EMPLOYMENT TRIBUNALS

Claimant: Cara Sargent

Respondent: Robinson Way Limited

Heard at: Manchester **On: 8-12 August 2022 and on 19 October 2022 (in chambers).**

Before: Employment Judge Leach, Mrs M Dowling, Ms H Fletcher.

Representation
Claimant: In person
Respondent: Mr. S. Proffitt (counsel)

RESERVED JUDGMENT

1. The claimant's claims under the Equality Act do not succeed.

2. Although the claimant was unfairly (constructively) dismissed, she is not entitled to any award

REASONS

A. Introduction

1. The claimant was employed by the respondent between November 2017 and her resignation on 24 July 2020. She claims that she resigned from her employment in circumstances that amounted to a constructive dismissal. She also raises various complaints under the Equality Act 2010, including complaints of harassment, victimisation and a failure to make reasonable adjustments.

B. The hearing

2. The claimant represented herself at the hearing. The respondent was represented by Mr Proffitt of counsel.

3. There were about 100 pages of witness statement evidence and a bundle of documents (Bundle) containing 750 or so pages. The parties suggested we spend the whole of day one reading into the case, which we did.

4. The claimant gave evidence on day 2. The respondent's witnesses gave evidence on days 3 and 4. We heard submissions on day 5. We met in chambers on 19 October 2022 in order to reach our decision.

5. We heard evidence from the following:-

a. The claimant
b. Chloe Wimpress (CW) HR manager, employed by the respondent.
c. Agi Szeplaki (AS), HR Adviser.
d. Joanne Hall, Team manager who chaired a disciplinary hearing concerning the claimant, in June 2020.
e. Ijeoma Igbokwe ("II"), in house legal counsel, who heard the claimant's appeal against the disciplinary sanction imposed by JH.
f. Michael Wilcock (MW) who carried out a disciplinary investigation in July 2020 into the claimant's conduct.

6. In the course of the evidence the Tribunal identified some documents that it wanted to see. One of these documents (the claimant's contract of employment) should have been in the bundle. The respondent had not been able to find the claimant's own contract and only able to produce a template. However the claimant was able to locate her contract and we added this to the bundle.

7. We also asked to see some documents relating to an employee representative forum that the respondent's first witness told us about. This evidence was in response to evidence from the claimant that there were no collective consultation arrangements (whether with a Trade Union or an employee forum or similar) in place.

8. Reference below to page numbers are to the bundle of documents (and additions)

C. The issues

9. A list of issues had been identified at case management. Both parties confirmed their agreement with this at the start of the hearing. We set out the list below (in italics) with one or 2 comments (not in italics).

DISABILITY DISCRIMINATION – JURISDICTION

Section 123 Equality Act 2010

1. Are the Claimant's claims of discrimination in time?

2. If the Claimant's claims of discrimination are out of time, is it just and equitable to extend time?

Comment - These jurisdiction points include consideration as to whether there was conduct extending over a period – for the purposes of section 123(3) EQA.

DUTY TO MAKE REASONABLE ADJUSTMENTS

Section 20 Equality Act 2010

*3. Were the following a provision, criterion or practice ("**PCP**") of the Respondent within the meaning of section 20(3) Equality Act 2010?*

3.1 The requirement to wear a headset to take calls;

3.2 The requirement to work in a hot desk environment;

3.3 The requirement to work in an open plan call centre style work space with no private quiet space to retreat to and excessive noise levels; and

3.4 The Respondent's policy that car parking spaces are allocated based on seniority.

Comment – The respondent accepts that 3.1 is a PCP that applied throughout the claimant's employment. The other PCPs relied are accepted by the respondent as having applied at all relevant times up to 18 March 2020 (the start of the coronavirus lockdown period).

4. Did the Respondent apply the PCP(s) to the Claimant?

5. Did the above PCP(s) place the Claimant at a substantial disadvantage as compared with others who are not disabled, the disadvantage(s) being:

5.1 She was caused avoidable distress;

5.2 Her career at the Respondent was negatively impacted;

6. Did the Respondent know (or ought it reasonably to have known) that the PCP(s) in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled?

7. Would the following adjustments have removed the substantial disadvantage which the Claimant suffered as a result of her physical impairment:

7.1 Being provided with a permanent back to the wall or corner desk (sooner);

7.2 Being provided with a noise cancelling headset (sooner);

7.3 Being provided with a designated car parking space so she could retreat to her car (sooner);

7.4 Provide written notes of Town Hall, Buzz meetings and any other important communications / instructions in writing;

7.5 Removal of balloons from the contact centre (sooner);

7.6 Requiring colleagues to minimise loud bang noises, especially behind her; and

7.7 Allow meetings to be audio recorded.

Comment - In relation to the disadvantages, the respondent noted that it does not accept that 7.4 and 7.7 are relevant to the PCPs relied on. As for the others, the disadvantage is a matter of timing.

