Case number: 2200163/2024

EMPLOYMENT TRIBUNALS

Claimant: **Ms Z Anderson**

Respondent: **University College London Hospitals NHS Foundation Trust**

Heard at: London Central, by cvp

On: 25 September, 26 September, 27 September and 11 November 2024

Before: Employment Judge Emery
Mr P Brione
Ms T Ashby

REPRESENTATION:

Claimant: In person
Respondent: Mr H Sheehan (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that the complaint of a failure to make reasonable adjustments is well founded and succeeds.

REMEDY JUDGMENT

The respondent shall pay the claimant the following sums:

a.	Compensation for past financial losses:	**£ 1,277.72**
b.	Compensation for injury to feelings:	**£25,000.00**

The Issues

1. The claimant was appointed in June 2019 and remains employed by the respondent as an Administration Pathway Assistant, a Band 3 role, in the

Restorative Dentistry department at the Royal National ENT and Eastman Dental Hospital.

2. It is agreed that the claimant is disabled as defined in s.6 Equality Act 2010, with the condition of Sarcoidosis; that the respondent was aware of this condition from 12 September 2022.

3. The claims of harassment related to disability and failure to pay holiday pay are withdrawn by the claimant and are dismissed on withdrawal.

Failure to make reasonable adjustments

4. Did the respondent have the following PCPs:

    a. A requirement to work 37 hours per week (full-time hours). The respondent accepts that it had this PCP for the claimant's role.
    b. A requirement to work at the office after a 6 week phasing-in period. The respondent accepts that it had this PCP for the claimant's role.
    c. A requirement to work in the office (after phasing in) regardless of fluctuations in her symptoms. This PCP, and an amendment to the wording of this PCP which the Tribunal considered was required to make sense of it, was the subject of debate, see the conclusions section below.

5. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she become excessively fatigued by long hours, and required frequent absence for medical appointments.

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

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

    a. A shorter working week, say 35 or 30 hours.
    b. A 3 to 6 month phasing in to full hours.
    c. Permission to work from home on days when her symptoms were bad.

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

9. Did the respondent fail to take those steps?

Application to postpone the hearing

10. Just prior to the hearing the respondent applied for a postponement of this hearing, the reason as follows. The claimant recently succeeded in an appeal against the decision to redeploy her. The respondent has subsequently introduced adjustments for the claimant to enable her to return to her role. The respondent says this is important as knowledge of what happens on her return – whether the

claimant is able to successfully return to work or otherwise – will be evidence to assist the claim being resolved "justly and fairly" and could also lead to an amicable resolution of the claim without the need to expend resources in tribunal. What happens to the claimant's return to work is relevant to the Tribunal's disposal of the case; the overriding objective means "there can only be" a postponement; there will be "events which have not yet happened" which are relevant to the claim. The claim was presented this year, it has progressed promptly, and a further delay is not inconsistent with the overriding objective. It would be a breach of law leading to a successful appeal if the hearing is not postponed.

11. The respondent accepts that there "may be a benefit" in proceeding to avoid delay, uncertainty for the parties, and it accepts that employment tribunals regularly deal with cases which look hypothetically at whether adjustments may or may not succeed. But in this case, there is a return to work and there will be a "definitive" outcome.

12. The claimant wants the hearing to proceed. She says the respondent is not implementing adjustments recommended by Occupational Health, for example she has been working for four days a week in the office, there is "no opportunity" to work from home, despite her role requiring her to be in the office only two days a week, she is struggling with the commute, she has not received a chair or recommended equipment, there is still a dispute about adjustments. She put in her flexible working request several months ago, the respondent is in breach of the requirement to decide on her request within 3 months. The longer the case goes on, the more difficult it is "I would rather get this over and done with to concentrate on my health."

13. The tribunal unanimously rejected the application to postpone. We concluded that there is a dispute between the parties as to the adjustments which it is potentially reasonable to make. The claimant seeks as an adjustment the ability to work from home, she says that this is what her role allows in any event, but that the respondent continues to want her in the office for longer. Many other adjustments have not been put in place. There is therefore no agreement on what the adjustments should be; in any event the flexible working application has not yet been agreed by the respondent, there is the prosect of further dispute about the ambit of what adjustments the respondent will agree to.

14. We concluded that in these circumstances a delay may not be of benefit to the parties in resolving the issue, as there is a prospect, if the Tribunal does not give a decision on adjustments, that there will continue to be a dispute. Also, there is no requirement for the tribunal to have actual knowledge of whether adjustments will work in determining whether or not they should be put in place. In addition, a large part of the claim is to address historical issues, in particular the decision to place the claimant on the redeployment register rather than allow her to return to her original role; this is an issue which it would be of benefit to the parties if it was resolved, to enable all to move forward without this dispute hanging over them.

15. During the course of the hearing, the respondent was concerned that the lack of postponement meant that evidence was being given on issues about reasonable adjustments on which it had no witness evidence, that this meant it had to reserve its position. In particular, its position was that the adjustments that the claimant sought as part of her claim have "been ineffective", and hence they are not adjustments which the claimant can say it was reasonable to make; but it has no evidence to say so. The claimant's case is that adjustments had not been put in place as recommended by OH, as above.

16. There was a discussion about whether or not the respondent would call additional evidence to address the efficacy or otherwise of the adjustments in place. Its initial response was that it would have investigated further the effectiveness of the adjustments to date had it had more time but was not calling evidence at this time. This position changed following further evidence from the claimant, the respondent said that it may call seek leave to adduce evidence "speaking to the phased return and the current situation". In the event, no additional evidence was adduced.

The tribunal's motion to reconsider its oral judgment

17. The tribunal gave the parties a verbal judgment on liability on day 3 of the hearing. During a break after giving judgment, the Tribunal came to the view that it had made the following errors: we had altered the wording of the 3rd PCP without given the parties an opportunity to comment on this varied wording; we had concluded that adjustments should have been made, but in relation to some of the adjustments we had again not given the parties an opportunity to comment in evidence or submissions; we had made recommendations, again without giving the parties an opportunity to comment.

18. The respondent's view was that as we had read out our decision and a request had been made for written reasons, the reasons as given to the parties had to be recorded in writing; at which time the process to review the judgment under the tribunal's own motion could be made under Employment Tribunal Rules 2013 Rules 72 and 73.

19. We concluded that the respondent's approach was not required under the Rules; there was no provision which prevented an error being rectified during a hearing before written reasons were produced, as long as the reason how this issue had come about and been resolved was properly recorded in the judgment. To adopt the respondent's approach would be time-intensive and would delay matters, requiring written reasons to be sent which the tribunal knew contained errors, a hearing would then need to be listed to address the application to vary, and an amended judgment circulated.

20. We saw no injustice to the parties in addressing the issue the following way: to list a further hearing which is required for remedy in any event; to allow representations from the parties on the issues which on which the tribunal had

given judgment without submissions; give judgment on those issues; address remedy.

21. In the event, at the 11 November 2024 hearing, the respondent said that it accepted the tribunal's judgment on the PCP, the adjustments and the recommendations, in fact it accepted the judgment on all issues, and that it was not going to make submissions on these points.

