EMPLOYMENT TRIBUNALS

Claimant: Mr D Sanders

Respondent: Department for Education

Heard at: Birmingham **On:** **23, 24, 25, 26, 27, 30 September and 1 October 2024 (parties by video).**
2 October 2024 and 4 November 2024 in panel deliberations.

Before: Employment Judge Edmonds
Mr S Woodall
Mr J Kelly

Representation
Claimant: In person
Respondent: Mr A Jones, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The complaint of direct disability discrimination is not well-founded and is dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

3. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed (although part of that complaint would have succeeded had it been presented within the applicable time limit as set out below).

4. The complaint of harassment related to disability is not well-founded and is dismissed.

5. The complaint of victimisation is not well-founded and is dismissed.

6. The complaint of failure to comply with section 80G of the Employment Rights Act 1996 in relation to a flexible working request is well-founded and succeeds. Unless the parties can agree the amount of the award of compensation, a separate remedy hearing will need to be listed for this purpose. The parties are ordered to seek to agree what they consider the appropriate award of compensation should be by **17 January 2025** and to write to the Tribunal by that date with an update on the position.

REASONS

Introduction

1. The claimant is an Apprenticeship Service Support Advisor within the respondent's Apprenticeship Service team. He is disabled (and was disabled at the relevant time for the purposes of this claim) by reason of depression, anxiety, Post Traumatic Stress Disorder and social anxiety. His claim is broadly about the way that the respondent treated him following him raising concerns about the impact of his disability on his role, whether the respondent should have enabled him to move to another role (particularly in content design work) and whether the respondent failed to address his flexible working application to work from home. He remains employed by the respondent.

2. ACAS Conciliation commenced on 29 March 2023 and ended on 10 May 2023, and his first claim form was submitted on 9 June 2023. He submitted a further Tribunal claim on 30 November 2023 raising allegations of victimisation, but no further ACAS Conciliation certificate was obtained in relation to that second claim. The respondent submits that in the absence of a new ACAS certificate, the Tribunal does not have jurisdiction to consider his second claim.

3. At the time of the incidents relating to these claims, the claimant had a different name (both first name and surname) and these proceedings were originally issued in that previous name. By consent, I ordered that the name of the claimant be amended to Mr D Sanders. We discussed whether the claimant wished to make an application under Rule 50 for anonymisation or other privacy application, which the claimant considered but ultimately decided not to do. The Tribunal did not consider that it was interests of justice to make any order under Rule 50 of its own volition, and we agreed that this Judgment and Reasons would refer to the claimant by his current name.

Claims and Issues

4. The issues in respect of the claimant's first claim (1304526/2023) had been agreed at a Preliminary Hearing on 23 October 2023. Following the issuing of the second claim (1308207/2023) the parties prepared an agreed updated List of Issues which was approved by the Judge at a second

Preliminary Hearing at which it was ordered that the two claims be heard together, although not consolidated in light of the jurisdictional challenge which the respondent raised about the second claim as identified above.

5. However, during the course of the hearing a number of amendments were made to the List of Issues as follows:

   a. The claimant withdrew certain allegations, specifically:
      i. Direct discrimination insofar as it related to Jodie Swain only; and
      ii. The victimisation complaints relating to the actions of Michelle Radcliffe, Gary Tucker and Angela Toal, leaving only those which relate to Saheel Sankriwala.

   b. During the course of the hearing, it was identified that the reasonable adjustments section of the List of Issues did not include as a step that could have been taken to avoid the disadvantage "moving the claimant to an alternative role". It was however clear that this was an argument raised by the claimant and having heard submissions from the parties we decided that it was in the interests of justice to amend the List of Issues to include that potential step.

   c. Having read the relevant documents prior to hearing evidence, the Tribunal identified that the claimant's claim form appeared to raise a complaint about a failure to process his formal flexible working request (i.e. failure to follow the process and provide a decision on it), however this was not within the agreed List of Issues. We raised this with the parties and the claimant said that it had been his intent to include an alleged breach of the formal flexible working procedure in his claim. The respondent submitted that this had not been mentioned by anyone at the previous Preliminary Hearings. We heard submissions from both parties about the matter, and took into account the case of **Z v Y 2024 EAT 63** which made clear (in the context of a claim where a matter had been pleaded in the claim form but not included in the list of issues) that the Tribunal is not required to stick slavishly to the list of issues if to do so would impair its core duty to hear and determine the case in accordance with the law and evidence before it. We noted that it had been immediately apparent to the Tribunal from reading the particulars of claim that there was a reference to a breach of the flexible working procedure, the claimant had covered the matter in his witness statement, Mr Nugent for the respondent had covered the matter to some extent in his witness statement and would be able to give supplementary evidence on the point if the respondent felt appropriate. We took into account that the respondent submitted that the actual decision in respect of the application was taken by an individual who no longer worked for the respondent. The respondent however also said that it was Mr Nugent who communicated the decision to the claimant and therefore should have knowledge of the reason why it was rejected, and in any

event the Tribunal was only considering adding a complaint regarding the process (rather than the substantive decision) to the List of Issues. Ultimately we concluded that it was in the interests of justice and in accordance with the Overriding Objective for this to be added to the List of Issues and we informed the parties that any witness who wished to do so could give supplementary evidence on this point (and/or the respondent was welcome to try to contact the employee who it said made the decision to give evidence if they wished to do so). It appeared to the Tribunal that the relevant documentation about the matter was already in the file for hearing but we also informed the parties that if there was additional documentation they could disclose it as soon as possible. We then spent time agreeing the formulation of the issues relating to that complaint before hearing any evidence.

6. The issues, following the amendments identified above are set out below (and we have moved the time limits issue to the end as we felt that it was only once it had been determined what, if any, allegations of discrimination were successful that it could be assessed whether those allegations were out of time and, if so, whether time limits should be extended). We also agreed that remedy would be dealt with at a separate hearing should the claimant be successful.

1. Direct disability discrimination

1.1 Did the respondent refuse, in February 2023, to permit the claimant to access career development training (specifically "Content Design Apprenticeship")?

1.2 Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The claimant says he was treated worse than Colum Nugent, Angela Toal, Luke Brown and Henry Morgan.

1.3 If so, was it because of disability?

1.4 Is the respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability?

2. Discrimination arising from disability

2.1 Did the respondent treat the claimant unfavourably by, in November 2022, attempting to coerce him into resigning, via the respondent's "Voluntary Exit Scheme"?

2.2 Did the following things arise in consequence of the claimant's disability? The claimant's case is that by this point, he had, firstly, taken sick leave and, secondly, by his persistent demands of the respondent as to his needs arising from his disability, they perceived him as a "problematic" employee.

2.3 Was the unfavourable treatment because of any of those things?

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

2.4.1 Ensuring that the claimant was aware that Voluntary Exit was available to all employees and that he was not disadvantaged due to sickness absence.

2.5 The Tribunal will decide in particular:

2.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

2.5.2 Could something less discriminatory have been done instead?

2.5.3 How should the needs of the claimant and the respondent be balanced?

2.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

3. Reasonable adjustments

3.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

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

3.2.1 That staff work from the office for three days every week [admitted]

3.2.2 That staff deal with customers directly [admitted]

3.2.3 That staff deal with customer complaints [admitted]

3.2.4 That staff process requests for re-submission of certificates for apprentices and for their Oyster Card applications [admitted]

3.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

3.3.1 In respect of the first PCP, the claimant's disability made it difficult for him to work in large groups, having constant interaction, resulting in him feeling drained and suffering sleeplessness.

3.3.2 In respect of the second and third PCPs, they contributed to his stress levels, often involving contact with people who were themselves stressed. Dealing with complaints, in particular, required an emotional resilience which he did not possess. Such interaction exacerbated his existing symptoms.

3.3.3 Generally, the claimant's workload was too great, again exacerbating his conditions and the fourth PCP gives examples of such workload.

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

3.5 What steps (the "adjustments") could have been made to avoid the disadvantage? The claimant suggests:

3.5.1 Working from home four days a week;

3.5.2 Not being required to deal with customers directly, or with their complaints;

3.5.3 To have his workload reduced by the removal of the stated tasks; and

3.5.4 To move the claimant to another role.

3.6 Was it reasonable for the respondent to have to take those steps and when?

3.7 Did the respondent fail to take those steps?

4. Harassment related to disability

4.1 Did the respondent do the following things:

4.1.1 Mr Colum Nugent, in April 2022, state "When you have problems like that, you should leave them behind the entrance doors, and when you are at work, you should concentrate on your work, as you should do";

4.1.2 Ms Helen Suffolk, on 31 August 2022 (in respect of the claimant looking for an alternative role), state "We shouldn't be doing that for you".

4.1.3 Mr Nugent, on 31 August 2022, state "You should be three days in the office, and you should be back fully efficient with the others as you should be".

4.1.4 Mr Nugent, on 18 October 2022, state (regarding flexible working) "unfortunately, there is policy in place, which is the standard. How you feel is how you feel".

4.1.5 Ms Suffolk, on 18 October 2022, state "There is no need for the [second] Occupational Health Review to be made, as we've just had one".

4.1.6 Mr Nugent, in November 2022, state "We will not allow you to work from home, as the others would like that too".

4.2 If so, was that unwanted conduct?

4.3 Did it relate to the claimant's protected characteristic, namely disability?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. Victimisation

5.1 It is common ground that the claimant did the following which constitutes a protected act:

5.1.1 issued a grievance dated 15 February 2023 ["protected act 1"]

5.1.2 issued a grievance dated 17 May 2023 ["protected act 2"]

5.1.3 issued proceedings against the respondent for disability discrimination on 9 June 2023 ["protected act 3"]

5.2 Did the respondent subject the claimant to any detriments as follows:

5.2.1 On 7 August 2023 did Saheel Sankriwala (grievance appeal manager) fail to follow the respondent's policy in that he did not re-hear the claimant's grievance?

5.2.2 Around August – September 2023 was Saheel Sankriwala (grievance appeal manager) biased and unfair in his dealing with the claimant's grievance appeal?

5.3 If so, was this because the claimant did a protected act? The Tribunal will consider whether any of the alleged acts of detrimental treatment pre-date any of the relied upon protected acts.

6. Flexible working (including time limits)

6.1 Did the claimant make a formal flexible working request in accordance with section 80F of the ERA 1996?

6.2 Did the respondent, under section 80G of the ERA:

6.2.1 Deal with the application in a reasonable manner?
6.2.2 Notify the claimant of the decision on the application within the decision period of three months or such longer period as may be agreed by the respondent and claimant?

6.3 Was the claimant's claim submitted to the Tribunal within three months beginning with the relevant date (allowing for early conciliation) – the relevant date being the first date on which the employee may make a complaint.

6.4 If not, was it reasonably practicable for the complaint to be presented within that period?

6.5 If not, was it submitted within such further period as the tribunal considers reasonable?

7. Time limits / Jurisdiction (discrimination)

7.1 The first claim form was presented on 9 June 2023. The claimant commenced the Early Conciliation process with ACAS on 29 March 2023 (Day A). The Early Conciliation Certificate was issued on 10 May 2023 (Day B) – Ref: R152622123/07. Accordingly, any act or omission which took place before 30 December 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

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

7.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

7.2.2 If not, was there conduct extending over a period?

7.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

7.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

7.2.4.1 Why were the complaints not made to the Tribunal in time?

7.2.4.2 In any event, is it just and equitable in all the circumstances to extend time? The Tribunal will decide:

7.2.4.2.1 Why were the complaints not made to the Tribunal in time?

7.2.4.2.2 In any event, is it just and equitable in all the circumstances to extend time?

7.3 The second claim form was presented on 30 November 2023. The claimant relies on the same Early Conciliation Certificate as obtained for the first claim, which commenced on 29 March 2023 (Day A). The Early Conciliation Certificate was issued on 10 May 2023 (Day B). Ref: R152622123/07.

7.4 Has the claimant complied with the requirements of Early Conciliation in respect of his second claim. If not, does the Tribunal have jurisdiction to consider the second claim (para 29, Science Warehouse Ltd v Mills UKEAT/0224/15/DA and s.18A of the Employment Tribunals Act 1996 (inserted by s.7 Enterprise and Regulatory Reform Act 2013 (the ERRA) refer).

7.5 If the Tribunal does have jurisdiction, are any of the victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

7.5.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

7.5.2 If not, was there conduct extending over a period?

7.5.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

7.5.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

7.5.4.1 Why were the complaints not made to the Tribunal in time?

7.5.4.2 In any event, is it just and equitable in all the circumstances to extend time? The Tribunal will decide:

7.5.4.2.1 Why were the complaints not made to the Tribunal in time?

7.5.4.2.2 In any event, is it just and equitable in all the circumstances to extend time?

Procedure, Documents and Evidence Heard

7. The Tribunal heard evidence from the following individuals:

a. The claimant;
b. Miss Jodie Swain on behalf of the respondent;
c. Mr Colum Nugent on behalf of the respondent;
d. Mrs Helen Suffolk on behalf of the respondent;
e. Mrs Angela Toal on behalf of the respondent;
f. Mr Gary Tucker on behalf of the respondent;
g. Mrs Michelle Radcliffe on behalf of the respondent; and
h. Mr Saheel Sankriwala on behalf of the respondent.

8. In relation to Miss Swain, upon receipt of the claimant's witness statement it became apparent to the respondent that the claimant intended to make allegations relating to Jodie Swain, a previous line manager. The respondent had not intended to call Ms Swain but having seen the claimant's witness statement, decided that it would wish to call her. A witness statement was prepared and the claimant raised no objection to her giving evidence using that statement. Although the Tribunal noted that of course Ms Swain would have had the benefit of seeing the claimant's witness statement before preparing her own, in the circumstances we determined that it was in accordance with the Overriding Objective to permit her to give evidence and to use that statement for that purpose alongside oral evidence.

9. Due to additional information coming to light during the hearing (after the claimant had completed his evidence) about the date on which Mr Nugent became the claimant's line manager, indicating that both the claimant and Mr Nugent had given incorrect evidence on this point, the claimant was recalled so that he could clarify certain matters in that regard.

10. A number of the respondent's witnesses requested permission to be excused from the hearing on 30 September 2024 so that they could attend the funeral of a colleague. The Tribunal sought as far as possible to complete evidence before that date however the cross examination of witnesses took longer than expected and this was not possible. As the funeral was not until lunchtime on 30 September 2024 it was agreed that

those witnesses who needed to attend the funeral would give their evidence either the previous week or in the morning of 30 September 2024, leaving those witnesses who were not due to attend the funeral to give evidence on the afternoon of 30 September 2024. The respondent's witnesses confirmed that they had no objection to this and the Tribunal verified with each of them that they felt able to give evidence on that day from a wellbeing perspective.

11. In general, we found all of the witnesses to be candid in their evidence and to be doing their best to recall the relevant matters to the best of their ability, although some recollections were somewhat faded given the passage of time. Whilst these Reasons are lengthy, they do not address each and every point raised during the proceedings, however the entirety of the evidence we were taken to was considered more generally in reaching our decision.

12. The Tribunal was presented with a file of documents ("the Bundle") amounting to 1421 pages, although there were some initial issues identifying the correct version as a shorter Bundle had originally been submitted to the Tribunal and then additional pages added to it. During the course of the hearing, some additional pages were added, for example the claimant's Further and Better Particulars and documentation showing the date on which Mr Nugent became the claimant's line manager, and these were inserted using sequential numbering (1422 onwards). In these Reasons, references to page numbers are to the page numbers of the Bundle. We also informed the parties that we would not be reading all documents in the Bundle and that they must take the Tribunal to any documents that they wished the Tribunal to read.

13. An issue was raised by the respondent at the outset of the hearing as to whether the claimant intended to pursue all elements of his claim, as the respondent asserted that his witness statement did not cover all of the elements of the List of Issues. Having read the documents, the Tribunal also noted that the claimant's witness statement did not contain information about some of his victimisation allegations and about certain aspects of his reasonable adjustments complaint. In the circumstances, and given that the claimant had not had any legal representation when preparing for the hearing, we determined that it would be appropriate to permit the claimant to give some brief additional evidence on these matters before moving to cross examination if he wished.

14. The Tribunal also received an opening note from the respondent at the start of the hearing and written submissions from both parties which they supplemented with oral submissions once evidence had been completed. The hearing finished early on 30 September 2024 which ensured that both parties had sufficient time between the end of evidence and providing those submissions to the Tribunal on 1 October 2024.

15. The hearing was held remotely by video as a reasonable adjustment for the claimant. The claimant was asked at the start of the hearing whether he required any further adjustments and he confirmed that he did not. The

Tribunal informed him that he could let the Tribunal know should he require a break at any particular time.

16. We agreed that this hearing would consider liability only and a separate hearing would be listed to consider remedy if the claimant is successful in all or part of his claim.

Facts

Background

17. The claimant joined the respondent in May 2019 in the Apprenticeship Service team as an Apprenticeship Service Support Advisor. The claimant's role is office based (although see our detailed comments below regarding hybrid working following the Covid-19 pandemic). He works in the Tier 2 team which is a team dealing with escalations from the Tier 1 team: each query was known as a "ticket". As part of the Tier 2 team, the nature of the queries would be more complex than those which the Tier 1 team dealt with. This could include complaints from customers, and would involve a mixture of telephone advice, emails, and other mechanisms. There was a reference in the List of Issues to dealing with Oyster Card applications as part of his role. We heard from the respondent, and we accept, that this formed a very small part of the role and declined during the relevant period in this claim. However, we consider that the claimant referenced this not because it was a substantial part of his role, but as an example he felt showed that the queries were complex in nature and required attention to detail. We find that the team dealt with a mixture of queries, some of which were easier than others and some of which were certainly more complex in nature. The role would involve speaking to customers in various formats, such as telephone, email and web chat.

18. The claimant is very diligent and ensures that the quality of his work is high, which means that in consequence he has a tendency to spend longer per query than some of his colleagues. As it was put to us in evidence, his quality was very high but his quantity not always so. Whilst the respondent would have wished the quantity of queries to be increased (and raised this with him on occasions, as detailed below), the claimant's line manager Mr Nugent also recognised the importance of quality and he was a valued and respected employee. There are no specific targets or KPIs, although performance data is collected on the number of tickets each employee deals with.

19. The respondent accepts that the claimant was at the relevant time disabled by reason of depression, anxiety, Post Traumatic Stress Disorder and social anxiety.

20. The respondent is a large public sector organisation. It is a Disability Confident employer and it was clear from the respondent's witnesses that there is a suite of training on equality and diversity that managers are required to undertake. The respondent also has a large number of policies relating to employment matters, many of which contain considerable detail. In particular, we were provided copies of:

a. Civil Service HR Employee Policy, which includes a section on "list of common workplace adjustments (page 174)
b. Grievance policy (page 1296)
c. Flexible working (page 155)
d. Workplace Adjustments – Line Manager's Best Practice Guide (page 128)
e. Attendance Management (page 159)
f. List of Common Workplace Adjustments (page 174)
g. Line Manager's Toolkit for Supporting Disabled Employees (page 195)
h. Managed Moves (page 216)
i. Managing Unsatisfactory Attendance (page 225)
j. Workplace Adjustments (pages 238, 243); and
k. Workplace Adjustments Factsheets (page 255)

21. There are a number of separate processes to address internal moves outside of the usual application processes:

a. Managed move (page 216). Managed moves can occur in a number of scenarios, including as a workplace adjustment for a disabled employee, but also in other situations such as employees at risk of redundancy, on return from family leave or to support career development.

