxiliary aid available and which come with this prospect.

149. The duty applies only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled employee or the extent to which it is reasonable to provide the auxiliary aid.

150. The test of reasonableness in this context is an objective one and it is ultimately the Tribunal's view of what is reasonable that matters. It is unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person. The focus of the Tribunal must be on whether the adjustment would be effective by removing or reducing the disadvantage the claimant is experiencing at work as a result of disability and not whether it would advantage the claimant generally.

151. The duty to make reasonable adjustments only arises where the employer knows or ought to know that the employee is disabled and that the employee is likely to be placed at a disadvantage by the provision, criterion or practice or the failure to provide the auxiliary aid.

152. It is for the claimant to make out a *prima facie* case that the respondent has discriminated against her. It is therefore for the claimant to make out a *prima facie* case that the respondent treated her unfavourably for something arising in consequence of disability and/or that the respondent failed to comply with the duty to make reasonable adjustments by reason of the imposition of a disadvantaging provision, criterion or practice or failure to provide an auxiliary aid. It is for the claimant to prove that she suffered the treatment and not merely to assert it. Should she do so, then the burden passes to the respondent to show a non-discriminatory explanation for the treatment.

153. An issue arises in this case as to whether or not the claimant presented her disability discrimination complaint within the relevant limitation period. The general rule is that a claim concerning work related discrimination brought under the 2010 Act must be presented to the Tribunal within a period of three months beginning with the date of the act complained of. Conduct extending over a period is to be treated as done at the end of that period. A failure to do something is to be treated as occurring when the person in question decided upon it. In the absence of evidence to the contrary, a person is taken to decide on failure to do something when that person does an act inconsistent with doing it or, where there is no inconsistent act, upon the expiry of the period in which the person might reasonably have been expected to do it.

154. Much of the case law upon time limits in discrimination cases is centred on whether there is continuing discrimination extending over a period of time or whether there is a series of distinct acts. Where there is a series

of distinct acts, the time limit begins to run when each act is completed whereas if there is continuing discrimination, time only begins to run when the last act is completed. In considering whether separate incidents form part of an act extending over a period one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents. However, even if the same individual is involved then this may not be sufficient to link the separate incidents if they are quite distinct from one another and ought to be treated as individual matters.

155. Where a complaint of discrimination concerns a denial of a particular benefit, an employee can reactivate the time limit for presenting a Tribunal claim by making another request for the benefit in question. If the subsequent request is a new application and is considered afresh by the employer then time will start to run within three months of the last occasion upon which the allegedly discriminatory policy was applied. Where the claim is based on the denial of a particular benefit, the time limit will begin to run from the date on which the last request for the benefit is refused.

156. The three months' time limit for bringing a discrimination claim is not absolute. The Tribunals have discretion to extend the time limit for presenting a complaint where they think it is just and equitable to do so.

157. There is no presumption that the Tribunal should extend time. It is for the claimant to convince the Tribunal that it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

158. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other. The prospective merits of a claim may be taken into account in weighing the balance of prejudice.

159. The prejudice to the respondent must be more than simply having to answer the claim. If that were to be a decisive factor then the discretion vested in Tribunals as to whether or not to extend time upon just and equitable grounds would largely be devoid of content.

160. In exercising discretion to allow out of time claims to proceed, Tribunals may also have regard to the checklist contained in section 33 of the Limitation Act 1980. This provision deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party will suffer as a result of the decision reached and to have regard to all of the circumstances of the case. In particular, regard may be had to: the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has co-operated with any request for any information; the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action. However, the section 33 factors are not to be adopted as a checklist and the Tribunal does not need to go through all of the factors in each and every case. The Tribunal will however err if a significant factor is left out of account.

161. The focus should not solely be on whether the claimant ought to have submitted her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other. In disability discrimination cases, there is an additional factor to be taken into account when considering an application to extend the time limit and that is the disability itself. The impact of the disability may be taken into account in assessing the reason for and length of delay in presenting the claim.

162. Claimants may also face problems in complying with the three months' time limit where the trigger is the employer's inadvertent failure to make reasonable adjustments. In such circumstances, Tribunals may be expected to have some sympathy with regard to the difficulty created for claimants by the operation of the relevant time limits.

163. We now turn to the claimant's constructive unfair dismissal complaint. By section 95 of the Employment Rights Act 1996, an employee is dismissed by the employer if (amongst other things) the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.

