EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109705/2019

Held in Stornoway on 14, 15 and 16 January 2020

Employment Judge M Robison
Tribunal Member N Elliot
Tribunal Member T Lithgow

Mrs K Logan	**Claimant Represented by Ms A Buchanan - Solicitor**
Western Isles Citizens Advice Service	**Respondent Represented by Mr C Edward - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

i) the respondent has unlawfully discriminated against the claimant contrary to the provisions of section 21 of the Equality Act 2010;

ii) the respondent shall pay to the claimant compensation totalling £8,330.84**,** including interest.

REASONS

Introduction

1. The claimant lodged a claim in the Employment Tribunal claiming disability discrimination (encompassing constructive dismissal) on 7 August 2019. The respondent resists the claims. The respondent accepts that the claimant is disabled in terms of section 6 of the Equality Act 2010.

2. At the final hearing, the Tribunal heard evidence from the claimant and from Ms Suzanne Smith, a former colleague who still works for the respondent, and Mr Roddy Nicolson, her former line manager, and former strategic manager with the respondent. For the respondent, the Tribunal heard evidence from Mr David Blaney, chairman, and Mr Steven Hankinson, strategic manager.

3. The respondent had intended to call two other witnesses, namely Ms Mhairi Nash, board member, and Ms Helen Maclean, operations manager, both based in Uist. Unfortunately due to weather conditions, those witnesses were unable to travel by boat and a flight arranged as an alternative was cancelled. After consideration, the respondent decided to proceed to submissions without leading their evidence.

4. The Tribunal was referred to documents from a joint file of productions (referred to by page number). Ms Buchanan sought to lodge a late production which was allowed, Mr Edward's objection to its relevance being noted.

Findings in Fact

5. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.

Background

6. The respondent is a charity which provides a free advice service to the public on issues such as debt, money advice, benefits, housing and employment issues throughout the Western Isles. The respondent is a member of Citizens Advice Scotland (CAS), an umbrella organisation which provides centralised support including IT and human resources.

7. The claimant worked with the respondent from 14 May 2018 until she resigned on 8 March 2019, with an effective date of termination of 31 March 2019. She was engaged on a fixed term contract as a Pension Wise Guidance Specialist (PWGS). This was a specialist advisory role which was funded by the DWP through Citizens Advice Scotland. The original contract was due to end on 31 March 2019.

8. At the commencement of her employment the claimant completed an equal opportunities form stating that she had a disability but that it was currently controlled and well managed. She was diagnosed with thyroid cancer six years ago in respect of which she is currently in remission, for which she requires to take Levothyroxine and Liothyronine which are hormone replacement medications. As a result, she suffers from fatigue and requires not to over exert herself in order to manage her condition, as confirmed in a medical report dated 12 September 2016 (page 235), where it is stated that "as part of the management of her condition [she] must take higher doses of hormone than normal and this is to suppress the risk of recurrence of her thyroid cancer. Unfortunately this replacement therapy does not work as well as natural thyroid hormone production and the result of this is tiredness, some difficulties with memory and concentration". That medical report goes on to state that she "tires more easily and has to pace herself….she is able to do her usual activities as long as she makes sure that she has rest in-between".

9. The claimant was based at the Lewis Citizens Advice Bureau office in Stornoway. She worked five days a week for a total of 35 hours. For three days each week the claimant dealt with five telephone appointments each day, three in the morning and two in the afternoon, giving advice to individuals throughout the UK and beyond seeking advice regarding pension freedoms. These appointments were scheduled centrally by Pensionwise employees based at CAS in Edinburgh some eight weeks in advance. Although these calls varied in length and complexity, they were intensive. On two days each week the claimant met clients who lived in the Western Isles in face to face appointments. Often there were fewer appointments on those days, which gave the claimant an opportunity to catch up with admin, undertake research and prepare for future calls. On occasion, she would assist the central Pensionwise team by conducting up to three telephone appointments on those days.

Request for homeworking

10. In September 2018, the claimant informed Roddy Nicolson, strategic manager and the claimant's line manager, that she was feeling fatigued and that she

was struggling to manage. She requested to work from home on the three days that she dealt with the telephone appointments.

11. Mr Nicolson was sympathetic to the request because he had noticed that she was getting really tired and seemed exhausted by the end of the day such that he had suggested she take more breaks. However when he consulted the operations manager, Ms Helen Maclean, she advised that this would not be possible for health and safety reasons and that it was not permitted by the claimant's terms and conditions of appointment. Ms Maclean suggested that if the claimant was unhappy with that decision, she should request a meeting with Mr David Blaney, the chairman.

12. On 24 October 2018, the claimant met with Mr Blaney. Notes of that meeting were taken by Mr Nicolson (page 170 – 172). During this meeting the claimant advised the respondent of the specifics of her disability that is she had thyroid cancer. She advised that she was keeping well although not as resilient as she once was and when she over does things she gets tired, she gets tired at night and feels worn out. She advised she found the face to face days manageable but said that the fatigue was caused by the intensity at times on the days she dealt with telephone enquiries. She said that she thought it was worsening, such that she found it a struggle, in addition to looking after her 11-year-old son and the fact that her husband works away from home.

13. She advised that her counterpart working for Shetland CAB worked from home. She stated that if she was at home she could rest between telephone calls. She said that working from home would give her more time for rest periods as she did not find it easy to rest in the bureau office.

14. She was advised that for health and safety reasons they required to have certain minimum numbers of personnel in the building. Mr Blaney raised the issue of confidentiality and she advised that she has a private space at home, that there is no paperwork and the laptop is password protected.

15. The claimant brought the respondent's duty to make reasonable adjustments to Mr Blaney's attention; she said that she was happy to come into the bureau on days when she may be required; she said that she had been advised by the

Pensionwise lead at CAS that she could work from home and that they could get the software for her to get remote access. She also informed Mr Blaney that ACAS has a process for homeworking and that the respondent would have to carry out a risk assessment in her home and that she would have to check her home insurance policy.

16. Mr Blaney stated that he would discuss her request with the board and take specialist advice. The claimant advised that her GP was aware of her health issues and would support her not to overdo things. Mr Blaney said that they might need a letter from her GP and she said she was happy with that, although no letter was sought.

17. The claimant again met with Mr Blaney on 31 October, Mr Blaney having taken advice from the HR team at CAS. Mr Blaney called this a "fact-finding meeting". During the meeting he asked the claimant a series of questions which had been prepared by Ms Maclean. Notes were again taken by Mr Nicolson (page 173 – 176).

18. In response to his question about how much she was affected by her disability on a day to day basis in the bureau, she advised that on the days of telephone appointments it is one after another and that she had not realised that the telephone appointments would be so intensive. She said that on the telephone days by the end of the day she feels brain weary she is very tired and her concentration is affected.