There was a dispute between the parties as to whether or not there is a list of managed move roles: the claimant said there is, and in fact Mr Nugent said in his witness statement that there was such a list. However, the evidence we heard from Mrs Swain and Mrs Suffolk was that there was no such list. We found generally that Mr Nugent did not always have a clear grasp of the respondent's policies and procedures and on the balance of probabilities we prefer the evidence of Mrs Swain and Mrs Suffolk on this point. We find that the managed move process instead involved the person interested in a managed move role completing a brief personal statement and applying for that role, and the recruitment manager would then review that statement to assess suitability. If they are suitable, the formal application process can be dispensed with.

However, the evidence we heard also suggested that once a vacancy had gone live and been advertised, it was too late for a managed move to be used for that vacancy. In cases involving disabled employees looking for a new role by way of reasonable adjustment, we find this to be a surprising position, given that the duty to make reasonable adjustments would continue to apply whether or not a role has been advertised. However, looking at the managed move policy (page 216, at page 218), it does clearly state that roles advertised on Civil Service Jobs would not be appropriate for a managed move.

The question then arises as to how an employee or manager finds out about a potential managed move role, in the absence of a list or advertised vacancy. The evidence we heard was inconsistent even within the respondent, showing a lack of knowledge of the finer details of the policy. We find on a balance of probabilities that there is no specific managed move list available to employees, whether or not they qualify for a managed move. Instead, a team called Directorate Support hold information (as referred to at page 344) and when a manager contacts that team, they can advise about any potential roles. If there are, the employee then needs to submit their personal statement.

b. Redeployment. This relates to employees who are at risk of redundancy due to organisational change (see reference to it at page 741). This is not relevant to the claimant's circumstances.

c. Job carving (page 221). This involves either redesigning an existing job around the needs of a specific disability, or creating a new role involving tasks an employee is better suited to do. The claimant suggested this policy creates a positive obligation on the respondent to create a new role: we find that this was not the case, rather it is a mechanism that can be used if the respondent is in a position to do so. It was also suggested that the budget for this is unlimited: by this we find that the respondent means that where there is a role which is suitable and required within the respondent, it would not be refused based on cost alone. We do not find that the respondent had a complete unlimited budget to put in place anything that an employee might request by way of adjustment.

d. Job Swap (page 1303). This is a process whereby employees can find other employees who wish to swap jobs with them on a permanent basis. It was a new scheme launched on 27 September 2022 within the respondent, with specific timeframes but an intention to run the scheme annually moving forward.

22. From the evidence we heard, the respondent clearly values the career progression of its employees. Where resources allow, employees are encouraged to attend training courses and pick up tasks not directly associated with their day job, in order that they can acquire new skills to further their overall career. We saw examples of the claimant doing this, notably in relation to content design which we will detail further below. Whilst the respondent aspired to develop its staff into the career paths of their choosing, this was subject to operational needs and dependent on it being able to release those staff from their day to day duties in order to take on these training opportunities or tasks.

Line Management

23. Mrs Swain was the claimant's line manager until January 2021, at which point she stopped being a line manager more generally and became more

focused on acting as a "task manager" for the team. This meant that whilst not the claimant's manager, she continued to have day to day oversight of what he was working on and the number of "tickets" he was completing, as her role was to manage that for the whole team.

24. The claimant asserts that Mrs Swain knew of his disabilities. He referred in particular to her having recommended a particular book on anxiety to him. However, we accept her evidence that this arose out of general conversations about confidence and speaking in front of colleagues and senior managers, because she was aware that the claimant appeared nervous in such meetings. She recommended a book called Feel the Fear but Do It Anyway which had previously been recommended to her to assist with public speaking and getting over nerves. We find that Mrs Swain did not have knowledge of the claimant's underlying health, the severity of it or the fact that it amounted to a disability, nor could she reasonably have known that during the course of her period as line manager.

25. Mr Nugent was the claimant's line manager from January 2021 to March 2023. Rather surprisingly, in Mr Nugent's witness statement and during the initial part of the claimant's oral evidence, both said that Mr Nugent managed the claimant from December 2021 (and not January 2021). Their evidence was that Miss Swain had been the claimant's line manager during 2021. After the claimant had completed his oral evidence, and had highlighted a performance development email sent to Mr Nugent in May 2021, the respondent located documents showing that in fact Mr Nugent became line manager in January 2021 (pages 1445 to 1458). It is unusual that both the claimant and Mr Nugent were unclear on the relevant dates to such an extent, and this resulted in the claimant being recalled to give further evidence as the discrepancy impacted upon the evidence that had been given about knowledge of disability. However, we accept that both made a genuine error.

26. In Mr Nugent's witness statement, he explained that he had managed three other employees at the respondent and had extensive experience from a prior role. Having heard Mr Nugent's oral evidence, whilst we do not doubt those experiences, we found him to be inexperienced when it came to dealing with an employee with underlying health conditions as he seemed not to have a clear grasp of the applicable policies and procedures.

27. Mr Nugent is currently undertaking a business management leadership apprenticeship within the respondent and has been doing since 2019.

28. When Mr Nugent took over line management responsibility he had a handover from Miss Swain. Neither of them could recall the specifics, but it would have included a discussion about performance and in all likelihood about the claimant's self confidence and public speaking difficulties, although his disabilities would not have been referred to as Miss Swain was unaware of these.

29. Mr Nugent was line managed by Mrs Helen Suffolk, who in turn was line managed by Ms Caroline Mason. We did not hear from Ms Mason and understand she has since left the respondent.

Working from Home and The Backlog

30. During the Covid-19 pandemic, the claimant and his colleagues moved to working from home on a temporary basis. It is not clear from the evidence we heard when the claimant and his colleagues were asked to return to office based working, as no one could recall this clearly, however following the easing of restrictions the respondent appears to have sought the return to offices of its staff. On the balance of probabilities we find that this would have been around early 2022. The respondent implemented a new hybrid approach under which employees were generally expected to work from offices 60% of the time. There was a push from senior management for this hybrid approach to be enforced and employees were required to return to offices on this basis.

31. During the course of 2021, the pressures involved in the claimant's role started to increase. In particular, there was a backlog of tickets building up and the team was short staffed, due to 4 employees being promoted. In addition, the Tier 1 provider changed, meaning that the Tier 1 staff were less experienced, resulting in more queries being submitted to the claimant's Tier 2 team. In fact, the level of work was such that when those 4 employees were promoted, they were not immediately released on a full time basis into their new roles, but instead spent some of their time continuing to support the claimant's team to try to clear some of the backlog. In addition, some staff did overtime and some members of managements stepped in to take tickets to support the team. The backlog continued to get worse and did not start to ease until mid 2022.

Content Design

32. On 3 and 4 March 2021 the claimant attended a two day Content Design Course (page 480). This is the kind of professional development that we referred to earlier. He then attended a Content Forum meeting with Miss Swain on 10 March 2021 and continued to remain involved in content work by attending meetings organised by Mrs Swain during the course of March, April, May and June 2021. There was then a break and on 15 September 2021 the claimant emailed Mrs Swain to ask whether there was any content writing work he could help with (page 278). There was no response to that email in the file, however we did see an email from Mrs Swain to Olaniyi Oshinusi on the same day, copying the claimant, addressing a different part of his email. This indicates to us that she did at least read the email. There is no evidence that she replied in writing to the claimant, however later that year in November and December 2021 he did attend further content meetings organised by Mrs Suffolk.

33. Content design work was an area which the claimant was personally interested in and wished to move into on a longer term basis. He wanted to use the respondent's career development support to gain exposure in that area with a view to ultimately securing a permanent role within a content team. Within the claimant's team, there was some content work and this is the work that they got him involved in, however it was a small part of the team's work, there were no full time content writers in the claimant's team

and he would have had to move teams to secure a permanent content writing position.

34. The claimant has said that two reasons why he would particularly wish to move into content writing work is because the role is suited from working from home and because it is suited to people with disabilities as the content needs to be accessible to customers with disabilities and so disabled people add valuable insight. We find that disabled people can indeed add valuable insight into that type of work, however the role is not specifically targeted to disabled people. In relation to working from home, the content teams would be subject to the same office attendance policies as the rest of the respondent, subject to any reasonable adjustments made.

35. The claimant also appears to consider that content work would be less stressful, because it is not dealing with day to day customer queries. Mr Tucker explained in evidence that the role was not in his view any less stressful, notably because it would involve working with a delivery team to hard deadlines preparing content for millions of people. That said, we consider that the claimant found speaking to customers on the telephone a particularly stressful part of his role and a content role would certainly alleviate that particular stressor for him.

36. In December 2021 the claimant says that he was moved away from content design. We accept that he attended content meetings regularly between 19 November 2021 and 17 December 2021, but not thereafter. We can also see that on 8 December 2021 he emailed Mrs Swain about some content work (page 279), and Mrs Swain replied on the same day offering to talk to him about it (page 1354).

37. The respondent's position is that it was not able to involve him in that work following December 2021 due to the work pressures of his team. Given the ongoing backlog and shortage of staff, it was necessary to prioritise his core role. The same applied to the rest of his team, who also had to prioritise the core workload of the team, and we heard from Mrs Toal in particular who found herself in the same position. We find that he was not formally removed from content work in December 2021 as the aspiration was always that once things quietened down he could get involved again, however we accept that from that time the claimant was no longer being proactively involved in that work.

38. We accept that the claimant was disappointed at not being involved, and actively tried to make it known that he was available to carry out any content work that he could, for example in an email to Mrs Swain on 2 February 2022 (page 480). He also specifically referenced his desire to continue content work in a Personal Development Plan on 30 March 2022 (page 284).

Disclosing his health to Mr Nugent

39. The claimant had a one to one meeting with Mr Nugent on 2 December 2021. Mr Nugent and the claimant had regular one to one catch up meetings, and this was one such meeting. At this meeting there were some

discussions about the claimant's performance although we do not have the detail of what was discussed as there are no notes and neither party gave detailed evidence on it. It is clear that there were concerns around performance, although the claimant was not ultimately placed on any kind of formal performance improvement plan as a result.

40. Following the meeting, on 6 December 2021 the claimant emailed Mr Nugent (page 1356) about their discussion. In the email, the claimant sought to demonstrate that he had not in fact been underperforming and suggested that colleagues who had dealt with more tickets than him had either been working overtime, had less complex queries and/or had more experience than he did. He also referred to his high customer satisfaction scores. There was a reference to him having been told that his performance would be monitored on a weekly basis. After setting that out, he moved on to say:

> "*I did not feel fully understood during our conversation, when you said that the health issues should be treated separately from work. I believe that health condition can have an impact on how an employer performs at work.*
> *Lastly, we briefly discussed the hurdles I am challenged by, which is my ongoing condition (complex PTSD for which I have been receiving ongoing on and off treatment) affecting my functioning. I have not mentioned my condition earlier, as I didn't feel it would be an obstacle in my work."*

41. From this email, we find that:

    a. There was clearly a discussion about the claimant's health at the meeting on 2 December 2021, given his reference to comments made by Mr Nugent.

    b. We find that this meeting on 2 December 2021 was the first occasion when the claimant raised his underlying health conditions at work, given his reference to not having mentioned it earlier. Whilst this email only refers to PTSD, we consider on the balance of probabilities that he had also mentioned his other health conditions for the first time at this meeting, particularly as Mr Nugent sent an email to HR (see below) about the matter on 8 December 2021 in which he referred to the claimant mentioning his "mental health and his overall wellbeing" (page 280).

    c. At this stage, Mr Nugent is on notice that the claimant has an underlying health condition, which he says is affecting him at work. Later in his grievance, the claimant says he disclosed his health in April 2022: we find that this was an error in his grievance as the content of this email clearly set out both that he had an underlying health condition and that he felt it impacted his work.

    d. In relation to the alleged comment "*you said that the health issues should be treated separately from work*", Mr Nugent did not reply to this email suggesting that the claimant had misunderstood (or in fact at all, as we detail below). Whilst Mr Nugent may not have used

the exact words set out by the claimant, he certainly said something that gave the claimant the impression that his health and work were to be treated separately, which concerned the claimant enough to refer to it in this email.

e. Mr Nugent did not reply to the email. He suggested in evidence that it would have been discussed at other one to one meetings, which may to some extent be the case as we anticipate that performance would have been an ongoing discussion. However, we consider that an email of this nature warranted a specific reply.

42. On 8 December 2021 Mr Nugent attempted to raise a ticket with HR, asking for support in relation to the claimant (page 280). He explained that he had discussed underperformance with the claimant, and that the claimant had responded (that response presumably being the email dated 6 December 2021). He expressed concerns about his performance levels and said "*He is mentioning his mental health and his overall wellbeing following on from our conversation and would appreciate some advice in terms of occupational health intervention / advice off the back of his email"*. At this stage therefore Mr Nugent had clearly identified that there was a need to investigate the health issues and had quite correctly sought HR guidance in how best to do that.

43. However, he then received a bounce back (also page 280) the following morning, saying that HR queries should be raised through a different portal and that tickets raised via that email address would not be viewed or responded to. Mr Nugent could not recall receiving this message, but we find that he did, and that for that reason his request for advice never reached the HR team.

44. Although we accept that Mr Nugent may not have spotted the bounce back and therefore did not realise that his request for advice did not reach its intended recipient, when he did not receive the requested advice, he did nothing. He did not re-submit it, nor reach out to HR in another way. He simply continued to manage the claimant in the usual way.

45. We find it disappointing that, having identified a need for guidance, Mr Nugent did not follow that through to ensure that he received that guidance. Consequently, nothing was done at that stage to identify the extent or nature of the claimant's ill health, what impact that might have on him in the workplace or any steps that could be reasonably taken to support him. This is an example of why we have found that despite his extensive management experience, Mr Nugent did not appear to have significant experience of managing employees with underlying health conditions.

46. We find that from December 2021 until the end of March 2022 (to which we turn below), the claimant continued to be line managed in the usual way,

without any specific recognition of his ill health. We also find that the claimant did not push the matter further during that period, despite the claimant suggesting in his witness statement that he had explained things verbally many time. This is also surprising given that he had raised his concerns with Mr Nugent over email, however we note that it has been said by both parties that the claimant found public speaking and speaking up to managers difficult. We find that if the claimant had been pushing the matter harder, that would have prompted Mr Nugent to do something given that Mr Nugent did in December 2021 make an attempt to contact HR for support in progressing the matter. Likewise, if Mr Nugent had approached the matter himself, the claimant would have been likely to open up about his health in more depth.

Request for an Occupational Health referral

47. On 31 March 2022 the claimant had another one to one meeting. At this meeting the claimant's performance was discussed again, and the claimant raised his health concerns and asked for adjustments. We find that Mr Nugent suggested to the claimant that he obtain a fit note setting out what adjustments he needed and the fact that he needed an Occupational Health referral. This is supported by the fact that the fit note, when submitted (see below), specifically suggested an Occupational Health review. At this stage, the claimant was in work and not off sick. Whilst fit notes can be used to indicate that someone is fit for work with adjustments, we can understand why the claimant felt it was odd to be asked to go and get a doctor to certify that he needed adjustments and an Occupational Health referral in these circumstances, rather than just referring him to Occupational Health to seek that guidance. We consider that there was nothing inappropriate about asking him to put his requests in writing, so that there was a clear record of what was being requested and why: this would be helpful to everyone. However we can understand that the claimant felt that, by requiring him to get a fit note before Occupational Health advice would be sought, unnecessary obstacles were being put in his way. We find that Occupational Health guidance could and should have been sought without needing a fit note.

48. We also find it strange that Mr Nugent did not at this stage remember that he had not had the HR advice he had sought months earlier and did not chase it up at this point. We do not find any deliberate malice on Mr Nugent's part, but this is another example of his inexperience in dealing with such matters.

49. Mr Nugent said in evidence that he made informal adjustments for the claimant in the meantime at this stage, however we were unable to ascertain a clear timeline of what adjustments were made at what specific times. We do accept that Mr Nugent, despite having performance concerns,

did not move into any formal performance management at this time. We do not however find that he put in place other adjustments to his role more generally at that point in time.

50. The claimant provided a fit note dated 6 April 2022 (page 288). This was for a period of 6 weeks, and stated that he had depression, anxiety and social anxiety. It says he was fit for work, taking account of the doctor's advice for amended duties and workplace adaptations. It said "*Please consider occupational therapy review…He is likely to experience variable symptoms including problems with focus, concentration, stress management and anxiety. It would be helpful if he could be supported with reduced duties, breaks if needed or extra support when he is particularly symptomatic….*".

51. The claimant sent this fit note to Mr Nugent on 12 April 2022 (page 300). In that email he said he would forward a letter from his therapist once received, which he did. That letter was dated 13 April 2022 (page 289). There was no reply to this email, and no steps taken during April to progress an Occupational Health referral. Although the claimant did not specifically request that referral in his email of 12 April 2022, the fit note clearly recommended it and we have found that discussions were had on 31 March 2022 about arranging one. Mr Nugent could and should have referred the claimant to Occupational Health upon receipt of that fit note.

52. On 4 May 2022 the claimant emailed Mr Nugent again, referring to the fit note and saying that he would arrange a new one shortly (page 299/300). We find that he sent this to try to politely prompt a reply from Mr Nugent, and he also stated that he would prepare a request for reasonable working adjustments shortly. He ended by asking Mr Nugent to let him know about next steps regarding occupational therapy review.

53. No reply was again received, and so Mr Nugent emailed HR on 8 May 2022, copying Mr Nugent. (page 298) In this email he requested a stress risk assessment, occupational therapy review and reasonable work adjustments. He said that he had emailed Mr Nugent but had had no progress and so was emailing Ms Thomas because the matter was "very urgent". This demonstrates that Mr Nugent had not spoken to the claimant about the fit note or next steps at that stage, and that this was causing distress to the claimant. Within the email he also referred to sickness absence on 5 and 6 April, however from the days of the week quoted and the context of the comment, this was clearly a reference to 5 and 6 May 2022.

54. Alexandra Pyatt in HR replied to Ms Thomas, the claimant and Mr Nugent, attaching a link showing Mr Nugent what he needed to do and confirming that it was his responsibility to take the matter forward with Occupational Health. The claimant then emailed Mr Nugent, copying HR, on 9 May 2022

(page 296), asking for the assessment to be arranged urgently. Mr Nugent did then take action that day to arrange the assessment however we find that it was the involvement of HR specifically telling him to take action with the claimant on copy that prompted him to move the matter forward. We find that he could and should have acted sooner.

55. On 9 May 2022 Mr Nugent emailed the claimant (page 296/297), confirming that he was progressing the OH referral, and asking the claimant to confirm whether he would be working his "3 days a week this week in the office". He said that "*Once occupational health respond, and as per advice from your doctor, I will ensure any adjustments that are agreed, will be implemented in line with any recommended advice from occupational health*". That shows that the claimant and Mr Nugent were by that stage having discussions about potential adjustments, but that these had not as yet been implemented.

56. The claimant replied on 9 May 2022 (page 296), explaining that his condition was deteriorating and that he wished to work from home as an exceptional circumstance until he became less symptomatic. He said that in the absence of this he would be off sick. As far as we are aware there is no written reply to that email, but on 11 May 2022 the claimant emailed a further update regarding his health (page 295) and again asked to work from home until his symptoms ease. He said that having to work in the office would exacerbate his symptoms. He ended by saying "*Thank you for your support so far and I hope you will be able to support me further with it".* Again, there is no written reply but on 13 May 2022 the claimant emailed again (page 295) thanking Mr Nugent for his helpful call on Wednesday. From that we can see that there were verbal conversations even if there was not a written reply. We find on balance of probabilities that by this time Mr Nugent was not enforcing the normal 60% office attendance requirement, pending Occupational Health advice, given the claimant's reference to the call as being helpful.

