EMPLOYMENT TRIBUNALS

Claimant: **Mr Y Saleem**

Respondent: **North East London Foundation Trust**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **10 and 11 March and (in chambers) 12 March 2021**

Before: **Employment Judge Moor**
Members: **Mrs J Land**
Mr D Ross

Representation
Claimant: In person
Respondent: Mr N Caiden, counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. **The Respondent contravened the Equality Act 2010 by failing to provide to the Claimant an auxiliary aid (a specialist chair) from 22 May 2018 until 12 November 2018. The Tribunal finds it just and equitable for time to be extended to hear this complaint.**

2. **The Respondent contravened the Equality Act 2010 by failing to make a reasonable adjustment in failing to provide the Claimant with a desk in the finance office at its CEME centre from 1 March 2019. The Tribunal finds it just and equitable for time to be extended to hear this complaint.**

3. **The Respondent did not contravene sections 15 and 39 of the Equality Act 2010.**

4. **The Respondent did not harass the Claimant contrary to sections 26 and 40 of the Equality Act 2010.**

REASONS

1. The Claimant is employed by the Respondent NHS Trust. He complains of disability discrimination.

Issues

2. The issues were clarified at the hearing on 9 December 2019. They are set out below. We have struck through those matters withdrawn by the Claimant at this hearing and added the further response of the Respondent. We adopt the same numbering for ease of reference.

<u>Disability</u>

1. The issues are as follows.

2. The Respondent accepts that the Claimant was disabled under section 6(1) of the Equality Act 2010 ("EqA 2010") from 26 February 2018 to 15 June 2019, which is the period that the claim appears to relate to ("the Relevant Time").

3. The Respondent accepts that it was aware that the Claimant was disabled from 20 September 2018.

4. The Respondent, ~~at present,~~ denies that it was it was aware that the Claimant was disabled prior to 20 September 2018.

<u>Failure to make reasonable adjustments (section 20 of the EqA 2010)</u>

5. Did the Respondent apply a provision, criterion or practice ("PCP") to the Claimant that it also applied to others who do not have a disability? The Claimant alleges that the Respondent applied the following PCPs:

5.1 Requirement to work from the CEME Centre from 14 January 2019.

5.2 The requirement to sit in close proximity to team in the office.

5.3 The requirement to work from 7.30a.m to 3.30p.m.

6. Did the Respondent fail to provide an auxiliary aid to the Claimant? It appears that the Claimant relies on the following:

6.1 From 5th March 2018 to 05th November 2018, the Respondent did not provide Lumber support.

Substantial Disadvantage

7. *In relation to 5.1 – 5.3 and 6.1, if yes, did the relevant PCP or failure to provide an auxiliary aid put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?*

8. *If yes, did the Respondent have actual or constructive knowledge of the relevant substantial disadvantage?*

Avoiding substantial disadvantage

9. *If yes, would the adjustment that the Claimant alleges the Respondent should have made avoided the disadvantage?*

Adjustment - reasonable

10. *If yes, would the relevant adjustment have been a reasonable adjustment for the Respondent to have made?*

11. *Notwithstanding the contentions of the Respondent that it did in fact make a number of reasonable adjustments, the Claimant's complaints and allegations in respect of failure to make reasonable adjustments, are as follows:*

    11.1 *On the Claimant's return to work on 5 March 2018 following the incident on 26 February 2018, Mr Rafiq did not allow the Claimant to work from home following the Claimant's request.*

    11.2 *On 5 March 2018 Mr Rafiq refused the Claimant's request for flexible working.*

    11.3 *On 22 March 2018 the Claimant submitted a request for a special lumbar chair. This was not actioned.*

    11.4 *On 11 September 2018 Mr Rafiq refused to allow the Claimant to work amended hours and altered duties, specifically 4 – 5 working hours in the office and 2 – 3 hours at home.*

    11.5 *In October 2018 the Respondent moved offices to a new location further from the Claimant's home making it difficult for the Claimant to commute. On 14 November 2018 Mr Rafiq refused to allow the Claimant to work from home or work at an office closer to his home.*

    11.6 *On 14 November 2018 Mr Rafiq referred the Claimant to occupational health for the purposes of ill health retirement.*

    11.7 *On 25 February 2019 Mr Rafiq refused to allow the Claimant to have a seat on the ground floor near the toilet.*

11.8 On 11 March 2019 Mr Rafiq referred the Claimant to occupational health again despite having two previous occupational health reports from September and November 2018.

11.9 In April 2019 occupational health recommended the Claimant work from home for 2 – 3 days. However, Mr Rafiq only permitted one day.

11.10 On 2 May 2019 Mr Rafiq offered the Claimant reduced working hours which would have reduced the Claimant's pay.

11.11 On 10 May 2019 Mr Rafiq refused to allow the Claimant to work from 7.30 to 14.00. These hours were compatible with the medication the Claimant was taking.

12 The Claimant was not allowed to work from home for three days a week after receipt of an OH report dated 11 September 2018.

Harassment (section 26 of the EqA 2010)

13 Did the Respondent engage in unwanted conduct in respect of the Claimant. Specifically by:

13.1 Mr Rafiq openly announced in October 2018 that all team members could work from any agile location except the Claimant who had to work from the office because he would have a permanent desk.

13.2 On 4 March 2019 Mr Rafiq intimated that the Claimant was doing Band 5 instead of Band 7 work.

13.3 Mr Rafiq informed the Claimant at a meeting on 4 March 2018 (1400-1500 hrs) that "you were working on ICAN before you ran away".

13.4 The Respondent attempted to retire the Claimant on medical grounds on 14/11/2018.

13.5 Mr Rafiq stated in an e-mail to the Claimant dated 11 March 2019 that the OH report was the Claimant's demands not an assessment.

13.6 In a meeting on 2 May 2019, Mr Rafiq asked the Claimant why he did not use the upstairs toilet ~~and why he spent more time in the toilet~~.

13.7 On 10 May 2019 Mr Rafiq told the Claimant that he should 'stop mourning and start building relationship with management'

14 If yes, was any of 13.1 – 13.7 above "related to" the Claimant's disability (section 26 (1) (a) EqA 2010).

15 If yes, did the conduct have the "purpose or effect" of "violating [the Claimant's] dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for [the Claimant]" (section 26 (1) (b) EqA 2010).

16 If yes, was it reasonable for the conduct to have this effect?

Discrimination arising from disability (section 15 EqA 2010)

17 The Claimant relies on ~~the referrals to occupational health in March 2019 and~~ the threat of ill health retirement as discrimination arising in consequence of disability.

18 The Respondent denies this. The Respondent also relies on the legitimate aim of enabling all options to be considered in the Occupational Health referral.

Jurisdiction

19 Was the claim issued within the 3 month time limit provided by section 123 of the Equality Act 2010? The Respondent contends that only acts or omissions that are alleged to have occurred on or after 11 March 2019 are within time. The Claimant contends that the matters amount to a continuing course of conduct.