164. This question must be determined in accordance with the law of contract. Therefore, an employee is entitled to treat herself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or it shows that the employer no longer intends to be bound by one or more of the essential terms of it. Conduct is repudiatory if, viewed objectively, it shows an intention upon the part of the employer no longer to be bound by the contract.

165. The relevant term of the contract with which we are concerned in this case is the implied term of trust and confidence. (We shall at times refer to this as *'the implied term'* or *'the implied term of trust and confidence'*). It is well established that a breach of the implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. The Tribunal's function therefore is to look at the employer's conduct as a whole and to determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee could not be expected to put up with it.

166. Once repudiation of the contract by the employer has been established, the proper approach is then to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It is enough that the employee resigns in response, at least in part, to a fundamental breach by the employer. There must be unequivocal acceptance of the repudiation by words or conduct. The employee must make up her mind to leave soon after the conduct of which she complains. If she continues for any length of time without leaving, she will be regarded as having elected to affirm the contract and will lose her right to treat herself as discharged from it.

167. Earlier waived fundamental breaches may be revived should the employee resign in response to a *"final straw"* which, not in itself a breach of contract, must be an act in a series of earlier acts which cumulatively amounts to a

breach of the implied term. The final straw does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. However, an entirely innocuous act on the part of the employer cannot be a final straw even if the employee generally but mistakenly, interprets the act as hurtful and destructive of her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

Conclusions

168. We now turn to our conclusions. This involves the Tribunal applying the relevant law to the findings of fact in order to arrive at its conclusions.

169. We shall deal with the claimant's allegations in the order in which they appear as set out in paragraph 7 above. We shall therefore deal firstly with the complaint of constructive unfair dismissal. As we have said, it is for the claimant to show that she was constructively dismissed by reason of a fundamental breach of contract upon the part of the employer. Should the claimant fail to show that she was constructively dismissed then it follows that she was not unfairly dismissed (as no dismissal will have taken place, there being no issue that the respondent expressly dismissed her). Should the claimant establish that she was constructively dismissed, then it will follow that she was unfairly dismissed as the respondent has not advanced any potentially fair reason for the constructive dismissal.

170. The first issue (at 1.1.1 of paragraph 7) is the alleged failure upon the part of the respondent to refer the claimant to occupational health or to purchase hearing aids for her within weeks of her employment starting in August 2017. In the Tribunal's judgment, the respondent did not act in breach of the implied term by reason of its conduct in relation to this issue. The Tribunal has found as a fact that the respondent did not inform the claimant that it was going to refer her to occupational health for an assessment of her hearing loss and there was no reason for such a referral until September 2019. The Tribunal also found as a fact that the claimant purchased her private hearing aids very early on in her employment with the respondent. Her doing so is at odds with her case that the respondent agreed to refer her to occupational health in order to see if any auxiliary aids may be provided by the respondent in order to assist with her duties. The Tribunal refers in particular to its conclusions in paragraphs 65 to 73 and 112 above. This allegation therefore fails upon the facts.

171. Allegation 1.1.2 is that the respondent failed to allow the claimant to take holiday when she wished. The Tribunal's findings of fact upon this issue are at pages 78 to 83. The respondent's handling of the claimant's request to take a day's holiday on 27 December 2018 was unsatisfactory. This was fairly acknowledged by Mrs Hogg (as recorded by the Tribunal in paragraph 82). Nonetheless, on balance, the Tribunal accepts that the claimant's colleague Tara had made the request to take that day off as annual leave before the claimant did so. The respondent was entitled to

refuse the claimant's application in order to ensure that the store was covered. This contention therefore fails upon the facts.

172. Furthermore, this concerns an incident which took place around December 2018. The claimant did not resign her position until around a year later. The claimant continued to work. Therefore, even if the respondent acted in repudiatory breach of the implied term of trust and confidence by refusing the claimant a day's annual leave on 27 December 2018, by her conduct the claimant has affirmed the contract and therefore waived the right to resign from it and claim to have been constructively dismissed by reason of that breach. The claimant did not reserve her right to resign in response to the alleged breach. She continued to work. She co-operated with the respondent around the grievance process and occupational health referral.

173. The allegation at 1.1.3 concerns the allegation that the respondent withdrew the email role because the claimant applied for it and/or failed to appoint her to it. This contention fails upon the facts. We are satisfied that there was in fact no email role. We refer to the findings of fact in paragraphs 122 to 133.