19. The respondent had conducted a detailed analysis of her movements between 1 June and 26 October from their records. It was noted that during that period of 109 days, she had taken 5.5 days of sick leave, 4 days of public holidays, 4 days of TOIL, that on 62 of the days she had taken less than one hour for lunch, and in 42/62 the break had been for less than 50 minutes and that on 14 days she had taken more than an hour for lunch (page 174). The claimant advised that she took a shorter lunch break on occasions to allow her to finish earlier. She also had to build up TOIL (of 10 minutes each day) which was required so that the office could close between Christmas and New Year.

20. Mr Blaney asked how working from home would make the desired difference from a medical point of view and she stated that it would help to manage energy levels because she would not have to rush out in the morning and she could pace herself, by having a lie down at lunchtime. Mr Blaney raised the issue of job share and she said that she would consider it if they could not accommodate home working.

21. A further meeting took place on 21 November, after further advice had been obtained by the HR team at CAS, when again notes were taken by Mr Nicolson (pages 177 – 178). At this meeting the claimant was advised that for a trial period she could work one day at home until the end of 2018, although that could be extended until the end of January if it took longer for CAS to set up remote access. The claimant asked why she was not being permitted to work from home for three days and was told that this was advice from CAS and that it would be reviewed when Mr Blaney was back in Stornoway between 14 and 16 January. He also asked her again about client confidentiality, and she confirmed that all measures were in place to ensure client confidentiality. It was agreed that Thursdays were most suitable.

22. The claimant agreed to contact Pensionwise to arrange for the relevant software to be uploaded to her laptop computer to enable working from home. On 21 November, she got in touch with the relevant contacts in Edinburgh, although no progress was made despite reminders.

Application for post of strategic manager

23. On 30 November 2018, Mr Nicolson handed in his resignation giving two months' notice.

24. On 14 December 2018, the claimant submitted an application for the vacancy for strategic manager (page 179 – 191). This application was acknowledged on 15 December but she received no further correspondence regarding the post. Shortlisting was undertaken by Mr Blaney and another board member, Ms Nash, who did not know the claimant, who considered that the other candidates were better qualified.

25. The successful applicant for the strategic manager's post was Steve Hankinson, who commenced employment on 22 January 2019.

Homeworking trial

26. The claimant advised Mr Hankinson of her request for homeworking and that nothing was being done to progress it at that time.

27. On 30 January 2019, Mr Hankinson emailed the Pensionwise lead at CAS to ask whether it was possible for her to work from home three days a week (page 141). His response that same day was, "Kathryn can work from home to conduct Pensionwise appointments via telephone. Kathryn should already have an AVAYA "softphone" on her laptop (we purchased an additional license for Kathryn so if this has not yet been added by CAS IT please let me know). In order to use this software phone she will need adequate bandwidth in the location she is using and I believe Kathryn has provided a broadband speed report previously (this can be checked easily using a postcode). I would also assume that your bureau would have a risk assessment protocol to follow for homeworking. From our perspective, a private and uninterrupted environment must be part of any risk assessment" (page 140).

28. Mr Hankinson that same day asked the relevant contacts at CAS if the necessary software had been added to her laptop; and the claimant was then told, on 31 January, that it could be done remotely (page 142).

29. A test of the technology was arranged for 5 February and since it proved successful, the claimant's first day of the trial was due to take place on 7 February. The claimant called Mr Hankinson after the first or second appointment to say that it had gone well. During that telephone conversation Mr Hankinson advised that the trial had to be cancelled due to concerns about confidentiality.

30. At that point Mr Hankinson was of the view that a risk assessment should have been carried out before the trial could continue, because he had concerns about the claimant's health and safety, and the confidentiality of the data, and about the organisation's reputation should there be a confidentiality breach.

31. Neither the claimant nor Mr Hankinson made any further reference to the telephone call or to the aborted trial. Mr Hankinson did not put in any steps to arrange for the required risk assessment to be undertaken.

Funding to extend contract and claimant's resignation

32. On or around 28 February 2018, Mr Hankinson was advised by CAS that funding to extend the post to 31 March 2021 had been approved, although the respondent did not yet have confirmation whether the funding was sufficient to extend the contract on the same basis.

33. During February, the claimant entered discussions with her brother about the possibility of working for his kitchen and bathrooms business in a management role.

34. The claimant submitted her resignation on 8 March 2018. She made no reference to her concerns about the aborted homeworking trial.

35. On that day Mr Hankinson advised her that funding had been secured to extend the contract for a further two years. He asked her to consider staying on.

36. An advert to replace the claimant was issued with a closing date of 31 March 2019, for a fixed term until end March 2021 (page 193). That advert stated that "we have a flexitime scheme which enables our employees to work flexibly in line with organisational requirements, and as an inclusive employer we are happy to consider other flexible working arrangements where appropriate" (page 193). The job was subsequently re-advertised with a closing date of 5 June 2019, it not having been filled. The last line of the advert was amended to add "including homeworking". (page 194)

37. Although the claimant had intended to commence employment for her brother's company on 1 April 2019, she decided that she needed a period of recovery and she did not commence until 7 May 2019. That role has an annual salary of £30,000 per year full time. The claimant works part time, 22.5 hours per week (page 206). The claimant has since she started been keeping a look out for suitable full-time employment, which suits her health conditions and is of interest to her.

Claimant's grievance

38. By letter dated 30 May 2019 (page 203), the claimant wrote to Mr Blaney advising that the main reason she resigned was due to the lack of support and continued failure to make reasonable adjustments in light of her health issues and that she was particularly offended to note that homeworking was being offered in the adverts to replace her in the role.

39. On 3 July 2019 the claimant wrote a further letter regarding her application for the post of strategic manager to complain that despite meeting the criteria for the role, she was not invited for interview and suggesting that she believed this to be a further instance of being discriminated against as a result of her disability and also as a consequence of her request for homeworking.

40. She completed the equal opportunities form as part of the application process specifying that she had a disability. She noted that CAS subscribed to the Disability Confident Scheme (which replaced the two tick scheme) and she said that she had no reply to the letter of 30 May and asked what was happening to her grievance.

41. The claimant received no reply to either of these letters.

Relevant law

42. Section 13(1) of the Equality Act 2010 states that "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". Disability is a relevant protected characteristic.

43. Section 15 of the Equality Act states that a person discriminates against a disabled person if he treats the disabled person unfavourably because of something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim.

44. Section 20 sets out the employer's positive duty to make reasonable adjustments to address disadvantages suffered by disabled people. The

relevant requirement is set out at section 20(3) which states that "the first requirement is a requirement, where a PCP of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage". A failure to comply with the duty by an employer amounts to discrimination under section 21(2).