20 If any acts are out of time, is it just and equitable to extend time?

Hearing Management

3. We explained the hearing day to the Claimant including time for breaks (a 10-minute break in the morning and afternoon, and an hour for lunch). We asked if he needed further adjustments. We agreed he could move about in his chair, lean back at any time and that he would let us know if he was experiencing discomfort that required a break for him to move around. The Claimant did so on two occasions during the hearing.

Findings of Fact

4. Having heard the evidence of the Claimant and Mr H Rafiq, Head of Software and Databases, and having read the documents referred to us in the evidence, we make the following findings of fact.

5. The Claimant started his employment with the Respondent on 26 April 2016. At the relevant time he was a Software Database Developer at Band 7.

6. The Claimant worked in the Software and Database team that oversaw the data feeds and databases, application development and application support within the Respondent. He did development and database work and responded to application support requests over the telephone (about 10-15 a day). He was a Team Lead who supervised and managed 2

members of staff. He was also Mr Rafiq's deputy and in that role was responsible for supervising and overseeing the wider team of 4 others. He supervised his team of 2 by helping them solve the complex problems, using his extensive experience and knowledge. His management tasks included undertaking annual appraisals and 1:1s with his team. He was a relatively senior employee.

7. The team met formally once a week. Members of the team interacted as and when required to solve problems together. They communicated with other teams and visited and telephoned colleagues in other parts of the Trust to support them. The team worked core hours of 10am-4pm and could work flexibly either side of those hours. Full-time work was 8 hours a day, including a half-hour unpaid break. The Respondent set core hours because that was when the demand for support calls was at its highest. The Claimant had been working 8am to 4pm daily.

8. In 2017 the team trialled working from home in a 'virtual trial', which failed because of reduced productivity. On 14 January 2018 the team moved to CEME office in Rainham, from then each member of the team was allowed to work at home one day a week. During the pandemic, team members have worked about 2 days a week in the office because of the difficulties of doing the work solely at home.

9. Mr T Hodgkin a developer in the same team (the documents at pages 417 and 418 show this) worked from home in Leicester full-time. He was a developer who did not have the management and supervisory responsibilities of the Claimant.

10. The Claimant requested to work from home for a few weeks in December 2017 for childcare reasons but this was refused.

11. Since about 2016 the Claimant has had a back condition called lumbar stenosis. It gives him chronic low back pain. This makes sitting continuously painful. His condition worsened over time.

12. At work an incident on 26 February 2018 ended with the Claimant lying on the floor in the office due to his back pain. Afterwards he was allowed to work from home for a few days.

13. On the same day the Claimant saw his GP who gave him a fit note describing '*chronic low back pain due to lumbar spondylosis*'. It recorded that from 26 February 2018 to 23 April 2018, he was fit for work with the following advice: *'to avoid continuous sitting, needs intermittent breaks from work and postural change.*'

14. The Claimant and Mr Rafiq discussed the GP recommendations over the phone. The Claimant returned to work on 5 March 2018. From then on the Claimant took as many breaks as he needed to get up and move around at work.

15. In 2018 walking became more difficult for the Claimant as it put pressure on his lower back and caused his leg to become numb. He began therefore sometimes to use a crutch outside and on the way to work but he did not use it in the office. Mr Rafiq observed this from about March

2018 onwards.

16. The GP did not recommend that the Claimant should work from home. Soon after the Claimant asked his consultant to tell the Respondent he wished to work at home. His consultant did not do so. The Claimant agrees that, in 2018, working from home was worse for his back because he only had a laptop without the two extra monitors he used at work.

17. On occasions at work Mr Rafiq and the Claimant prayed together using the room dedicated for the purpose. Mr Rafiq did not observe the Claimant to have any difficulties with the movements required.

18. On about 22 March 2018 the Claimant requested a display screen equipment ('DSE') assessment. In his request he identified that his chair was not suitable. He also stated he regarded himself as disabled. By sending the DSE request an email would have gone automatically to Mr Rafiq to action. Mr Rafiq does not remember receiving the email and thinks he must have missed it because he took no action. By mid-May 2018 the Claimant had not followed this up.

19. On about 17 July 2018 the Claimant told Mr Rafiq that he had planned a pain clinic surgery date for injections for pain relief. This included a letter from a health practitioner describing 'chronic low back pain'.

20. The Claimant's first prolonged absence for back problems was from 30 July 2018 to 6 September 2018. The GP fit note of 6 September 2018 advised '*alter hours of work and amend duties accordingly'*. The GP did not advise working from home.

21. On his return on 11 September 2018 the Claimant was referred to Occupational Health ('OH') because of the length of the absence.

22. Mr Rafiq agreed to the continuation of regular breaks and moving around; he removed from the Claimant the requirement to go to external meetings (reducing travelling time); and temporarily removed his management duties i.e. appraisal but he was still expected to supervise his two team members. A phased return to work was agreed.

23. After a telephone consultation (no examination), OH reported on 20 September 2020. It identified the diagnosis of Lumbar Stenosis and lower back pain after sitting for long periods. OH said that the Claimant was 'likely to be' disabled. Mr Rafiq saw the OH report.

24. The OH report records that the Claimant *'would like to work from home for 3 days a week as recommended by his GP'* and supported that '*if management can accommodate it'*. However, we find the GP had not recommended working from home.

25. On 1 October 2018 the Claimant requested a chair assessment from the Health and Safety team. He explained that at the OH assessment they had recommended a special chair. On 3 October 2018, Mr Rafiq asked for the chair to be prioritised. The DSE assessment was on 10 October and the report was produced on 18 October identifying the appropriate chair. The chair and footrest were ordered on 25 October 2018 and

delivered by about 12 November 2018 (about a week after the start of a further period of sick leave, see below).

26. We do not consider that the allegation at issue 13.1 (that Mr Rafiq allegedly announced in October 2018 that all team members could work from any agile location except the Claimant who would have a permanent desk) has been made out on the evidence. Further, it would not have made sense at the time, for Mr Rafiq to have said this, given that a move of office was forthcoming.

27. On 2 November 2017 the Claimant experienced his first urinary incontinence. He had to leave work early. He told Mr Rafiq about this. The fit notes describes the problem as 'lumbar spondylosis, increased frequency of micturition' (222 256). Mr Rafiq did not know what micturition was but a simple word search would have shown it is a word for 'urination'.

28. By this time the Claimant had commenced further sick leave on 5 November 2018 which continued until 27 January 2019. After a period of holiday until 25 February 2019, the Claimant returned to work.

29. On 7 November 2018 in an email the Claimant asked to work from home *'as sitting for 8 hours is not possible for me'* (229). HR advised Mr Rafiq they would be concerned about working from home because it would have the same impact as working in the office (228) i.e. sitting. And Mr Rafiq therefore refused the request.

30. On 14 November 2018 Mr Rafiq made a further referral to OH one of the purposes of which was to consider ill health retirement. We do not find that this was an attempt by Mr Rafiq to medically retire the Claimant (as set out at issue 13.4): he was seeking guidance about this and other options. All OH referrals in the Claimant's case from September 2018 onwards have included the optional question about ill health retirement. Nevertheless, the Claimant was concerned that Mr Rafiq appeared to have reached the conclusion that there had to be ill health retirement.