57. Although the Occupational Health referral was then progressed, no stress risk assessment was done. Mr Nugent said that this was on the advice of his grade 6 manager (i.e. his manager's manager), Caroline Mason. That may well have been the case, but Mr Nugent also explained in evidence that he had not given her the full picture of the claimant's health because of confidentiality. In those circumstances, Mr Nugent should have been aware that Ms Mason could not have given accurate guidance on such matters and we consider that a stress risk assessment should have been done given the clear recommendation of his doctor. In any case, regardless of what information Ms Mason had about his health, it would be unusual not to allow an employee to complete a stress risk assessment if they or their GP felt it was something they ought to do.

Other matters arising in April and May 2022

58. On 22 April 2022 an email was sent to all permanent staff in Digital and Technology about a headcount reduction (page 290). This was not a redundancy exercise but rather setting out strategies for how the respondent could reduce headcount in other ways, such as a recruitment freeze. This is relevant in the context of explaining why the claimant was not able to find an alternative role during his later search. At this stage we find that there would be a reduction in internal vacancies, as well as external ones. This was then followed by a further email on 31 May 2022 from Boris Johnson (then Prime Minister) setting out proposals to reduce the size of the civil service.

59. Also in April 2022, the claimant says that Mr Nugent told him that "*When you have problems like that, you should leave them behind the entrance doors, and when you are at work, you should concentrate on your work, as you should do*" in relation to his health. The claimant was unable to pinpoint the exact date when he says this happened and although he had manuscript notes from later meetings, he did not have any from this meeting. In considering whether this comment was made, we find generally that the claimant has tried to give what he sees as an honest reflection of discussions in his evidence throughout this case. However, we also find that on occasion the claimant has misunderstood certain comments or written text (as set out elsewhere in these findings). We find that at a meeting at some point in April 2022, there was a discussion about the claimant's health and we find that the claimant has misinterpreted something that Mr Nugent said. We do not consider that Mr Nugent would have said the words quoted, or even words to that effect. We take on board that in December 2021 there was reference to him having said about separating work and health matters, and we consider that there was some kind of reference to that again. However, we do not accept that it went as far as to say that health matters should be left at the entrance door as if they are irrelevant. We also bear in mind that at this stage Mr Nugent was considering adjustments for the claimant, albeit they had not yet been formally implemented, which would be at odds with a statement that health matters should be left behind at work.

60. On 10 May 2022 the claimant submitted a further fit note (page 294). This again advised that he was fit to work with adjustments for a further 6 week period. The claimant sent it to Mr Nugent on 11 May 2022 (page 295), and in the email he said that he was feeling "on the edge".

61. On 17 May 2022 Mr Nugent contacted HR for advice about the claimant (page 301). He referred to a drop in the claimant's performance, and said that there were "*glimpses of improvement while working from home*" and that the claimant had sought a workplace adjustment related to his mental

health. The request for advice however was regarding the performance issue and at this stage the Occupational Health advice was still awaited.

62. On 18 May 2022 (page 302) Mr Nugent received confirmation that the claimant had an Occupational Health appointment booked for 15 June 2022. The appointment went ahead on that date however the report was not received for a number of weeks (as set out below).

The claimant's absence from work and Occupational Health report

63. The claimant was then absent due to ill health from 17 June to 1 July 2022 (page 307). His fit note said "*covid-19 infection recovery due to breathing difficulties. Background of ongoing mental health problems".* Although his mental health was mentioned we find that this was a COVID related absence.

64. The claimant was not fit to return to work when his fit note expired and provided a further one covering the period 1 July 2022 to 1 August 2022 (page 308). This time the reason for absence was "*covid recovery and mental health – depression and anxiety*" – by this stage we find that his absence was for both reasons and that during this period he was not fit for work, even with adjustments.

65. The claimant received a draft copy of the Occupational Health report and made various amendments to it on 5 July 2022 as he felt that there were numerous errors in the original version (page 309). It was then further amended on 14 July 2022 due to "*client comment*" (page 312) although the content appears to be largely the same. It was sent to Mr Nugent on 26 July 2022.

66. The report said that the claimant had explained to the clinician that he had been diagnosed with depression, anxiety, Post Traumatic Stress Disorder and social anxiety for over 10 years, and that he was on medication. It said that the claimant had reported that when his conditions were exacerbated and impacted by workplace stressors, he would experience short term memory loss and reduced concentration. It also reported reduction in sleep, challenging managing emotional reactions in social situations, headaches, digestive problems and panic attacks. It linked the panic attacks to both attending the office and having to be amongst large crowds when commuting.

67. It went onto say that he was finding workplace stressors to be impacting his ability to think process and concentrate. It said that he would be fit to return to work once recovered from covid (bearing in mind that the appointment had been whilst ill with covid) and set out potential adjustments. Most of these were set out in bullet points but above the bullet points, at the end of

the preceding paragraph it stated "*In my opinion from a medical perspective, it would be helpful if he could continue working less than the 60% of the time in the office due to the symptoms he is currently experiencing".* It is slightly toned down from the other recommendations through the use of the phrase "*it would be helpful if*…" and the recommendation is also linked to his current symptoms, rather than a permanent change to his contractual place of work. The other adjustments recommended were a reduction in workload for 4 weeks, flexible working to avoid travelling at peak times, twice monthly 121 meetings, access to a quiet space within the workplace, and a stress risk assessment.

68. The report concluded by saying that it was likely that his condition would meet the requirements of the Equality Act 2010. Mr Nugent explained that he had not understood what that sentence meant, and specifically that it means the claimant was likely to be disabled. This is surprising given his diversity training and is another example of his lack of experience in dealing with disabled employees. He could also have asked HR or a colleague for clarification for the meaning, but does not appear to have done so. Mrs Suffolk appreciated that the claimant was likely to be disabled from the time when she read the report.

69. The report also said "*in our assessment today he did discuss whether he could have support with transitioning into a less strenuous role as this would support his psychological well-being needs further".* It is clear that this was something on the claimant's mind, although the report does not go as far as to recommend that this adjustment is put in place.

Meeting on 28 July 2022

70. Mrs Suffolk held a meeting with the claimant on 28 July 2022 (the contents of which were summarised in a subsequent email to Mr Nugent and Ms Mason on 29 July 2022 (page 315): the email refers to the meeting being "today" but in fact she had started drafting it the day before but not sent it until that day). Mr Nugent was on annual leave which is why Mrs Suffolk conducted the meeting. The claimant was off sick at this time.

71. At the meeting the claimant's occupational health report was discussed with him. The claimant says that he asked for a Managed Move but that Mrs Suffolk encouraged him to look for alternative role outside of the respondent, which made him feel unwanted and like a problematic employee. We can see from Mrs Suffolk's email to Mr Nugent and Ms Mason that she recorded that they would look at managed moves but that it could take some time, and that he could also look for alternative roles. We accept that the email is an accurate reflection of their discussion and that, whilst she clearly did refer to the possibility of him looking for alternative roles, this was in the context that she could not guarantee finding him one

through the managed move process quickly. We do not consider that this was in any way a reflection of him being unwanted or problematic.

72. They also discussed potential adjustments to help him return to work at the meeting, including a phased return, temporary working from home with a phased return to office working, the managed move issue outlined above, temporary removal of elements of his role which were causing him stress, and completing a risk assessment. In broad terms, this covered the recommendations from Occupational Health (we say in broad terms because some of the recommendations such as a quiet space in the office would not be required if he was temporarily working from home). We find that, as an initial discussion following receipt of the first Occupational Health report this is a supportive conversation clearly approached from the perspective of a willingness to make at least temporary adjustments whilst the claimant was experiencing increased symptoms. We also find that it was at this stage that the respondent was considering making temporary adjustments to the claimant's duties (such as speaking on the telephone to customers).

Return to work discussions

73. The claimant was still not fit to return to work and provided a further fit note covering the period 29 July 2022 to 22 August 2022 (page 316). This time the reason for absence was mental health, depression and anxiety (and no longer any link to Covid). The fit note suggested a potential return to work on 22 August 2022 on a phased return over at least a 4 week period.

74. On 18 August 2022 Mr Nugent and Mrs Suffolk met with the claimant on Teams to discuss a potential phased return to work from 22 August as per the fit note. Adjustments were discussed both in relation to the physical working arrangements and the type of work that the claimant did. It was agreed that (page 322):

    a. The claimant would return to work from 22 August 2022
    b. He would work a phased return, starting with one day a week, then two, then three days per week. He then had a two week period of annual leave booked.
    c. He would work from home for those initial three weeks, and then in the fourth and fifth weeks (after his annual leave) he would attend the office on Mondays and Fridays which are quieter days.
    d. He would be assigned easier tasks to begin with. This included removing the claimant from telephone / web chat work and ensuring the more complex tasks were not allocated to him.

75. We consider that this demonstrates that, whilst Mr Nugent may have been inexperienced in dealing with disabled employees, at this stage he was

supportive to the claimant and did put in place adjustments for him. We do note however that no mention was made of a stress risk assessment, nor did one happen. Whilst no reference is made of flexible working to avoid travelling at peak times, in the initial weeks he would not be attending the office anyway and we know from later correspondence that he was given permission to come in late when he felt it necessary due to his symptoms. There is no specific mention of one to one meetings however we can see from the timeline we have that there were regular meetings.

76. On 19 August 2022 Mr Nugent emailed Ms Mason and Mrs Suffolk outlining the return to work plan and adjustments agreed (page 322). Ms Mason replied on the same day, saying that in the fourth and fifth weeks he needed to be attending the office and that it should be made clear to him that he will be adhering to the respondent's policy (of 60% office attendance) by October. She then replied again twelve minutes later, querying whether the claimant working one day per week initially was sufficient and saying that it did not feel enough especially if he was receiving full pay at that time. Mr Nugent said that he would explore the matter with the claimant. The tone of this email exchange suggests to us that Ms Mason was not fully on board with the level of adjustments that Mr Nugent was proposing to make for the claimant, and was placing some pressure on him to get the claimant back both to work and to the office more quickly than Mr Nugent had proposed.

77. This must have placed Mr Nugent in a difficult position, and we also note Mr Nugent's evidence that he had not fully shared the details of the claimant's health with Ms Mason (because he saw this information as being confidential) and therefore she could not be in a position to fully understand what adjustments were appropriate in any event. In fact, Mr Nugent did not require the claimant to return to the office more quickly and therefore quite rightly ignored the pressure he was under in favour of taking a more understanding approach to the claimant's return to work.

78. The claimant provided a further fit note dated 19 August 2022, confirming that he was fit to work with adjustments. This specifically recommended starting with one day per week and building by one day each week to full time hours (page 325). This fit note stated the reason for absence to be "*mental health, depression and anxiety, work related stress*".

The claimant's return to work

79. The claimant returned to work as planned on 22 August 2022, on a phased return. The claimant says that he struggled because he knew that the adjustments were temporary and that he felt unable to cope with the high demands and expectations of management. This seems to be an indication the claimant was worried about what the future held, rather than that the adjustments at that time were not suitable for him.

80. On 31 August 2022 the claimant met with Mr Nugent and Mrs Suffolk. They were both in attendance so that Mrs Suffolk could support Mr Nugent as his line manager. We were provided with manuscript notes that the claimant had taken at the time, which were mostly in English but had several notes in Polish (page 326). We were also provided with an email (page 329) which Mr Nugent had sent to Mrs Suffolk the day after the meeting, summarising what had been said at the meeting. We find that neither note is verbatim and both provide a reflection of what the author had interpreted from the meeting. The below is what we find was discussed at the meeting on the balance of probabilities.

81. At the meeting the claimant's phased return was discussed with him. We find that the claimant was positive about the phased return at the meeting, and was positive about being back working more generally. He confirmed that he was working on easier "tickets".

82. We find that it was explained to the claimant at that meeting that although he was on a phased return, he should be aiming to get back to 60% office attendance. We find that this was a comment that the claimant did not view positively. In his note he wrote "*3 days in office be back fully efficient with the others as you should be"*. The claimant says that this would force him to behave as if he had no disability. We find that from Mr Nugent's perspective at that stage, Occupational Health had merely said that "*it would be helpful….due to the symptoms he is currently experiencing*". We find that there is a disconnect between what the claimant wanted (full time working from home) in comparison to what Occupational Health had actually said and what Mr Nugent understood, which was the adjustment to home working was only suggested whilst he had his current symptoms. We find that Mr Nugent did make a comment about the claimant coming back to the workplace at the same level of 60% as his colleagues, but on the balance of probabilities we do not find that he said the exact words set out by the claimant, although it is how the claimant interpreted it. What we find was said on balance of probabilities is that the claimant should be aiming to return to the office 60%, not that he should be at that point in time.

83. From Mr Nugent's note of the meeting, it is clear that when Mr Nugent explained about aiming to return to the workplace 60% over time, the claimant became anxious and did not feel able to commit to a specific date for this. As a result, Mr Nugent and Mrs Suffolk agreed to relax the phased return so that in week 4 he would only come into the office on one day, and that he would not take phone calls during that week.

84. There was also a discussion at the meeting about a search for alternative internal roles. In his handwritten note the claimant records that "*I have been asking for training and help with changing roles since 2 years (my PDPs:*

policy, then content design)". The claimant has recorded Mrs Suffolk as saying "*We shouldn't be doing that for you*". In his later grievance he attributed that comment to Mr Nugent however that was in error and it is his position that Mrs Suffolk said it. We find that the context in which the alleged comment arose was around a discussion about how a search for alternative role would be done. Mr Nugent recorded in his note that "*we have advised that [the claimant] needs to empower himself to reach out to the stakeholders in this area and look to apply himself if he wants to change roles".* He went on to say that he and Mrs Suffolk had offered support to the claimant in preparing him to do this and suggested he use free and protected time to seek "*development opportunities*", "*ensuring his current work is not interrupted".* The use of the phrase development opportunities suggests to us that the respondent saw this as not being related to the claimant's health, but a personal career aspiration for him (which is supported by the claimant's comment that he had been asking for this for two years, long before any health concerns were raised). The claimant's note records the comment as "*We shouldn't be doing that for you"* with "*Look for another position"* noted in Polish below it (the Tribunal has translated this using a free online translation service as no translation was provided to us at the hearing).

85. There was therefore clearly a discussion during which the claimant was informed that it was his responsibility to find any alternative role, albeit Mrs Suffolk and Mr Nugent would help him to do that. Therefore, on balance of probabilities we find that Mrs Suffolk did say something to the effect that it was not for Mr Nugent and/or Mrs Suffolk to find an alternative role for him. At this stage, the medical advice had not suggested that he would not be fit to carry out his role in the longer term and there was no recommendation that he move to an alternative role, the Occupational Health report only recorded that the claimant had discussed with the advisor whether he could have support transitioning to a less strenuous role. In these circumstances, it was for the claimant to take the lead on applying for alternative role, and we find it was in this context that Mrs Suffolk made the comment to him.

86. On 5 September the claimant requested a managed move through an online portal (page 341). HR told the claimant to speak to Mr Nugent about his request and ask him to contact Directorate Support to advise on any vacancies.

87. On the same day Mr Nugent submitted a detailed request for a caseworker to be assigned through HR (page 331) . In this email he summarised the meeting notes from 31 August 2022 again but added additional detail at the end of the note. In particular he noted that the claimant was concerned about returning to the office, but that neither occupational health nor his GP had recommended permanent homeworking.

88. Also on the same day, Mr Nugent wrote to the claimant setting out the updated phased return to work plan, showing that his first office day would be Thursday 29 September 2022, working in the office one day that week, two days the following two weeks, and then three days in the office from w/c 17 October 2022.

89. The claimant says that Mr Nugent did not progress his managed move request. Mr Nugent said in his witness statement that he showed the claimant at a one to one meeting where he could access the list of managed moves and internal expressions of interest. However, we have found that there was no such list, as has been explained by other witnesses for the respondent. Therefore, whilst we accept that Mr Nugent showed the claimant how to access a list, it cannot have been a managed move list and must have been an alternative list of internal vacancies. We have heard no evidence to suggest that Mr Nugent did contact Directorate Support as HR had advised was the next step for a managed move process. At this stage therefore we find that the managed move was not in fact progressed.

90. On 27 September 2022 a Job Swap scheme was launched within the respondent. The following day Mr Nugent passed it onto the claimant saying that he thought it may be useful for him. The claimant explored the Job Swap scheme and a potential role of Credit Controller was identified. Both the claimant and Mr Nugent followed it up, in Mr Nugent's case by speaking to the manager for the role. In parallel, the claimant emailed HR requesting to close his request for a managed move on the basis that "*I was referred to a Job Swap Programme, so I guess this counts as a functional equivalent to a Managed Move*". This is unfortunate as the two processes are distinct and in fact the claimant did not find a successful job swap. In relation to the credit controller role, both Mr Nugent and the claimant identified that it would not in fact be a less stressful role for the claimant and was office based, and on that basis did not progress it.

91. At this stage, the adjustments for the claimant remained in place, save that he had worked back up to full time working by early October, and was supposed to be increasing his office attendance up to 60%. However, he was informed that on any day when his symptoms were problematic he was permitted to either come in late or work from home, and in fact he never attained that 60% office attendance (and was not submitted to any formal process for that).

92. In addition, the adjustments to his role, for example removing him from telephones and web chat (so that he was communicating with customers over email only) and giving him less complex queries continued. He was also permitted to sit in a quiet spot on the south side of the building when he did attend the office, away from the busier atmosphere of the team he worked in. The claimant has said that sitting on the south side made him

feel distant and like a leper: we find that sitting in that area was optional and was permitted as an adjustment, not to make him feel isolated. This was consistent with the Occupational Health recommendation to give him "*access to a quiet space within the workplace…"*. Mr Nugent did visit him whilst he was on the south side, showing that he was attempting to maintain a physical connection to him, which would not have been possible if he was working from home.

Meeting on 18 October 2022

93. On 18 October 2022 the claimant attended a further meeting with Mr Nugent and Mrs Suffolk. The claimant took manuscript notes at this meeting (page 335), however we do not have a note of the meeting from Mr Nugent or Mrs Suffolk.

94. At this meeting there was a further discussion about office attendance and it is clear that the respondent's policy of 60% office attendance was discussed. The claimant says that Mr Nugent said "*Unfortunately, there is policy in place, which is the standard. How you feel is how you feel"*. The claimant's note however also records that in between those two sentences other comments were made by Mr Nugent, including *"we can look at case-by-case basis"*. We find that Mr Nugent did refer to the policy as being the standard, but we also find that he made clear that there could be exceptions on a case by case basis. We find that this is consistent with the respondent's policy and is an entirely appropriate approach. As to the comment "*how you feel is how you feel"*, we find on the balance of probabilities that a comment along these lines was said, but that it was in the context that the claimant was clearly unhappy with the respondent's policy, and Mr Nugent was communicating that effectively he could not change the claimant's view on that. At this time the claimant did not have any medical recommendation for permanent home working.

95. The claimant also says that Mrs Suffolk told him at the meeting that there was no need for a second Occupational Health review when he asked for one. We find that she did initially say that, on the basis that she did not feel it had been long enough since the July 2022 report for it to be worthwhile. However, the claimant then explained to her and Mr Nugent that he had additional symptoms of IBS and she then agreed to arrange a second Occupational Health referral. We find that her initial reticence was based on her genuine belief that it would not provide useful information, and that the fact that she will immediately willing to change her position of hearing of the additional symptoms shows that she was open to getting the advice if it would be of benefit.

96. Also on 18 October 2022 the claimant had a separate meeting with a mentor (page 336), who appears to have advised him that he should move away from customer service.

97. On 19 October 2022 Mr Nugent contacted HR again to request support (page 337-338). On 21 October 2022 Jenny Shakesby was assigned to the case as HR Case Manager.

The claimant's flexible working request

98. On 25 October 2022 the claimant raised a formal flexible working request (page 405). In this he requested to work from home for at least 12 months or on a permanent basis, with occasional working from the office, for example 1 day per fortnight. He said that this request was related to reasonable working arrangements based on his disability, and also referenced being an informal carer to his mother. He set out a large list of benefits he said that working from home during the covid pandemic had brought him, which largely related to improved health and mental wellbeing. He also set out what he considered the business impact would be.