45. The duty arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. What is reasonable in any given case will depend on the individual circumstances of the disabled person. The test of reasonableness in this context is an objective one (*Smith v Churchill Stairlifts plc* 2006 ICR 524 CA). An adjustment from which the disabled person does not benefit is unlikely to be a reasonable one *(Romec Ltd v Rudham* EAT/0069/07). However, there does not have to be a good prospect of an adjustment removing a disadvantage for that adjustment to be reasonable *(Noor v Foreign and Commonwealth Office* 2011 ICR 695 EAT). The question is whether the adjustment would be effective in removing or reducing the disadvantage the claimant is experiencing as a result of their disability, not whether it would advantage the claimant generally. To assess the effectiveness of a proposed adjustment, it is best practice to consult the disabled employee, who is most likely to know whether the adjustment would make a difference. Alternatively, or additionally, expert opinion, such as medical or occupational health advice, could be obtained on the probable effect of any proposed adjustment.

46. Section 136(2) of the Equality Act 2010 states that "If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred".

47. This shifting burden of proof involves a two stage analysis: first the claimant must prove, on the balance of probabilities, facts from which the tribunal could infer discrimination (a prima facie case). If proved, the respondent must prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the protected ground. The Tribunal should take account of the revised

Barton Guidance (*Igen v Wong* 2005 EWCA Civ 142). A difference in status and a difference in treatment are not sufficient; something more, which need not be a great deal, is required (*Madarassay v Nomura International* 2007 IRLR 246 CA and *Denman v EHRC* 2010 EWCA Civ 1279 CA).

Claimant's submissions

48. In oral submissions, Ms Buchanan invited the Tribunal to make certain findings in fact. She asked the Tribunal to prefer the evidence of the claimant where the facts were in dispute, in particular: in regard to the meeting between the claimant and Mr Blaney in January that Mr Blaney did not offer to help but only asked if the software was installed, since it would not make sense for her to refuse an offer of help; in regard to the telephone call on the day of the trial, although despite disagreement about what was discussed, the evidence of both was that there were no further trial days and no date was set for it to recommence and no steps were taken to arrange for a risk assessment to take place after the claimant resigned; that the claimant was not advised of the funding decision until after she had resigned; that she had not raised concerns when she resigned because she did not want to be perceived as a victim, but was prompted to act when she saw the adverts offering homeworking.

49. She submitted that the evidence supported her submission that the claimant had resigned because of the ongoing failure to make reasonable adjustments, which she had first requested in September 2018, but that when Mr Hankinson disengaged, she came to the view that it would not work out and that for health reasons she had to leave. Her evidence was that she was not looking for work but since her brother had a vacancy she could assist him and obtain alternative employment for herself. She submitted that the principal reason for resigning was the discriminatory treatment, because she would not have made the decision to leave if they had carried out the risk assessment.

50. Relying on *RBS v Ashton* 2011 ICR 632 which restates the guidance in *Environment Agency v Rowan* 2008 ICR 218, as well as *Archibald v Fife Council* 2004 ICR 954 and *Willcox v Birmingham* CAB UKEAT/093/10, she submitted that the claimant has demonstrated the relevant criteria to establish

that the duty was triggered where the PCP was to undertake work in the office and the disadvantage was fatigue, and that on the evidence this was more than minor or trivial, and in comparison a non-disabled person carrying out the same work would not get fatigued like the claimant.

51. Relying on *Rowan* and *Salford NHS Primary Trust v Smith* UKEAT/0507/10, she submitted that it is unlikely that a trial period will be considered a reasonable adjustment, but accepting, referring to *Smith v Churchills* 2006 IRLR 41, that a trial period can be an appropriate adjustment providing it ameliorates the disadvantage. Here, a one day, one off trial did not ameliorate the disadvantage the claimant was suffering.

52. Even if the trial was considered to be a reasonable adjustment, there was still an unreasonable delay in implementing it. In *Abertawe Bro Morgannwg University Trust v Morgan* 2018 EWCA Civ 640, it was held a delay of four months to implement redeployment was not reasonable. Here, while some delay in obtaining the software might be reasonable, the delay in this case was not and nor was the delay in carrying out a risk assessment.

53. By 24 October 2018 the respondent was well aware of what needed to be done, and while it may have been as early as September (Mr Nicolson could not recall whether the claimant had disclosed the reason for her request at that time), the latest date the duty arose was 24 October and there was still no adjustment in place by 8 March 2019.

54. The EHRC code of practice at para 6.33 includes the example of homeworking as a reasonable adjustment. Further, there was another Pensionwise adviser in Shetland who was homeworking and although for a different reason this showed that it was do-able. There was no evidence that it could not be implemented; the only concern was health and safety and issues which could be addressed through a risk assessment.

55. While the claimant had originally argued that the failure to interview her and the failure to discuss the continued funding breached sections 13 and 15, the claimant withdrew her claim in respect of the latter. However, she maintained her argument that the failure to select her for interview was because of her

disability and therefore direct discrimination under section 13 and/or because she had made a request for reasonable adjustments and therefore discrimination arising from disability under section 15.

56. She submitted that in respect of both cases that the claimant had made out a prima facie case, such that the burden of proof shifted.

57. Mr Blaney conceded that although the application forms were anonymous, he knew that the claimant had applied from the details in her application form. She submitted that the Tribunal was entitled to draw an interference from the failure to provide any explanation about the qualities which were required to be shortlisted in response to the voluntary questions and in evidence gave no explanation why the others were deemed to be better qualified; from the failure to explain why the claimant was less appropriate than others selected; from the fact that the respondent had breached the reasonable adjustments duty. She submitted that the claimant had raised a prima facie case and that the burden shifted but the respondent had failed to show that discrimination played no part in their decision.

58. Turning to time bar, in this case the claimant contacted ACAS on 1 June 2019 and the EC certificate was issued on 12 July, so that the claimant had one month from the date of that certificate to lodge her claim, and she did so on 7 August. She submitted that the duty to make reasonable adjustments arose on 24 October, and there was no compliance by the time the claimant's employment ended on 31 March, and the claim had been lodged within three months of that date. She disputed Mr Edward's assertion that the failure crystallised on 7 March, and in any event, relying on *Job Centre Plus v Jamil* UKEAT/0097/13, where there had been a refusal but the decision was kept under review, it should be treated as a continuing act.

59. With regard to the failure to be invited for interview, the claimant did not immediately question the decision, but it was only after the delay in implementing the reasonable adjustment that she began to consider that the failure to select her for interview may be linked. She argued that this was a continuing act of discrimination, and therefore not time barred.

60. Even if the claim is lodged out of time, Ms Buchanan invited the Tribunal to extend time on the basis that it was just and equitable to do so given that the claimant was not advised of the outcome of the selection process and did not know the outcome until Mr Hankinson took up his position on 22 January. She submitted that the Tribunal should also take into account the fact that the claimant was, throughout the period, suffering from fatigue and worn out by the pressures of the job, and needed a period of recovery, and she would be greatly prejudiced by a finding that the claim was out of time because she has no other remedy.