31. On 22 November 2018 OH reported, but without the Claimant's consent to give the report to Mr Rafiq. PH referred to bladder disturbances about which the Claimant was waiting for a specialist review. The bladder problem was stated as being likely related to his back condition. The report stated that the Claimant was unfit for work. It recommended on return there be flexibility to work at home with attention to his workstation there.

32. On 14 January 2019, the team moved from their office at Goodmayes, Ilford to the CEME office at Rainham. This made the Claimant's journey to work more complicated. Goodmayes was near to his home and his wife dropped him off by car, whereas it was too far for her to drive conveniently to Rainham. The Claimant himself could not drive more than about 7 minutes because of his back problems. The Claimant had to get 3 different buses or 2 buses and a train to reach the CEME office. This was difficult for him because he used a crutch and walking longer distances put pressure on his back. As part of the consultation for the

office move, the Claimant raised this difficulty with Mr Jenkins, Finance Director, and Mr Beacon, who was responsible for the logistics of the move. They agreed with him that he make an Access to Work application for funding for taxis and, in the meantime, the Respondent would pay for his taxis to work. Mr Rafiq was not involved in that consultation.

33. The last fit note ending on 17 January 2019 described the Claimant's problems as '*urgency of micturition*' as well as the back problem.

34. The Claimant met Mr Rafiq and HR on 25 February 2019 at a return to week meeting. At that meeting the following matters were discussed.

Hours

34.1. The Claimant requested altered hours: because he said he needed to take three medications. He said that, after 2pm, he needed a 2-hour break. The Claimant therefore sought to start early and finish early. The Respondent did not consider it safe for the Claimant to work alone from 6am. In addition, it needed calls covering in the period after 2pm. It therefore offered to adjust his usual hours to 7.30-3.30, with a half hour break, and review this each month.

34.2. The Claimant's GP fit note did not state the need for a break of 2 hours in length. The Claimant provided no medical evidence to the Respondent nor to us about this. He suggested in his evidence that it was the combination of drugs taken at 2pm that caused drowsiness, but as one of these drugs only had to be taken once a day, there was no explanation for why it had to be taken at 2pm rather than when the Claimant arrived home. The Respondent referred the question of hours and medication to OH but did not receive any advice about the Claimant's medication needs. OH suggested working 7.30 to 1500, with no reasoning behind it and this would either not have included the necessary half-hour break in the working day or it would have reduced the Claimant's paid hours, which he did not want to do. We note that when the Claimant finally started working from home full-time he did so from 8-4, with some flexibility.

Toilet Needs

34.3. The Claimant told the Respondent he had urinary incontinence. He explained that he needed to get to the toilet quickly which meant that he needed a toilet on the same floor. The Respondent decided that the disabled toilet was near to where the Claimant's desk was situated. The Claimant's concern was what would happen if it was occupied and the Respondent suggested he sought GP advice about his continence needs at work.

34.4. The disabled toilet on the first floor required the Claimant to walk through 3 automatic doors across three corridors. Mr Rafiq tells us it took him 30 seconds to walk there. We find the Claimant took significantly longer than this given his slower walking pace. We do not accept the toilet was the distance of 6 bus lengths

away but do consider it was more like two bus lengths with the added pauses caused by the automatic doors. We do not accept there was evidence before us that many disabled workers used the first floor toilet, but nor was it the Claimant's 'personal' toilet. After the return to work meeting the Claimant sought advice from his GP who advised on the use of incontinence pads and gave him exercises to help his urinary control

Working from Home

34.5. Finally, the Claimant, along with other members of the team, was allowed to work one day at home subject to a DSE assessment. This was delayed, at his request, because he was shortly to move house.

Phased Return

34.6. A phased return to work was agreed over 4 weeks to finish from 2pm gradually through to 4pm in the final week.

Other continuing Adjustments

34.7. At the Return to Work meeting Mr Rafiq agreed to continue to cover the Claimant's external meetings; and that his regular postural breaks should continue.

35. Despite his agreement with the Finance Director about taxi fares, the Claimant did not travel to work by taxi and claim those fares. He was a senior manager who sometimes had travelled to external meetings. We find he knew how to claim expenses via the online process.

36. On 4 March 2019 Mr Rafiq asked the Claimant about where he was up to with some work on a system called ICAN that he had been doing prior to his sick leave. We find the Claimant heard him say '*before you ran away'*. We also accept Mr Rafiq's evidence he said, '*before you went away'*. The two words are similar in sound and we find it most likely that the Claimant misheard.

37. On 6 March 2019 the Claimant had a further OH assessment by telephone. Again the bladder incontinence was described as being likely related to his underlying medical condition. OH did not provide any assessment about the medication timing needs or whether it would cause drowsiness. The adviser simply asked whether the Respondent would be happy with working hours of 0730 to 1500. OH also suggested working from home 2 days a week '*as these could be seen as reasonable adjustments*' but again without any reasoning. The OH adviser recommended a move to the ground floor closer to the toilets and to avoid moving past other offices to get to the toilets.

38. On 11 March 2019 Mr Rafiq sent an email to the Claimant confirming a conversation of the previous Friday. He stated the OH report '*did not acknowledge the actions previously agreed'*. He concluded by stating he would be contacting OH '*as they did not provide an assessment … what I received was a repeat of your demands*.' Mr Rafiq acknowledged in his

evidence that he should not have used the word '*demands'* but he explained his frustration that OH did not appear to be aware of the changes made: the hours had been changed to end at 3.30pm; working from home had been agreed for 1 day; and in his view the workplace was near a disabled toilet.

39. On 15 March 2019, not 4 March 2019, the Respondent's transcript of the Claimant's covert recording shows that Mr Rafiq stated, '*You're band 7 … you are not there yet*.' He queried what work the Claimant was doing as team lead, in other words, his supervision work. Mr Rafiq accepted in evidence this was in the context of the Claimant doing more of the band 5 work on support calls than supervisory work. We find therefore that he did intimate in this call that the Claimant was performing lower than his band 7 and more at a band 5 level.

40. On 3 April 2019 Mr Rafiq told the Claimant he did not think the Trust would pay for taxis and referred him back to Mr Beacon. We do not consider this remark would reasonably have prevented or discouraged the Claimant from taking taxis because he had obtained the agreement of a more senior manager, Mr Jenkins, to do so pending his Access to Work application.

41. On 25 April 2019 OH provided a further report. It indicated he was wearing incontinence pads and repeated suggestions in the earlier report.

42. After finding out how to go about doing so, in April 2019, the Claimant made the Access to Work application for funding for taxis to work. It was based on his difficulty walking far and driving any more than 5-7 minutes. By a letter dated 1 May 2019, he was informed this application was successful. He found out about this several days later.