Witnesses

22. We heard evidence from the claimant. For the respondent we heard from Mrs Carole Mandel, Administration Team Leader, Restorative Dentistry, the claimant's line manager who undertook the "Stage 1" long term sickness process; from Ms Anna Jones, at the time the Deputy Divisional Manager Surgical Specialties, who Chaired the Stage 2 long-term sickness process; and from Mr Darren Hobbs, Divisional Manager, Imaging, who heard the claimant's successful appeal against the stage 2 decision to redeploy her.

23. At the remedy hearing we heard from the claimant and from Ms Cook, the claimant's current line manager who is managing the claimant's return to work.

24. The Tribunal spent the first half-day of the hearing reading the witness statements and the documents referred to in the statements.

25. The judgment does not recite all the evidence we heard, instead we confine our findings to the evidence relevant to the issues in this case. It incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

26. There was disagreement about the duties the claimant undertook in her role. The claimant agreed with only some of Mrs Mandel's characterisation of her role: she accepts that she was required to deal with general administration work, taking patient calls to make or cancel appointments, calling to remind patients of appointments, downloading clinical letters to send to the patients General Dental Practitioners; dealing with incoming post and emails, scanning post onto EPIC. The claimant does not accept that she was required to visit the Huntley Street clinic to speak directly to physicians and patients or deliver notes – she says that she has never done so as part of her role. In her evidence, Mrs Mandel accepted that for more complex situations it may be Band 4 staff who convey notes or messages to clinics or to go to Huntley street, Band 3 may be sent to deal with simpler issues.

27. There were four full-time staff including the claimant undertaking the Band 3 APA role; each was required to attend the office two days a week to provide admin cover. Their other three days of work, each APA worked from home.

28. In March 2022 the claimant started developing medical symptoms including joint pain and respiratory issues, this was eventually diagnosed as Sarcoidosis. She was off work for nearly 18 months. Her condition was poorly controlled for some time, and different treatment plans were tried.

29. During this period, the claimant went through the respondent's sickness absence procedures, attending several review meetings at which she gave updates on her condition. The claimant had several assessments by Occupational Health, all of which say that she was not fit to work for the foreseeable future because the different treatments she was receiving over time were not working, the severity of her fluctuating physical symptoms, and their effect on her memory, concentration, fatigue and anxiety.

30. The relevant chronology starts at a stage one sickness absence meeting on 27 February 2023. The prior Occupational Health report dated 8 February 2023 (317) says that the various medication treatments she had received were ineffective, but she was commencing new medication. It says that the claimant was not fit to work in any role, it was difficult to assess when she may be in a position to return.

31. At the 27 February meeting, the prospect of the claimant returning and what this return would look like were discussed. It was at and after this meeting that Mrs Mandel made it clear that management's position was that the claimant's role was a full-time role. The meeting notes show that the claimant said she is "not sure" if she wanted to return to work full time; also, that she could work from home.

32. Mrs Mandel's position was that working from home could be considered as part of a phased return, but after the phased return she would need to be on the office two days a week. The claimant responded saying she has had a mobility issue for some time, "… and sometimes being in the office is better," (256). The last comment was Mrs Mandel's who said that there was "no capacity" for the role to be part time "… as the Service needed full time roles and would put that in the OH referral." (257).

33. Emails the same day as this meeting show Mrs Mandel and her manager Jackie Kasozi-Batende discussing the role: Mrs Mandel was told to let Occupational Health "… know we can't support part time in our service due to the nature of the role." Mrs Mandel is told in answer to her subsequent query ("Am I allowed to do that") to, "Just write the needs of our service require that a full-time band 3 and it would be difficult to recruit to a part time role."

34. By March 2023 the OH records indicate that the claimant was showing a "very slight improvement" as a consequence of the new medication treatment, but her overall health was such that there was no consideration of a return to work (320). Notwithstanding this, it was the claimant's view at this time that she wanted at least to start negotiations about how she could return to work, she "felt I could do something" at this time.

35. The stage two sickness absence process started in July 2023. This stage would decide whether to extend the review period for up to 12 months, or to terminate on grounds of ill health (summarised at 343).

36. An OH report dated 28 June 2023 again determined the claimant as being unfit to return to her substantive post but suggested a limited trial in a supernumerary capacity for 2-4 hours day to allow the claimant to assess her ability to perform her role.

37. Mrs Mandel prepared a management presentation for the 3 July 2023 stage two meeting. This states that she "would not feel comfortable" with the claimant working from home, because of the "cognitive issues" the claimant was describing. In her statements, Mrs Mandel characterises this as not working from home for "at least the first four weeks upon her return" because of the cognitive issues. However, there is no reference to a timeframe in the documents she prepared. Mrs Mandel's view was that at least initially she should return to work "in a less responsible role"; in addition, the department required the role to be carried out "full-time" (352-6).

38. The stage two absence process was conducted by Ms Jones. During the evidence we heard, there was significant dispute about what the claimant said at the 3 July meeting, in particular the hours she said she wished to work in the workplace and at home, whether she said she was not prepared to work in the office.

39. The transcript of the 3 July meeting was not in the bundle, it was disclosed on day 3 of the hearing. Up to this point in the evidence, the respondent's position had been that it was the claimant who had said was only prepared to work from home most if not all of her working week. In her evidence, Mrs Mandel pointed to her email dated 12 October 2023, which records that the claimant "confirmed" at the 3 July meeting she wanted to work part-time and to work solely from home (380).

40. On careful review of the 3 July meeting notes, and the other disclosed meeting notes, we can find no reference to the claimant saying she was only prepared to work from home. In fact, her only comment in 3 July meeting about working from home was to say "I cannot work from home full-time. I will have to go into the office." The notes show that the claimant expressed a wish to return to work part-time, to then have surgery if recommended, to use holiday to aid recovery from surgery, and then be in a position to consider if and when she was able to return full time.

41. The 3 July meeting notes make it clear that it was Mrs Mandel's view that the claimant shouldn't work from home, at least initially on her return. The notes say that Mrs Mandel "… wouldn't like to think of someone coming back to work after 15 months and being at home on their own".

42. Mrs Mandel's reasons at the 3 July meeting for the role being full-time with no possibility of working part-time were: it's a demanding role with lots of pressure, the need to multi-task, deal with calls from patients, doctors and lots of emails. She said that it had taken a long time to recruit a bank replacement, before which the team had been down to three, which had created significant issues: "we would not wish to place these pressures" back on staff if the claimant were to commence a phased return and reduced hours.

43. On being asked to elaborate on the stress in the role, Mrs Mandel's response was the role "… is very busy, it requires continuity. We have lots of things going on at any given time and things can change at the drop of a hat. The role is to deal with incoming telephone calls, outgoing telephone calls to patients, GDP and picking up emails, cancellations. There's just a lot going on"; she said that given these factors "we would not wish to split the role".