61. Turning to compensation, with regard to injury to feelings, she submitted that an award in the mid Vento band was justified because the failure had led to the loss of her employment and was ongoing for a number of months, and she felt upset, angry and frustrated and let down. She also sought injury to feelings for the failure to shortlist, accepting that no evidence that she would be successful was led because no documentation was available.

62. With regard to the claim for failure to make reasonable adjustments, she asked the Tribunal to accept that was the reason for her resignation, and therefore that she is entitled to financial loss resulting from not working on the extended contract, which was to be fully funded for at least two years.

63. Ms Buchanan submitted that the claimant had mitigated her losses by finding other work. Although she had started later than planned, she needed time to recover. Although her new role was not suitable for homeworking, she dealt with her fatigue by working part-time. Her evidence was that she would work full-time if she found something suitable and that she is looking for something appropriate in the third sector but opportunities are limited in the area. It was therefore reasonable for the Tribunal to award the difference in income between what she was earning and what she would have earned during that period.

Respondent's submissions

64. Mr Edward submitted that the claims should be dismissed.

65. While the respondent knew that the claimant was disabled, by reference to Schedule 8, para 20, the respondent is not subject to the duty if the respondent did not know that the claimant was likely to be put at a disadvantage because she required to work in the office. Although she raised it in September 2018, the respondent was not aware of the disadvantage until the meeting of 24 October.

66. The onus is on the claimant to establish substantial disadvantage (see *Project Management v Latif* 2007 IRLR 279 EAT para 45), but here the claimant had failed to prove any relevant disadvantage. The Tribunal must ask what is it about working in the office as opposed to her work duties that put her at the disadvantage, because there is no claim here that she should have been doing less work, or different work at home, since it simply relates to where the work was taking place.

67. It is also necessary for the claimant to show that the PCP caused the disadvantage; it is not enough that the work itself might cause the disadvantage, but it must be working in the office that caused her to become fatigued. If the work to be performed is the same, it is just as easy for her to rest in the office, and it is not clear what difference working from home would have made.

68. Mr Edward also argued that the duty was not engaged because, by reference to schedule 8, paragraphs 2 and 5, it must be disadvantage in relation to a relevant matter as defined, and there it is stated that the relevant matter is employment. He argued that the disadvantage must be in relation to her employment; if the disadvantage is fatigue as the claimant argues, then the PCP is not causing disadvantage in relation to her employment, because here the disadvantage is caused by pressures before work or stress after work and not during work in relation to her employment.

69. Further, the employer's duty to ameliorate the disadvantage can only be in regard to the disadvantage they are aware of, and the claimant cannot assume that the respondent had any knowledge of disadvantage that they were not told of. Thus the only disadvantage they are aware of is that referred to in the

minutes of the meetings, namely that she was suffering from fatigue, that she was stressed in the morning and worn out in the evenings.

70. Further, the disadvantage must be substantial, that is more than minor or trivial, but Mr Edward submitted that in this case the level of fatigue did not meet the required standard. The evidence, including circumstantial evidence, all points to any disadvantage the claimant may be suffering not being "substantial": for example the claimant was working through her lunch hour; working longer hours than necessary; she made no request to reduce her hours that is recorded or minuted; flexi time was available allowing her to start later, or have a longer lunch; she took on extra phone appointments, although Mr Blaney said that she did not have to; there was evidence that Mr Blaney volunteered to chase up the software for the laptop but the claimant did not accept the offer and did nothing to chase it up.

71. Even if the Tribunal accepts that there was substantial disadvantage, there is no evidence that this was any different from someone who did not have a disability. By reference *Griffiths v DWP* 2015 EWCA Civ 1265, and given the wording of the relevant section, while there does not need to be a comparison with someone who does not have a disability, the PCP must "bite harder" on a disabled person rather than a non-disabled person. However there was no evidence here that others, such as the counterpart in Shetland, were not similarly fatigued by the work. Further, there was no evidence led that during the one day trial she felt any less fatigued working from home; or that she had a lie down at lunch time or that it made any difference.

72. With regard to the proposed adjustment, that must be reasonable. The homeworking example cited from the Code of Practice para 6.33 related to physical difficulties with an office. Para 6.27 states that the health and safety of any person, including the disabled person, is relevant to the reasonableness question, and a risk assessment should be used to help determine whether a risk is likely to arise. Para 6.28 gives some of the factors to be taken into account when deciding what steps are reasonable, one of which is practicability. This is a factor which the respondent took into account in this case. It was reasonable for the respondent, having become aware of the duty

on 24 October, to check with HR and to conduct a second, fact-finding meeting to find out the impact on the claimant. One of the steps was to arrange for the necessary software, which the claimant volunteered to do. While there may have been a delay by CAS IT, they were not the employer, and it was reasonable for Mr Blaney to leave it in the hands of the claimant when his evidence was that he did not know what software was but the claimant did. Once Mr Hankinson was aware of the situation, he quickly obtained the software and became aware that a risk assessment should be done. Thus by 30 January there was no unreasonable delay other than by IT in Edinburgh. When it came to the trial on 7 February, Mr Hankinson realised that no risk assessment had been done which Pensionwise had advised and which he knew was necessary from his own experience. There was no evidence prior to that of them contemplating a risk assessment. Thus it was not practicable to allow homeworking until a risk assessment had been undertaken. Mr Hankinson told the claimant on the phone that a risk assessment would be done (although that is disputed by the claimant).

73. There was no evidence to show that homeworking would have removed any disadvantage suffered by the claimant; while she would be less rushed in the morning and she still had to be there by 9.10, so that the only difference was the travelling time which was only 10 minutes; she'd still have to get up and get herself and her son ready and it was not clear that would reduce fatigue.

74. With regard to the claims under section 13 and section 15, Mr Edward submitted that there was no challenge to the evidence that other applicants were more qualified; the claimant simply said she did not know about the other applicants.

75. With regard to the argument that the burden of proof had shifted, Mr Blaney said he knew that it was her application and that he knew that she was disabled and that he did not shortlist her, but that is insufficient to reverse the burden of proof because something more is required. It cannot be enough to say that she had made a request for reasonable adjustments because that is tied in with the protected characteristic.

76. Mr Blaney's evidence that Ms Nash was involved and that she did not know the claimant and did not know the request was not challenged; and it was not put to Mr Blaney that he had influenced her or that she had not made the decision not to shortlist independently. His evidence was that he had expressed concern about the claimant being tired and working alone and he had not refused to consider homeworking. It was unlikely that he would refuse to shortlist her because she had made a request that he had not refused.