43. On 2 May 2019 there was a further meeting between the Claimant, Mr Rafiq and HR to discuss his needs. During that meeting Mr Rafiq asked the Claimant why he was using the downstairs toilets. He explained that he was wearing incontinence pads and he was embarrassed about the time it took to change them in the toilet. He explained that once someone had knocked on the toilet door upstairs. It was agreed the Respondent would put a sign on the toilets. The Respondent offered the Claimant a seat in the finance office, closer to the disabled toilet on the first floor. He declined this now that he was wearing pads. The Claimant was annoyed that this had not been offered at the outset. The finance office was not far from the team: 'around the corner' as the Claimant put it. Mr Rafiq explained his reasoning for not allowing working from home for more than 1 day a week because the Claimant's role included supervision of his team, which involved the interaction we have described above.

44. On 2 May 2019 the Respondent offered the Claimant reduced working hours if he wished. But he refused as it would have reduced his pay.

45. On 10 May 2019 we find on balance that it is likely that Mr Rafiq said to the Claimant '*stop moaning and start building relationships'*. He admits he said '*start building relationships'*. The allegation '*stop mourning'* is a

misspelling likely based on accent. It would not have made sense for him to say this, but we find it likely he said '*stop moaning'* because Mr Rafiq had found managing the Claimant's requests for adjustments troublesome: he had already called them '*demands'*. This comment is not captured in the Claimant's covert recordings but we do not find this makes it less credible that it was said because the recordings are of poor quality and the transcripts are therefore not complete.

46. The Claimant was redeployed to the role of information analyst on 9 July 2019. In this role he was not required to supervise a team. He has worked from home from 8am – 4pm, flexibly when necessary. He has no complaints about the working arrangements in that role.

Submissions

47. We refer to the excellent written submissions of both parties but do not repeat them here. Both parties also made summary oral submissions.

Legal Principles

48. Section 6 EqA provides: '*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…*'.

49. The discrimination alleged here is that the Respondent:

    49.1. Failed to comply with a duty to make reasonable adjustments, contrary to section 39(5), section 20-21, as read with Schedule 8 EqA; or

    49.2. Subjected the Claimant to unfavourable, detrimental treatment contrary to section 15 and section 39(2)(d) EqA;

    49.3. Harassed him, as defined at section 26, and in employment contrary to section 40(1) EqA.

Reasonable Adjustments

50. The duty to make reasonable adjustments does not arise if the employer did not know the Claimant was disabled or '*could not have been reasonably expected to know'*.

51. The required knowledge is of the *facts* of the disability, not whether those particular facts meet the legal definition: Gallop v Newport City Council [2013] EWCA Civ 1583 at paragraph 36. As Rimer LJ put it:

> *Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are*

satisfied in any case depends also on the clarification as to their sense provided by Schedule 1.

52. 'Constructive knowledge' is established when an employer reasonably could have been expected to know of the disability. The Equality and Human Rights Commission Code of Practice on Employment 2011 ('the Code') advises, at paragraph 6.19, that employers '*do all they can reasonably be expected to do'* to find out this information. (We must take this into account any part of the Code that appears to us to be relevant to any question arising in the proceedings.)

53. The knowledge of the disability must be at the relevant time. It may be that at the outset there was no constructive knowledge, but as events occurred, there will come a time at which a Tribunal considers the employer ought reasonably to have known of disability. It is to be remembered that it is not just knowledge of the adverse impact of any condition that fixes the employer but knowledge that it is long term or likely to be.

54. The duty to make reasonable adjustments arises under section 20 EqA:

54.1. *'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.'*

54.2. 'where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to provide the auxiliary aid.'

55. Tribunals should take a structured, step-by-step approach to the consideration of whether there was a duty to make reasonable adjustments. Contrary to popular assumption: it does not arise in every case of disability. The steps are as follows:

55.1. First was a provision, criterion or practice ('PCP') applied?

55.2. Second, did the PCP put the Claimant to a comparative substantial disadvantage (substantially meaning more than minor or trivial). The comparison is with a person who is not disabled? Or, but for the provision of an auxiliary aid, would there be such disadvantage?

55.3. Third, did the Respondent know or ought it to have reasonably known of that disadvantage?

55.4. Fourth, has the employer taken reasonable steps to avoid that disadvantage or provide the auxiliary aid? This is an objective question, the focus being on the practical result.

56. When considering what is reasonable, we have had regard to paragraph 7.29 of the Code, which sets out factors which may be relevant: the size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustment; the logistics of making the adjustment; the nature of the role; the effect of the adjustment on the workload of other staff; the other impacts of the adjustment; the extent it is practical to make. How far the adjustment is effective is also a consideration.

57. In Linsley v Revenue and Customs Commissioners [2019] IRLR 604, Choudhury P confirmed, at paragraph 38:

> '*An employer is not required to select the best or most reasonable of a selection of reasonable adjustments, nor is it required to make the adjustment that is preferred by the disabled person. The test of reasonableness is an objective one: see the case of* Smith v Churchill's Stairlifts plc [2005] EWCA Civ 1220, [2006] IRLR 41 at [44], *in which it is said that, 'So long as the particular adjustment selected by the employer is reasonable it will have discharged its duty'.*

58. We also note that just because the employer has already made some adjustments does not mean that there may not be others it is obliged to make.

Section 15

59. Section 15 EqA provides:

(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.

60. Section 15 recognises that a disabled employee may be adversely treated for something that other employees would be adversely treated for, but where that something arises '*in consequence of their disability'* the disabled employee is afforded greater protection.

61. Section 15 does not apply if the employer shows that it did not know, and could not reasonably have been expected to know, that the employee had the disability.

62. Section 15 is read with section 39 EqA, which means that if unfavourable treatment is found it must also have subject the Claimant to a detriment. To find a 'detriment' a Tribunal '*must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view*

that he had thereby been disadvantaged in the circumstances in which he had thereafter to work', Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UUKHL 11 (para 34). An unjustified sense of grievance cannot amount to 'detriment' but nor is it necessary to demonstrate some physical or economic consequence.

63. Section 15 does not give the disabled employee complete protection: the employer can avoid liability if it can 'objectively justify' the treatment.

 63.1. First, it must identify that the treatment was in order to pursue a legitimate aim: a real, objective consideration or real need on the part of the organisation.

 63.2. Second, it must satisfy us that treatment was a proportionate means of achieving this aim: both an '*appropriate means'* of achieving it and '*reasonably necessary'* (not the only possible way but we should ask whether lesser measures could have achieved the same aim). This requires an objective balancing exercise between the effect of the treatment and the importance of the aim. This is an objective test and does not matter if employer did not have these reasons in its mind at the time.

Harassment

64. Section 26 EqA provides so far as is relevant to this case:

> *'(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to [disability], 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. …*
>
> *(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.'*

65. We must ask the questions posed by the statute in turn.

66. To establish that the unwanted conduct is 'related to' disability the Claimant does not have to show that the unwanted conduct was directed to him 'because' he was disabled, but that there was a connection between the conduct and his disability, see para 7.9 of the Code, and Hartley v Foreign and Commonwealth Office Services 2016 (para 23-24). In that case the EAT held that whether the conduct is 'related' to the

protected characteristic is a broad test, requiring an evaluation by the Tribunal of the evidence in the round. The alleged perpetrator's and victim's perceptions of whether it is related are not conclusive. The precise words and the context are important. It is also open to us to draw inferences if necessary.