44. Mrs Mandel's witness statement says that her managers had concluded the role needed to remain full time to ensure continuity of urgent tasks, giving the example of cancellation of clinics at short notice "and that trying to cover it with part-time hours would be unsustainable as there was a high likelihood of errors being made; each employee believing the other had completed a task". Also, if one of the part-time staff members went ill, the other would have "double the work." The statement refers to other staff members having disabilities which need to be accommodated, other had childcare arrangements in place, again meaning working part-time and working from home more than two days a week could not be considered.

45. Mrs Mandel's evidence at this hearing was that a job share was not feasible, as it would be difficult to ensure that relevant tasks had been completed on handover, also that if the claimant took sick-leave half-way through the shift it would be difficult to know what had been done. She did not accept that it was feasible for the claimant to, for example, inform a manager of work which needed doing if she needed to leave, saying that a manager "could be in a meeting, and is not on site every day, an email message could get lost in a handover …". She said that the NHS "is an odd place … you can't touch something", that there is a lot of dotting I's and crossing t's so that patients are aware, and the admin team is aware of a decision "a multi-faceted task." She gave the example of a part-time employee not passing an email onto their colleague "there are lots of loopholes. … My opinion that it is not feasible to split that role."

46. We note that the respondent has adduced no evidence which shows that it would be difficult to recruit to a part-time role. Mrs Mandel's statement says that " … there were no part time roles available… All Administration Assistants work full time."

47. During this hearing, the claimant confirmed that she had been prepared at all stages on her return to work two days on site, she accepted the rota required this, that an APA was always required on site. Her evidence, which we accepted, was that when she was putting her mind to returning to work, she wanted to return part-time, working two days a week in the office and 1 day at home. Her preference, as she expressed during meetings to arrange her return, on which more below, was to start work before or after rush hour, at least while an Access to Work application was being progressed.

48. We conclude that the respondent's position, during the whole of the return-to-work process and up to questions of the claimant at this hearing, that it was the claimant's position that she wanted to work solely from home, was a misconception and mischaracterisation by the respondent of the claimant's actual position. To reiterate, her stated position throughout was that she was prepared to work in the office two days a week and she preferred to work part-time three days a week.

49. The outcome of the 3 July 2023 final absence meeting was that Ms Jones was not satisfied that all options had been exhausted to support the claimant's potential return to work; the meeting was adjourned until the claimant was again reassessed by Occupational Heath in September 2023; that questions to OH would include whether a part-time or a redeployed role should be considered.

50. The outcome also detailed the difficulties the claimant was having with her health at that time, the changes of medication with a view to stabilising her condition, that the claimant's wish was that when a treatment plan was in place that was working, she return to work on a part-time basis (363-7).

51. On 12 October 2023, the claimant was confirmed by Occupational health as fit to return to work on a phased return (416). OH said that "less than fulltime working is likely to support sustainability in work" because of her underlying symptoms. It says hybrid working "may be considered" – two days on site and Access to Work for travel to and from work.

52. The OH report recommends the following adjustments:

    a. Phased return over 6-8 weeks starting 25% of hours week 1; 50% weeks 2-3P 75% weeks 4-5; full time hours thereafter
    b. Commence with routine familiar tasks, gradually building up work
    c. "Remote working as far as feasible for the service; ad-hoc on site working is acceptable… [she] is unlikely to be able to manage daily on site working in the foreseeable future"; with Access to Work assistance with the commute
    d. Flexibility in hours
    e. Pacing of work with regular breaks
    f. Adjustment of targets

g. DSE assessment including appropriate chair and footstool
h. Regular 1-1 supervision with support and training
i. Opportunity to attend medical appointments
j. Less than full time working, to support sustainability in work

53. The report states "If these adjustments are not feasible… permanent redeployment to a role which is better able to support adjustments is advised."

54. A query was raised by Mrs Mandel about the Occupation Health report's failure to address a question about medical redeployment. OH's response was that because OH had assessed her as fit to return to work, medical redeployment was not an option. Mrs Mandel's position can be seen by her response on 18 October 2023 to Employee Relations: that OH has assessed the claimant as being fit to return to work; "… I think we can safely say that this will not be an option on the day, and we will be looking to redeploy the member of staff." (471).

55. The claimant's consultant rheumatologist wrote a letter for her employer the same day – 12 October 2023. This states that her condition had been challenging to treat, but new medication meant that the consultant "predicted" she would "continue to improve slowly over the next few months. I would therefore strongly support…" her proposal to start work part-time, which would allow her to attend hospital and to manage any flareups; "Continuing to work whilst managing a chronic health condition has many positive benefits for overall health…" (443).

56. Mrs Mandel remained of the view in communication with HR that that the claimant's role is full-time "and would require her to be on site two days a week"; and that the Ms Jones was "keen" for the claimant to be offered a part-time working from home role "which I have advised is not something our department can offer" (18 October email - 474).

57. The stage 2 long-term absence meeting reconvened on 23 October 2023. At this meeting, Mrs Mandel confirmed that her senior management was of the view that the role is full-time, "We wouldn't be able to reduce that to part time" because of the nature of the role. Mrs Mandel talks about the claimant not working on site at all, meaning the rest of the team would have to come in extra days.

58. The claimant's view at this meeting was that working from home is "important" referring to issues travelling peak time on the bus, "I definitely would need to work from home more often than not" as it was exhausting traveling at peak-time; she said there was a 14-16 week waiting list for an Access to Work assessment (491-2).

59. The outcome was that the claimant would be redeployed to an existing vacancy on medical grounds, because her condition has "prevented [her] from attending work in their existing role for the required standard" (510-13). The report states that the respondent has "taken reasonable steps" to support her during her absence

and “has exhausted all its options” for her to remain in post. As Ms Jones put it, the service was unable to accommodate “part time working and at home working full-time.” (500).

60. In her evidence, Ms Jones rationale for her fact that there was no consideration of the suggested adjustment of an Access to Work application, as any application would occur only if the claimant returned to work full time, and because the claimant wanted to work more from home. She said that this and other adjustments were not considered further because of the recommendation the claimant return part time, and the service’s position that they were unable to accommodate a part-time AWA. On the possibility of a job-share she says she discussed this with Employee Relations; but that although there are part-time employees in the NHS, “it depends on the role and service needs… I accepted Mrs Mandel’s viewpoint … it’s fair to assume that it would be challenging to manage two part-time employees in that role”.

61. At appeal stage, Ms Jones’ view was that had she understood the claimant’s position to be that “you could not attend the office and were requesting to work solely from home” (1104). Ms Jones evidence was that “this is how I interpreted the claimant’s position”. She accepted that “predominantly” work from home would have been a more appropriate word to use.

62. The claimant was put on the redeployment register on 31 October 2023. She expressed a preference to avoid peak travel times to work, she wanted to work 8.00am to 4.00 pm if possible 3 days a week, saying she found commuting very difficult (531).