174. As there was no *"sole email responder"* role, it follows that such a role could not have been withdrawn from the claimant. In any case, the evidence is that the respondent invited the claimant to apply for the two roles that were advertised in the early course of November 2019. As we said in paragraph 133, it would be an odd thing to do for the respondent to draw the claimant's attention to the two available vacancies if the respondent was really seeking to thwart the claimant in her wish to pursue another role. The Tribunal is satisfied that the claimant was given a fair opportunity of applying for the two roles that were available. She was interviewed for one of them. Unfortunately for her, she found herself up against stronger external candidates, one of whom was appointed.

175. The Tribunal is satisfied that the failure to appoint the claimant to the role for which she applied was not a repudiatory breach (or indeed a breach of any kind) upon the part of the respondent. The respondent is entitled to pursue recruitment as it sees fit. The respondent simply chose the best candidate for the position. There was no satisfactory evidence that the claimant was a stronger candidate than the individual who was appointed to the post.

176. Allegation 1.1.4 concerns the conduct of Mr Yunis. The findings of fact may be found at paragraphs 84 to 102. The Tribunal found as a fact that Mr Yunis did shout at the claimant and threatened her with disciplinary action in front of other members of staff. On any view, this is repudiatory conduct and a breach of the implied term of trust and confidence. For a senior employee to upbraid a junior employee in front of other members of staff (particularly where the junior employee is not at fault) is conduct that is likely to destroy or seriously damage mutual trust and confidence.

177. Mr Zovidavi sought to argue that the respondent having taken action to discipline Mr Yunis cured the breach of contract. The difficulty for the respondent is that a breach cannot be cured by the party in repudiatory breach nor can the breach be waived by the innocent party. (What may be waived is the right to resign in response to the breach). Once a

fundamental breach of contract is established, the issue becomes one of affirmation. The question that then arises is whether the innocent party (the claimant in this case) conducted herself so as to affirm the contract and waive her right to resign and claim constructive dismissal in response to the repudiatory breach in question.

178. The claimant did not resign from her post with the respondent until 22 December 2019. This was almost four months from the date of Mr Yunis' repudiatory conduct which took place on 30 August 2019. Between that date and the date of her resignation, the claimant had undertaken her duties with the respondent and had engaged with the respondent in connection with her grievance, the occupational health referral and the interview for the customer services manager role. Further, there was no mention by the claimant of the incident involving Mr Yunis in the email that she sent on 1 December 2019 in which she intimated the possibility of her resigning. She advanced a number of factors about which she was unhappy (which is summarised in paragraph 136) but not that episode.

179. The claimant did not add to the issues raised by her in the email of 1 December 2019 when she posted her message on My Space in which she told the respondent that she had resigned her position. Therefore, the Tribunal finds the reason why the claimant resigned was not because of Mr Yunis' conduct towards her on 30 August 2019 and in any case the claimant had waived the right to resign in response to Mr Yunis' conduct by virtue of the passage of time and her conduct in performing her role and engaging with the respondent's processes.

180. Allegation 1.1.5 in paragraph 7 is that the respondent took an unreasonable time to obtain and discuss occupational health advice. The findings of fact about this are at paragraphs 105 to 116.

181. The Tribunal finds that there was no reason for the respondent to make a referral of the claimant to occupational health for advice until the issue was raised at the grievance meeting of 11 September 2019. We refer in particular to paragraph 105.

182. In the Tribunal's judgment, the respondent progressed matters reasonably quickly once on notice of the claimant's issue. An occupational health appointment was arranged for the claimant on 7 October 2019. This is a little over three weeks after 11 September 2019. The occupational health report was then prepared and circulated on 9 October 2019. The claimant met with Mrs Siviter and Mrs Hogg to discuss it on 12 November 2019. Mrs Siviter then engaged with the claimant about the specifications of the hearing aids in order that matters could be progressed. The claimant was absent on annual leave from 21 October 2019. The period between the date of circulation of the occupational health report of 9 October 2019 and the claimant going on annual leave was therefore a period of only 12 calendar days. This did not leave a lot of time for a meeting to be arranged.