67. The question of whether an act is 'sufficiently serious' (to quote from the Code at para 7.8) to support a harassment claim is essentially a question of fact and degree.

68. In Weeks v Newham College of Further Education EAT 0630/11 Langstaff P considered that '*environment'* means a state of affairs, which may be created by one incident where the effects are of longer duration (para 21). But at paragraph 17 he observed:

> '*Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.'*
>
> The context of words used is very important.

69. Whether the conduct violates a person's dignity is also a question of fact and degree. We note the observations of Underhill P (as he then was) referred to us by Mr Caiden in Richmond Pharmacology v Dhaliwal [2009] ICR 724 (EAT) at paragraph 22 (in a harassment related to race claim):

> *… We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…*

Time Limits

70. The primary time limit in Equality Act cases is that the claim must be brought within 3 months, section 123(1)(a) EqA, as extended by the Early Conciliation provisions.

71. First, we must consider whether there was '*conduct extending over a period'* section 123(3). It is right that some conduct must be within the primary time limit for this to apply.

72. In relation to inadvertent omissions, time starts to run from the end of the period in which the employer might reasonably have been expected to

comply.

73. If the claim is outside the primary time limit we consider whether to extend our discretion to extend time if it is '*just and equitable'* to do so, section 123(1)(b) EqA. In exercising this jurisdiction we weigh the relevant factors.

74. One factor it is essential to consider is the reason for the delay. If there is no good reason for delay that is not determinative, but is a weighty factor against extending time.

75. Other factors include the length of the delay; whether a fair trial of the issues is possible or whether there has been prejudice caused by the delay, for example in the gathering of documents or the fading of memories. We must consider where the balance of hardship lies.

76. Mr Caiden referred us to the observations of Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434 that the exercise of the discretion to extend time is the exception to the rule and time limits are exercised strictly in the Tribunal. We agree with the observations of Sedley LJ in Chief Constable of Lincolnshire v Caston [2010] IRLR 327 CA that we must apply the words of the statute and the matter is a question of fact and judgment. What is strict or what is an exception can mean different things to different Tribunals and those tests are an unhelpful gloss on the statutory wording. We acknowledge that the Claimant has the burden of proof, but it is a rare case where the burden of proof decides the issue: the facts usually point in one direction or another.

Application of Facts and Law to Issues

Issue 4: Knowledge before 20 September 2018

77. In our judgment the Respondent had constructive knowledge of the Claimant's disability by the end of March 2018.

78. The facts that the Respondent knew were:

    78.1. the incident at work in late February 2018 that led to the Claimant lying on the floor at work in back pain;

    78.2. Mr Rafiq knew that the GP had provided a fit note in relation to the Claimant's back problem and had discussed the GP's recommendations with him, though not seen the fit note. Those recommendations included the need for the Claimant to avoid continuous sitting;

    78.3. Mr Rafiq saw the Claimant walking with a crutch from about March 2018;

    78.4. On 22 March 2018, the Claimant had filled out a request for a DSE assessment identifying in it his lack of suitable chair and his view that he was disabled.

79. In the light of what he knew and had observed, in our judgement Mr Rafiq is reasonably to have been expected to ask further questions about the Claimant's back problem. The Claimant's use of a crutch signified a significant problem and likely substantial adverse impact on the day to day activity of walking around. In addition, in March 2018 Mr Rafiq knew the GP had recommended to avoid continuous sitting: this likewise suggested a substantial problem. Whilst sitting at work is not a day to day activity, sitting at home and socially is and can be done normally for long periods like watching television or a film or eating a meal with friends. Had Mr Rafiq asked further questions in March 2018, he would have seen the fit note describing a 'chronic' lumbar problem. The word 'chronic' means long-lasting. If he had asked further questions, he would also likely have found out that the back problem was long-term because the Claimant had been experiencing worsening pain since 2016. Mr Rafiq ought reasonably to have been expected as a manager to see the automatic email alerting him to the DSE assessment request made on 22 March. In this request the Claimant describes himself as 'disabled': while the label is not determinative, again this would have alerted Mr Rafiq to the need to ask more questions. We do not consider the fact that the Claimant revealed no back issue when praying meant that it was reasonable for Mr Rafiq not to ask questions: this is because back problems result in many different kinds of symptoms. Here the Claimant's trouble was in prolonged sitting and extensive walking, which are different movements to those described by Mr Rafiq in praying.

80. If we are wrong about constructive knowledge, then we find that the Respondent had actual knowledge of disability, by the latest 17 July 2018, when the Claimant provided Mr Rafiq with medical letters describing his problem and the need for pain management intervention. By this time it was clear that there was a substantial problem: there had been now a few more months of the Claimant using a crutch; and the need for him to attend a procedure at a pain clinic again suggested a significant problem. As well as walking impacting on day to day activities, Mr Rafiq now knew that the Claimant had chronic pain: this impacts on day to day activities in a more than minor way. Further the health letter described that problem as 'chronic' which reasonably suggested something that had lasted or was likely to last more than a year. Mr Rafiq did not need to know the definition of disability nor need to know that it applied to the Claimant, but he knew enough facts for this to be the conclusion had he applied the definition.

Reasonable Adjustments Claim

81. We will deal with the aid and then each PCP in turn. Working through the list of issues.

Issue 6.1: Did the Respondent Fail to Provide an Auxiliary Aid: from 5 March 2018-5 November 2018?

Issue 7: substantial comparative disadvantage

82. The Claimant was placed a disadvantage compared to non-disabled persons in that the lack of a specialist chair made sitting at work more

painful. We find this was substantial in the sense of being more than minor: the Claimant had long-lasting back pain and sitting normally was a problem for him.

Issue 8: knowledge of disadvantage

83. The Respondent constructively knew about disability from end March 2018. It also constructively knew about the substantial disadvantage of sitting by 22 March 2018, upon the Claimant filling out the DSE assessment identifying the lack of suitability of his chair, combined with the discussion Mr Rafiq had had about the GP recommendations about the discomfort of sitting.

Issue 9: avoiding disadvantage

84. The specialist chair identified and eventually supplied to the Claimant gave him greater lumbar support and enabled him to lean back and thereby helped reduce the pain on sitting thereby reducing the disadvantage. This achieved a real practical result even if it did not remove the disadvantage entirely.

Issue 10: reasonableness

85. We find it was reasonable for the Respondent to provide the chair. It was a large organisation with the resources to match. The cost of the chair was not an issue, as it was ultimately purchased for the Claimant. The chair was recommended by health practitioners as something to assist the Claimant in remaining at work more comfortably. It was reasonable to provide it.