99. The respondent accepted in evidence that no formal written outcome was ever sent to the claimant about his request, but that in essence it was declined and he knew that. One area where the evidence was inconsistent is whether the request was actually declined (verbally) or not addressed at all. The evidence we were presented with was that:

    a. In the claimant's witness statement he said that the request was "not processed";
    b. In oral evidence, when it was put to the claimant that Mr Nugent spoke to him and told him that his request would be rejected he said that he did not remember the detail but it was likely that such a conversation took place;
    c. In his grievance, the claimant said that he was told by Mr Nugent that he would not proceed with the flexible working request at a one to one meeting in November 2022 (page 444);
    d. In the grievance outcome (page 726) it stated that both "*CN and HS's testimony shows that this request was submitted but not agreed. CN explains that he did not say that it wouldn't be accepted and so they shouldn't submit but tried to manage expectations as he was aware that few requests like that were approved"*;
    e. Mr Nugent said in evidence that he told the claimant "to hold off" and focused on what could be done from an internal perspective;
    f. On 2 November 2022, Mr Nugent emailed the claimant (page 361) saying that he would wait until after the Occupational Health report to put this forward;

g. On 28 November 2022 the claimant chased Mr Nugent regarding his flexible working application (page 404), saying that Mr Nugent had previously said that he would wait for the Occupational Health report before considering it. On 8 December 2022 (page 403) the claimant emailed Mr Nugent, pointing out that he could only make one request in a 12 month period and saying that lack of action may be interpreted as disability discrimination; and
h. He then sent what he described as "an updated request" on 15 December 2022 (page 403), in which the application itself was described as being "amended on 15 December 2022".

100. We have considered whether Mr Nugent verbally rejected his application, as the respondent submits, or merely indicated that it was likely to be declined / that he would not be processing it yet, leading to the claimant amending his application.

101. We also note that the claimant has alleged that there was a meeting in November 2022 at which Mr Nugent said "*we will not allow you to work from home, as the others would like that, too"*. We address whether this comment was made below, but it is clear that there was a discussion about homeworking in November 2022 which we find would have included a discussion about the homeworking request.

102. By this time, Mr Nugent had spoken to Ms Mason about the flexible working request. Mrs Suffolk would have been unable to authorise it as this required G6 level authorisation. Ms Mason informed Mr Nugent that the request would be declined if it was progressed, although Mr Nugent had not given her all the relevant information about the claimant's health, again for confidentiality reasons. In those circumstances she cannot have had an informed view and she did not have any meeting with the claimant to discuss his request, nor had there been any other meeting with the claimant to discuss his request.

103. Taking into account all of the evidence above, we find that the application was not progressed, and although Ms Mason had decided (without any process or the relevant information) that it would be refused, that refusal was not communicated to the claimant, who was instead told that it was on hold and not being progressed at that time.

104. The Occupational Health report was received in late November 2022. We find that at the meeting following receipt of the Occupational Health report, the flexible working application was also discussed. This must have taken place after 28 November 2022 as the claimant referenced wanting to discuss it in his email of that date (page 404). Again however we find that the application was not refused at this meeting, but rather led to the claimant submitting his amended application.

105. In addition, the flexible working policy (page 156) explicitly set out that where an employee requests contractual homeworking by way of flexible working application, there is a separate process through which the request should be sent by the manager to the HR Specialist Advisory Team who will consider the application and provide the final outcome. Therefore, Ms Mason was not the correct person for Mr Nugent to have gone to. Mr Nugent suggested in evidence that because the respondent had implemented a 60% hybrid working policy recently, and the permanent secretary was trying to get employees back into the offices after the Covid-19 pandemic, he needed to take account of that. We consider that these additional factors made it all the more important to follow the process and get that specialist HR advice, as they would be best placed to balance any individual needs and circumstances against that wider policy approach. That process was not followed, as shown by an email sent to the claimant by HR some months later in July 2023 when he submitted a query asking if the process had been followed and what the outcome was (page 799-800).

106. We find on balance of probabilities, and in particular given that the renewed request for flexible working dated 15 December was specified to be an amended request, and given his email on 8 December 2022 (page 403) regarding an alleged lack of action, that what in fact happened was that the claimant was told that his application was not being progressed at that time, rather than explicitly that it had been refused. It was on that basis that the claimant continued to chase, and ultimately amend his application: this was not a new application but an amended version of the original one. Despite receiving the amended application, the respondent again failed to follow any kind of formal process in relation to the application or to provide any written outcome to him prior to these proceedings.

The "Formal Attendance Meeting" on 1 November 2022

107. On 1 November 2022 the claimant was invited by Mr Nugent to a Formal Attendance Meeting which was to take place that same day (page 354). The claimant responded to point out that there were various steps to follow under the attendance policy, including a formal invitation, 5 working days' notice and the right to be accompanied. Mr Nugent replied and apologised, saying that in fact this was not a formal attendance meeting and was instead an informal meeting about his phased return. The invitation itself had stated in the narrative that "this is a formal attendance meeting to review your current health and return to office plan". We find that this was a genuine error on his part, and he did not intend to deprive the claimant of any of his entitlements under the policy, however it reveals a stark lack of understanding of the distinction between the different meeting types that he referred to it as a formal attendance meeting when in fact it was an informal phased return review meeting. We can understand that the claimant would

have been distressed to receive the invitation initially, however we consider that once the position was clarified to him that this was not a formal meeting, that should have reassured him.

108. The meeting took place on 1 November 2022 and Mrs Suffolk was also in attendance. Mr Nugent set out a summary of the meeting in an email to the claimant on 2 November 2022. Given that the claimant did not object to what was in that email, we accept it to be an accurate reflection of the meeting. At the meeting, it was agreed that the claimant's phased return would be scaled back to 1 day in the office that week, and one day the following week, following which there would be a review meeting. The notes also refer to a second occupational health appointment having been arranged. The notes indicate to us that Mr Nugent was supporting the claimant and open to making further adjustments as appropriate to support his phased return.

The Voluntary Exit Scheme

109. On 4 November 2022 the claimant obtained a further fit note (page 363) which said that his symptoms were much better in the home environment and could be trigger or exacerbated by going into work. It recommended that he have the flexibility to work from home when he is having a flare up of symptoms.

110. On the same day Mrs Suffolk invited the claimant to a general catch up meeting which was to take place on 7 November 2022 at 11.30am (pages 364 and 368). The claimant has submitted that this meeting was in fact arranged because Mrs Suffolk knew that a voluntary exit scheme was about to launch and wanted to persuade him to participate in it. We accept Mrs Suffolk's evidence that she did not know about the scheme and that this was a general catch up that she arranged with the claimant because Mr Nugent was on annual leave to discuss his health more generally.

111. On 7 November 2022 at 9.04am an email was sent to all "CXDT" staff within the respondent (which included the claimant) launching a voluntary exit scheme (page 365). This included an invitation to a meeting at 11am that morning about the scheme. We find that this was a general email sent to all eligible staff and it was not targeted in any way at the claimant. Similarly, the meeting at 11am was a group meeting for all eligible staff and again did not target the claimant in any way.

112. Following that group meeting, the claimant had his pre-arranged meeting with Mrs Suffolk. We were not provided with any manuscript notes from this meeting, however we did see a summary of it which Mrs Suffolk emailed to the claimant, copying Mr Nugent, shortly after the meeting finished (page 367). We find that this was an accurate summary of the points discussed.

The claimant alleges that Mrs Suffolk was attempting to coerce him into applying under the voluntary exit scheme. We can see that Mrs Suffolk does indeed refer to the voluntary exit scheme in her first bullet point, and so we accept that this was likely to have been the first topic of conversation. However, that is in the context that they have come immediately from an all staff meeting about that scheme. It is natural and appropriate that Mrs Suffolk would start the meeting by referencing that, and that she would inform the claimant that it was something he could consider, as it was for all employees. The fact that she did so does not in any way mean that she was targeting him or wanted him to apply for the scheme. We have seen nothing to suggest that Mrs Suffolk or indeed anyone else at the respondent tried to entice him to apply for the scheme because he was problematic, nor because he had had some sickness absence or a phased return.

113. At the meeting, his health was also discussed, along with the temporary adjustments in place, the potential for a Job Swap and the fact that the claimant would continue to sit in the south side when he was in the office. On that particular week the claimant agreed to attend the office on two days. It appears to the Tribunal that overall the meeting was supportive in nature.

114. On 11 November 2022 the claimant received an email from the Learning and Development Team about the voluntary exit scheme (page 376). The claimant could only see his name in the address bar and in his Particulars of Claim (page 21) he stated that "*An automated email was sent singularly to me only reminding of an opportunity to participate in the Voluntary Exit Scheme*". In evidence, having heard that this was a standard email sent to all eligible employees, including Mrs Suffolk, the claimant accepted that it was not sent only to him. We find that it should have been obvious that it was sent to a wider group of employees, not only because of the nature of the email but also because it had a comment in it specifically aimed at line managers, which would not have made any sense if the email were directed at the claimant alone. We find that the claimant's initial belief that it was intended for him alone, despite the content of the email clearly being designed for a wider audience, is indicative of the claimant at that time being particularly sensitive and making assumptions about the respondent's underlying intentions when the evidence did not support that.

The second Occupational Health Report

115. The claimant attended a further appointment with Occupational Health on 11 November 2022. Although an initial report was prepared that day, the claimant had a number of comments on it and so the final report was amended on 21 November 2022 (page 381).

116. The report referred to the claimant having been diagnosed with irritable bowel syndrome and that the claimant had said that his symptoms can be triggered or exacerbated by going into the workplace, and referred to fatigue when attending the office. Irritable bowel syndrome is not a disability that the claimant relies on. He says it is linked to his other underlying conditions. Whilst we have no medical evidence to say one way or the other definitively, we note that the occupational health report refers to his disabilities and the irritable bowel issues interchangeably and in particular says that he has panic attacks which can trigger an onset of stomach pains, leading to increased toilet use. We therefore find that the irritable bowel syndrome was linked to his other underlying conditions.

117. The report said that he was fit for work, and recommended "*flexibility to work from home …when his symptoms are exacerbated*". This is consistent with his GP's advice. It also said that "*He may benefit from transitioning to a less stressful and demanding role, if feasible and practical for the business"* and recommended continuing the previously advised adjustments along with a stress risk assessment.

118. Within the report we can see the specific questions which had been sent to Occupational Health: at least some of these, if not all, were drafted by Mrs Suffolk. The tone of the questions is rather unsupportive in nature: it focusses on asking why in the clinician's view the claimant has failed to follow the adjustments (notably sitting in a quiet area) and also questioned how he had been on holiday to a busy setting, if he could not be in a busy setting in the office. In evidence she expanded on this saying that being in an airport and on a plane is stressful and she wanted to understand the difference. We consider that these questions were ill judged and show a lack of understanding at this stage of how the claimant was feeling or the fact that there is a distinct difference between what an employee can cope with in terms of transportation to get to a relaxed holiday, in comparison to spending each day in a busy office environment. The questions come across in a rather accusatory manner, suggesting that the claimant was not helping himself. We find that the claimant was trying to help himself, and that the reason he had not always sat in the quiet area was because he did not want the team to be aware of his condition and he wanted to challenge himself and avoid stigmatisation.

119. On 23 November 2022 the claimant and Mr Nugent discussed the Occupational Health report briefly (page 384). At this stage the claimant was not moved to a different role but adjustments continued to be made to his existing role. "Job carving" was not specifically explored at this stage however in reality his job had been temporarily carved, albeit not under the policy. There were no changes to his adjustments at that stage, and we find that this was a reasonable approach because Occupational Health had not recommended they be adjusted, and in addition he did have the flexibility at

that time to work from home when his symptoms required this. Unfortunately however, the stress risk assessment was still not progressed.

Meeting on 30 November 2022

120. On 30 November 2022 the claimant attended a further one to one meeting with Mr Nugent. In his Particulars of Claim at paragraph 41 (page 22) the claimant suggested that he had notes of this meeting but none were provided in the file and the claimant said he could not locate them.

121. The claimant says at this meeting he was told by Mr Nugent that "*We will not allow you to work from home, as the others would like that, too*". We find on the balance of probabilities that there was a conversation about the claimant's flexible working application at this meeting, and that Mr Nugent told him that his application was not being progressed at that time (but not that it had been refused). By this time, Mr Nugent had the benefit of an Occupational Health report which recommended working from home when he had a flare up, but not permanent home working. He was not specifically informed that he was not allowed to work from home (and the adjustment of allowing him to work from home when his condition required it continued). As to whether he said that others would like this too as part of the rationale, we do not consider that this was the rationale behind his comment, however we do consider on the balance of probabilities that he did reference others wanting to work from home as well as it was clear from the evidence we heard that there was a focus at that time on applying the new hybrid working policy.

December 2022

122. On 2 December 2022 the claimant sent Mr Nugent a request to go on a policy context, design and implementation course (page 385-388). This was approved. The claimant says that these courses are not sufficient for the professional development he needed and that others had more than him. We see no basis for that assertion and we have not seen evidence that others were given more training courses than he was. He had no entitlement to any other courses.

123. On 2 December 2022 Mrs Suffolk emailed the claimant in Mr Nugent's absence on annual leave, asking which three days the claimant had worked in the office that week and which three days he would be working the following week. The claimant replied on 5 December 2022 to say that he had been in twice the previous week because he understood he could work from home when his symptoms were worse. He said that the following week he intended to come in on Tuesday, Wednesday and Thursday. From this conversation we can see that Mrs Suffolk thought that he would be back to 60% office attendance by this time, but in fact he was not and the claimant

understood (correctly) that he had a reasonable adjustment in place allowing him to work from home when needed because of his symptoms. Based on this exchange we find that by this point he was back to 60% office attendance in principle but subject to the agreed adjustment, which in practice meant he did not tend to do 60% attendance. In fact, we heard that in reality he never sustained a 60% attendance in the office.

124. On 12 December 2022 the claimant emailed Mr Nugent to request a meeting to discuss the occupational health report (page 391). Although they had met previously, they had not discussed the report in detail by that point. The claimant referred to the fact that he now attended the office three days a week but said that his symptoms were deteriorating. He said that he was not clear about what adjustments would be in place and for how long. He also repeated a request for the stress risk assessment. He did not raise any complaint about anything said on 30 November 2022.

125. Mr Nugent and the claimant met to discuss adjustments on 13 December 2022 and Mr Nugent emailed the claimant confirming the key points from their discussion on 14 December 2022 (page 393). The claimant took his own notes of the meeting (page 392).

126. In his manuscript notes, the claimant recorded in Polish what he said the first question he was asked was. In his manuscript note he has then translated that as "*When are you going to make yourself redundant*?". We find that this translation was added at a later date because it is made with a different pen and slotted into a gap within the page. We have used a free online translation service and the Polish comment has been translated on that service to "*When will you quit*"? Either way, the gist of it suggests that the claimant was asked about ending his own employment. However, before the Polish wording on the page it also says "*Are you looking for new jobs*" in lower case and then the Polish is in capitals and in brackets. Having considered the wording, we find that the accurate words used were *"Are you looking for a new job*" and that the claimant has interpreted it to mean "are you going to quit" or "are you going to make yourself redundant".

127. This is around the time of voluntary exit scheme. In fact however we find that Mr Nugent was talking about the claimant's previously stated desire to move roles and the Job Swap or other opportunities that might be available if he looked for them. It was reasonable for him to ask about how that was progressing and was not a targeted comment to encourage the claimant to leave. This is supported by a comment recorded by the claimant in which Mr Nugent told him to look at the job he wanted to apply for and offered to review his CV.

128. It was agreed with him at the meeting that the adjustments that he had in place were indefinite and he was advised to come into the office on quieter days.

129. One point that was addressed by Mr Nugent was that the claimant had not been communicating his symptoms with Mr Nugent and he said that the claimant was expected to meet the office attendance requirement, but that if he communicated worsening symptoms to Mr Nugent then he could explore coming in later or working from home. The claimant has said that he should not have to communicate detail about his health to Mr Nugent as this is private. The context however is that the medical advice recommends flexibility around adjustments depending on his particular state of health on any given day, and therefore Mr Nugent had a genuine need to understand what the claimant's day to day symptoms were on an ongoing basis. Mr Nugent refused to allow working from home for the following two weeks as a blanket agreement but said that his symptoms would be managed on a day to day basis (including flexible working if his symptoms flare up in the morning).

130. By this time, a key issue for the claimant was that he wanted the security of being told that he could work from home on either a permanent basis or for a defined period of time. However, the adjustment that was recommended by Occupational Health was more fluid in nature, suggesting that this should depend on his symptoms at any given time. We consider that the real issue here is that the Occupational Health advice did not reflect what the claimant believed he ought to have by way of reasonable adjustment i.e. a more defined pattern of work with either reduced or no office attendance, rather than it being decided on a day to day basis depending on his symptoms. From the claimant's perspective, we find that he felt that the stress of being asked to come into the office was in itself causing the symptoms, and therefore the issue was rather circular, in that from his perspective unless he was given a more fixed and reduced office working pattern, his symptoms would not improve. However, from the respondent's perspective, they were working with the medical advice they had been given.

131. In the summary to the claimant on 14 December 2022, he ended by saying "*If you can also complete your flexible working request, we can then submit this"*. This is on the face of it strange because the claimant had already submitted one as outlined above. We find that it is in response to this that the claimant amended his amended application on 15 December 2022. This supports our earlier finding that his initial request had not been specifically refused and had just not been processed at that time, pending further clarification.

132. On 16 December 2022 the claimant met with Gary Tucker, Deputy Director of Apprenticeship Service. This was arranged following Mr Tucker holding a

well-being call with staff focusing on wellbeing in light of return to office post covid. He agreed to meet with the claimant individually following a discussion with Ms Mason. There are no notes from this meeting,. At the meeting, the claimant discussed his struggles with stress and anxiety with Mr Tucker and Mr Tucker gave some guidance to the claimant about his career. They discussed the claimant's interest in content work and the claimant also expressed an interest in policy roles. At the end of the meeting, it was agreed that there would be a follow up meeting in due course and there was a discussion about whether the claimant could spend some time with the digital team to understand more about the roles that could potentially become available. In the end that follow up meeting did not happen because the claimant commenced long term sickness absence before it was arranged.

133. On 19 December 2022 the claimant requested a catch up with Mr Nugent (page 411). In his witness statement Mr Nugent set out a summary of what was discussed, however on reviewing his note of the separate meeting on 13 December 2022 (page 393) it is clear that the summary in his witness statement stated to be about the meeting on 19 December was actually the meeting on 13 December. We can see that a meeting invite was accepted on 19 December (page 411) however in light of our finding that the information in Mr Nugent's statement is wrong about what happened at the meeting, we have no knowledge of what happened at that meeting.

January 2023

134. On 7 January 2023, Jenny Shakesby, the HR case manager assigned to the claimant's case, contacted Mr Nugent asking for an update as she had not heard from him since 27 October 2022 (page 423). We can therefore assume that Mr Nugent sought no HR advice about the case between those dates (and therefore presumably no HR advice about the latest Occupational Health report or the flexible working request). On 16 January 2023, as Mr Nugent had not replied, Ms Shakesby informed him that she was closing the case. We find it disappointing that Mr Nugent had this support available to him and yet did not use it.