183. In the Tribunal's judgment, the respondent's conduct upon the occupational health referral and the timescales around it are not, objectively, a breach of the implied term of trust and confidence. The respondent's conduct was not such that objectively it was likely to destroy or seriously damage mutual trust and confidence. In the Tribunal's

judgment, the respondent expedited matters reasonably quickly once alerted to the need for an occupational health referral. There was nothing in the respondent's conduct around the obtaining of occupational health advice and discussing matters with the claimant that was anything other than entirely innocuous. There was nothing about the respondent's conduct around this issue which contributed to the breach of the implied term arising upon the issue involving Mr Yunis. There is therefore no final straw which enabled the claimant to rely upon and revive the breach of contract arising from Mr Yunis' conduct (which right had been waived by her) because of the respondent's subsequent conduct upon the occupational health issue.

184. The Tribunal now turns to the claimant's complaints brought under the 2010 Act starting with the claim of a failure to make reasonable adjustments.

185. It is recorded in Employment Judge Wade's Order (as set out in paragraph 7 above) that it was not in dispute that the claimant has a hearing condition which puts her at a disadvantage in being able to hear and take part in telephone conversations, in comparison with colleagues. Mr Zovidavi clarified the respondent's position during the course of the hearing (in particular during his closing submissions). The respondent accepts that the claimant was substantially disadvantaged by reason of her hearing loss in comparison with non-disabled colleagues in undertaking telephone work with effect from 11 September 2019. This was the date upon which the claimant raised the issue of her hearing loss during the course of the grievance investigation. The respondent's position is that it could not know and could not reasonably have known of the claimant's disability and that she was substantially disadvantaged because of it prior to that date.

186. It is conceded by the respondent that the claimant is a disabled person because of the physical impairment of hearing loss. The Tribunal found as a fact that the respondent knew of her hearing loss prior to the claimant starting work: see paragraphs 57 to 60. We found as a fact that the claimant disclosed the fact of her hearing loss to the respondent and that in any case the NHS hearing aids were visible for the interviewers to see. We also determined that in any case, the fact of the claimant's hearing loss became apparent several weeks after the claimant commenced her employment: see paragraph 61 to 64.

187. An employer may defend a complaint of a failure to make reasonable adjustments upon the basis of a lack of knowledge. In this context, knowledge relates not only to the fact of the disability itself but also the disability causes a substantial disadvantage to the disabled person within the workplace. Therefore, the Tribunal's findings of fact that the respondent knew of the physical impairment only takes the claimant so far. The respondent may still avail itself of the defence of lack of knowledge if it can show that it did not know or could not reasonably have been expected to know that the disability caused a substantial disadvantage to the disabled person within the workplace by reason of the application to the disabled person of a disadvantaging provision, criterion or practice or because of the non-provision of an auxiliary aid.

188. A substantial disadvantage means, for the purposes of the 2010 Act, one that is more than minor or trivial. The question that arises therefore is whether the respondent knew or ought to have known of a more than minor or trivial disadvantage caused to the claimant within the workplace because of her hearing loss.

189. The Tribunal found as a fact, in paragraph 67, that the claimant was asked to take a customer call during her training period. We found that this happened upon one occasion and that the claimant struggled with the call, requiring Lauren Siviter to take over. We also found as a fact that it was not normal practice for customer service managers to undertake customer calls during the training period. Therefore, this was an unusual and one-off event which was not repeated during the training period.

190. The training period lasts around six weeks. The claimant's training will therefore have ended in early October 2017. By this time, she had purchased the Amplifon hearing aids. The Tribunal has found as a fact that the claimant bought the Amplifon hearing aids not to assist her with her work tasks but because they were better than the NHS hearing aids for the purposes of her day to day activities. We refer to paragraphs 72 and 112 above.

191. The Tribunal found as a fact that after she had bought the privately sourced hearing aids, she was able to cope with the demands of her job. The respondent made adjustments to enable her to undertake it. Firstly, they allowed her to have her mobile telephone out on her desk in order that it could synchronise with her hearing aids. The respondent therefore made an exception for the claimant to the general rule that employees are not permitted to have their mobile telephones out while at work. Secondly, the claimant was only expected to work taking customer calls during the quietest periods of the day. We refer to paragraphs 40,44, 50 and 73 to 76 above. The Tribunal is concerned, upon a reasonable adjustments claim, not with the process that was followed by the employer but rather with the outcome. That there appears to have been no formal consultation with the claimant about matters does not detract from a finding that the respondent made reasonable adjustments over the period to September 2019.