77. When the claimant resigned, she made no mention of the problem of the reasonable adjustments in her email, and Mr Harkinson's position was that he had asked her if it was because of the homeworking issue and that she had said no; the claimant's own evidence was that she only became annoyed when she saw the advert mentioning flexibility and homeworking and this is in direct opposition to resigning because of those issues.

78. With regard to time bar and the failure to make reasonable adjustments, the Tribunal must contrast a refusal with continuing consequences and an ongoing refusal to make reasonable adjustments; while the latter is always an ongoing act, here the breach occurred on 7 February, which is when the failure crystallised, which triggered time bar.

79. Viewed independently, the failure to shortlist must be out of time because the decision must have been made before 22 January; if the reasonable adjustments claim is considered in time, then the failure to short list is not part of that continuing act. These are two separate kinds of claims or behaviours alleged of the respondent, and done by different people: it was Mr Blaney who refused to short list and Mr Hankinson who allegedly failed to make reasonable adjustments; the fact that these were different actors suggests that they were not part of a continuing act.

80. With regard to any just and equitable extension, the claimant accepted that she knew about time limits but gave no explanation about why she did not bring a claim after giving her notice. She was not working for the whole of April, so she had time to consider making a claim; and it would not be just and equitable to extend time because it took time for her to become annoyed.

81. With regard to remedy, Mr Edward submitted that the claimant had failed to mitigate her loses during the whole of the month of April when she chose not to work; she had not claimed in the ET1 that she had not worked because of her health. She would have left employment in any event when her contract came to an end on 31 March because she had obtained the part time job. If the claimant is seeking two years pay, she would have needed to be very clear that she would have stayed on even with homeworking but she was not.

82. With regard to injury to feelings, she has not expressed a great deal of concern, referring only to being frustrated and distressed when the trial was cancelled and nothing beyond that, so he suggested it be set at a minimum level.

Tribunal's observations on the witnesses and the evidence

83. We considered the claimant to be an honest and credible witness, who gave her evidence in a clear, articulate and straightforward way, without prevarication or hesitation. We therefore accepted her evidence, including where the evidence of the respondent's witnesses differed in respect of disputes of fact. While we noted that the claimant was slow to complain, both during her employment and after her resignation, we understood her rationale for that. She was working on a short-term contract so understandably did not want to rock the boat; she was conscientious and keen to fulfil her contract if at all possible, and indeed there was no suggestion that she had not performed her job role fully; she did not want to be perceived as a "victim" having made the decision to move on. Ultimately however, we were of the view that responsibility for implementing a reasonable adjustment which had been highlighted to the respondent lay with them.

84. We found Mr Nicolson's evidence to be reliable and credible, and noted he had a good memory for dates and details by reference to other events. We got the impression that he was and still is loyal to the organisation where he worked for 35 years but he was prepared to be critical as appropriate. We did however note that he took no responsibility himself for implementing the adjustment once agreed at board level, although we considered that it was the

management who should have taken responsibility for implementing the decision.

85. We were of the view that the respondent's witnesses were less straightforward in the way that they gave their evidence. We thought that Mr Blaney was somewhat reticent and unforthcoming because his recollection of the sequence of events was poor. Although confirming that it was the board, not management, who were the employer, he then seemed to distance himself from responsibility not only for implementation but also for the substantive decision, relying he said on HR support at CAS, although they were effectively consultants and not the employer. While he said that he had offered to assist the claimant to follow up in regard to the software, we did not accept his evidence in that regard, particularly in light of his protestations of not understanding what software was. Given the organisation relies on IT and given his background in banking, we took the view that as the chair of the organisation if he did not know what it was he ought to have known. We accepted Ms Buchanan's submission that it would not have been logical for the claimant to have refused such offers had they been made. We thought that his emphasis on the need for trust as an important requirement of an employee, especially in regard to confidentiality, given his apparent reluctance to allow her to work from home and let the trial run, was contradictory.

86. With regard to Mr Hankinson, while we found his evidence to be helpful in regard to understanding the context and rationale for not continuing the trial, we found him to be particularly unreliable in regard to detail in this case. We got the impression that the evidence that he gave was what he thought he ought to have done and said rather than what he had in fact done and said. We appreciate he was new to the job and would be finding his feet but we were of the view that this had led to certain confusion about the sequence of events. It was for that reason that we preferred the claimant's evidence where it differed from his, in respect in particular of the telephone call when we accept he made no mention of the risk assessment, and in respect of his recall about having told her about the funding before she put in her resignation, and in respect of having suggested that homeworking would be looked into further when he was

asking her to stay on. While he initially assisted in pressing ahead with the trial, we thought that he did disengage when things got complicated and indeed his evidence was he made no further efforts to implement the risk assessment, or indeed even mention it to her, although he said that on reflection perhaps he ought to have done.

Tribunal's deliberations and conclusions

Request for homeworking

86. The claimant argues that the respondent's response to her request to work from home amounts to a failure to make reasonable adjustments contrary to section 21 of the Equality Act.

87. In this case, the claimant relies on the first requirement under section 20(3), which indicates that the duty is only triggered a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Mr Edward argues in the first instance that the duty was not engaged in this case.

88. It was common ground that the PCP was the requirement for the claimant to perform her work in the office. Beyond that however, Mr Edward argued that the claimant had not proved any relevant disadvantage or that the PCP had caused any disadvantage; that if there was relevant disadvantage it was not substantial; that if there was any substantial disadvantage it was not in relation to a relevant matter; and in any event it could not be said that there was any substantial disadvantage in comparison with persons who are not disabled.

89. Mr Edward thus argued that the claimant had not suffered any disadvantage, but we did not accept that submission for the reasons which follow. We were of the view that the fatigue which the claimant said that she suffered was a relevant disadvantage, and sufficient to fulfil that element of the test at least. Mr Edward had argued that the claimant could only rely on any disadvantage of which the respondent was aware, that is what was stated in the minutes.

While he suggested that was limited to fatigue, we noted a reference to decreased levels of concentration in the medical report, and we noted from the minutes of the fact finding meeting that the claimant referred to her concentration being affected. Notwithstanding, the focus in the case was on fatigue.

90. Mr Edward argued that the claimant had not shown that it was the PCP, ie the requirement to work in the office, that caused the disadvantage, that is that it was working in the office that caused her to be fatigued. He argued that it was her work duties, and not working in the office, which put her at the disadvantage (of suffering fatigue) because this is not a claim about doing less work or different work from home, but simply about where the work was taking place. Mr Edward also argued that any disadvantage caused by the PCP was not in respect of "a relevant matter". Mr Edward submitted that those words were there for a reason and should not be overlooked. Here he argued that any disadvantage was in relation to "an outside matter" specifically that the disadvantage if caused by the PCP was felt both and after work; in that she felt stressed and pressured getting out in the morning and then tired when she got home at night.