135. On 12 January 2023, when Mr Nugent was on leave, Mrs Suffolk noticed that the claimant was not in the office. She messaged him (page 420) and he explained that he was in the office, but on the south side, and that the previous day he had worked from home as he did not feel well enough to come in. Mrs Suffolk asked him why he was on the south side rather than with the team, which shows that at this stage she was not aware that this particular adjustment was continuing, and also that he was not deliberately being ostracised by being forced to work on the other side of the building (which is something that he has alleged). When he explained, she did not criticise him for working in the south office or at home, but did ask that he let

someone know where he was for health and safety reasons. The message ended amicably with her wishing him a good day.

136. On 18 January 2023 there was a further message between Mrs Suffolk and the claimant (page 426). In this exchange Mrs Suffolk asked him if he was in the south building and he confirmed he was. She queried this, saying that she thought he was now working with the team again and the claimant said that this was not the agreement, and that his understanding was that he could be with the team as much as he could, but depending on how he felt. He said that combining working with the team and working in the south building gave him the best balance. We find that the claimant was correct in that this was the agreed adjustment and Mrs Suffolk is incorrect in assuming that he should be back with the team. However, the point remains that the claimant was clear on the adjustment that applied to him and working to it, and also we can see that Mrs Suffolk accepted his explanation and wished him a good day. He wished her a nice day in return.

The apprenticeship role and the meeting on 1 February 2023

137. On 24 January 2023 the claimant contacted Mr Nugent asking for his support in applying for an apprenticeship role as a content creator (page 427). He described it as "re-skilling". Mr Nugent informed the claimant verbally that he could apply for the scheme, but that he recommended he do shadowing instead. We find that Mr Nugent did not refuse to let him access the scheme per se, but he did point out to the claimant that this was not part of his core role.

138. An apprenticeship is something that builds on an existing role in that particular area of expertise, and therefore to be accepted onto an apprenticeship in content design, he would need to already have a content design based role. This is supported by an email from Sophie Singh within the respondent (page 427) where she had stated on 23 December 2022 that "*the apprenticeship must match your current job role"*. We find that there is a fundamental misunderstanding of how the apprenticeship scheme works by the claimant. The claimant believes that because he has some content experience and he believes that he could have content exposure in his current role, that is sufficient to qualify him for an apprenticeship. However, the requirement is not simply that the current role has some exposure to that skill set, it must be an actual match. A content creator apprenticeship is not a match for the claimant's current role and therefore he would not qualify for it and the advice that Mr Nugent gave was correct.

139. In evidence Mr Nugent also suggested that he had in mind that the apprenticeship would be a lot of work and that he felt the claimant might not be able to cope with the demands of it at that time. That might be something that was on his mind, but in any case the claimant would not have met the

qualifying requirements for the apprenticeship and that is in fact the reason why he was not supported to apply for that role. This would have been the case whether or not the claimant had stopped doing content work in 2021.

140. The claimant has suggested that Mr Nugent ignored his request for an apprenticeship. We find that it was not ignored; in fact they met on 1 February 2023 and discussed it at that meeting (see below).

141. On 26 January 2023 Mrs Suffolk contacted Mr Nugent to say that the claimant had not attended the office on that day. She informed Mr Nugent that there should be an attendance meeting or another reasonable adjustment meeting. From the message it is clear that she disagreed with the claimant having stayed at home the previous day after a sleepless night and felt that instead he should try to come in a bit later rather than working from home. She suggested that a meeting take place with Mr Nugent to discuss arrangements moving forward.

142. That meeting took place on 1 February 2023, and was also an opportunity to discuss the apprenticeship role that the claimant wanted to apply for. The claimant took manuscript notes of the meeting (page 436).

143. The claimant's notes show that there was a discussion about arranging content design shadowing for 2 to 3 months and then deciding about an apprenticeship. We find that this was a reasonable suggestion for Mr Nugent to have made (and we further find that the claimant would have had to move role in any event to qualify for the apprenticeship). There was a further comment saying that his performance would need to improve before shadowing could be arranged. In the end the shadowing did not materialise as the claimant was off sick from the following day for over a year.

144. They also discussed when the claimant would work from home, and the claimant was advised that if he had a flare up in the morning, he needed to tell Mr Nugent or another member of the management team. He should then work from home in the morning but come into the office once he was ready. By this we interpret it as meaning to come into the office once his symptoms had settled down – and so if they did not he could continue working from home that day.

145. The claimant's note also shows that in relation to his flexible working application it was said "*we didn't hear anything back from them so that we can assume it was declined".* We interpret this to mean that the claimant was informed that he should assume his request had been declined, although it is not clear who "them" is. This is of course completely contrary to the policy, but we find that it was at this point that the claimant was informed that his flexible working request had been declined.

146. The claimant has also alleged that his reasonable adjustments were withdrawn unilaterally at this meeting. It is not clear exactly which adjustments he says were withdrawn, however the only reference to any change to the adjustments in his own attendance note is the one identified above about coming in late rather than always working from home if symptomatic in the mornings. We also note from Mr Nugent's witness statement that he discussed the claimant returning to outbound calls at the meeting, and he said that this was only if the claimant felt comfortable, which the claimant said he was not. He says that he did not push this. We find that the topic was discussed, and although the claimant was not forced to move back to telephone work at that stage, he would have been aware that there was a longer term expectation that he would restart that work at some point. We do not find that the claimant's adjustments were unilaterally withdrawn at the meeting.

147. In his later grievance, the claimant said that (page 445) he was told at this meeting that he would be subject to an informal Performance Improvement Plan. There was clearly reference at the meeting to issues with his performance but the claimant's notes do not record being told that he would be subject to a formal plan. We are aware of other errors in his grievance (for example saying that he disclosed his health condition in April 2022 when in fact it was December 2021) and on balance we prefer the claimant's contemporaneous notes as more accurate record of what was said.

148. In any event however, the claimant was clearly upset by what was said and the following day he reported sickness absence (page 437). He did not return to work until 1 April 2024. The reason for his absence was work related stress.

The claimant's grievance

149. On 15 February 2023 the claimant raised a detailed grievance (page 443). The grievance focussed on the following areas:
    a. The failure to process his flexible working application;
    b. Alleged disability discrimination in relation to how he had been treated since April 2022;
    c. Delays in processing his requests, specifically his request for an occupational health review;
    d. Breach of procedures, in relation to being invited to a formal attendance meeting without the proper processes being followed
    e. Failure to respond to emails;
    f. Not keeping to agreements, for example not transitioning him to a less stressful role, not carrying out a stress risk assessment;
    g. Blocking access to training, upskilling and re-skilling;

h. Being coerced into resigning (a reference to the voluntary exit scheme); and
i. Being harassed by Mrs Suffolk and Mr Nugent

150. Within the respondent, grievances are allocated to both a decision makers and investigation manager. It is the investigation manager's role to carry out the interviews and analyse the evidence, then producing a report which the decision maker would use to reach their decision. Ms Radcliffe was the investigation manager and originally Mr Tucker was allocated as decision maker, although later this was changed to Charlotte Briscall. The claimant has not made specific allegations about the grievance investigation process (only the appeal: his allegations about the grievance process itself were framed as victimisation allegations and he withdrew those at the hearing). Therefore we do not detail all of the investigations undertaken in these reasons, however we note that they were thorough.

New line manager

151. Mr Nugent moved role on 1 March 2023 and Mrs Angela Toal took over as the claimant's line manager, although it appears from the documentation we have seen that this did not take effect until later that month. At this point the claimant remained absent from work due to his ill health. During his absence, we find that the claimant had regular discussions with Mrs Toal.

152. The claimant attended a meeting about his grievance with Mr Tucker on 6 March 2023 (page 460). There were initially some discussions about whether mediation would take place, but ultimately it was confirmed to the claimant on 22 March 2023 that the matter would proceed to formal investigation (page 465). On 29 March 2023 the claimant commenced ACAS Early Concilation (page 1).

153. During the course of April 2023 both Mrs Suffolk and Mr Nugent were interviewed in relation to the grievance (pages 565 and 586). One point worth noting from Mrs Suffolk's interview is that she commented that the grade 6 (Caroline Mason) had pushed for the claimant to come back at 60% office attendance at an earlier stage, but that she had resisted this. This supports our earlier finding that Ms Mason was seeking to influence the claimant's adjustments which must have put Mrs Suffolk and Mr Nugent in a difficult position (especially as Ms Mason did not have full knowledge regarding his health) and that they quite properly resisted that pressure.

154. On 17 May 2023 the claimant raised a second grievance, in relation to the way that the first grievance was being handled (page 637). We do not detail all the elements of this as it is not relevant to the issues in the claim (save for being the second asserted protected act in the List of Issues), however it

centred largely on what the claimant saw as delay in dealing with the grievance.

155. On 9 June 2023 he submitted his claim to the Employment Tribunal.

156. The grievance investigation report was completed on 30 June 2023 (page 705 to 729) and sent to the claimant on 3 July 2023 (page 736). His grievance was not upheld and it was found that there had been no breach of the Equality Act 2010, however it was acknowledged that some of the respondent's policies had caused undue upset to the claimant because of how he perceived these and it was recommended that lessons are learned for future.

157. A further Occupational Health report was obtained on 20 July 2023 (page 744). This report recommended redeployment and indicated that the clinician did not think that there were reasonable adjustments that could be made to support him in the workplace in his role because of the claimant's perceived impact of the role on his mental health. It commented that *"it seems he is not suited to the role"*. We find that this was the first time it was stated by Occupational Health that the claimant could not carry out his role in the longer term. It also referred to a "high demand" on the claimant, "stressors in the workplace" and "a lack of control over the way in which he worked".

158. On 24 July 2023 the claimant submitted a detailed appeal against the grievance outcome (page 746) and Mr Saheel Sankriwala was appointed as appeal manager. Mr Sankriwala was not aware of the claimant's Employment Tribunal claim. The claimant has said that he must have been because the grievance for appeal managers (page 1296) includes a statement (at page 1297) that "*In exceptional circumstances, the case could go beyond the appeal to an Employment Trribunal; if this happens your time commitment could intermittently extend across a number of months as you may be called as a witness".* We find that this was a generalised comment explaining that some individuals who raise grievances go on to bring Tribunal claims: it did not in any way indicate that the claimant had done or would do so. We find that the claimant has misunderstood this point.

159. The grievance appeal manager guidance explains that an appeal can take the form of a review or a re-hearing, but that in most cases it will be a review. Mr Sankriwala dealt with it as a review. The claimant says that he should have dealt with it as a re-hearing because one of the situations where a re-hearing is required is where the appeal is based on a *"significant procedural failing such as failure to make reasonable adjustments…"*. The claimant's position is that this applied to him because his grievance was about an alleged failure to make reasonable adjustments.

160. We again find that the claimant has misunderstood the guidance. What the guidance is in fact saying is that, if the grounds of appeal are that there was a failure to make reasonable adjustments during the grievance process itself (i.e there were insufficient adjustments made to the grievance process), then a re-hearing would be required. This was not such a case and so no re-hearing was required.

161. In the course of considering the claimant's appeal, Mr Sankriwala held two meetings with the claimant, on 7 August 2023 (page 815) and on 31 August 2023 (page 856). The second meeting arose because the claimant emailed Mr Sankriwala after the first meeting (page 824) to say that he had had insufficient time at the meeting to go through everything. Mr Sankriwala had replied the following day offering a second meeting, and it was arranged at the first available opportunity as Mr Sankriwala had a period of annual leave between the two meetings. Across the two meetings, we find that the claimant had a full opportunity to put forward his case.

162. The claimant was sent the appeal outcome on 4 September 2023 (page 870). His appeal was not upheld. It was found that there was clear evidence of reasonable adjustments being made to support him in accordance with the Occupational Health recommendations. In relation to his flexible working request, it was acknowledged that there were lessons to be learned in terms of the timescales but that a flexible working arrangement had been offered albeit informal. It was found that he was being supported in finding a new role and in upskilling, that there were no process failures in the grievance process, and that there had been no discrimination.

Injury Leave Claim

163. On 30 August 2023 the claimant submitted an application for "injury leave" to Angela Toal (page 962). This is a specific ill health benefit offered through Civil Service Pensions in certain circumstances. In his witness statement he alleged that he had received no response to that application, and his second Tribunal claim included a claim that she had victimised him by delaying that application.

164. During the hearing the claimant was taken to a number of documents which showed clearly that, far from ignoring, delaying or not responding to his application, in the days and weeks following his application Mrs Toal sent a large amount of correspondence both to the claimant and to other individuals within the respondent with a view to progressing that application (see, for example pages 959, 957, 877, 876, 871, 909, 874, all of which took place before 13 September 2023). Between 19 and 22 September 2023 Mrs Toal was seeking comments on the documentation she had completed in relation to the application from Mrs Suffolk and HR (pages 904-905), and on 28 September 2023 she attempted to submit the

application (page 917). There were some IT issues with the documentation which meant that it was not submitted on that date and Mrs Toal was then on annual leave until 3 October 2023, but it was submitted on 5 October 2023 (page 920 and 965).

165. On 30 October 2023 Mrs Toal received an email indicating that there was a password issue with the documentation she had sent (page 968), however she did not spot that email. Whilst unfortunate, we accept that this was not deliberate and it simply got missed: when the claimant contacted Mrs Toal on 13 November to say that he had been advised that the completed claim had not been received, she was surprised and referred to the fact it had been sent (page 943). On the same day Mrs Toal sent the required information about the password so that it could be progressed.

166. Mrs Toal continued to chase the matter throughout November (pages 1003 and 976) and on 1 December 2023 Mrs Toal received an email from "mycsp" who was progressing the application to say that further information was required (page 987). She replied on the same day with the requested information (page 986). She was then contacted again on 14 December 2023 (page 984) asking for more information and she replied within two minutes.

167. Having been presented with this evidence during the hearing, the claimant decided to withdraw the allegation that Mrs Toal had delayed his application for injury leave. He said that he had not been privy to that information. Whilst he was not privy to all of it at the time of the events in question, he was aware of some of it and therefore we find that his witness statement was missing relevant detail when it simply asserted that there was no response. In addition, since disclosure he would have had all of the relevant information and could have revisited the matter at that point. We find that the claimant had jumped to conclusions in assuming that the delay in his application being progressed was down to Mrs Toal. We also note that whilst this was originally framed as a victimisation claim, there is no evidence whatsoever to suggest that any delay was in any way linked to the fact that the claimant had raised a grievance or brought a Tribunal claim.

Adjustments relating to working from home

168. The claimant remained absent due to ill health throughout that period and beyond, and was signed off from 3 October 2023 to 2 January 2024 by his GP (page 919). During that period the claimant's future working pattern was explored with him, specifically in relation to office attendance. HR wrote to the claimant on 6 October 2023 (page 1040), advising him that his request to work one day per week from the office had now been approved. It was explained to him that he would remain on an office-based contract, but with a Workplace Adjustments Passport put in place to record the separate

arrangement for him to work one day per week in the office. There was also reference to potentially reducing that further as part of a future phased return or a longer-term option of one day per fortnight should he struggle with one day per week.

169. There was some delay in progressing this by Mrs Toal (but the claimant was absent from work in any event during that period) but on 30 November 2023 Mrs Toal confirmed that this would be implemented subject to regular review. We find that she said this because the change in working pattern was in the context of this being a workplace adjustment for health reasons. The claimant was unhappy about this because he viewed the comment about it being subject to review as meaning that this was not a formal change to his working pattern and wrote a long email objecting to this (page 1035). By this point he had also submitted his second Employment Tribunal claim on 30 November 2023 (page 74).

170. In his email of 30 November 2023 the claimant raised other issues, including that he believed that Mrs Toal had told him that she would not continue to look for a managed move opportunity for him because she had referred to a different opportunity "in lieu of a managed move". This particular role was in a different part of the Apprenticeship Service and the respondent's intention was that this could provide more experience in content work.

171. Mrs Toal sent a detailed reply to the claimant on 21 December 2023, dealing with his various concerns and confirming that she was still exploring a managed move and the fact that an alternative role had been suggested did not detract from that. Ultimately, at that stage it had not been possible to secure a managed move (in part because of a recruitment freeze meaning that fewer vacancies were available to consider) and therefore she was looking at other options in the short term to assist the claimant.

172. Ultimately, the claimant returned to work on 1 April 2024. This was on a phased return, and although the terminology was not used, this in effect amounted to Job Carving because of the adjustments made to his role. From 29 April 2024, he returned to full time hours.

173. The claimant has continued to look for another role within the respondent. Whilst this postdates the relevant period for the purposes of his claim, there are two points we would wish to note:

    a. In relation to an interaction designer role, we were advised that the claimant was considered alongside another candidate and it was not known by Mrs Toal whether they had any particular circumstances which should put them at a priority such as disability or redundancy. However, Mrs Toal went onto say that she believed

that the other candidate had more experience and was better suited to the role. We do not make a finding on this as (a) it post dates the relevant period of the claimant's claim and (b) Mrs Toal's evidence was not first hand and therefore may not be accurate in any event, but we would note that in circumstances where a candidate is requesting a managed move because of a disability, it is not as simple as considering whether or not they are the most experienced / best suited candidate, as it may be appropriate to prioritise the disabled candidate if they are capable of doing the role, even if not the best candidate.

b. In relation to a secondment opportunity, we were told that this could not be given to the claimant as it had already been advertised. This again post-dates the claimant's claim and is not part of his pleaded claim, however we do not understand why the fact that a role had been advertised (and therefore fell outside the formal managed move process) would override any need to consider reasonable adjustments for a disabled person.

Comparators

174. Finally, we address the circumstances of the comparators who have been named by the claimant:

a. Mr Nugent: the claimant compares himself to Mr Nugent and says that Mr Nugent benefitted from an apprenticeship within the respondent. This apprenticeship is in business management and not content design.

b. Mrs Toal: the claimant says that she was offered increased coaching which assisted her obtain promotion. Specifically, he refers to her having been taken off the phones for six months. The respondent says that this was because her phone was broken and therefore she was assigned alternative duties, rather than it being a career development opportunity. Although six months is a long time for a phone to be broken when it directly impacts the work an employee can do, in the absence of any evidence to the contrary and given that we accepted that the respondent's witnesses were in general honest in their evidence, we accept that position. We also find that Mrs Toal was given some informal support by Mrs Swain in her application for promotion, however that Mrs Swain would have done the same for any other employee who asked for that support. It was informal in nature, and was simply coaching to assist her to make her own application: we find that Mrs Toal was promoted based on her own merits.

c. Mr Luke Brown: the claimant says that he was also offered support towards promotion. Again we find that informal support may have been offered to him but there is no evidence to suggest anything other than a fair application process or that he was offered support that would not be available to others.

d. Mr Henry Morgan: the claimant again says that he was offered support towards promotion and we find the same as for Mr Brown. In addition, the claimant refers to the fact that Mr Morgan was permitted to work from home four days per week. We find that this was indeed the case and that this therefore did not align to the respondent's hybrid working policy, however the reason why he did so was because he lived a significant distance from the office (94 miles) and when he had been appointed his homeworking arrangements had been specifically negotiated.

e. Ms Tina Croydon: Ms Croydon was not named as a comparator for direct discrimination in the List of Issues but the claimant named her during evidence and asserted that she too received mentoring and coaching. This was not in content design but regarded promotion to the role of manager within the same team as Ms Toal in around 2022 and early 2023. As she was not a named comparator we did not hear specific evidence from the respondent about the coaching she may have had, but on balance of probabilities we find that she was treated in the same way as the other comparators in this regard.

Law

Direct Disability Discrimination

175. Section 13 of the Equality Act 2010 ("the Equality Act") provides that:

> *(1) 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.*

176. Section 23 of the Equality Act goes on to provide that:

> *(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*

177. In the House of Lords decision of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, ICR 337**, it

was held by Lord Scott that "*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class"*.