63. On 8 November 2023 the claimant appealed the decision to put her on the redeployment register. She asked to be retained in her current role (545). Her grounds of appeal include the following: that given her ongoing symptoms and medical treatment it would be best to return to a familiar role, department and team; being on the redeployment register was having an adverse effect on her mental health; she considered that she had not been given a “reasonable response” as to why her department could not work part-time for, say, the first 6 months after her return – she says she was told “we don’t allow part-time”, and it would not be reasonable to other staff members if she went part time; no good reason had been given why she could not work from home.

64. Despite proactive and significant assistance from the respondent’s Employee Relations team to find her a role in the redeployment process, no suitable role was found for the claimant. Some roles which were suggested to her by ER it was accepted at the time were unsuitable (for example temporary roles which meant she would be back on the redeployment register at some point – for example 522). Other roles the claimant believed to be unsuitable because of the nature of the role and her ill-health (for example at 549, 553); other roles the recruiters said could

not accommodate a job-share ("far from ideal" – 560), or part-time working ("maintaining … a full-time role is the most practical decision at this time" - 558).

65. Whilst seeking redeployment the claimant was required to submit medical certificates; from April 2023 she had been on half-pay under Agenda for Change terms and conditions. This continued until 26 April 2024, and which time her pay reduced to zero (627). She suffered financial hardship (591).

66. The claimant was again referred to Occupational Health on 17 January 2024; the question asked by management was that given "informal redeployment" had been unsuccessful, whether medical redeployment or an application for ill health retirement was recommended by OH (578). The OH report dated 7 March 2024 again states that the claimant is fit to start a phased return to work; that she is unlikely to be able "to work daily on site"; that Access to Work should be considered for her commute; she would prefer less than full-time working. It says that because the claimant was fit to return to work with adjustments, medical redeployment cannot be considered (599-602).

67. The claimant's appeal against the decision to redeploy her was heard on 6 June 2024, Chaired by Mr Darren Hobbs, Divisional Manager, Imaging. On 24 June 2024 the claimant's appeal was successful; the report says that management appear to have misunderstood her wishes to work from home "predominantly" and not solely; that the management case was she was required to be on site a minimum of two days a week, which "shows their view" that the "role can incorporate a degree of flexibility around working from home on occasion". The findings say that there is nothing in the decision which "confidently explains" why the role has to be full time. The report acknowledges that management believed that it may be difficult to recruit part-time to the role, but this was not sufficient reason to reject her request.

68. Mr Hobbs evidence was that there was no major difference between the role requirements and the claimant's wish to work from home, as she had confirmed that office working was not an issue, but there had been no discussion during the process about how often this would be; that the claimant wanted a "degree of flexibility' particularly in cold weather. He said that the main difference between them was part-time work, and he "went back through the evidence" to see the rationale for this decision, "… and what I could find was reduced hours was difficult to recruit to, and they did not this to set a precedent." His own view is that part-time working may not work in all circumstances, but that for the claimant this needed to be reviewed through a flexible working request.

69. The respondent's position is that because the claimant expressed that she had difficulties attending the office on 23 October 2023 at the reconvened stage 2 meeting , that "management believed" reasonably that the claimant wanted to work from home, that the respondent had a "reasonable understanding" that it was

difficult for her to attend the office; there was a "communication error"; also "the claimant's description of her needs was confusing."

70. We did not accept this that this was solely a communication error: as the claimant put it in her evidence, "… I'm not sure where the misunderstanding came from as I was clear that I wanted to work part time and I that I can come into the office". We found no evidence that the claimant said she wanted to work solely or mainly from home; she had said she would find commuting difficult, as she put it in her evidence "this is why we discussed Access to Work to help me come into the office". As she put it at the appeal hearing "I've never really been opposed to coming into the office … coming into the office is not a major problem, it's … how we manage it…" (appeal transcript – 1082).

71. The appeal recommended the claimant remain in her current role, and that she submit a flexible working request, which will enable management to "make a refreshed assessment of the situation and provide a full and justifiable rationale for whatever decision they feel needs to be made,".

72. On 4 July 2024 the claimant submitted a flexible working request: she requested part time working - ideally three days a week, two working from home and one in the office. She asked to be allowed to start before or after rush hour; she asked to start at 22.5 hours, up to 25 hours per week (1151).

73. On 15 August 2024 the claimant returned to work in her APA role. The respondent's position, put to the claimant, is that her return to work has been "ineffective", that her return to work is "going badly". The claimant disagrees, saying there are several issues including a failure to make the adjustments recommended by Occupational Health.

74. The few records following her return to work show that in some weeks the claimant was rostered to work four days a week in the office – for example w/c 9 September 2024 (Supplemental bundle 8); she said in response that she was struggling with the commute, her legs were swollen, and it was painful to walk. At the time of the liability hearing, she was working three days a week in the office.

75. In her evidence the claimant gave the following reason why she was working in the office more than her colleagues were required: that her managers "… said they were waiting on what happens in this case, and they did not feel confident with me working from home." She says that training was not the reason why she is currently working three days in the office; the training was about log-in and telephone access on the new systems.

76. At the date of the liability hearing, the claimant had not been given suitable computer equipment to enable her to work from home. She had not been provided with a suitable office chair or other equipment in the office "so it is a struggle to sit down". The claimant's position is that, notwithstanding the respondent's failure to

provide all the adjustments OH recommended, her work standard "has been fine to my knowledge".

77. The respondent put its case as follows: that the claimant struggles with travel and is reporting fatigue when attending the workplace more than two days a week. The claimant accepts this, saying that she finds a return to the workplace more than two days causes "issues with travel and concentration", that this "has caused anxiety and strain".

Closing arguments

78. The respondent provided written submissions and spoke to them. The claimant provided a verbal submission. We refer to both in the 'conclusions' section below.

The law

79. Equality Act 2010:

s.6: Disability

(1) A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

s.20: Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises …

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

80. *Sheikholeslami v University of Edinburgh [2018] IRLR 1090*, *EAT*, held:

"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. This … is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP."

81. The EHRC Code of Practice states: "Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact

assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

82. *Archibald v Fife Council [2004] UKHL32:* the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. … that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled.

83. The EHRC Code of Practice on Employment (2011) para 6.28 factors which might be taken into account when deciding on adjustments:

- 'whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.''

84. The Code para 6.33 examples of reasonable adjustments:

- allocating some of the disabled person's duties to another worker;
- transferring the worker to fill an existing vacancy;
- altering the worker's hours of working or training;
- assigning the worker to a different place of work or training or arranging home working;
- acquiring or modifying equipment;

85. *Royal Bank of Scotland v Ashton [2011] ICR 632*: "to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination, [the Employment Tribunal] must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial … viewed in comparison with persons who are not disabled.' The EAT stated that the examination on whether adjustments should reasonably have been made "should be an objective analysis of the practical result of the measures which could be taken."

86. *Smith v Churchills Stairlifts plc [2005] EWCA 1220*: The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly.

87. *Jennings v Barts and the London NHS Trust [2013] EAT EqLR 326*: It is a "straightforward factual analysis of the evidence provided" to determine whether the adjustment contended for would have been reasonable to put in place.