91. While the relevant provisions define a relevant matter in this case as employment, in our view this is to distinguish the context from other contexts which are covered by the Equality Act, for example the provision of education, or access to services etc. Further and in any event we did not accept that it was not the work or the employment which caused the disadvantage, given that the PCP related to working in the office, and had the claimant not been working in the office then she would not have felt so tired.

92. Mr Edward argued that any disadvantage which she might have suffered was not "substantial", and thus that she had not proved that any fatigue suffered was "more than minor or trivial". In making this submission he relied on the claimant's evidence that she often worked through her lunch hour or worked longer hours than necessary and took on extra phone appointments and made no request to reduce her hours or to take advantage of the flexible

working arrangements which would have allowed her to start later or take longer lunch breaks.

93. As defined in section 212(1), "substantial" means "more than minor or trivial". It does not therefore as it might first appear need to be substantial as in "large", but rather "material" or "of substance". This is an objective question and a relatively low threshold. We accepted the claimant's evidence, which was supported by the evidence of Ms Smith, Mr Nicolson and indeed Mr Blaney to an extent, that she was finding the telephone calls particularly tiring, and that the impact on her was such as to meet the "substantial" threshold.

94. Mr Edward also argued that the claimant had not shown that the PCP caused substantial disadvantage in comparison with others who were not disabled. He argued that the role would have been intensive for any other employee and that there was no evidence that others, such as her counterpart in Shetland, found it any less tiring than the claimant.

95. There was some discussion about whether a comparison was required at all for the claimant to meet this aspect of the test, and I understood Mr Edward to accept, by reference for example to the *Griffiths* case, that no comparison is required and certainly no comparator or even hypothetical comparator as would be required for direct discrimination. The EHRC code of practice at para 6.16 explains that the disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be had the disabled person in question not had the disability, and "the purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular [PCP]….disadvantages the disabled person in question". This principle has most recently been articulated by the then President of the EAT in *Sheikholeslami v University of Edinburgh* 2018 IRLR 1090 as follows: "Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

96. We take the view then that it is appropriate to make a comparison with the claimant's circumstances when she was not disabled. In finding that she had proved substantial disadvantage as a result of the application of the PCP we relied not only on the evidence of the claimant about the impact of her treatment on her and energy levels compared with before her diagnosis, but also on the evidence of Ms Smith who had known her before her treatment and the medical report which was lodged, which stated by reference to her condition that she "tires more easily and has to pace herself". To use the language of Lord Justice Elias in *Griffiths,* we found that the disadvantage suffered, namely fatigue from the requirement to work in the office, "bites harder" on a disabled person than a non-disabled person.

97. Taking account of all of these pointes, we rejected Mr Edward's submission that the duty was not engaged in this case.

98. We then went on to consider whether what the respondent did in this case in the name of adjustments could be said to be reasonable. In so doing, we took into account the factors set out at para 6.28 of the EHRC's code of practice, which are stated to include: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruptions caused; the extent of the employer's financial or other resources; the type and size of the employer. We noted too at para 6.27 that any increased risk to the health and safety of the claimant or any other person is a relevant factor to take into account in assessing whether any adjustment is reasonable, and it is expected that a risk assessment should be used to help determine whether such risk is likely to arise. We noted, at paragraph 6.29, that ultimately the test of reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

99. In this case, Mr Edward focussed on the practicability of the step, arguing, as we understood it, that it only became practicable when it was known that a risk assessment had to be carried out, and that there was no unreasonable delay in carrying out the risk assessment.

100. In this case we heard that the claimant had requested homeworking in September 2018. Mr Nicolson could not recall whether the claimant had at that point in time advised him of the reasons for her request, however it was common ground that the claimant had made the request and informed the respondent of the reasons by 24 October 2018.

101. The initial reason for the refusal, that homeworking was not in the claimant's contract of employment, which would not of course be an objective reason to refuse an adjustment that was reasonable in terms of the Equality Act, was not pursued. We also heard that the reason given was "health and safety". Initially that appeared to be concerns about lone working and other health and safety concerns were not articulated until later.

102. In the meeting, Mr Blaney raised concerns about the levels of personnel in the office. This seemed to be a general concern and while we heard that it was a concern at that particular point in time, and that the situation has improved, we also heard that there could be around six people working in the office and no detail about any times when the claimant might have been the only person in the office. Further and in any event, the claimant offered, in that meeting, to be flexible and to come in on homeworking days if she was needed. We concluded that this was not a relevant factor in this case which would make any adjustment unreasonable.

103. Mr Blaney also raised concerns about confidentiality. The claimant said she was aware of that and considered that it would not be an issue since there was no paperwork to be retained and she had a private space in her house.

104. However, we noted that during the meeting on 24 October the claimant also advised that her counterpart in Shetland worked from home; that she had been advised by the Pensionwise lead at CAS that she could work from home; that they could get her the software; that she was aware that ACAS has a process for homeworking; she said she knew that the respondent would have to carry out a risk assessment; she said she would check her home insurance policy; she gave her consent for the respondent to contact her GP.

105. In short, the claimant alerted the respondent, as early as 24 October, of what was needed to be done to implement her request, and alerted them, if they were not aware themselves, of the expectation that a risk assessment would be carried out to take account of the respondent's concerns. After a month and during the third meeting, the offer was of a one day per week trial. It was not necessarily clear to us why a trial was needed or what a trial would achieve, beyond ascertaining whether it was technically possible (it seems there may have been an issue about broadband width although that could be checked remotely) and to confirm from the claimant's point of view that she was able to pace herself better at home than in the office.

106. Mr Blaney took advice from CAS HR and although he said it would not be appropriate to disregard their advice, they were effectively HR consultants, since the respondent is the organisation under the duty. It was not in any event made clear to us in evidence why it would be that CAS would suggest just a one day per week trial, especially when Pensionwise had no issue in principle with homeworking; it was not clear to us why the respondent would require to undertake further fact finding rather than for example going ahead with a risk assessment or obtaining a report from the GP.

107. Indeed, despite claiming to have empathy with the claimant we did not get the impression, especially from the notes of the meetings, of an employer who was keen or going out of their way to facilitate the adjustment. Rather these give the impression of an employer looking for obstacles; and of an employer making subjective judgements about whether she was or was not fatigued as she claimed. This is apparent from the fact that the respondent felt the need to conduct a detailed analysis of her movements between 1 June and 26 October from their records and to take a view of what this said about whether she was fatigued or not; and in evidence questioning why she would offer to do additional Pensionwise appointments on her day of face to face interviews.

108. We were of the view that the respondent did not have an appreciation of the circumstances from the point of view of the claimant: that is that she was keen to fulfil her contract; if she were to take her full lunch break every day it would

mean that she would get home even later; and she would not be able to accumulate the additional time which clearly the employer required her to build up to close the office between Christmas and New Year.