86. The obligation is to take such steps as it is reasonable to take to provide the aid. Given what eventually occurred, once the chair was prioritised in October 2018, we find it would reasonably have taken no more than 2 months from the filling out of the DSE request to provide the specialist chair: this would have involved a DSE assessment and likely a referral to OH. We take into account the large size of the employer and therefore the significant administrative resources available to it and that later OH referrals did not take long. Thus, the specialist chair should reasonably have been provided by 22 May 2018. The chair was provided on about 12 November 2019, a delay of over 5 months, though the Claimant was absent from work for 6.5 weeks of that period.

87. We therefore find the Respondent failed reasonably to provide the Claimant with an auxiliary aid contrary to the EqA from 22 May 2018 until about 12 November 2018. (This is the proposed aid at issue 11.3.)

<u>PCP 5.1 Requirement to work at CEME Centre.</u>

88. It is agreed that the Respondent applied the PCP that, from 14 January 2019, the Claimant was required to work at the CEME Centre, Rainham. This applied to him, in practice, from 25 February 2019 when he returned from sick leave.

Issue 7: substantial comparative disadvantage

89. We find that the requirement to work at the CEME centre placed the Claimant at a substantial disadvantaged compared to non-disabled persons. This is because he found walking more difficult than non-disabled persons and the 3 changes in public transport each way were more difficult when using a crutch, an aid that non-disabled persons would not need to use. We find this disadvantage to be more than minor or trivial: the use of the crutch shows that the difficulty was not minor; the number of changes multiplied the difficulty making it substantial. The walking distances were worsened by the need to make the changes.

Issue 8: knowledge of disadvantage

90. We find the Respondent both knew of the disability (by its own admission) and of this disadvantage by the time the Claimant had to work at CEME. This is because he had told Mr Jenkins and Mr Beacon about the problem during the consultation for the move.

Issue 9: avoiding disadvantage

91. Here, at issues 11.1, 11.5 and 11.9, and issue 12, the Claimant argues that working from home avoided the disadvantage and this is true. But the Respondent argues that its offer of taxi fares pending the Access to Work funding, and then the Access to Work funding also resolved the problem, and we agree. This is because it was the journey to work by public transport with the walking and the many changes it involved that created the comparative disadvantage. Had the Claimant taken up this offer and got a taxi to and from work he would no longer have been subject to the disadvantage. Further, by 10 May 2019 the Access to Work funding paid for taxi fares.

Issue 10: reasonableness

92. Applying the principle stated above in Linley, the Respondent is not required to select the adjustment preferred by the Claimant. The test of reasonableness that we must apply is objective. We find that the adjustment offered by the Respondent discharged its duty because it avoided the disadvantage created by the journey to work by public transport.

93. In reaching this view we considered carefully the findings we have made in context. The Claimant is a senior employee, operating at Band 7. He had claimed expenses before. There was an online expenses process. Before his return to work in 2019, he had obtained the agreement of the Finance Director, more senior than his line manager, for taxi fares to and from work pending the Access to Work application. The Claimant did not need to know any more before he took taxis to work and reclaimed the fares on expenses. We would have reasonably expected him to take that initiative.

94. While Mr Rafiq's opinion on 3 April 2019, that he did not think the Trust would pay taxi fares, muddied the water and was, as a matter of fact, wrong, this came after the agreement and would not have stopped the Claimant from claiming fares beforehand. Nor do we consider it reasonably ought to have stopped him from continuing to claim taxi fares

afterwards because Mr Jenkins was more senior and the Claimant could simply have reverted to Mr Beacon, as Mr Rafiq had suggested, who was responsible for the move logistics and knew about the agreement.

<u>PCP 5.2 requirement to sit in close proximity to the team in the office</u>

95. The Claimant was required to sit close to the team in the office. This was because the team did confer on problem solving and that was best done face to face. As team lead for two colleagues, the Claimant, unlike the other team members, had the responsibility to supervise their work, helping them with problem solving.

96. There are two elements to this PCP: sitting and being close to the team. There are also two different periods of time. We deal first with the circumstances known to the Respondent in 2018 and then in 2019.

2018

Issue 7: substantial comparative disadvantage and Issue 8: knowledge

97. In 2018 the Claimant's back problem gave him pain by sitting continuously. We have already found that this subjected him to a comparative substantial disadvantage. We have also already found knowledge of this disadvantage from March 2018.

98. In 2018 there was no other disadvantage by having to work in the office near the team: the Claimant got a lift to work and he had not developed urinary incontinence at this time.

Issue 9: avoiding disadvantage

99. We consider the disadvantage created by sitting was reduced by the Claimant being allowed to take breaks from work in order to move around from March 2018. This was flexible: he could take as many breaks to move around as he needed, thereby removing the need to sit continuously. It was also eventually reduced by provision of the specialist chair.

Issue 10: reasonableness

100. If the Claimant suggests that the disadvantage of sitting could be reduced by working at home in 2018, we disagree. He accepted that his set up at home was worse than at work. In any event, at home he would be sitting and the way to relieve the problem would be to move around. This is what he had been allowed to do in the office: to take breaks and to move around as much as he needed. Therefore the conditions at home were no better in this regard than the conditions at the office. Also there was an operational reason why the Respondent preferred him to work in the office: his supervisory responsibilities, unlike Mr Hoskin who had none.

101. We find that the Respondent had made a reasonable adjustment in

connection with sitting in close proximity to his team in the office: namely flexible breaks and ultimately the specialist chair.

102. We do not therefore find that the Respondent was required to take the steps suggested at Issues 11.1, 11.5 and 11.9, and 12. And we find, in relation to the issue at 11.2, that the Respondent did allow flexible working in the form of breaks so far as was reasonable to avoid the disadvantage.

2019

Issue 7: substantial comparative disadvantage

103. By his return to work on 25 February 2019, the Claimant had developed urinary incontinence. This plainly put him at a comparative disadvantage at work compared to non-disabled people because he needed to access the toilet more quickly than non-disabled people and otherwise was at risk of uncomfortable and embarrassing accidents.

Issue 8: knowledge

104. The urinary incontinence was known to the Respondent. OH had told it of bladder problems likely related to the back condition on 22 November 2018. Thus this was known to be not a new disability but a new symptom of the original disability. The GP fit note of 17 February 2019 described '*urgency of micturition*'. The Claimant told the Respondent at his return to work meeting on 25 February 2019.

105. The Respondent knew that bladder incontinence put the Claimant at a comparative disadvantage at work which was substantial: it is obviously not a minor or trivial problem to need to access the toilet more quickly to avoid accidents, especially given that the Claimant's slower walking pace exacerbated the problem.

Issue 9: avoiding disadvantage

106. The Respondent contends it placed the Claimant close to the disabled toilet on the first floor of the CEME office. Given the time we have found it took to access the first floor toilet and the need to pass through 3 automatic doors, the placement of the Claimant's seat did not reduce the disadvantage effectively. The Claimant had to start wearing incontinence pads all day, which he found uncomfortable and time-consuming to change. Of course, steps can be reasonable even if they do not reduce the disadvantage completely, so will consider under reasonableness whether the original placement of his desk was a reasonable adjustment in all the circumstances.

Issue 10: reasonableness

107. The Claimant contends that his desk was not as close to the toilet as it could have been and points to the May offer of a desk in the finance office which was closer.