178. The test as to whether there has been less favourable treatment is an objective one: the claimant's belief that there has been less favourable treatment is insufficient. Likewise, the treatment must be less favourable, not merely different. Unreasonable treatment is not sufficient, although it may be evidence which supports an inference if there is no adequate explanation for the behaviour (**Anya v University of Oxford and anor 2001 ICR 847, CA**).

179. Where there is less favourable treatment, the key question to be answered is why the claimant received less favourable treatment: was it on grounds of the protected characteristic or for some other reason (**London Borough of Islington v Ladele [2009] ICR 387**). As Mr Justice Linden said in **Gould v St John's Downshire Hill 2021 ICR 1, EAT**

"The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective…For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision…[and] the influence of the protected characteristic may be conscious or subconscious."

180. In **Nagarajan v London Regional Transport 1999 ICR 877, HL**, Lord Nichols said that

"discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds…had a significant influence on the outcome, discrimination is made out"

181. Often there will be no clear direct evidence of discrimination and the Tribunal will have to explore the mental processes of the alleged discriminator and draw inferences. The claimant will need to prove facts from which a Tribunal could properly conclude that the respondent had committed an unlawful act of discrimination, and this can include the drawing of inferences (see burden of proof section below). However, simply establishing a difference in status is insufficient: there must be "*something more*" (**Madarassy v Nomura International plc [2007 EWCA Civ 33** and

Igen Ltd v Wong [2005 ICR 931]). Likewise, unreasonable conduct alone is insufficient to infer discrimination.

Discrimination Arising from Disability

182. Section 15 of the Equality Act provides that:

> *(1) A person (A) discriminates against a disabled person (B) if –*
> *a. A treats B unfavourably because of something arising in consequence of B's disability, and*
> *b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

183. A comparator is not required. The Equality and Human Rights Commission's Code of Practice on Employment ("the EHRC Code") equates unfavourable treatment to being "put at a disadvantage" (paragraph 5.7). An unjustified sense of grievance would not amount to a disadvantage.

184. As set out in **Sheikholeslami v The University of Edinburgh [2018] UKEAT**, there are "*two distinct causative issues:*

> *a. Did A treat B unfavourably because of an (identified) something? and*
> *b. Did that something arise in consequence of B's disability?*

185. In considering whether there was unfavourable treatment because of something, this involves consideration of the alleged discriminator's mental processes (both conscious and subconscious, although motive is not relevant). Consideration of whether that something arose in consequence of disability is an objective test. There must be a connection between the "something" and the disability, even if it arises from a series of links (**iForce Ltd v Wood UKEAT/0167/18**).

186. To amount to unfavourable treatment because of the "something" this must be more than a trivial part of the reason for the treatment, however it is not necessary for it to be the main or sole reason (**Pnaiser v NHS England [2016] IRLR 170, EAT**).

187. The focus is on the reason for the treatment and it is insufficient for a claimant to show that "but for" their disability, they would not have been in a position that led to unfavourable treatment (**Robinson v Department for Work and Pensions [2020] EWCA Civ 859**).

188. It is for the respondent to show that the treatment amounts to a proportionate means of achieving a legitimate aim. In considering this, the Tribunal must strike "*an objective balance"* between the discriminatory effect and the reasonable needs of the party who carries out the treatment (**Hampson v Department of Education and Science [1989] ICR 179)**. The treatment must be both an appropriate means of achieving the aim and reasonably necessary in order to do so (**Homer v Chief Constable of West Yorkshire [2012] UKSC 15**).

Reasonable Adjustments

189. Section 20(3) of the Equality Act 2010 provides that:

> *(2) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

190. Section 21 of the Equality Act 2010 provides that:

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

191. The burden is on the claimant to show the application of a provision, criterion or practice, and the substantial disadvantage suffered by him because of it. Substantial means "more than minor or trivial". If that is done the burden shifts to the respondent to show that the adjustment in question was not reasonable. A one-off act can amount to a PCP where there is an indication that it would be repeated if a similar situation arose in future (**Ishola v Transport for London [2020] EWCA Civ 112, CA**).

192. The duty to make reasonable adjustments does potentially require an employer to treat a disabled person more favourably than others (**Archibald v Fife Council [2004] ICR 954**)

193. Paragraph 6.28 of the EHRC Code sets out some of the factors that might be taken into account when deciding what is a reasonable step: it is wise for the Tribunal to consider the factors although there is no duty to consider each and every one (**Secretary of State for Work & Pensions (Job Centre Plus) v Higgins [2014] ICR 341, EAT [58]**). What is reasonable is considered objectively having regard to all the circumstances. The steps are:

    a) Whether taking any particular steps would be effective in preventing

the substantial disadvantage;
b) The practicability of the step;
c) The financial and other costs of making the adjustment and the extent of any disruption caused;
d) The extent of the employer's financial or other resources;
e) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
f) The type and size of the employer.

194. The test of reasonableness is objective and will depend on the circumstances of the case.

195. The duty to make reasonable adjustments will only arise if the disabled person is put at a substantial disadvantage. The purpose of the identification of a provision, criterion or practice is to identify the matter that causes the disadvantage (**General Dynamics Information Technology Ltd v Carranza 2015 ICR 169, EAT**) and this disadvantage must not equally arise in the case of someone without the claimant's disability (**Newcastle upon Tyne Hospitals NHS Trust v Bagley UKEAT/0417/11**). It is for the claimant to show substantial disadvantage (**Bethnal Green & Shoreditch Educational Trust v Dippenaar UKEAT/0064/15**, and **Hilaire v Luton BC [2023] IRLR 122**). However, it is not necessary for the claimant to show that the disadvantage arises because of his disability, provided they have shown substantial disadvantage in comparison with persons without the disability (**Sheikholeslami v University of Edinburgh UKEATS/0014/17**).

196. In **Project Management Institute v Latif 2007 IRLR 579, EAT**, Mr Justice Elias (who was then president of the EAT) said:

"In our opinion, the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement which causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not".

197. The test of reasonableness is an objective one (**Smith v Churchills Stairlifts plc 2006 ICR 524**). The Tribunal should look at the proposed adjustment from the point of view of both claimant and employer to make an objective determination of whether or not it would be a reasonable

adjustment (**Birmingham City Council v Lawrence EAT 0182/16**). The Tribunal should also consider the business needs of the employer (**Griffiths v Secretary of State for Work & Pensions [2017] ICR 160**, per Elias LJ, and **O'Hanlon v Commissioners for Inland Revenue [2007] ICR 1359**).

198. A key question when assessing reasonableness is whether or not the proposed adjustment would be effective in preventing the substantial disadvantage. There does not have to be a good or real prospect of the disadvantage being removed, it is sufficient if there would have been a prospect of the disadvantage being alleviated (**Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10**).

199. The duty to make reasonable adjustments will only arise if the respondent not only knows, or ought reasonably to have known, of the disability but also that the individual is likely to be placed at the substantial disadvantage. Schedule 8, Part 3, paragraph 20 of the Equality Act provides that:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

a) …..

b) that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

c) ….

200. The EHRC Code states that employers must *"do all they can reasonably be expected to do"* to assess whether an employee has a disability.

Harassment

201. Section 26 of the Equality Act provides:

(1) A person (A) harasses another (B) if –
a. A engages in unwanted conduct related to a relevant protected characteristic, and
b. The conduct has the purpose or effect of –
i. Violating B's dignity, or
ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) …..

(3) …..

(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

a. The perception of B;
b. The other circumstances of the case;
c. Whether it is reasonable for the conduct to have that effect.

202. In order to determine whether the conduct is related to the protected characteristic, it is necessary to consider the mental processes of the alleged harasser (**Henderson v General & Municipal Boilermakers Union [2016] EWCA Civ 1049**). This may be conscious or unconscious: as stated by Underhill LJ in **Unite the Union v Nailard [2018] EWCA Civ 1203**:

"it will of course be liable if the mental processes of the individual decision-taker(s) are found (with the assistance of section 136 if necessary) to have been significantly influenced, consciously or unconsciously, by the relevant protected characteristic."

203. As set out in the EHRC Code, "unwanted conduct" can include "a wide range of behaviour" (at paragraph 7.7) and it is not necessary for the employee to expressly state that they object to the conduct (at paragraph 7.8). Unwanted conduct means unwanted by the employee (**Thomas Sanderson Blinds Ltd v English EAT 0316/10**).
204. A single incident can be sufficient provided it is sufficiently serious (**Bracebridge Engineering Ltd v Darby (1990) IRLR 3**).

205. When looking at the effect of harassment, this involves a subjective and objective test. The subjective test is to assess the effect that the conduct had on the complainant, and the objective test is to assess whether it was reasonable for the conduct to have that effect (**Pemberton v Inwood 2018 ICR 1291, CA**). The conduct complained about must however "reach a degree of seriousness" in order to constitute harassment, so as not to "trivialise the language of the statute" (**GMB v Henderson [2015] IRLR 451**).

206. In relation to the subjective element, different individuals may react differently to certain conduct and that should be taken into account. However, as set out in **Richmond Pharmacology v Dhaliwal 2009 ICR 724** by Mr Justice Underhill (as he then was):

"if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

Victimisation

207. Section 27 of the Equality Act provides:

> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
> *a) B does a protected act, or*
> *b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act:*
> *a) Bringing proceedings under this Act;*
> *b) Giving evidence or information in connection with proceedings under this Act;*
> *c) Doing any other thing for the purposes of or in connection with this Act; and*
> d) *Making an allegation (whether or not express) that A or another person has contravened this Act.*

208. The detriment will not be due to a protected act if the person who put the individual to the detriment did not know about the protected act (**Essex County Council v Jarrett EAT 0045/15**, and **Deer v Walford and anor EAT 0283/10** where awareness of "some sort of legal case" was insufficient to establish knowledge).

209. For victimisation to occur, the detriment must be because of the protected act. It does not need to be solely because of the protected act to amount to victimisation, but it does need to have a significant influence (**Nagarajan v London Regional Transport 1999 ICR 877, HL**). This means an influence which is "more than trivial" (**Igen Ltd v Wong, above.**).

210. The motivation does not need to be conscious (**Nagarajan, above**). It is possible for a dismissal or detriment to be in response to a protected act but nevertheless not amount to victimisation if the reason for the treatment is not the complaint itself but a separable feature of it such as the way in which the complaint was made (**Martin v Devonshires Solicitors [2011] ICR 352**).

211. The focus should be on the motivation of the person who submitted the individual to the detriment. If a third party provided "tainted information" to influence the decision maker, that would need to be raised as a separate allegation, otherwise an innocent party could find themselves liable for an act for which they were personally innocent (**Reynolds v CLFIS (UK) Ltd and ors 2015 ICR 1010, CA**).

Burden of Proof

212. Section 136 of the Equality Act (burden of proof) states that:

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) 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.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

213. Put simply, the claimant must show facts from which the Tribunal could infer that discrimination took place, in the absence of other explanation. If the claimant cannot do that, the claim fails. If the claimant does show such facts, then the burden shifts to the respondent to show that discrimination did not take place (**Igen v Wong, above**, **Royal Mail Group v Efobi [2021] UKSC 33**). In deciding whether the burden has shifted, the Tribunal should consider all of the factual evidence provided by both parties (although not the explanation for those facts).

214. In **Madarrassy v Nomura International [2007] ICR 867 CA**, Mummery LJ stated that "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

215. Something more than a finding of less favourable treatment is required in order to shift the burden of proof to the respondent, however the "something" need not be considerable (**Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276**). Unreasonable behaviour alone is not evidence of discrimination (**Bahl v The Law Society [2004] IRLR 799**) but can be relevant to considering what inferences can be drawn (**Anya v University of Oxford & anor [2001] ICR 847**)

216. Where the burden has shifted to the respondent, it is then for the respondent to prove on the balance of probabilities that the less favourable treatment was not because of the protected characteristic.

217. Although the burden of proof is a two stage test, there are cases where an Employment Tribunal can legitimately proceed directly to the second stage of the test (see, for example, **Laing v Manchester City Council and anor 2006 ICR 1519, EAT**).

Time Limits – Discrimination

218. Section 123 of the Equality Act (time limits) provides that:

(1) "….proceedings on a complaint within section 120 may not be brought after the end of -

a) The period of 3 months starting with the date of the act to which the complaint relates, or
b) Such other period as the employment tribunal thinks just and equitable.

(2) ….

(3) For the purposes of this section –
a) Conduct extending over a period is to be treated as done at the end of the period;
b) Failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the, a person (P) is to be taken to decide on failure to do something –
a) When P does an act inconsistent with doing it, or
b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

219. There is a distinction between a continuing act and an act with continuing consequences. Where there is a continuing policy, rule, scheme, regime or practice, that will amount to conduct extending over a period, however where there is a one off act which has consequences over a period of time, that will not (**Barclays Bank plc v Kapur [1991] 2 AC 355, HL and Sougrin v Haringey HA [1992] ICR 650, CA**). One relevant but not conclusive factor is whether the same or different individuals were involved (**Aziz v FDA [2010] EWCA Civ 304**)

220. However, the Tribunal should not focus too heavily on whether there is a policy, rule, scheme, regime or practice. The Tribunal should ask itself whether there was an act extending over a period, rather than a series of unconnected or isolated individual acts (**Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA**). It is relevant whether the same or different individuals were involved, and a break of several months may mean that continuity is not preserved (**Aziz, above**). Unproven allegations cannot be part of the continuing act (**South Western Ambulance Service NHS Foundation Trust v King 2020 IRLR 168, EAT**).

221. As held in **Worcestershire Health and Care NHS Trust v Allen [2024] EAT 40**), the fact that unconnected acts are linked by the factual context does not meant that they should be treated as conduct extending over a period. For there to be conduct extending over a period, there must be ongoing discriminatory conduct.

222. In relation to whether it is just and equitable to extend time, whilst it is a broader test that that for unfair dismissal, exercising discretion to extend time is the exception rather than the rule (**Robertson v Bexley Community**

Centre [2003] EWCA Civ 576). When considering whether to extend time, the Tribunal should consider all the circumstances (**Robertson, above**), including the balance of prejudice and the delay and reasons for it. Although **British Coal Corporation v Keeble [1997] IRLR 336** sets out a checklist approach in line with section 33 Limitation Act 1980, it is not necessary to go through the full checklist in each case, as long as all significant factors are considered (**Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23** and **Afolabi v Southwark London Borough Council [2003] EWCA Civ 15**). Factors which are almost always relevant include:

a. The length of and reasons for the delay; and
b. Whether the delay has prejudiced the respondent.

The merits of the case can be taken into account when considering the balance of prejudice. The fact that a delay is short does not mean that an extension of time should automatically be granted. Per Underhill LJ in **Adedeji** (above):

"Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any the less desirable in principle. As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago".

Flexible working

223. Section 80F of the Employment Rights Act 1996 ("the ERA") (as in force at the relevant time) provided that:

(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if –
a. The change relates to –
i. The hours he is required to work
ii. The times when he is required to work
iii. Where, as between his home and a place of business of his employer, he is required to work, or
iv. Such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations.

(2) An application under this section must –
a. State that it is such an application
b. Specify the change applied for and the date on which it is proposed the change should become effective [and]

c. Explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with.

(3) …

(4) If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.

224. Section 80G of the ERA provided (at the relevant time for the purposes of this complaint):

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

a. Shall deal with the application in a reasonable manner;

aa. Shall notify the employee of the decision on the application within the decision period, and

bb. ….

….

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

(a) The period of three months beginning with the date on which the application is made, or

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

…..

225. Section 80H of the ERA provided (at the relevant time for the purposes of this complaint):

(3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under subsection (1)(a) or (b) may be made until –

a. The employer notifies the employee of the employer's decision on the application, or

b. If the decision period applicable to the application (see section 80G(1B) comes to an end without the employer notifying the employee of the employer's decision on the application, the end of the decision period.

…..

(5) An employment tribunal shall not consider a complaint under this section unless it is presented –

a. Before the end of the period of three months beginning with the relevant date, or

b. Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(6) In subsection 5(a), the reference to the relevant date is a reference to the first date on which the employee may make a complaint under subsection (1)(a), (b) or (c), as the case may be.

(7) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(a).

226. Section 80I of the ERA provided at the relevant time that:

(1) Where an employment tribunal finds a complaint under section 80H well-founded it shall make a declaration to that effect and may –

a. Make an order for reconsideration of the application, and

b. Make an award of compensation to be paid by the employer to the employee.

We do not set out here the provisions regarding the calculation of compensation as this hearing was to determine liability only.

227. In assessing whether a request has been dealt with in a reasonable manner, this relates to the procedure followed and not the substance of the decision. In **Whiteman v CPS Interiors Ltd and ors ET Case No. 2601103/15** (a first instance decision and therefore not strictly binding), it was noting that there was a rebuttable presumption that if the ACAS Code of Practice on requests for Flexible Working is followed then the procedure would be reasonable, and vice versa. Employers must act in good faith, and give real thought to the request.

Conclusions

228. We address time limits at the end as it is only once time limits have been considered that we can address whether or not any discrimination which has been found to have occurred formed part of a continuing course of conduct.

Direct disability discrimination

Did the respondent refuse, in February 2023, to permit the claimant to access career development training (specifically "Content Design Apprenticeship")?

229. We note first of all that this allegation is no longer pursued against Miss Swain. We address below separately the issue in relation to content design training more generally, and then the specific apprenticeship that the claimant wanted to apply for: whilst the stated issue in the List of Issues relates very specifically to February 2023, we consider it important to set out what came before by way of context.

230. During the course of 2021 and 2022 access to career development training in relation to content design was in essence put on hold, although not stopped formally. On 2 December 2022 he however requested to go on a policy context, design and implementation course which was approved. We do conclude that, whilst not formally stopped, the effect was that in late 2021 and 2022, up to December, the claimant was not permitted to access career development training specifically in content design to the level he previously had done.

231. In relation to the apprenticeship specifically, this was discussed with Mr Nugent on 1 February 2023 and he was told to do some shadowing first (which did not occur because of his subsequent sickness absence). We conclude that the claimant was not permitted to access the apprenticeship at that time.

Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The claimant says he was treated worse than Colum Nugent, Angela Toal, Luke Brown and Henry Morgan.

232. None of the comparators quoted wanted to access a Content Design Apprenticeship or in fact were seeking content design roles more generally. The claimant has quoted them as comparators because (a) Mr Nugent did secure an apprenticeship (in a different subject) and (b) Mrs Toal, Mr Brown and Mr Morgan were provided (according to the claimant) increased coaching in order to obtain promotion.

233. Whilst Mr Nugent did secure an apprenticeship, there is a material difference in his circumstances in that we consider his apprenticeship to have been a match to his actual role, given that the apprenticeship was in business management and he was working as a line manager in the same field (i.e. management) as his actual role (which was a Support Manager).

234. In relation to the other named comparators, the treatment that the claimant says was less favourable was that they were given support and coaching towards promotion, whereas he was not permitted to access content design training through an apprenticeship. More generally, we consider that there are material differences in circumstances between someone who wants to receive training ultimately in the form of a formal apprenticeship in an area which is not their core role (the claimant), and someone who is seeking generic coaching and mentoring in order to be promoted within their current field of expertise (the other named comparators).

235. We conclude that there were material differences between the circumstances of each of the named comparators and the claimant, such that they are not appropriate statutory comparators, because none of them were seeking to move into a different area of expertise (content design) and to secure an apprenticeship in that area.

236. We have also considered whether the claimant was treated worse than a hypothetical comparator would have been treated, in the absence of an actual comparator. In considering this we have taken account of how those named as comparators were treated by the respondent (as an "evidential comparator"), in order to assess how we consider that hypothetical comparator would have been treated.