109. While the claimant may have agreed to arrange for the software to be put on her computer, we accepted Ms Buchanan's submission that it was the respondent's responsibility to chase that up. Although we did not think it was necessarily for Mr Blaney to do that, nor did we think that Mr Nicolson should have so readily absolved himself of responsibility and we noted that as soon as Mr Hankinson took steps to deal with the situation the software issue at least was dealt with very quickly.

110. But even when the software was procured, the respondent's actions only served to delay the implementation of the adjustment. Although the claimant had raised the issue of the risk assessment at the meeting on 24 October and again this was raised by Mr Owens on 30 January, Mr Hankinson only seemed to realise an imperative to undertake that on 7 February when the trial had already commenced. We have found that he did not explain that to the claimant during the telephone call; and the undisputed evidence was that no further steps were taken to progress that risk assessment. Mr Hankinson himself accepted in evidence that six months was not a reasonable time for any administrative decision to be made.

111. We therefore accepted Ms Buchanan's submission that a one day trial could not be said to have fulfilled the respondent's reasonable adjustment duty, and given the delay in implementing either a trial or an adjustment to her working conditions, the circumstances are better categorised as a continuing failure to implement the reasonable adjustments duty.

112. On the question of whether the adjustment sought by the claimant would have the effect of eliminating or reducing the substantial disadvantage caused by the PCP, Mr Edward sought to convince us that there was no evidence that working from home would or could alleviate the disadvantage suffered, specifically fatigue, and he argued that there was no evidence led that during the one day trial the claimant felt any less fatigued working from home.

113. We did not accept that submission. We thought that the fact that there was no evidence from the aborted trial to be irrelevant. While we heard evidence from the claimant and from Ms Smith regarding how the fatigue would be lessened by working from home, as a Tribunal we readily accepted that working from home would alleviate fatigue. Even though in this case the claimant's commute was short and she was assisted by getting a lift from her colleague, we were of the view that it would minimise the pressure to get "office ready" to start work in the morning, of having to get organised and ready for the outdoor world by 9 am when a telephone call could be made at 9.10. Further, we readily accepted that it would be inappropriate and impracticable for the claimant to rest in her office, even though she had an office to herself with an "engaged" sign on it. At home, it would be much easier for the claimant take a rest at lunch time, and to rest in her breaks and she would not have to rush home at the end of the day to undertake those chores. In short it would allow her to "pace herself" and to "rest in-between" doing her usual work duties. We concluded overall that she would thereby be able to lessen her fatigue and ameliorate the substantial disadvantage which she was suffering, such that such an adjustment would be reasonable.

114. We concluded therefore that the respondent's failure to implement or delay in implementing the adjustment to allow the claimant to do homeworking was a breach of the respondent's duty to make reasonable adjustments.

Failure to shortlist

115. The claimant in this case initially argued that the failure to shortlist her and the failure to discuss the funding with her were because of, or arose from, her disability, and therefore amounted to a breach of section 13 and section 15 of the Equality Act. During submissions however, the claimant withdrew her claim in respect of the funding point, but maintained the reason she was not shortlisted was because of her disability and/or because she had made a request for reasonable adjustments.

116. Ms Buchanan argued that the burden of proof had shifted, such that the respondent had the burden of showing that the decision to shortlist had nothing to do with the claimant's disability.

117. We gave careful consideration to Ms Buchanan's argument that the burden of proof had shifted. We readily accepted Mr Edward's submission that a difference in treatment and in the protected characteristic in not enough, and that there had to be something more, although that something more does not have to be much.

118. In this case Ms Buchanan argued that the fact that the claimant had made a request for reasonable adjustments; and that she could rely on any finding that there was a failure to make reasonable adjustments; that the respondent had failed in the answers to the voluntary questions and indeed in evidence to provide any explanation of the qualities desired and why the claimant was less appropriate than the other candidates who were selected for interview.

119. We accepted Mr Edward's submission that she could not rely on the fact that she had made a request for reasonable adjustments because it was simply an aspect of the claimant's protected characteristic, but more specifically because there had been no refusal of the homeworking request. We were of the view that evidence regarding qualities of candidates shortlisted was an aspect of the second stage of analysis. In any event, Mr Blaney's evidence that Ms Nash, who conducted the shortlisting with him, did not know the claimant and did not know of her circumstances was not challenged. While the respondent had not retained application forms, we noted that was in fulfilment of the respondent's policies on such matters.

120. Ultimately we concluded that there were insufficient secondary facts to support the reversal of the burden of proof in this case, and we accepted Mr Edward's evidence that the claimant had not put forward any evidence to support her contention that she was better qualified that those who had been shortlisted.

121. We should however record that we thought Mr Blaney's approach to the shortlisting was traditional and simplistic and that had he undertaken the role

with appropriate commitment that he would have been able to recall at least the main criteria upon which the selection decision. This was not least because this was a key post in the organisation which was the link with the board. We were concerned too about the respondent's policy in regard to the retaining of application forms; while we understood that for data protection reasons applications should be destroyed, the respondent was effectively immunising themselves from a discrimination claim, at least where the claimant could not show that the burden of proof had shifted. As it happened in this case, we did not accept that the claimant was able to raise any inference of prima facie discrimination, but that might not always be the case.

Claimant's resignation

122. The claimant argued that she had resigned in response to the ongoing discriminatory treatment by the respondent.

123. We required to give careful consideration to the question of whether the claimant's resignation was because of the failure to offer homeworking or because the funding was about to come to an end and she had found a more suitable job. The question for consideration was whether the claimant would have resigned in any event.

124. We did not accept Mr Hankinson's evidence that she had been told about the funding before she resigned; we did not accept his evidence that when asking if she would stay on, whether her decision had anything to do with homeworking.

125. We take into account the fact that the claimant made no vocal complaints or grievances during her employment, that she did not raise her concerns even on her resignation, but we accepted her evidence to the effect that she did not want to make an issue of it and she did not want to be perceived a victim. We accepted too that she would have been annoyed when she saw the job offered not just stressing flexible working opportunities, but even homeworking and that would have reinforced any sense of grievance.

126. We noted the claimant's evidence she would have stayed if she had been offered something more concrete than a trial. Given that there was nothing to indicate from the respondent's point of view that the risk assessment and the trial would not be successful, we have accepted that homeworking would have been a reasonable adjustment. Had that adjustment been made, we consider it more likely than not that she would have stayed on.

127. In the circumstances, we came to the view that the claimant resigned because of the failure to make reasonable adjustments and so that the reason for her resignation was a consequence of her being discriminated against because of the failure to make reasonable adjustments.

Time bar

128. The respondent maintained their argument after hearing evidence that the claimant's claims were in any event time barred.