108. Just because the Respondent (and the Claimant by wearing pads) has

made an adjustment reducing the disadvantage does not mean we should not consider whether another, more effective step, was available.

109. The offer initially of a seat in the Finance office would have reduced the disadvantage more effectively than where the Claimant was placed because it was closer to the toilet: the effectiveness of the adjustment is a relevant factor as to its reasonableness.

110. We balance that against the Respondent's need for the Claimant to be in close proximity to his team because of his supervisory responsibilities. But the finance office was still near to the team, around the corner, and in our judgment would not significantly have prevented the Claimant from supervising: he needed to get up to move around and could see them at such times; he was available on the telephone if they wanted him to come and help; and they could get up to come and see him. The very fact of the offer in May shows that his supervisory responsibilities could still be met from the Finance office.

111. In our judgment while the team would have experienced some inconvenience, the Claimant would still have been able to supervise his two colleagues from the Finance office desk. A seat here was closer to the toilet and would have reduced the risk of him not making it to the toilet in time, with the unpleasantness and discomfort that entailed (even when wearing pads).

112. Finally, we find he is likely to have accepted the offer of the desk in Finance in February 2019, even though he rejected the offer on 2 July, because by that later stage he was annoyed the offer had not been made earlier and had ended up having to wear pads.

113. Therefore we find the Respondent failed to take the reasonable step of offering the Claimant a seat in the Finance office closer to the toilet on the first floor on his return to work in the new office.

114. As to timing: the Claimant had expressed his concerns about the situation of his desk and the toilet at the return to work meeting. We find it would have only taken the Respondent a few days to identify a closer desk and reconfigure the finance office and make this offer to the Claimant. We consider this step could reasonably have been taken by 1 March 2019.

115. We do not find that the adjustment contended for at issue 11.7 was reasonable to take, because situating the Claimant downstairs put him farther away from his team and supervision then became more difficult.

PCP 5.3 The requirement to work from 7.30am to 3.30pm

116. The PCP in relation to hours that was applied to others was the core hours of 10am to 4pm.

117. The Respondent argues it made an adjustment of those hours in the Claimant's case to allow him to work 7.30 – 3.30pm but that this, in addition to the flexible breaks, was as far as it could reasonably go because of the need for support calls to be taken until 4pm.

Issue 7 substantial comparative disadvantage

118. Was there a substantial disadvantage to the Claimant in being required to work the core hours?

119. On balance we do not consider the PCP of core hours placed the Claimant at a substantial disadvantage compared to non-disabled persons because we have heard insufficient evidence of drowsiness caused by his drug regime. The GP did not provide any. The OH suggestion was not reasonably workable because it either dispensed with the necessary mid-shift break or reduced working time but the Claimant did not want to reduce his salary.

120. In our judgment therefore no duty arose to adjust the core hours. Thus the proposed steps at issues 11.4 and 11.11 were not required.

Issue 9 Reasonableness

121. Even if we are wrong about the lack of a substantial disadvantage: we consider the adjustment made as to hours was as far as the Respondent reasonably could go without reducing hours in total because of the need for the Claimant to take support calls. This would not have been met by the Claimant taking a two hour break between 2-4pm and working later at home.

Issue 11: Other proposed adjustments

122. In so far as we have not already dealt with the proposed adjustments at Issue 11, we deal with them below.

123. Issue 11.1 was not a reasonable step to because the Respondent did not know about disability on 5 March 2018. Once there was knowledge of disability and of the substantial disadvantages as at the end March 2018, we have found the Respondent complied with its duty to make reasonable adjustments and was not required to allow the Claimant to work from home at that time.

124. Issue 11.2: the Claimant was allowed flexibility so far as was reasonable in allowing him to take breaks from work in order to move around. The core hours did not subject him to a substantial disadvantage.

125. Issues 11.6 and 11.8 the fact that there was a referral to OH was not a failure to make a reasonable adjustment. The referrals to OH were sensible steps in the circumstances, even though they did not always find out the detailed advice that the Respondent was looking for and sometimes the OH adviser did not appreciate the steps that had already been taken.

126. The issue at 11.10, the offer to reduce working hours was not taken up by the Claimant. It was not a failure to make reasonable adjustment.

127. In summary, therefore we have found the Respondent:

127.1. Failed to provide the auxiliary aid of a specialist chair from 22 May 2018;

127.2. Failed to make the reasonable adjustment of the provision of a desk space in the finance office at the CEME centre from 1 March 2019.

128. Whether those claims are upheld will depend on our decision whether each claim is in time and, if so, whether to extend time. (see below)

Harassment

Issue 13: did the Respondent engage in unwanted conduct as alleged

129. It follows from our findings of fact that we do not find that the Respondent engaged in the unwanted conduct set out at issues 13.1 and 13.4.

130. It follows from our findings of fact that the Respondent did engage in the conduct at issues 13.2 (on 15 March 2019 not 4 March); 13.5; 13.6; and 13.7 (except that we find Mr Rafiq said ‘moaning’ not ‘mourning’). As to issue 13.3 we have found that the Claimant heard ‘ran’ but that Mr Rafiq said ‘went’.

131. We find that all of those comments by Mr Rafiq were unwanted by the Claimant.

Issue 14: related to disability

132. We do not find that the comment about performance at 13.2 was related to disability. It was about performance. Mr Rafiq was identifying what level of work the Claimant had been doing. As a manager it was appropriate for him to discuss this with the Claimant so that the Claimant understood his concerns and was able then to seek to resolve them.

133. We find that the comment at issue 13.3 (as it was said and as it was heard) was a reference to absence, which related to disability.

134. We find the question at issue 13.6 was about not using the upstairs toilet, which obviously related to the symptoms of the Claimant’s disability.

135. We also judge the comment at issue 13.5, about ‘demands’, and the comment at issue 13.7, about ‘moaning’, to be about disability because we have found that they referred to the Claimant’s requests for adjustments, which related to his disability.

Issue 15 and 16: Purpose or Effect of violation of dignity/proscribed environment?

136. Of the ‘ran/went’ away comment (13.3). While the Claimant subjectively heard this as a pejorative statement about his absence, the Respondent did not make it as such. Thus the remark could not have reasonably had any of the proscribed effects because ‘ran’ was not said. All that Mr Rafiq was doing was referring to the absence as a matter fact in order to establish where the task was up to, not as a matter of criticism.

137. We do not consider that the question about the use of the upstairs toilet (13.6) can reasonably have violated dignity or contributed to a proscribed environment because it was reasonable for Mr Rafiq to have made that enquiry. In any event, we doubt it would have subjectively done so. There had been ongoing discussions about adjustments and it was appropriate for Mr Rafiq to check whether there was a problem. We have considered it in the context of the other comments we have found and do not regard that it could reasonably be heard as hostile or humiliating or any of the other descriptors of the proscribed environment.

138. What remains then are issues 13.5 and 13.7: the two comments in which Mr Rafiq described the Claimant's requests for adjustments as demands and as moaning.