88. *Garrett v Lidl Ltd [2010] All ER D 07 (Feb) EAT:* employers are able to conclude that the best adjustment may be transferring the employee to a different place of work, even though the claimant did not want to move (where there was a mobility clause in the contract).

89. *Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10*: when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring.

90. *Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960: if a suitable vacancy is identified during a* reorganisation, it may not be sufficient for an employer to ensure she was given an interview; the more favourable treatment could be to offer her the role.

Review of judgment – the law

91. We noted the following principles:

    1. Employment Tribunal rules 2013 Sch 1 r 70: The power to reconsider: A Tribunal may, … on its own initiative … reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

    2. This is a power that is exercisable either before or after registration under r 67.

    3. r 73: Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused)

Conclusions on the evidence and law

92. We find it noteworthy that much of the case law discusses favourable treatment – for example, should a vacancy be created, or an employee slotted into a vacancy ahead of other vacancies. We do not suggest that this should have happened, but it is indicative of what the case law makes clear is a positive and proactive duty to make adjustments if reasonable to do so. For the tribunal, two questions arose:

    a. whether there were adjustments which had a prospect of working so she could return to her APA role, and if so when; and/or
    b. whether the R's position of putting C on redeployment register with some HR assistance was a reasonable adjustment to make, and if so whether

this means that adjustments to the APA role did not need to be considered.

93. To answer second question first: putting the claimant into a redeployment programme, even with the positive assistance by Employee Relations, was not a reasonable adjustment in these particular circumstances.

94. The respondent does not accept that the aim of reasonable adjustments would be to retain the claimant in their role – what is required are adjustments to avoid a disadvantage; in the current circumstances redeployment was a reasonable adjustment to avoid the disadvantage the claimant faced in returning to her substantive role.

95. The respondent also argues that where there is the choice of two adjustments and both are potentially reasonable "the respondent may choose" which one to adopt. "On the facts, redeployment was at the time a reasonable adjustment."

96. We conclude that there was no proper consideration of the adjustments which could have been made to enable her to return to her AWA role: Ms Jones accepted that no consideration was given to adjustments to her role because of management's view that part-time working was not feasible.

97. We also conclude that the claimant placed at a substantial disadvantage when on redeployment, as she required the same or similar adjustments to all potentially suitable roles which those managers were not prepared to meet, or the roles were not suitable at all. No roles were identified which would have facilitated her return to work with the adjustments she sought. The redeployment process required the claimant to show her suitability for roles; it required her to submit sick certificates when she was capable of performing her role with some adjustments; it required her to receive less and then no pay; there was no guarantee she would find a suitable role. Going through this process caused the claimant harm to her mental health. She appealed, and it was clear at this point the effect the redeployment process was having on her. It was not reasonable for the respondent to consider this to be a reasonable adjustment without first putting their mind to properly considering adjustments to her APA role.

98. We set out above our detailed chronology on what the respondent called a reasonable misconception of the claimant's position on working in the office. Having considered carefully what the claimant said during the various meetings, and what Occupational Health recommended, we have concluded that it was not a reasonable misconception. As Mr Hobbs found, there was no significant difference between the claimant's and respondent's positions on the requirement to work part of the working week in the office.

99. We find that it was the respondent's belief that the claimant had to work predominantly from the office, more than two days a week, and the reason for this

was their perception that her poor mental health meant her working from home was not advisable. This adjustment was therefore dismissed without further thought. This was a misguided decision, as it failed to consider the claimant's physical need not to work in the office more than two days a week and the effect on her mental health if she was forced to do so; and it failed to consider Occupational Health's clear recommendation that she be able to do so. The respondent substituted OH's opinion with its own opinion about the claimant's ability to work from home without seeking any medical advice on its opinion.

100. The issue of whether the role could be undertaken on a part-time / job-share basis: We find that throughout the process the respondent's management team had a strong belief that the role could only be undertaken on a full-time basis. This was coupled with a strong view that redeployment was the only option.

101. However, we do not accept the rationale given by the respondent for this is sound. We accept Mr Hobbs view that the managers believed it would be difficult to recruit a part-time employee, they did not want to set a precedent. We find that the examples given by Mrs Mandel – the danger of missing issues at handover – could likely be addressed by an appropriate protocol being drawn up on how to conduct a handover. For example, it was not suggested that a handover had to take place on a day the claimant was working in the office; we fail to see why it was not feasible to arrange a teams or similar meeting to review work that needed to be done and handed over.

102. The claimant believes that a proper handover would be possible to a colleague, that messages could be passed on, even in a busy hospital environment where there is a lot of interactions. The Tribunal accepts that staff-handovers in hospital have to happen all the time for example at the end of shifts for departments which operate continuously. We appreciate that the department in this case does not operate a shift system, but we also consider that the respondent has outlined what is a hypothetical risk, which good practice, and a proper handover plan would minimise.

103. Given no attempt was made to recruit to a part-time role, we do not accept that the respondent has any evidential basis for its view that it may be difficult to hire for a job share. No evidence was presented that the respondent finds it difficult to recruit part-time employees to Band 3 Administration roles.

104. We conclude that the respondent was under no obligation to make adjustments until the Occupational Health report had provided its recommendations on adjustments on the claimant's return to work on 23 October 2023. Prior to this date there was no positive indication that the claimant would be able to return to work in the near future, or what adjustments should be put in place for her return.

105. It was at and following the meeting of 23 October 2023 that the duty to consider and make adjustments arose. Because however of management's set position

that the claimant was only able to work part-time (which was correct) and from home (incorrect) none of the proposed adjustments to the claimant's role were considered. This meant that, for example, there was no attempt to consider how Access to Work could facilitate the claimant's attendance in the office; how many days the claimant could work in the office, and how many days the claimant could work from home, the extent of a phased return, what duties she could undertake during a phased return.

The PCPs

106. The respondent accepts it had the practice of requiring full time hours, 37 per week; it accepts it had the practice of working in the office after a 6-week phasing in period.

107. The 3rd PCP is worded in the list of issues as follows: "A requirement to work in the office (after phasing in) regardless of fluctuations in her symptoms". The corresponding adjustment sought by the claimant is as follows: "Permission to work from home when meant to be on site on days when her symptoms were bad." (our underline).

108. As made clear above, at the date of this hearing the claimant was mainly working in the office. However, she was also working at home. She says that the respondent's PCP was in fact a requirement to work in the office on 'at work in office days' when symptoms were bad, she accepts that she did not need to work in the office when she was in fact on a working from home day. In our oral judgment to the parties, we gave the following wording for this practice: "A requirement on *'at work in office days' to either* work in the office (after phasing in) regardless of fluctuations in her symptoms *or call in sick*.

109. The respondent argues that there is no evidence that the claimant was ever required to work in the office when she had symptoms, that it did not have such a PCP.

110. We had not sought submissions on this proposed amendment and we revoked this aspect of the adjustment following an adjournment. We sought submissions on this issue at the reconvened hearing. In the event, respondent did not dispute this amended wording of this PCP at the reconvened hearing.