192. We therefore agree with the respondent that they could not reasonably have known that there was any further disadvantage caused to the claimant by reason of her hearing loss until September 2019 which called for the making of additional reasonable adjustments or for the provision of an auxiliary aid. Firstly, the claimant only had one experience of dealing with customer calls prior to the purchase of the private hearing aids. Thereafter, in our judgment, the claimant was able to manage her work satisfactorily with the benefit of the two adjustments made by the respondent to which we have just referred in paragraph 191.

193. We think that Mrs Siviter made a telling point (recorded in paragraph 47) when she observed that the claimant volunteering to undertake customer service work during busier parts of the day pointed away from the claimant having difficulty undertaking the customer service role. She would hardly have volunteered to undertake work which would have caused her difficulty and distress. Indeed, such is inconsistent with her evidence

(which we accept) that she made a full disclosure of her hearing impairment at interview stage and applied for the job because she considered it to be one within her capability. She did this out of concern of being *"rumbled"* were she to hold herself out as capable of doing a job that she was unable to undertake. In our judgment, therefore, it is credible that the claimant would apply the same logic when volunteering for the middle shift: she would have feared being "*rumbled"* had she been unable to cope with the demands of it. She volunteered to undertake middle shifts in order to be helpful and because she was of the view that she was fit to do the work and her conduct signalled to the respondent that little if anything was wrong.

194. The Tribunal agrees with Mr Zovidavi that the claimant was able to manage her condition by the use of the hearing aids which she purchased privately for her day to day needs. As we have said already, the claimant of course did the right thing to purchase the private hearing aids. Plainly, they have improved her life enormously. All of this is very much to her credit. The two adjustments that the respondent made (in relation to the mobile telephone and the allocation of shifts) coupled with the claimant's management of her condition resulted in matters proceeding satisfactorily for the first two years of the claimant's employment.

195. The Tribunal is fortified in this conclusion by the fact that the claimant did not raise a grievance at any point about difficulties with her hearing loss until the issues was raised by her in the grievance hearing of 11 September 2019. As we said in paragraph 77 above, the claimant impressed us as an assertive individual who is not afraid to stand up for herself and take action to protect her position. In our judgment, it is not credible that the claimant soldiered on for two years experiencing difficulty such as to cause her to be gravely upset each day without her having had something to say about it.

196. It follows therefore that until 11 September 2019 the respondent applied to the claimant the requirement (or '*provision, criterion or practice'* to use the statutory language) to carry out her role as a customer service manager. The one-off incident during the training period may be considered to be minor or trivial given that the claimant (after the acquisition of her privately purchased hearing aids) was able to function well with the adjustments that were made by the respondent. Likewise, there was no requirement for an auxiliary aid to enable the claimant to undertake her work over and above the auxiliary aids which the claimant purchased herself (those being her mobile telephone and her hearing aids both of which doubtless she would have acquired anyway for the purposes of her day to day activities).

197. The Tribunal accepts there to have been a deterioration in the claimant's ability to cope with her work by around the autumn of 2019. Firstly, the claimant raised the issue at the grievance meeting of 11 September 2019. She had not raised a grievance about the issue before then. Secondly, in her email of 1 December 2019 referred to in paragraph 105 she referred to *"now [having] hit breaking point".* The use of the word "*now"* is indicative of the onset of a deterioration.

198. The Tribunal accepts that as at 11 September 2019 the respondent was fixed with actual knowledge of both the disability and the disadvantage caused to the claimant by it. Therefore, at this stage the duty to make reasonable adjustments and provide an auxiliary aid was engaged.

199. In the Tribunal's judgment, the respondent took such steps as were reasonable to comply with the duty. The respondent made an occupational health referral the day after the grievance meeting. The occupational health consultation took place on 7 October 2019 and the report was prepared on 9 October 2019. The respondent then set about putting in hand steps to implement the occupational health physician's recommendations. The claimant was on annual leave from 21 October 2019. She in fact did not return to the workplace because, following the end of her annual leave, she commenced a period of sick leave. Nonetheless, the respondent sought to discuss the claimant's needs with her. This resulted in the meeting of 12 November 2019 referred to in paragraph 112 between the claimant, Mrs Siviter and Mrs Hogg. Mrs Siviter then put in hand steps to investigate auxiliary aids which may assist the claimant: paragraphs 114 to 121.