139. We do not consider that those two comments were made with the purpose of creating the proscribed environment or violating the Claimant's dignity. While it was inappropriate for Mr Rafiq to have referred to requests for adjustments as 'demands' or as 'complaints', we have had regard to the context.

    139.1. In relation to the first comment: it was reasonable for Mr Rafiq to have been frustrated by the lack of information OH had about the adjustments that had already been made.

    139.2. In relation to the second comment the context is similar: by the 10 May 2019 the finance desk had been offered and we have found there to have been no outstanding adjustments to be made. Mr Rafiq may have reasonably regarded that the requests had been satisfied.

140. What about the effect of the comments on the Claimant? We can understand why he was upset by the comments. But, in the context we have described, and given that the two comments were made two months apart, we question whether subjectively they were sufficient to violate his dignity and/or create the proscribed environment. Plainly the comments indicated some criticism of him but only in a minor way.

141. In any event, we are clear that the comments related to disability were insufficient reasonably to have had the effect of violating the Claimant's dignity: they were two comments, made two months apart, which were inappropriate but insufficiently serious. Violation is a strong word. Violation of dignity means more than upset. We do not consider that a person of reasonable fortitude would have found their dignity violated those two comments.

142. Equally, in our judgment, the comments could not reasonably have had the effect of creating the proscribed environment. There were only two remarks, two months apart. The context was not one of intimidation, hostility, but of the manager being troubled by the OH report and its lack of understanding as to what had happened already; and seeking to ask the Claimant to look to the future now that adjustments had been made. The comments were critical but not sufficiently serious reasonably to be described as humiliating or degrading or offensive. We discussed this

matter with some care and have had regard here to the guidance in Dhaliwal: it is not for every unfortunate phrase that legal liability should be imposed. We regard Mr Rafiq's remarks as in that category: ill-judged, transitory and insufficiently serious to create the proscribed environment.

143. We therefore find that the Respondent did not harass the Claimant.

Section 15

144. We are clear in our judgment that the Respondent did not threaten the Claimant with ill health retirement. Our findings are that the Respondent enquired of OH whether the criteria for ill health retirement had been met. It was sensible for the Respondent to receive advice about all of the options.

145. Nor in our judgment, is asking the question about ill health retirement either unfavourable treatment or a detriment to the Claimant. As it turned out the conditions were not met. Even if they had been, the Claimant would have had the option to apply. Logically he was not therefore disadvantaged by the question. Thus the claim under section 15 and section 39 fails.

146. If we are wrong we would have decided that such a question could have been objectively justified for the reasons given by the Respondent. It had a legitimate interest in obtaining information about all the options open to it and the Claimant in respect of his employment because it was managing how his health impacted on his work and he had already experienced some prolonged absence. The asking of a question to obtain such advice was appropriate and reasonably necessary to achieve that management aim: it did not tie the Respondent or the Claimant into the ill health retirement route.

Time Limit

147. The ET1 was presented on 20 August 2019. The ACAS EC period was 10 June 2019 until 24 July 2019. We agree with the Respondent that any act prior to 11 March 2019 is out of the primary time limit of 'within' 3 months, as extended by the Early Conciliation period, because this is the date 3 months less a day before the start of early conciliation.

148. Thus neither of the claims that we have found would otherwise succeed, were brought within the primary time limit. This is because we have found the time by which the chair ought reasonably to have been provided was 22 May 2018 and the time by which the finance office desk was 1 March 2019.

149. The Claimant has told us, and we accept, that he tried to solve his problems internally, not by a formal grievance, but by making requests of his manager and HR and of more senior management. Late in 2018 he started to speak to the Freedom to Speak up adviser about his concerns.

150. It is also clear that after his return to work in February 2019, even though we have found there to have been no failure of duty on hours and working from home, the Claimant pursued internally complaints about

those matters. This was not unreasonable and ultimately secured his preferred option of redeployment to the information analyst role that could be undertaken at home. This took until 9 July 2019 to resolve. Thus the Claimant was pursuing matters internally at all times. Like many employees he had not thought of litigation as his first option. These reasons do not entirely explain why the Claimant did not act more quickly given his lack of action on the chair from 22 March 2018 to October 2018. We bear in mind however that during the relevant time the Claimant was experiencing worsening back pain and was absent from 30 July 2018 until 6 September 2018 and again from 5 November 2018 until 25 February 2019. He was having to cope with a deteriorating health condition and the low back pain. In addition in late 2018 he had to cope with the new symptoms of urinary incontinence and seek advice from his GP and specialist about this. Because of his sickness absence, the Claimant did not actually receive the benefit of the chair until 25 February 2019.

151. We are clear that a fair trial has been possible of the two successful claims. We have found that the Claimant did send off a DSE assessment request. Thereafter alerting his manager was an automatic process. While Mr Rafiq does not remember the email, he acknowledges, because it was an automatic process that he must have missed it. This is not a case where evidence has been lost. The evidence on the position of the desk at the CEME centre has not been affected by the passage of time.

152. Then we consider the balance of hardship: the merits of the claims are in the Claimant's favour and we consider this weighs the balance of hardship in his favour.

153. The claim is about the delay in providing the aid and making the adjustment. A delay is less serious than a total failure and this will result in a lower injury to feelings award than would otherwise have been the case. But the delays were not without the very real consequences of having to continue to work in an unsuitable chair for some months and, for 2 months, not working as near to the toilet as was reasonable.

154. Finally we acknowledge that achieving speedy resolution in employment disputes is the reason for the relatively short primary time limit and we kept this in mind.

155. We took some time to balance these competing factors. We unanimously reached the view that the merits of the claims and feasibility of the fair trial outweighed the inadequacy of the reasons for all of the period of the delay. This was clear in the finance desk claim, given that the delay was a matter of days and at the time the claimant was pursuing his complaints. In the provision of the chair claim it was a more difficult balancing exercise, but we concluded that the merits of the claim outweighed the lack of reasons for the initial delay in bringing the claim bearing in mind the pain that the Claimant was experiencing at the same time.

156. In our judgment, therefore, it is just and equitable to extend time in the claims of failure to provide an auxiliary aid (a specialist chair) and the

failure to make a reasonable adjustment in relation to the provision of a desk nearer to the toilet. All other claims are not upheld.

Remarks of the Industrial Jury

157. We have all been concerned in this case that Mr Rafiq did not appear to have a good understanding of the Respondent's potential obligations towards disabled employees. He was reactive rather than proactive and at times showed little empathy. He would benefit from guidance and training in the identification of disability and management of disabled employees.

Remedy Hearing

158. A simple case management order has been prepared for the remedy hearing listed on 11 June. The parties are encouraged to explore whether they can reach agreement over remedy. There is no loss of earnings here. The injury to feelings award will be limited by the relatively short periods of time covered by the two issues of discrimination we have found. We will have to discount for those hurt feelings the Claimant experienced in relation to the issues we have not upheld. Nor have we found any intentional discrimination or high-handed treatment by the Respondent.

Employment Judge Moor
Date: 16 March 2021