111. We find that this was a PCP of the respondent: the claimant was required to attend the office on days she was rostered to attend and was told that she was to call in sick if she was unable to attend (see her email dated 9 September 2023 page 8 Supplemental Bundle).

112. The claimant's evidence was that she was working from the office 4 days a week, this has recently been reduced to 3 days. We wonder why she was still required to work in the office 3 days when the operational requirement is for her to work in the office for 2 days.

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

113. We accept the claimant's evidence that she became excessively fatigued by the PCP of working full time hours. The Occupational health report make it clear that part-time working is required to manage fluctuations in her condition and was more likely to support her sustained return to work. Her treating consultant's report says part-time work is recommended to allow her to attend hospital for her medication (which was by infusion), and to enable her to manage flare-ups. The claimant describes how tired she became on her return and the pain she experienced because she was returning full-time and mainly from the office.

114. We accept that the return-to-work full-time had the direct consequence of increased pain and tiredness; she was less able to manage her symptoms; we accept that working full time would be exhausting and debilitating for her. In addition, she has been forced to take days off work, most Fridays, because this is when her hospital appointments for her continuing treatment take place.

115. The claimant has been working in the office 4 days then 3 days, instead of the 2 days that is required by all APAs. Being required to work solely and then mainly from the office was a substantial disadvantage in comparison to non-disabled employees because of the significant ill-effects which occurred because of the physical and mental stress of the claimant's commute to work.

116. In addition, it was a substantial disadvantage to operate a PCP of not being allowed to work from home on an in-office day when her symptoms were bad. The claimant was able to work, but she was unable to cope with the commute, certainly when working over two days a week in the office. The claimant was not contractually required to attend the office more than two days a week, she was being required to do so. As one example: the claimant works two days from the office and seeks to work the next day from home; her colleague would be working from home after two days in the office, but not her. Being forced to take sick leave when a colleague was not is a detriment. Also, she would be accruing sickness absences; she was disproportionately being required to work from the office and penalised when she could not do so. We find that this was a substantial disadvantage in comparison to a colleague who was not disabled, who would not require to work from home for medical reasons and who would not therefore be required to take sick leave when they were otherwise able to do their job.

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

117. The medical reports and OH reports make it clear that part-time working and remote working is recommended to avoid pain and excessive tiredness, for treatment and for a sustainable return to work. This was discussed during meetings; it is one of the reasons why the respondent decided to redeploy her. The respondent knew that the claimant was likely to suffer pain and tiredness by its practice of requiring employees to work full time. The respondent also knew

that the claimant had medical appointments to receive treatment on Fridays; it knew that expecting her to work Fridays meant that she would face the disadvantage of either have to take time off work on sick leave or take annual leave to attend these appointments.

118. The respondent also knew that requiring her to work in the office was likely to cause the claimant pain because of her commute. It observed the same during the 23 October 2023 meeting, and this was used as a rationale for deciding to redeploy the claimant. The medical reports make it clear that working in the office will cause the claimant pain by the fact of her commute. The claimant told the respondent that working full time and in the office would be problematic on numerous occasions, including during the redeployment process. On 25 October 2023 the claimant says she wished to start at 2 – 3 days a week, that she would like to increase this in the future "but can't guarantee". She says she would like to work at most 2 days on site.

119. The respondent was therefore fully aware of these substantial disadvantages to the claimant.

<u>What steps could have been taken to avoid the disadvantage, and was it reasonable for the respondent to take these steps?</u>

120. The claimant suggests a shorter working week, say 35 or 30 hours; a 3 to 6 month phasing in to full hours; permission to work from home on days when her symptoms were bad.

<u>A shorter working week</u>

121. We conclude the following: we have heard no evidence which viewed objectively shows that it would be unreasonable to appoint to a job-share. There was no discussion with the claimant about whether this should be a temporary or permanent arrangement. There was no evidence that this role would be difficult to recruit into either on a temporary or permanent basis. There was no consideration to using bank employees on a part-time basis, to see whether this arrangement could work. No consideration was given to working out if the role could feasibly be done on a part-time or job share basis, as Mr Hobbs also accepted.

122. At a minimum the Occupational Health report recommendations should have been considered and discussed with the claimant. That is the purpose of these reports. The respondent's failure to do so means it did not fully consider the recommendations and whether in fact they could be put in place. We note that the management team appears to have had little training on the concepts of disability discrimination and the duty to make reasonable adjustments.

123. We did not accept the management team's rationale that it would be difficult to implement a job-share. We did not accept Mrs Mandel's evidence on the need to

give urgent messages in person was a significant part of the claimant's role; in fact, we accept the claimant's evidence that she had never had to do so in person. We accept the claimant's evidence that there are various staff members she could hand over to if she needed to leave the office urgently.

124. We accept that the respondent is correct that these issues – cover, handover, ensuing a full handover on all issues – may require time and effort to implement. But we do not accept that this is sufficient rationale for not trying them, or that it means they will fail.

125. We conclude that, viewed objectively, the dismissal of a shorter working week as impracticable was not reasonable. It should have been put in place on or shortly after 23 October 2023, when the claimant was fit to work.

126. We find that there is a real prospect that working a shorter working week would have ameliorated the significant disadvantage to the claimant's health that working a full-time week was causing her on her return to work. This is what was recommended by Occupational; Health and her consultant. There would have been more recovery days; the claimant would have been to attend hospital to receive treatment without having to take sick or annual leave. The practical result of this adjustment is, we find, likely to have been beneficial to the claimant's sustained return to work, to her health, her treatment and her recovery.

127. This adjustment would involve the following: taking steps to make the claimant's role a 'job-share'; the claimant working up to 3 days a week and, if this proved practicable, for example the respondent was able to hire to the part-time role and the claimant wished to make this change permanent, a transfer to a part-time contract.

<u>Phasing in to full-time over 6 – 8 months</u>

128. The second adjustment proposed by the claimant was phasing in to full-time over 6 – 8 months. This is effectively an alternative to the first adjustment, for example if the claimant's health improved, or if part-time working or a job share did not prove practicable on a permanent basis. The claimant had said during the redeployment process that she hoped start part time but wanted to be able to increase her hours over time.

129. The respondent's position was that this could not be achieved without causing harm to the service, however we did not accept this evidence. The claimant has been forced to effectively work part-time since her return, for example taking many Fridays off work, and we heard no evidence that this has caused harm to the service, or to other employees. While it may be stressful to cover for colleagues who are often absent, it is for the respondent to manage its resources to ensure that the claimant could phase her return. The alternative was the claimant facing increased harm to her health by working more hours that Occupational Health

recommend; this in turn would cause her to take more time off sick, causing more issues of cover for her work than a planned phased return.

130. We find that, viewed objectively, the respondent's dismissal of this adjustment was not reasonable. We find that there is a real prosect that phasing in the claimant's hours to full time over a period of months would have been beneficial to the claimant's health. This is what was recommended by Occupational Health. There was no objective evidence available to the respondent when it decided that this adjustment was not practicable. We find no reason why recruitment could not attempt to recruit a temporary worker to work the additional hours, if necessary, during her phased return.