200. The Tribunal accepts that the claimant's computer was capable of being Bluetooth enabled and that the provision of such an auxiliary aid had a prospect of alleviating the disadvantage caused to the claimant around the autumn of 2019 by reason of her hearing impairment. The difficulty for the claimant however is that the duty to make reasonable adjustments is aimed at assisting the disabled employee within the workplace and not generally. There was insufficient time for the respondent to commission the auxiliary aid in question following receipt by the respondent of the occupational health report before the claimant left work on 21 October 2019.

201. The Tribunal accepts that the capability to Bluetooth enable the computer had been available throughout the claimant's employment. However, it is only when the respondent was reasonably placed upon notice that but for the provision of such an auxiliary aid the claimant was at a substantial disadvantage that the duty to make reasonable adjustments arises. In our judgment, in this case, that position was not reached until the claimant raised the matter on 11 September 2019 or, at the latest, upon the receipt by the respondent of the occupational health report of 9 October 2019.

202. The relevant duty is to undertake such steps as are reasonable. It is not reasonable to expect the respondent to commission the necessary auxiliary aid the minute that the occupational health report lands upon the manager's desk. Investigations have to be undertaken and time taken to implement the recommended adjustments. Unfortunately for all concerned, this was thwarted by the claimant's absence from the workplace from 21 October 2019. The provision of a Bluetooth enabled computer screen would not have alleviated the disadvantage to the claimant being experienced by her from the autumn of 2019 given that she was in fact never in the workplace from 21 October 2019.

203. The claimant also contends that the respondent failed to make a reasonable adjustment by failing to appoint her to the sole responder email role. This contention must fail on the facts given the Tribunal's findings that there was no such role. It may of course be a reasonable adjustment to ameliorate a substantial disadvantage to move an employee from one role to another. Again, however, a difficulty for the claimant (leaving aside the fact that the sole responder to emails role did not exist) is that she never in fact returned to the workplace after 21 October 2019.

204. From the questions asked of the claimant during her interview for the full-time customer service manager role, it is apparent that that role entails dealings with customers in any case. Moving an employee to a different role may of course served to ameliorate a disadvantage caused to that employee. In this case however it appears that moving the claimant, by way of reasonable adjustment, from her substantive role to the customer service role would not ameliorate any disadvantage in any case as the job content appears similar to that of her substantive role. Even if that were not to be the case, the claimant was not in work in any case after 21 October 2019 and, as we have said, the duty to make adjustments is aimed at ameliorating disadvantage within the workplace and not more generally.

205. That there was a reasonable prospect of the provision of the auxiliary aid (by way of Bluetooth enabling the claimant's computer) ameliorating the claimant's disadvantage is evidenced by her happy experience with her new employer Polypipe. However, this does not assist the claimant for the reasons given in paragraphs 198 to 203.

206. The Tribunal observes in passing that we do not accept Mr Zovidavi's point that the claimant lied to the respondent in her email of 1 December 2019 at pages 177 to 180. It will be recalled that the claimant had said in her email of 1 December 2019 that she had been left with no choice but to look for a job elsewhere. The respondent's suggestion was that she had already in fact acquired the job with Polypipe by the time that that email had been sent and she was thus misleading the respondent. In our judgment, the claimant's email of 1 December 2019 is ambiguous and could be read either as a statement of future intention (in which case we agree that it had the capacity to mislead) or a statement of what she had decided to do and had already acted upon. The Tribunal does not accept that the claimant lied to the respondent or sought to mislead the respondent. There is of course nothing in law to stop an employee from seeking employment elsewhere and in such circumstances many employees will be coy about their activities when communicating with their employer.

207. We now turn to the complaint of unfavourable treatment because of something arising in consequence of disability. This is an issue that is unconnected with the reasonable adjustments claim. The Tribunal has found as a fact that Mr Yunis did shout at the claimant in front of other employees and threatened her with disciplinary action. As we said in paragraph 100, on any view this is unfavourable treatment. Unfavourable treatment in this context means treatment which a reasonable employer would consider to be to their disadvantage. Plainly, being shouted at in front of colleagues and threatened with unwarranted disciplinary action is unfavourable treatment.