237. We consider that a hypothetical comparator who requested coaching or mentorship from a manager would have been offered that support, as was the case for Mrs Toal, Mr Brown and Mr Morgan. Having said that, we also consider that the claimant would have been offered the same support if he had asked for it: we have seen references, for example, to Mr Nugent offering to review the claimant's CV when he was looking for alternative roles. This is subject to the one caveat that, at times of increased business pressure, additional support in non-core areas of work would not be offered, in the same way that it was put on hold for the claimant during part of 2021 and most of 2022 in relation to content design. We have found that this was also the case for Mrs Toal. We do not conclude that there was any less favourable treatment in this regard.

238. In relation to the apprenticeship role specifically, we conclude that the hypothetical comparator would be someone who wished to apply for an apprenticeship in a different area of work to their core role. As such, they would also not be a match for the apprenticeship role and they would be unsuccessful. Whilst Mr Nugent made some comments in evidence about the level of work involved in an apprenticeship and whether the claimant would be able to cope with that at that time, he still fundamentally would not meet the criteria for the apprenticeship given that he was not already in a content design role and that was the reason why his application could not

be progressed. In effect, he needed to move into a content design role and then try to secure an apprenticeship from that position. The claimant was not treated less favourably that the hypothetical comparator.

239. Overall, therefore, there was no less favourable treatment. In such circumstances, the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden of proof does not shift to the respondent and this complaint fails.

If so, was it because of disability?
Is the respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability?

240. Whilst the claimant's claim for direct discrimination is not well-founded for the reasons set out above, for completeness we would add that we consider that the respondent has shown that the reason why the claimant was not permitted to join the content design apprenticeship was because he was not employed in a content design role. This is not because of his disability. In addition, the respondent has also shown that the reason why he was not able to get involved in content design alongside his core role in 2021 / 2022 was because of the backlog of work, again not because of his disability (and the same applied to Mrs Toal).

Discrimination arising from disability

Did the respondent treat the claimant unfavourably by, in November 2022, attempting to coerce him into resigning, via the respondent's "Voluntary Exit Scheme"?

241. In its closing submissions, the respondent helpfully identified five alleged occasions of coercion and we address each of these in turn:

    a. In relation to the initial email to employees on 7 November, this was sent to all employees and was not targeted at the claimant in any way.

    b. In relation to the all staff meeting on 7 November, likewise this was for all impacted employees and was not targeted at the claimant in any way.

    c. In relation to the meeting with Mrs Suffolk on 7 November, we have found that the reason that this meeting was placed into the claimant's diary was not because of the voluntary exit scheme (which Mrs Suffolk did not know about at the time she scheduled the meeting), but instead to discuss the claimant's health with him in Mr Nugent's absence. Whilst the voluntary exit scheme was

discussed at the meeting, and was the first item recorded as having been discussed, this was in the context of making sure the claimant was aware of the scheme and in the context of them just having attended an all staff meeting about it. This was entirely inappropriate and in fact we conclude that Mrs Suffolk could have been criticised by the claimant had she not referenced the voluntary exit scheme in those circumstances.

d. In relation to the email from HR on 11 November, in evidence the claimant accepted that this was not targeted at him (as it clearly wasn't) and that it was a generic email sent to everyone impacted. We have found that the claimant was mistaken in initially thinking that it was targeted at him.

e. In relation to the comment by Mr Nugent on 13 December 2022 to the effect of "Are you looking for a new job", we have found that this comment was made but in the context of the claimant's previously stated desire to move roles.

242. We conclude that none of the above, nor the respondent's treatment of the claimant more generally, amounts to attempting to coerce the claimant into resigning through the voluntary exit scheme. Rather, the treatment of the claimant was to ensure he was aware of the scheme, in the same way as would be the case for other impacted employees, and in the context of the claimant having specifically said that he wanted to move roles, to consider whether the claimant was looking for such a new role. There was no coercion, nor was there unfavourable treatment more generally.

243. Having made that determination, this complaint must fail and it is not necessary to consider the other issues relating to discrimination arising from disability.

Failure to make reasonable adjustments

Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

244. We have found that Miss Swain did not have knowledge of the claimant's disability and that, although she referred him to a particular book about anxiety, this was in the context of general confidence and not disability.

245. We have found that the claimant disclosed his ill health to Mr Nugent at a meeting on 2 December 2021. We have found that the claimant did not disclose his health conditions to Mr Nugent before 2 December 2021 despite him being his line manager for around a year by that point, on the basis that in his email on 6 December 2021 the claimant said "*I have not mentioned my condition earlier*". Equally, however, although that email only

referenced PTSD, on balance of probabilities we found he would have mentioned his health more generally at the meeting on 2 December 2021.

246. Therefore, from 2 December 2021 we have found that Mr Nugent had knowledge of the claimant's health. The respondent has conceded that the claimant was disabled at the relevant time however has not conceded that the respondent was aware of the disability at that time.

247. As far as the Tribunal is aware, the word "disability" was not used with Mr Nugent when he first became aware of the claimant's health conditions. However we consider that Mr Nugent had constructive knowledge of disability from December 2021 i.e. he could reasonably have been expected to know that the claimant was disabled. From Mr Nugent's email to HR on 8 December 2021, it is clear that he had identified that medical input may be required about the claimant's health and was on notice that further enquiry was warranted. His response, in not progressing that for a number of months, fell short of what he could reasonably be expected to do to find out more. Had he done the Occupational Health referral at an earlier stage, when he first identified the potential need for it, or even simply had more detailed discussions with the claimant about his health, we consider that it would have, as the report in July did, identified that the claimant was likely to meet the definition of disability under the Equality Act 2010.

248. Therefore, the respondent could reasonably have been expected to know that the claimant had the disability from December 2021.

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

a. *That staff work from the office for three days every week [admitted]*
b. *That staff deal with customers directly [admitted]*
c. *That staff deal with customer complaints [admitted]*
d. *That staff process requests for re-submission of certificates for apprentices and for their Oyster Card applications [admitted]*

249. The respondent admits that all of these were PCPs which it had.

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

a. *In respect of the first PCP, the claimant's disability made it difficult for him to work in large groups, having constant interaction, resulting in him feeling drained and suffering sleeplessness?*
b. *In respect of the second and third PCPs, they contributed to his stress levels, often involving contact with people who were themselves stressed. Dealing with complaints, in particular, required an emotional resilience which he did not possess. Such interaction exacerbated his existing symptoms?*

c. *Generally, the claimant's workload was too great, again exacerbating his conditions and the fourth PCP gives examples of such workload?*

The first PCP

250. We have no medical evidence relating to the period prior to April 2022. We also do not know exactly when the 60% office attendance PCP was put in place, as the witnesses were unable to recall this. We do however take judicial notice that it was in January 2022 that the government removed the national advice to work from home. Given the nature of the claimant's role and the fact that he was employed in the public sector, we consider that this would have been the earliest point at which office working would have been required for the claimant and therefore prior to that the respondent did not have the PCP at all.

251. The claimant's email of 6 December 2021 to Mr Nugent about his health did not refer to any issues with office attendance. We consider that, if there was any substantial disadvantage during that period, either it would have been in the email of 6 December 2021 or he would have raised it separately between then at the end of March. We conclude that there was no substantial disadvantage during this period.

252. The claimant's initial fit notes on 5 April 2022 and 10 May 2022 refer to social anxiety which could indicate difficulties in group situations. In his email of 9 May 2022 to Mr Nugent he raises concerns about bring in a group situation in the office, and it was from around 13 May 2022 that Mr Nugent implemented informal adjustments so as not to require 60% office attendance at that time.

253. The Occupational Health report amended on 5 July 2022 stated amongst other things that:
    a. The claimant had had social anxiety for over 10 years;
    b. *"His other symptoms include reduction in sleep and finding it challenging to manage his emotional reactions in social situations….he would experience panic attacks quite frequently due to attending the office and having to be amongst large crowds when commuting…"*
    c. *"it would be helpful if he could continue working less than the 60% of the time in the office due to the symptoms he is currently experiencing"*

254. We conclude that at this point in time, the claimant's disabilities were making it difficult for him to work in an office environment, due to his symptoms. This was not however stated to be a permanent state of affairs.

We also note that having to be amongst large crowds when commuting is not the same thing as working in a large group, however the report also more generally referenced his emotional reactions in social situations. At this stage we conclude that the PCP of requiring that staff work from the office three days per week would put the claimant at a substantial disadvantage during periods when his symptoms were exacerbated (although see our separate conclusions as to whether it was in fact applied to him). We conclude on the balance of probabilities that this was the case from the end of March 2022 when Mr Nugent and the claimant discussed the potential need for an Occupational Health referral.

255. Turning to the period from July 2022 onwards, we have found that the claimant continued to suffer from ill health during that period. In November 2022 there was another Occupational Health report which recorded that:

    a. His symptoms can be triggered or exacerbated by going into the workplace
    b. The claimant had fatigue when attending the office
    c. *"I recommend flexibility to work from home is considered for [the claimant] when his symptoms are exacerbated"*

256. We conclude that, again, a requirement to work from the office for three days each week would put the claimant at a substantial disadvantage when his symptoms are exacerbated and that this was the case throughout the period from July to November (i.e. things did not improve following the first Occupational Health report). We also conclude that things did not improve following November 2022 until the end of the relevant period for the purposes of this claim and such a requirement would continue to place him at a substantial disadvantage (whilst his symptoms are exacerbated). We conclude that a PCP of working from the office three days per week would cause substantial disadvantage until sickness absence started in February 2023 and thereafter he was not fit to work in any case until after the point at which his claim form was submitted (see below about whether it was in any case applied to him).

257. The claimant's first claim form (which is the claim form that included a claim for failure to make reasonable adjustments) was submitted on 9 June 2023 and therefore what happened after that date is not relevant for the purposes of this claim. However, we note that there was a further Occupational Health report in July 2023 which recommended redeployment. Whilst recognising that he found the workplace "*noisy busy*", it did not go onto specifically recommend home working.

The second and third PCPs

258. We consider these together, as they both relate to the claimant's dealings with customers in his role. We have found that the claimant's role would involve dealing with customer complaints and that, as he worked on Tier 2, the nature of the queries that he would receive from customers would potentially be more complex. We conclude that dealing with complaints in particular, required an emotional resilience which the claimant found difficult to maintain and such interactions exacerbated his symptoms.

259. As to what medical evidence we have regarding the alleged substantial disadvantage, the fit note from 5 April 2022 recorded that the claimant had problems with stress management and said that it would be helpful if he could be supported with reduced duties. The Occupational Health report from July 2022 recorded increasing work tasks but did not specifically record issues with dealings with customers. The Occupational Health report in November 2022 said that he may benefit from transitioning to a less stressful role but again did not specifically address the topic of customer complaints and it is not made clear what the particular stressors are (i.e. workload, type of work, dealing with customers or a combination of these).

260. The later Occupational Health report dated 20 July 2023 referred to a "high demand" on the claimant, "stressors in the workplace" and "a lack of control over the way in which he worked" however it is not immediately clear whether that means interactions with customers or something else related to his role (the lack of control could also relate to not being allowed to work from home).

261. Overall, the medical evidence does not set out specific issues with dealing with customers and/or their complaints. However, generally we have found that his role would ordinarily involve dealing with customers on second tier queries and complaints and that some of these may be complex. We conclude that there would be stressful elements to the role and that in the context of the backlog during 2022 in particular, workload was more pressured. His symptoms were exacerbated at that time. Taking into account all of the relevant circumstances, we do conclude that the PCPs of dealing with customers directly and dealing with customer complaints put the claimant at a substantial disadvantage compared to someone without his disability, in that when his symptoms were exacerbated he was less able to deal with those stressors within his role. We find that this was the case from December 2021, and formed part of the reason why the claimant disclosed his health conditions at that time (in the context of providing an explanation for any performance issues).

The fourth PCP

262. We conclude that processing requests for re-submission of certificates for apprentices and for their Oyster Card application applications in itself is not

a substantial disadvantage because it formed a minor part of the claimant's role. However, if we consider his workload more generally along with the complexity of queries more generally, then we conclude that he was at a substantial disadvantage when his symptoms were exacerbated.

263. The claimant had had his underlying health conditions for a number of years, and before 2021 there is no suggestion that it impacted his role in any way, which supports our conclusion that the disadvantage only occurred when his symptoms were exacerbated. Although it appears that he dealt with fewer queries than colleagues because of the detail he went through on each one, the quality of his work was not criticised and was in fact praised. That said, from the correspondence we have seen in December 2021 it is clear that, whilst no formal action was being taken, his performance and volume of tickets (which links directly to workload) was being raised with him and his response to that was to explain his health concerns. Therefore we conclude that this substantial disadvantage again occurred from December 2021.

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

264. In relation to the first PCP of working from the office three days per week, this was not something that was raised in the December 2021 email as a concern. We have found that in reality nothing substantive was raised until early May 2022. In particular on 8 May 2022 the claimant indicated that he did not feel well enough to commute to the office and work from the office, and on 9 May 2022 asked to work from home. We consider that prior to 8 May 2022 the respondent could not reasonably have been expected to know that the claimant was likely to be placed at a substantial disadvantage by office working. From that point onwards, the respondent did have knowledge.

265. In relation to the manner in which he dealt with customers (the second and third PCP) and the workload (the fourth PCP), we consider that these issues were raised by the claimant in December 2021. His email of 6 December 2021 clearly focusses on his workload and the discussions that have taken place about the number of tickets that the claimant has resolved. The claimant explains in that context about his health. In addition, whilst the email does not specifically refer to dealing with customers / complaints as a specific concern, it does more generally highlight the complexity of the work he does and the fact that colleagues who work weekends do not have to deal with incoming phone calls. We bear in mind that this email followed a verbal discussion about the issues, and we consider that between that conversation and this email, the respondent had knowledge that the claimant was likely to be placed at the disadvantage. Even if that were not the case, then we also consider that Mr Nugent had

sufficient information to be on notice of the potential issue and should reasonably have explored it further to understand the claimant's difficulties and what disadvantage he was placed at, and therefore we would also find that the respondent could reasonably have been expected to know that the claimant was likely to be placed at the disadvantage from December 2021.

What steps (the "adjustments") could have been made to avoid the disadvantage? The claimant suggests:

(a) Working from home four days a week;
(b) Not being required to deal with customers directly, or with their complaints;
(c) To have his workload reduced by the removal of the stated tasks.
(d) "To move the claimant to another role" (added to the List of Issues during the hearing)

Was it reasonable for the respondent to have to take those steps and when?

Did the respondent fail to take those steps?

266. Although these are separate issues, we consider them together as they are inter-linked.

267. In relation to working from home four days a week, that would avoid the disadvantage however the medical advice even in late 2022 was that the claimant only needed to work from home when his symptoms were exacerbated. We consider that a key issue for the claimant was that he wanted the security of knowing that permanent homeworking on at least 4 days a week had been granted. However, that was not what the medical advice recommended. In circumstances where the medical advice was to allow homeworking on individual days when symptoms were exacerbated, it was reasonable for the respondent to limit the adjustment to that recommended by the medical professional, which ensured that he was not in fact required to attend the office when to do so would place him at a substantial disadvantage. Therefore, in summary on this issue, whilst the adjustment proposed would avoid the disadvantage and whilst the respondent did not take that step (only allowing him to work from home when symptoms were exacerbated), it was not reasonable for the respondent to have to take the step of allowing working from home four days per week when that went beyond what was recommended by medical practitioners.

268. The respondent did put in place the adjustment that the claimant was not required to attend the office when his symptoms were exacerbated (and/or could attend the office late on those days allowing time for the symptoms to subside first) and we conclude that this adjustment was put in place promptly, given that we have found that from 13 May 2022 flexibility was being applied to him (and that it was only from 8 May 2022 that he really

identified that office working was detrimental to him at that time). In addition, although there was a return to work plan in August 2022 that envisaged working up to three days a week in the office, when the claimant struggled to adhere to it, it was extended, and in fact he never returned to three days a week in the office before his period of long term sickness absence starting in February 2023. Therefore there was no failure to make reasonable adjustments in relation to home working on the respondent's part.

269. As for not being required to deal with customers directly, or with their complaints, and in relation to the claimant's workload, we are aware that the claimant's work was adjusted so that he did not have to work on the phones and so that he could work on easier queries, however Mr Nugent's evidence did not set out the specific dates when this was done. We have found however that this was implemented as one of the adjustments following the claimant's return to work after his absence from June to August 2022, with it first being discussed around the end of July 2022. It remained in place until after the claimant's period of long term sickness commenced in February 2023 (although the claimant has said that it was unilaterally withdrawn in February 2023 we have not found this to have been the case). Therefore, from his return from sick leave in August 2022 the adjustment was implemented and the respondent did not fail to take those steps.

270. In relation to the period December 2021 to June 2022, the claimant had raised a concern on 2 and 6 December 2021 suggesting that any performance concerns were linked to his health. It appears no action was taken to remove interactions with customers until after his period of absence in August 2022. We consider that action was taken within a reasonable period following the Occupational Health advice in July 2022, however that advice was delayed because Mr Nugent did not progress it between December 2021 and May 2022. Equally we acknowledge that the claimant did not push the matter until the end of March 2021.

271. In the claimant's email about his health on 6 December 2021, he refers to the fact that his queries are complex in nature. Had Mr Nugent taken the Occupational Health advice that was needed at that time, it would have revealed to him that the claimant may have required temporary adjustments to his role because of his health. Likewise, proper focussed discussions with the claimant about his health would have given Mr Nugent greater insight into any adjustments the claimant might require. Even without Occupational Health input, it was clear to Mr Nugent that the claimant felt that his performance in his role was impacted by his health condition and Mr Nugent could and should have explored that further not only with Occupational Health but also with the claimant. One adjustment which would have alleviated the disadvantage for the claimant would have been not to require him to deal with customer directly and/or by telephone, or to remove complaints from his workload at least temporarily. It was reasonable

for the respondent to have to take that step given that they had knowledge that the claimant said that his condition impacted his performance at work and given that in August 2022 they were able to implement this adjustment until his sick leave in February 2023 and potentially beyond. The respondent failed to take that step until August 2022, although it was discussed towards the end of July 2022. In reality as the claimant was absent from work from 17 June 2022 (and therefore no adjustment could realistically have been implemented between 17 June and 22 August 2022), we consider that the respondent's failure occurred between January 2022 (allowing a reasonable period of time following the claimant's disclosure in December 2021) and 17 June 2022 – however please see the section below regarding time limits for our conclusion on the exact point in that period when we have concluded that the failure occurred. Therefore we conclude that there was a failure to make a reasonable adjustment, however this is also subject to time limit issues which we address below.

272. For the avoidance of doubt, we recognise that a failure to get Occupational Heath advice about potential reasonable adjustments is not a failure to make reasonable adjustments in itself, however in this case there were adjustments that could and should have been made earlier and the relevance of the failure to get Occupational Health advice forms part of an overall failure on the respondent's part to consider and identify the appropriate adjustments, and then to implement them. We also recognise that no formal performance management steps were taken during that period, but the fact that one adjustment was made does not negate the fact that there was another reasonable adjustment to make.

273. As for the allegation that the respondent could have moved the claimant to another role to avoid the disadvantage, whilst this would have been one way of removing the need for the claimant to deal with customers and/or their complaints (depending on what role he moved to), it was not until the July 2023 Occupational Health report that redeployment was recommended for the claimant. Prior to that, the Occupational Health recommendations had been focussed on adjustments to the claimant's existing role, which is what the respondent implemented. Whilst it was clear to the respondent that the claimant did not enjoy his role and wanted to move to a different role (particularly in content design), there was no information available to the respondent to suggest that this was needed from a health perspective, provided that the other adjustments were implemented until his symptoms were under control. In those circumstances, whilst a change of role (depending on the role) might have removed any disadvantage associated with workload or type of work, it was not reasonable for the respondent to have to take that step. We would also note for completeness that changing role would not have enabled the claimant to work from home any more than was already the case, given that the issue for the claimant around home working was the respondent's standard policy.