131. We find that there is a real prospect that working a shorter working week and increasing her hours over time, commencing when she was fit to return to work in October 2023, would have ameliorated the significant disadvantage to the claimant's health that working a full-time week was causing her on her return to work. There would have been more recovery days; the claimant would have been to attend hospital to receive treatment without having to take sick leave.

132. The practical result of this adjustment is, we find, likely to have been beneficial to the claimant's sustained return to work, to her health, her treatment and her recovery.

Permission to work from home when symptoms are bad

133. We accept that permission to work from home when symptoms are bad is an adjustment the respondent could reasonably make. In saying this, there may be tasks which can only be done in the office; we accept also that there may on occasion be less work to do to do if working from home on days she was expected to work in the office. However, we were given no evidence from the respondent that there would be insufficient work or no work for her to do on such days.

134. We are also of the view that this adjustment is only likely to be required *if* the respondent did not put the claimant back on the usual requirement of two days in the office. It is because the claimant was required to attend the office more than two days a week on her return to work that it because more likely the claimant would need to work from home on office days.

135. The alternative to not being allowed to work from home is that the claimant would be on sick leave on a day she was able to do her job. If there is work that can be done by her at home, practicably we can see no reason why this would be disadvantageous to the respondent, apart from the obvious fact the claimant would not be in the office that day. We consider that a failure to at least trial this as an adjustment is a failure to take a step which may well have avoided this disadvantage.

136. We find that, viewed objectively, the respondent's dismissal of this adjustment was not reasonable. We find that the respondent's general rationale for being resistant to her working from home – the effect of working from home on the claimant's mental health – was unreasonable and unsupported by any evidence; in fact OH's recommendation that she be allowed to work from home suggests that the opposite was true.

137. We find that there is a real prosect that allowing the claimant to work from home on days when she was unable to travel would have been beneficial to the claimant's health. This is what was recommended by Occupational Health. There was no objective evidence available to the respondent when it decided that this adjustment was not practicable. The respondent's other employees were working from home 60% of their working week with no apparent ill-effects on the service.

138. We find that there is a real prospect that, on or shortly after 23 October 2023, allowing the claimant to work from home would have ameliorated the significant disadvantage of having to take sick leave when she was otherwise able to work from home or having to attend the office when symptoms were made. The claimant would not have accrued sickness absence or would not have come into the office causing physical pain. The practical result of this adjustment is, we find, likely to have been beneficial to the claimant's sustained return to work, to her health, her treatment and her recovery.

Provision of an ergonomic claim and a full workplace assessment

139. This is an adjustment which we did not discuss with the parties before giving judgment, we address this above. The respondent did not make any submissions on this adjustment when given the opportunity to do so.

140. The claimant was in pain at work in part because of the lack of a chair and assessment. There was no evidence why this adjustment could not be made. It is recommended by Occupational Health. We find that there is a real prospect that making this adjustment would assist with the claimant's pain management at work, making it more likely that she would be able to work from the office when required. There was a failure to provide this adjustment from 23 October 2023, when the claimant was fit to return to work and to the office with adjustments.

Provision of homeworking equipment

141. This is an adjustment we did not discuss with the parties before giving judgment, as above.

142. It is apparent that the claimant's colleagues have suitable equipment to allow them to undertake their role from home, and the lack of suitable equipment is one of the factors which is impeding the claimant's ability to work from home. We heard no evidence why this adjustment could not be made. It is recommended by Occupational Health, and we could see no reasonable reason why such equipment should not be provided.

143. We conclude that there is a real prospect that the provision of homeworking equipment would ameliorate the substantial disadvantage faced by the claimant: the lack of suitable equipment means she is less able to work from home even when contractually able to do so. This means she needs to work in the office more than colleagues; providing the equipment will remove the significant disadvantage that attending the office causes her. There was a failure to provide this adjustment from 23 October 2023.

Progression of Access to Work application

144. Again, this was not an adjustment which was discussed with the parties. Again, the respondent did not object to this adjustment at the reconvened hearing.

145. It was an adjustment recommended by Occupational Health, as Access to Work can substantially fund, say, private cab costs where use of public transport causes significant difficulties. We find that there is a real prospect that provision of travel to work by cab via Access to Work funds would ameliorate significant difficulties faced by the claimant when commuting by public transport. The respondent offered no reason why this process had not yet been commenced. It is our strong view this is a process which needs to be commenced as soon as practicable, with Employee Relations assisting the claimant and management by providing them with details of the steps that both need to take to progress this application. There was a failure to make this adjustment from 23 October 2023.

Recommendations

146. None of the recommendations were discussed prior to judgment; we gave the parties opportunity to comment at the reconvened hearing.

147. At the reconvened hearing, the respondent argued that the recommendations had been accepted by the respondent and put in place; hence there was no need to make recommendations within a judgment when these recommendations had already been implemented.

148. It was agreed that the judgment should refer to the recommendations we made and then withdrew pending further submissions. Given the respondent's submissions that recommendations have been implemented we agree that we need not issue formal recommendations. We set out below the recommendations we believe were required and which the respondent has now implemented or agreed to implement.

149. It was apparent that the Access to work application had not been progressed at the remedy hearing. The respondent agreed at this hearing to cooperate with the application to Access to Work, including the provision of assistance as the claimant may reasonably require with it. Accordingly given the respondent's commitment, we do not make the recommendation we otherwise would have made.

To meet with the claimant to progress her application for reduced hours and working from the office two days

150. As mentioned above, although the respondent has accepted it should have attempted to put the claimant back into her role from 23 October 2023, and has done so from August 2024, in fact few adjustments have been made. We have received no good reason why the claimant cannot work two days a week from home. No decision has been made on her application for flexible working.

151. We initially determined that one adjustment which could significantly assist a successful and long-term return to work is a proper consideration of the adjustments she is seeking though the prism of all of the Occupational Health recommendations. Progressing these adjustments may involve considering how to recruit to a job share or whether there is an alternative way of making up the hours.

152. We accepted the claimant's view that there is no good reason why she cannot not revert to two days' work in the office, the remainder of her working week from home. Given that this is now being implemented, we see no reason to make this recommendation.

To progress as a priority the access to work application and provision of equipment

153. The equipment has been provided to the claimant's satisfaction.

154. We are surprised that by the remedy hearing no attempt had been made to progress the Access to Work application. Given the respondent's commitment to now do so, we no longer make this recommendation.

Was the claim issued in time?

155. The claimant's case as stated in her evidence is that the duty to make adjustments arose in February 2023, when she wanted to return to work, and that the respondent refused to consider them. The respondent argues that, if this is correct, the claim has been brought out of time, as time starts to run from the date of the duty to make adjustments.

156. As set out above, we conclude that the duty to make adjustments arose from 23 October 2023; the date of the stage two absence process at which the Occupational Health report's recommendations that the claimant was fit to return to her role with adjustments was discussed. We do not accept the argument that the duty to make adjustments arose at an earlier date.

157. The claim is accordingly made in time: the ACAS process stated on 23 October 2023 and ended on 4 December 2023; the claim was issued on 2 January 2024.