208. The key question that arises is whether the unfavourable treatment was because of something arising in consequence of disability. In this case, it is significant that Mr Yunis did not have to raise his voice in normal circumstances when speaking to the claimant. Therefore, in our judgment Mr Yunis did not shout at the claimant for something arising from her disability (that being her hearing loss). He shouted at her because of his frustration with the situation in which he found himself late on the evening of Friday 30 August 2019. Mr Yunis shouting at the claimant and threatening her with disciplinary action was not therefore for something that arose in consequence of her deafness. It was for something that arose in consequence of business need and Mr Yunis' frustration with the situation and the pressure upon him to get matters organised for the next busy working day. Mr Yunis should not have dealt with matters as he did. He candidly and fairly accepts that he was in the wrong. The respondent took disciplinary action against him for it. All of this notwithstanding, it is plain that Mr Yunis' actions were not because of something that arose as a consequence of the claimant's deafness.

209. The Tribunal finds that Mr Yunis did have knowledge of the claimant's disability. We found that he had knowledge of it having been told of it at interview and, at the very latest, finding out about it several weeks into the claimant's employment. That finding does not however avail the claimant because the necessary causal link between her disability on the one hand and Mr Yunis' conduct on the other has not been established.

210. The issue of justification of the respondent's treatment of the claimant does not arise. There was no unfavourable treatment arising as a consequence of the claimant's disability. Had there been a causal link, then the respondent would not have been precluded from seeking to justify the treatment of the claimant by reason of a failure to make reasonable adjustments as there was no such failure. That being said, we would have held that Mr Yunis' conduct could not be justified. There was a legitimate aim, that being the need for cover to staff the store on 31 August 2019. However, it cannot be a proportionate means of achieving the aim to resort to berating a junior employee in front of her peers.

211. It follows therefore that the discrimination complaints stand dismissed. That being the case, it follows that the claimant was not constructively dismissed contrary to the 2010 Act by reason of any alleged discriminatory conduct upon the part of the respondent.

212. The only outstanding issue (referred to in 5.1 in paragraph 7) is that of whether the claimant's complaint about the alleged failure upon the part of the respondent to provide her with hearing aids was presented outside the relevant time limit. This claim has failed upon the facts in any event. By way of reminder, this is because the Tribunal has found that the claimant purchased her own hearing aids. They were purchased by her on 25 September 2017. This was very early on into the claimant's employment with the respondent. The claimant was therefore managing her own condition in conjunction with the reasonable adjustments that were made by the respondent.

213. Time will start to run for the purposes of the limitation period under the 2010 Act where the employer fails to do something. A failure to do something is to be treated as occurring when the employer decided upon it. This may be when the employer does an act inconsistent with taking the necessary step or upon the expiry of the period in which the employer might reasonably have been expected to do so. There was no act upon the part of the respondent inconsistent with failing to provide hearing aids. This is because the respondent was not aware of any need for them (the claimant having acquired them herself).

214. This being said, on any view, taking the claimant's case at its height, a period of two years from September 2017 to 2019 goes beyond when the employer may reasonably have been expected to provide the hearing aids for her. However, it is possible for an employee to reactivate the time limit for presenting a Tribunal claim by making another request for the benefit in question. In this case, in the Tribunal's judgment, this is what occurred in September 2019. Effectively, the claimant made a fresh request for a consideration of reasonable adjustments generally. The matter was considered afresh by the employer. An occupational health referral was commissioned and a meeting was held about that with the claimant on 12 November 2019. Therefore, in our judgment, the time limit within which for the claimant to bring her action concerning the alleged failure upon the part of the respondent to provide an auxiliary aid in the form of hearing aids was reactivated by the claimant's request made on 11 September 2019. The matter was under consideration by the respondent at the time of the claimant's resignation. It follows therefore that in our judgment this aspect of the claimant's complaint of a failure to make reasonable adjustments by way of the provision of an auxiliary aid was presented in time.

215. Were the Tribunal to be wrong upon this, then the Tribunal would in any case extend time in order for the Tribunal to entertain the claimant's complaint. In our judgment, it is just and equitable so to do. The prejudice to the claimant of refusing to extend time would have been to drive her from the judgment seat such that this aspect of her claim would not have been dealt with. There was no prejudice to the respondent over and above that of simply having to meet the claim. There was no submission from Mr Zovidavi to the effect that the cogency of the evidence was in any way affected by any delay (such as there was) in the claimant bringing her claim. The issues in the case were very well documented in contemporaneous evidence. The respondent was able to call the

witnesses whom it relied upon in order to refute the claimant's claims. In all the circumstances, therefore, even if this aspect of the claimant's reasonable adjustments complaint had been presented out of time it would have been just and equitable for the Tribunal to extend time to vest the Tribunal with jurisdiction to consider it.

Employment Judge Brain

15 December 2020