129. With regard to the reasonable adjustments claim, although there may still be some question other whether in a reasonable adjustments case the failure to make the adjustment is a continuing act or an omission, on the evidence in this case we have found that the duty arose on 24 October and there was no subsequent refusal to implement the reasonable adjustment. Although Mr Edward argued that the "breach" was on 7 February when the claimant was advised that the trial was cancelled, we did not accept that submission, because on the respondent's evidence the intention was then to undertake a risk assessment and not to refuse the request altogether. It continued to be open to the claimant to pursue that request, and indeed the subsequent adverts show that homeworking is being offered in appropriate circumstances. In this case, there was no compliance with the duty by 31 March when the claimant's employment terminated, so that time would start to run from that date. The claimant contacted ACAS on 1 June, and early conciliation was completed on 12 July. There would then be one month from that date for the claimant to lodge her claim, and the claim having been lodged on 7 August, we find that the claim is lodged in time.

130. With regard to the failure to be invited for interview, Ms Buchanan conceded that, having applied on 14 December and Mr Hankinson having commenced on 22 January, the latest date at which time would start to run on the face of it was 22 January, which would mean that the claim was lodged well outwith the three month time frame. Her argument that the claim was lodged in time was based on her submission that the failure to shortlist was somehow linked to the claim for the failure to make reasonable adjustments, and an aspect of a continuing act. We did not however accept that submission. The fact that the claimant did not initially realise that the failure to shortlist had anything to do with her disability or her claim for reasonable adjustments and that it dawned on her over time when there was a delay in implementing appears to indicate that there was no link and indeed we have found on the evidence that the burden of proof does not shift. We accepted Mr Edward's submission that these are two separate kinds of claims or behaviours alleged of the respondent, and took account of the fact that the acts were done by two different people which we accept reinforced the view that the behaviours were not linked and therefore not part of a continuing act.

131. Ms Buchanan invited the Tribunal to extend time on the basis that it was just and equitable to do so, given that the claimant was not advised of the outcome of the selection process and did not know the outcome until Mr Hankinson took up his position on 22 January. She submitted that the Tribunal should also take into account the fact that the claimant was, throughout the period, suffering from fatigue and worn out by the pressures of the job, and needed a period of recovery, and she would be greatly prejudiced by a finding that the claim was out of time because she has no other remedy for that discrimination.

132. We did not accept that submission. The claimant knew from 22 January that she had not got the job. She said in evidence she knew about time limits when she resigned from her employment on 8 March. Her employment had terminated on 31 March. She gave as the reason for resigning the fact that they had not yet made the reasonable adjustments she had requested. She knew then that the adjustments had not been made and that she did not get

the strategic manager's role. She did not take the necessary steps to pursue a claim until June, when she saw the advert referencing home working. Mr Edward's position was that she had throughout April to make a claim, and that it would not be just and equitable to extend time because it took time for her to become annoyed with her employer. We accepted Mr Edward's submission that the claimant knew about time limits but gave no explanation about why she did not bring a claim after giving her notice. We noted too that she did not at the time believe that it had anything to do with her disability or her request for homeworking, and that she was prepared to accept that she did not have had sufficient qualifications. Further, she is self-evidently not left without a remedy, since we have upheld her reasonable adjustments claim.

133. Thus, even if we were wrong about the burden of proof not shifting, we find that the claimant's claim in regard to the failure to shortlist was out of time.

Remedies

134. We then turned to consider remedy. The claimant forwarded an up to date schedule of loss, which incorporated figures which had been agreed with the respondent.

135. With regard to mitigation, we accepted Mr Edward's submission that the claimant had failed to mitigate her losses during the first month after the termination of her employment, when she delayed the start of her employment with her brother until 7 May 2019. While we accept that she decided that she needed a period of recovery, we took account of the fact that the new job which she had secured was part time, and we accept that during that period she was not looking for suitable full-time employment. Although the employment which she secured had a higher annual salary, she earned less because she worked part-time, and we recognise that this was not a job where she could do homeworking and indeed in many respects she recognised that it would be more physically demanding than her previous job and that is why she took it on a part-time basis. We accept that thereafter she was on the lookout for a suitable full-time job which would be more suited to her experience and that those jobs may be less easy to come by in her locale.

136. While it is acknowledged that the assessment of loss inevitably involves speculation, we took the view that it should be possible to obtain full-time employment within around six months, although we also take account of the fact that any full-time employment which the claimant secures will require to be suitable for her health conditions. We heard evidence that she had recently seen an advert for a suitable job which she was proposing to apply for.

137. Taking account of that, we therefore awarded the claimant the difference between what she was earning and what she would have earned up to the date of this hearing, that is from 7 May 2019 to 14 January 2020.

138. The figures in regard to pension ongoing pension loss were agreed.

139. With regard to injury to feelings, we were of the view that injury to feelings fell into the middle of the lower Vento band. The claimant had been engaged on a short fixed term contract. She did not know, and could not necessarily expect, that it would have been renewed. In any event it was not a permanent job, but only a two year extension to the fixed term contract. She did not know that it had been renewed until after her decision to resign. While we accept that she was frustrated and angry about the delays to the homeworking trial, and the failures on the part of the respondent to progress it, still she did not complain at the time or lodge a grievance, and ultimately she was resigned to accepting that, and decided to challenge it only after she saw that the contract was to be extended and homeworking was being offered.

140. In such circumstances, we conclude that an award around the middle of the lowest Vento band of £4,000 to be fair, reasonable and just.

141. The Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 state that we may include interest on the sums awarded, and that we shall consider whether to do so without any need for any application of any party. For injury to feelings interest is calculated from the date of the contravention and ending on the day of calculation. For other compensation, interest is calculated from the mid-point date to the date of the calculation. For this calculation we require to take a view on what would have been a reasonable time for the respondent to implement the reasonable

adjustment. We have come to the view that the adjustment should have been in place by 1 January 2019, at the latest. Thus interest will run at 8% on the injury to feelings award from 1 January 2019 to 14 January 2020, which is 54 weeks, and for other compensation from the mid-point which totals 27 weeks.

Compensation table

Head of Loss	Calculation	Sub-total	Totals
From 7.5.19 to 9.9.19	£381.57-£312.94 = £68.63 x 18 weeks	£1,907.85	
13.9.2019 (new rate) to 14.1.2020	£381.57 - £295.08 = £86.49 x 18 weeks	£1,235.34	
Pension loss from 7.5.19 to 14.1.2020	£26.25 x 36	£945	
Less contributions from new employer to date at 2%	£346 x 0.02 x 36	(£249.12)	£3,839.07
Interest on financial losses	27 weeks x 3839/52 x 8%		£159.47
Injury to feelings			£4,000
Interest on injury to feelings	54 weeks x 4000/52 x 8%		£332.30
TOTAL			£8,330.84

Employment Judge : M Robison
Date of Judgment : 24 January 2020
Date sent to parties : 27 January 2020