REMEDY – REASONS

158. At the outset of the remedy hearing the parties confirmed that the claimant has received her full back pay for periods when she was fit to work with adjustments but received no pay or half-pay. The claimant makes no further claim for back-pay.

159. The outstanding loss of income claim at the hearing was for employer pension contributions: a figure for this sum was agreed between the parties at the outset of the hearing - £1,277.72.

160. The respondent's position on the claim for injury to feelings is that it accepts the claimant has suffered injury, but it says that much of the injury she claims pre-dated the dates of claim. The claimant accepted in her evidence that she refers to stress and anxiety because of her work situation from November 2022 onwards; for example, in December 2022 she says she felt targeted and pressured to return to work; in February 2023 being pressured with constant emails. The claimant accepted that all of this caused her stress and anxiety. The claimant also accepted that some of the stress and anxiety she suffered from relates to issues of harassment, a claim now withdrawn; also, to debt issues which relates to time off work sick before the acts found to amount to a failure to make reasonable adjustments.

161. The respondent has made adjustments between the liability and remedy hearings: these include a chair, a riser, keyboard and other items; it has provided remote working facilities the claimant accepted that this equipment is all working welk.

162. There has also been an agreement to put in place adjusted hours on a temporary basis – two days working in the office and one day from home.

163. There was a dispute about the status of the Access to Work application: the claimant said it was "not true" she had declined to make an application "why would I decline"? Ms Cook's evidence was that she "recollected" that this is what the claimant had said, although she could not recall whether she noted this down.

164. In submissions the respondent argued that the injury can only flow from when discrimination occurred; it accepted that the claimant may be vulnerable because of continuing work-related issues, but this would mean a claim for exacerbation of an already-existing injury, not a claim for the whole injury.

165. For 18 months, the claimant was upset by treatment prior to the acts of discrimination, she felt harassed, she can claim none of this in her award. Having said this, the respondent accepts that the claimant "has been severely affected" by

the time it has taken to remedy the failure to make adjustments, but it argues that this is not in the most severe of truly unacceptable acts. These facts, say the respondent, "do not come close to the Vento high band".

166. This was not targeted or malicious treatment; there is no claim for physical injury; while the claimant may have suffered distress because of her financial situation, this was the case prior to acts of discrimination. In addition, the claimant's case was upheld on appeal, she received vindication

167. The respondent argues that the claim for injury to feelings falls, at best, at the lower end of the mid band. Referring to the cases in written submissions, the respondent argues a sum of £14,000 for injury to feelings.

168. The claimant argues that there was a clear intent on the part of the respondent to redeploy her and not make adjustments to her role "this is the only plan, there were no other options". The respondent's own sickness policy talks about adjustments to existing posts, the respondent should have sought support, but the OH recommendations were ignored. She referred to her ongoing therapy "feelings of worthlessness broke my confidence", together with an uncertain future during the redeployment process. She referred to a continuing "tenseness" with her employer because of the prospect the adjustments will not be permanent.

169. The claimant referred to the lack of equipment on her return causing her pain and discomfort; even when she expressed she was in pain no steps were taken to adopt a phased return, she was instead told to take sick leave. Prior to her return, a lack of income meant that at times she was unable to afford medication, meaning shew as weaker and unable to fight the disease; the lack of empathy about redeployment caused her to need to bring an employment tribunal claim.

Conclusions

170. We accept that the tribunal must not compensate the claimant for any harm caused by non-discriminatory acts, even if the acts were those of the respondent. We accept also that the claimant was upset and suffered injury because of acts of the respondent prior to the discrimination she was subjected to.

171. We accept also that the claimant suffered significant injury from October 2023 onwards. It was from 23 October 2023 that the respondent's position on adjustments became plain. The claimant was fit to return, but the respondent was not prepared to consider adjustments to her role. We accept that this caused the claimant significant stress and depression at a time when she had been focusing on her recovery; instead, she was faced with a significant setback to her return to work. Instead of returning to a workplace with adjustments, she was on half pay

then no pay and was forced to go through a redeployment process she believed she should not be going through.

172. On the claimant's return to work, adjustments were again not made, despite the claimant's appeal succeeding, there was no equipment, no access to work, hours in the office were in excess of those of her colleagues and no attempt was made initially to put in place homeworking arrangements, it appears because of concerns about the claimant's mental health. This has also had a significant adverse effect on the claimant's mental health

173. We accept that the claimant can only be awarded a sum to reflect the injury she has suffered as a consequence of the discrimination; not for any pre-existing injury caused by the respondent's non-discriminatory acts. We accept that she had phycological distress and injury in the period pre-discriminating acts. We accept that there were financial issues exacerbating her health. We accept that the claimant's treatment plan was not always going well, and this has a great psychological impact on her.

174. Against this, it is for the respondent to take the claimant as she was at 23 October 2023 she was vulnerable and in fragile physical and mental health. While she had reasons to be optimistic because of the slow recovery in her health, her mental health was fragile. We consider that the claimant suffered a very significant injury to her mental health because of the failure to make adjustments. She needed therapy as a consequence of this failure. We accept the evidence she gave in her statement and oral evidence on this effect.

175. These effects are continuing: the claimant described her lack of confidence in her employer as a consequence of the failure to make adjustments, and the rationale she has heard for their failure to do so; also because of the continuing failure to make adjustments on her return to work.

176. The claimant believes her physical health has deteriorated as a consequence of the failure to make adjustments – she cites the pain and difficulties she has faced on her commute, because of the lack of equipment, the failure to progress Access to Work. The claimant accepts that she has not made a claim for exacerbation of physical injury, and there is no medical evidence to this effect. But the claimant attributes some of the decline in her mental health to the fact her physical health has deteriorated; she believes because of the lack of adjustments.

177. It is for the Tribunal to find that the claimant has shown a causal connection between the failure to make adjustments and the injury. The claimant must prove that her mental health has suffered as a consequence of the failure to make adjustments. We accept that all of the worsening of her mental health from 23

October 2023 was caused by the respondent's failure to make adjustments. We accept that the claimant is still suffering from distress as a consequence, that this having a long-term effect on her during a period when the claimant suffers from a significant disability.

178. On a review of the case law supplied by the respondent, and on our assessment of the injury suffered as described by the claimant in her statement, we conclude that the claimant's injury can properly be place at just above the mid-point of the Vento middle band. We considered the case of D'Bell, an award at the mid-point of Vento middle band, in today's money £22,500. We consider that this case has factors which make it appropriate to make a larger award, including the fact that the injury has been more significant for the claimant as a consequence of her pre-existing vulnerabilities.

179. We conclude that it is appropriate to award £25,000 to compensate the claimant for the significant injury she suffered as a consequence of the failure to make adjustments from 23 October 2023 to the date of this hearing. We recognise that this injury is ongoing and will continue to have a significant effect on her for some period, and this fact is reflected in this award.

Employment Judge Emery
20 January 2025

Judgment sent to the parties on:

24 January 2025
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For the Tribunal:

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