274. Therefore in conclusion in relation to reasonable adjustments, we have found that there was a failure to make reasonable adjustments in relation to dealing with customers directly, dealing with customer complaints, and workload prior to 17 June 2022. However, we also have to consider time limits which we do below.

Harassment related to disability

Did the respondent do the following things:

1. *Mr Colum Nugent, in April 2022, state "When you have problems like that, you should leave them behind the entrance doors, and when you are at work, you should concentrate on your work, as you should do".*

275. We have not found that the respondent through Mr Nugent made the comment as alleged. There was some kind of comment but not as indicated by the claimant and it was at a time when Mr Nugent was planning to obtain Occupational Health advice regarding potential adjustments which would be at odds with the alleged comment. The claimant has not shown us that this comment was made and therefore his claim for harassment in respect of this comment must fail.

2. *Ms Helen Suffolk, on 31 August 2022 (in respect of the claimant looking for an alternative role), state "We shouldn't be doing that for you".*

276. The comment was made or words to that effect, in the context of explaining to him that he had to take responsibility for looking a new role if he wanted one.

If so, was that unwanted conduct?

277. Unwanted in this context means unwanted by the employee. Given that the claimant wanted the respondent to find him another role, it was unwanted.

Did it relate to the claimant's protected characteristic, namely disability?

278. The comment was made in the context of an employee who in any case wanted to move into a different type of role for personal reasons, because of his interest in content design and/or policy work. In addition, at that stage the Occupational Health advice does not say anything to indicate that a change of role is necessary for health reasons.

279. In his own note from the meeting on 31 August 2022, the claimant recorded that he had been asking for training and help to change roles for two years, which would predate his period of ill health. This is also supported by the respondent's reference to the matter as being related to "development opportunities" (rather than being related to health) in Mr Nugent's summary email following the meeting. We consider that his desire to change roles at

this time (as opposed to by mid 2023) is in reality a general career aspiration. Although the claimant did talk about his health at that meeting, on balance of probabilities and based on the notes from both the claimant and Mr Nugent, we conclude that the discussion about changing role was about career aspiration, not health. Therefore, it was not related to disability and the claimant's claim in this regard must fail.

280. For the avoidance of doubt, if we were wrong on that then we also conclude that it did not have the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In addition, in the even it did have that effect (and we accept that the claimant was upset by being required to put the legwork into the task himself), it was not reasonable for it to have that effect given that there was no evidence at that stage that the claimant needed to move roles for medical reasons, and given that the claimant himself acknowledged that he had been wanting to change roles since before any issues relating to his health were raised with the respondent for unrelated reasons. In essence, the claimant had an unrealistic expectation of the level of support that the respondent would offer in relation to career progression and in that context it was not reasonable for it to have that effect.

    3. *Mr Nugent, on 31 August 2022, state "You should be three days in the office, and you should be back fully efficient with the others as you should be".*

281. As to whether this comment was made or not, we have found that it was not made in those exact terms, but that the claimant interpreted it that way. What he was told is that he should be aiming to return to the office 60%, not that he should be at that point in time. Therefore, the comment was not made as alleged.

282. However, given that the comment was made in the context of him aiming to return to the office in future, we have also considered whether such a comment made in that context would amount to harassment.

If so, was that unwanted conduct?

283. In the context of the claimant wanting to be permitted to work from home on a full time or four day per week basis, it was unwanted on his part.

Did it relate to the claimant's protected characteristic, namely disability?

284. We conclude that it did relate to disability. The claimant felt that unless he was allowed to work from home permanently, this would continue to be a stressor for him in relation to his health. We say that whilst acknowledging that this was not reflected in the medical advice. We also acknowledged that it may not be the sole reason as there may have been personal reasons as well for the claimant wishing to work from home. Whilst we acknowledge that it is necessary to consider the mental processes of the alleged harasser, we consider that the Mr Nugent was aware that a key reason why the claimant was asking not to be required to adhere to the

60% requirement was because of his disability (even though the precise request from the claimant was not supported by medical advice).

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

285. We conclude that the purpose of the comment was not to harass him, but instead to convey the respondent's policy and aspiration for him (subject to his health).

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

286. We accept that the claimant perceived the comment to be a requirement that he come back to the office three days per week, which upset him because he was so fixated on trying to avoid doing that. However, we also conclude that in reality the claimant misunderstood what was being said to him: he was being informed that this should be his aspiration, but it was also clear to him that when he was symptomatic, he was being offered additional flexibility to work from home on additional days. Therefore he was not being told to return to the workplace three days per week in practical terms at that time. Taking into account those circumstances, and the need not to trivialise the concept of harassment, we conclude that it was not reasonable for the conduct to have that effect and therefore this complaint fails.

4. Mr Nugent, on 18 October 2022, state (regarding flexible working) "unfortunately, there is policy in place, which is the standard. How you feel is how you feel".

287. We have found that a comment to that effect was made, although importantly there was an additional comment that "we can look at case by case basis".

If so, was that unwanted conduct?

288. Bearing in mind the additional element to the comment set out in the above paragraph, in this context the claimant is not being told that he cannot work flexibly at all, but rather that adjustments are considered on a case by case basis. On that basis we consider that, even taking into account that we should consider whether a comment is unwanted from the claimant's perspective, this is not unwanted comment but merely a reflection of the respondent's policy which does not indicate to the claimant one way or another what his personal situation will be. Therefore, the claimant's complaint about this comment must fail, however we have in any case considered below the other elements of the test for harassment relating to this comment, in the event that it were unwanted conduct.

289. The comment, if it were unwanted, did relate to disability in that it was the context of office attendance and the claimant's request not to be required to

attend the office for health reasons, and it included the additional comment about considering matters on a case by case basis, which would include adjustments relating to disability.

290. However, we consider that the comment did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, nor was it reasonable to have that effect. This was a neutral comment made in the context of explaining what the policy was, subject to consideration of individual circumstances, and a comment to the effect that Mr Nugent could not change the fact that the claimant did not like the policy (which was true). We must not trivialise harassment and in this context it would not be reasonable for the conduct to have that effect.

    5. *Ms Suffolk, on 18 October 2022, state "There is no need for the [second] Occupational Health Review to be made, as we've just had one".*

291. Mrs Suffolk accepted making this comment, although she changed her position promptly upon being made aware that the claimant had new symptoms.

If so, was it unwanted conduct?

292. As to whether it was unwanted conduct, at the precise moment it was made it was, as the claimant wanted further Occupational Health advice.

Did it relate to the claimant's protected characteristic, namely disability?

293. The comment was made in relation to a potential assessment of the claimant's health, which related to his disability.

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

294. We conclude that it clearly did not have that purpose. It was a genuine comment based on the fact that there was relatively recent Occupational Health advice already, and Mrs Suffolk changed her position (to allow a second Occupational Health review) once she was aware of the claimant's new symptoms.

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

295. We also conclude that it was not reasonable to have that effect. This is particularly so given that it was within the same conversation that Mrs Suffolk changed her position upon receipt of further clarification. Therefore, by the time the conversation ended, the claimant had been told that he could have the Occupational Health assessment that he wanted, and the reason why Mrs Suffolk had initially declined that but then changed her

position had been made clear to him. In those circumstances, it would have been obvious to him that there was a genuine reason why she initially refused, and equally that she took on board his point of view and the rationale he provided. This complaint fails.

6. Mr Nugent, in November 2022, state "We will not allow you to work from home, as the others would like that too".

296. First of all, we would clarify that the issue appears to be about permanent homeworking, rather than the temporary adjustments that the respondent had already made. We do not go as far as to find that he was told that "*we will not allow you to work from home*" given that we have found that he did not receive a response to his flexible working application. However, a comment was made to suggest that such application would in all likelihood not be successful if it was progressed at that time. We also found that Mr Nugent had said something about others wanting to work from home as well. Although we do not consider that the words used were exactly as stated by the claimant, we consider that there was a comment suggesting that firstly there was no point progressing the flexible working application at that time, and secondly that others also wanted homeworking.

If so, was that unwanted conduct?

297. It was unwanted conduct as the claimant wanted to be permitted to work from home permanently, at least four days per week.

Did it relate to the claimant's protected characteristic, namely disability?

298. We conclude that it did, because although not supported by the medical evidence at that time his request was wrapped up in what the claimant perceived would assist his health. As explained above, we consider that Mr Nugent was aware that this was the case.

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

299. We conclude that it did not have this purpose, but rather was intended to make sure that the claimant understood the position in relation to home working.

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

300. Whilst we accept that the claimant did find it hostile that the respondent would not automatically agree to him working from home on a more permanent basis, we consider that it was not reasonable for it to have that effect in the context of there being no medical advice recommending permanent homeworking. We do consider the comment that others would like that too to have been ill advised given that the claimant was in a different situation to others, however that does not detract from the overall

position that the medical advice was for a temporary adjustment as and when his symptoms required it, which the respondent had agreed to. Whilst the claimant perceived the refusal to allow longer term homeworking negatively, given those circumstances it was not reasonable for the comment to have that effect on him.

301. Therefore, the claimant's complaint of harassment in relation to all six comments is not well founded and is dismissed.

Victimisation

It is common ground that the claimant did the following which constitutes a protected act:

- *a. issued a grievance dated 15 February 2023 ["protected act 1"]*
- *b. issued a grievance dated 17 May 2023 ["protected act 2"]*
- *c. issued proceedings against the respondent for disability discrimination on 9 June 2023 ["protected act 3"]*

Did the respondent subject the claimant to any detriments as follows:

- *a. On 7 August 2023 did Saheel Sankriwala (grievance appeal manager) fail to follow the respondent's policy in that he did not re-hear the claimant's grievance?*

302. We conclude that Mr Sankriwala did not fail to follow the respondent's policy. Whilst he did not re-hear the claimant's grievance, the claimant has misunderstood what the policy says, and the policy does not in fact require him to do so. The claimant believes that because his grievance was about an alleged failure to make reasonable adjustments, a re-hearing is required. However, what the policy actually means is that if the appeal is about an alleged failure to make reasonable adjustments during the grievance process itself, it is in that circumstance that a re-hearing is required (to remove any disadvantage caused by the potentially deficient grievance process). This complaint therefore fails.

- *b. Around August – September 2023 was Saheel Sankriwala (grievance appeal manager) biased and unfair in his dealing with the claimant's grievance appeal?*

303. There is no particularity to this allegation however nothing we have seen suggests that this was the case. There were two meetings to discuss the appeal and we consider that Mr Sankriwala considered the appeal impartially and without bias. The claimant may not agree with the outcome, but that does not mean that Mr Sankriwala treated him unfairly. Again, this complaint fails.

If so, was this because the claimant did a protected act? The Tribunal will consider whether any of the alleged acts of detrimental treatment pre-date any of the relied upon protected acts.

304. Whilst the claimant's complaint of victimisation has already failed, we would add that our conclusion is also that any treatment of him in relation to the appeal (whether as set out above or otherwise) is not because of any protected act. In evidence the claimant said that the protected act relied upon here is his Tribunal claim, not the grievances in themselves. We have accepted Mr Sankriwala's evidence that he was not aware of the Tribunal claim. In that circumstance, the treatment cannot be because of the protected act given that he was not aware of it. Again, this complaint fails.

Flexible working

Did the claimant make a formal flexible working request in accordance with section 80F of the Employment Rights Act 1996 ("the ERA")?

305. The claimant's flexible working request dated 25 October 2022 (and amended on 15 December 2022) was a request to change the claimant's place of work (to home), which is one of the specific circumstances envisaged by section 80F of the ERA. It was an application for a change in his terms and conditions of employment, and it was set out on the respondent's Formal Flexible Working Arrangement Form. In those circumstances we conclude that the application was clear that it was an application within the scope of the statutory flexible working legislation, even if the claimant did not quote that legislation himself. It confirmed the proposed start date for the requested change and the effect that the claimant considered it might have on the respondent and how he considered that could be dealt with. We conclude that it was a formal flexible working request in accordance with section 80F of the ERA.

Did the respondent, under section 80G of the ERA:

(a) Deal with the application in a reasonable manner?

306. It did not. There was no meeting with the claimant to discuss his application or any attempt to investigate it properly, and in fact the initial indication given to him was that it was likely to be refused and so was not being progressed, without any formal decision being taken or any attempt made to follow a reasonable process, nor was he actually given a decision (in writing prior to these proceedings, and verbally prior to 1 February 2023).

307. In addition, Mr Nugent escalated the request to Ms Mason, who did not have the requisite knowledge of the claimant's health in order to give a considered opinion on the application. In any case, given that it was a request for homeworking, it was also supposed to have been sent to the HR Specialist Advisory Team which did not happen.

(b) Notify the claimant of the decision on the application within the decision period of three months or such longer period as may be agreed by the respondent and claimant?

308. It did not. There was no outcome to his application dated 25 October 2022, nor was there any agreement with him to extend the period for a decision to be provided.

Was the claimant's claim submitted to the Tribunal within three months beginning with the relevant date (allowing for early conciliation) – the relevant date being the first date on which the employee may make a complaint?

309. The relevant date is the date on which the respondent notified the claimant of its decision on the application. We have found that the claimant's request was not rejected in 2022, he was simply told it was not being progressed at that time. It was for that reason that he submitted an amended application in December 2022, which he would not have been able to do had his application been formally refused because the legislation makes clear that you can only do one in a twelve month period (as the respondent has itself referred to in submissions).

310. We have found that at the meeting on 1 February 2023 the claimant's notes record that he was told "we didn't hear anything back from them so that we can assume it was declined". This therefore amounts to the claimant being informed that the decision is to reject his application and this is therefore the relevant date.

311. Alternatively, if there had been no decision notified to the claimant at all, then the relevant date would be once the decision period of three months expired, which would be 25 January 2023.

312. ACAS early conciliation commenced on 29 March, the certificate was issued on 10 May and the claim form was presented on 9 June 2023. Therefore whether the relevant date is 25 January 2023 or 1 February 2023, the claim was presented in time. This complaint therefore succeeds.

313. We make a declaration that the claimant's claim under section 80H of the ERA is well-founded. We have considered whether to make an order for reconsideration of the application, however given the time that has passed since the application was made we understand that there have now been separate discussions between the parties about flexible working since the relevant time. In those circumstances we do not make an order for reconsideration of the application. However, we do consider it appropriate to make an award of compensation by the respondent to the claimant.

314. This hearing was to consider liability only and therefore remedy would need to be considered at a separate hearing. However, the Tribunal considers that the parties may be able to agree the remedy figure between them. The parties are therefore requested to seek to reach agreement between themselves and to write to the Tribunal by **17 January 2025** to confirm whether they have managed to reach agreement as to the amount of compensation that they consider should be awarded, or whether a remedy hearing is required.

<u>Time Limits – Discrimination</u>

315. Having considered all of the substantive elements of the claimant's claim, we now address time limits. We have already found that the flexible working complaint was presented within the required time limits, so this relates to

the discrimination complaint, and specifically the complaint of failure to make reasonable adjustments as this is the only aspect of the discrimination complaint that has been found to have been well founded. This relates to the first Tribunal claim presented by the claimant and it is also therefore not necessary to consider time limits (or jurisdictional matters more generally) in relation to the second claim.

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

a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

316. As set out in the agreed List of Issues itself, the first claim form was presented on 9 June 2023. The claimant commenced the Early Conciliation process with ACAS on 29 March 2023 (Day A). The Early Conciliation Certificate was issued on 10 May 2023 (Day B) – Ref: R152622123/07. Accordingly, any act or omission which took place before 30 December 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

317. We have made a finding that the relevant adjustments regarding workload and customer interactions were made following the claimant's return from sickness absence in August 2022, i.e. 22 August, and that the relevant failure to make reasonable adjustments must relate to the period prior to 17 June 2022 (but see below regarding the actual date on which the failure occurred). The claimant did not commence ACAS early conciliation until 29 March 2023. Given that any act or omission before 30 December 2022 is potentially out of time, and given that we have found that any failure to make reasonable adjustments must pre-date August 2022 when they were implemented (but see below regarding the actual date where we consider the failure took place), on the face of it these allegations are out of time. An unproven allegation cannot form part of a continuing act and therefore it is only relevant to consider those aspects in respect of which the claimant's complaints have succeeded.

318. We recognise that there is a distinction between a failure to act and a continuing act: a failure to make a reasonable adjustment is not a continuing act over a period, but time begins to run when the employer decides not to make the reasonable adjustment.

319. Initially on 8 December 2021, Mr Nugent clearly intended to get Occupational Health advice and consider adjustments, but that at some point fell by the wayside when he didn't chase the lack of response from HR (because he had sent the request for assistance to the wrong inbox). What happened here is that Mr Nugent omitted to progress the matter. Here, in accordance with section 123(4) of the Equality Act 2010, in the absence of evidence to the contrary, a person is to be taken to decide on failure to do something when they do an act inconsistent with doing it, or if they do not do an inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.

320. Here, there was no express act carried out which was inconsistent with making the reasonable adjustment. Therefore we consider when the expiry of the period was in which the respondent might reasonably have been expected to do it. Bearing in mind that the claimant raised the matter on 2 and 6 December 2021, and the respondent initially started the process of seeking advice on 8 December 2021, and allowing a reasonable period for him to have taken further action including the fact that it was approaching the end of year holiday period, we conclude that the expiry of that period would have been early January 2022. We therefore consider that the failure to make reasonable adjustments occurred at that time. The claim was not presented within three months of that.

    b. If not, was there conduct extending over a period?
    c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

321. In relation to reasonable adjustments, an omission is not conduct extending over a period. In any case, there was more than a three month period between August and the start of ACAS Conciliation by quite some margin. Therefore there is no conduct extending over a period in relation to discrimination.

322. We have also considered whether the issues relating to the flexible working application would form part of conduct extending over a period, the last act of which was in time. We consider that the flexible working issue was distinct from any failure to make reasonable adjustments in relation to dealings with customers / complaints and in relation to workload. The conclusions we have reached in relation to flexible working relate to the process followed and not to discriminatory conduct in itself, and therefore whilst Mr Nugent was involved in both matters and whilst they both relate to adjustments at work, they remain separate and distinct matters. This is particularly the case given that there was a large gap of well over three months between the failure to make reasonable adjustments and the breach relating to flexible working. This is not continuing discrimination but rather two separate streams of conduct. There was no conduct extending over a period.

    d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
        i. Why were the complaints not made to the Tribunal in time?
        ii. In any event, is it just and equitable in all the circumstances to extend time? The Tribunal will decide:
            1. Why were the complaints not made to the Tribunal in time?
            2. In any event, is it just and equitable in all the circumstances to extend time?

323. The claimant has not put forward any noteworthy basis for asserting that it would be just and equitable to extend time in relation to this matter, relying

instead on conduct extending over a period. He was attending work between June 2022 and August 2022 but did not initiate ACAS early conciliation in that period. He did refer to having tried to explore internal resolution, however he was aware of ACAS and has not sought to argue that he was ignorant of the relevant time limits.

324. The length of the delay was substantial and extending time should be the exception rather than the rule. Although we have taken account of the prejudice to the claimant in that he would not be able to pursue these aspects of his claim, having regard to the circumstances above and the prejudice to the respondent in otherwise requiring them to defend a claim which is out of time we conclude that it would not be just and equitable to extend time.

325. In conclusion therefore, the claimant's complaint of failure to make reasonable adjustments is unsuccessful because it was not brought within the required time limits, does not form part of conduct extending over a period, and it is not just and equitable to extend time.

326. The claimant's complaint in relation to breach of the flexible working procedure set out in the ERA succeeds. In the event that the parties are unable to reach agreement on an appropriate award of compensation by 17 January 2025, a remedy hearing will need to be listed.

Employment Judge Edmonds
27 November 2024