8. Were the above adjustments reasonable for the Respondent to make in the circumstances?

HARASSMENT

Section 26 Equality Act 2010

9. Did the Respondent engage in the following conduct?;

9.1 25 July 2018: Stuart Hawkins telling the Claimant not to telephone ahead of attending the office to request a parking space anymore;

9.2 27 September 2018: Lee McIntyre "purposefully" popping balloons behind the Claimant in the knowledge it caused her distress;

9.3 24 – 25 October 2018: Passing the Claimant from manager to manager in relation to outstanding requests for reasonable adjustments;

9.4 5 December 2018: Waqas Farooq asking the Claimant to be careful what she said to new starters, after the Claimant had allegedly spoken disparagingly to them about the Respondent;

9.5 3 January 2019: Jenny Hulme telling the Claimant "move seats" / desk;

9.6 15 January 2019: Refusing the Claimant's request to audio record meetings;

9.7 22 October 2019: Agi Szeplaki's refusal to remove balloons from the contact centre and her statement that the drawers behind the Claimant did not bang;

9.8 7 November 2019: Tunde Akinola refusing to remove balloons at the Claimant's request;

9.9 The Respondent instructing colleagues to log on 10 - 15 minutes prior to the start of their shift when working from home during the Coronavirus pandemic; and

9.10 The Respondent disciplining the Claimant for her "conduct" concerning the nature of her communications with management regarding the instruction to log on to the system 10 – 15 minutes prior to her official start time.

10. Was any of the above conduct unwanted conduct related to the Claimant's disability?

11. Did the conduct have the purpose and/or effect of violating the Claimant's dignity, and or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

12. Was it reasonable for the Claimant to assert that the alleged conduct in question had that effect, taking into account all the circumstances?

VICTIMISATION

Section 27 Equality Act 2010

13. Does the following amount to a protected act within the meaning of section 27 Equality Act 2010?

13.1 Lodging a grievance on or around 6 December 2018;

13.2 The Claimant sending an email to Chloe Wimpress on 15 November 2019; and

13.3 The Claimant sending an email to Paul Cooper on or around 12 May 2020 requesting compensation for logging on 5 minutes before her start time.

Comment – the respondent accepts that 13.1 and 13.2 amount to protected acts for the purposes of s27 EQA.

14. If the Tribunal concludes that the above complaint(s) do amount to protected acts, are any of the following alleged detriments?

14.1 The Respondent's decision to instigate disciplinary proceedings against the Claimant following her email of 6 May 2020;

14.2 Being required to attend a disciplinary hearing on 3 June 2020;

14.3 The imposition of a first written warning on 3 June 2020;

14.4 5 June 2020: Paul Cooper telling the Claimant that she would be marked late if she logged onto work at 10:55am prior to the commencement of her shift at 11:00am;

14.5 12 July 2020: The Respondent questioning how the Claimant had made notes of her disciplinary hearing during her appeal hearing;

14.6 20 July 2020: The Respondent's decision to not uphold the Claimant's appeal;

14.7 20 July 2020: The Respondent calling an investigatory meeting regarding the alleged covert recording of the disciplinary meeting;

14.8 24 July 2020: Michael Wilcock's decision that there was a disciplinary case to answer regarding the claimant's covert recording of the disciplinary hearing; and

14.9 24 July 2020: Michael Wilcock communicating his decision that he had recommended disciplinary action to the Claimant by telephone.

CONSTRUCTIVE UNFAIR DISMISSAL

Section 95(1) and 136(1) Employment Rights Act 1996

15. Did the following amount to the Respondent committing a repudiatory breach of the Claimant's contract of employment entitling the Claimant to resign?

15.1 The Respondent's conduct as part of the Claimant's complaints of discrimination, individually or cumulatively, including the appointment of Michael Wilcock as the investigatory officer:

15.2 The Respondent marking the Claimant late for her shifts when she did not log on 10 - 15 minutes early as instructed by the Respondent;

15.3 The decision to discipline her for the nature of the Claimant's communications towards her managers regarding the Respondent's instruction that all employees log on 10 - 15 minutes before their shift start time;

15.4 The imposition of a first written warning concerning the nature of the Claimant's communications towards her managers regarding the instruction for employees to log on 10 - 15 minutes before their shift start time;

15.5 The conduct and outcome of the Claimant's appeal meeting, which the Claimant alleges was biased against her, specifically because her representative was asked questions that the Claimant alleges should have been put to her; and

15.6 The Respondent's conduct on 24 July 2020 in relation to the Respondent's decision that there was a disciplinary case to answer concerning the allegation that the Claimant had covertly recorded disciplinary hearing(s).

16. In particular, did the Respondent act in a manner calculated or likely to breach or seriously damage the implied term of trust and confidence?

REMEDY

17. If any of the Claimant's claims succeed, what is the level of compensation to be awarded?

Comment- in the event that the Tribunal find a constructive dismissal, the respondent does not advance an argument that there was a fair reason for dismissal but will rely on the claimant's conduct as causing and/or contributing to the dismissal (and a reduction to the level of compensation to be given) and/or a "Polkey" reduction.

18. If the Respondent failed to comply with the ACAS Code, was its failure reasonable? If the Respondent's failure to comply with the ACAS Code was unreasonable, is it just and equitable to increase any award made to the Claimant?

19. Has the Claimant taken all reasonable steps to mitigate her losses?

20. If the Claimant succeeds in her claims of discrimination against the Respondent, what compensation is it just and equitable to award to the Claimant?

21. Should an award be made with respect to injury to feelings? If so, what is the appropriate "band" pursuant to Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102.

D. Findings of Fact.

10. The claimant's employment with the respondent began on 6 November 2017. She was initially employed in the role of Customer Contact representative, later becoming a legal customer contact representative. The roles involved the claimant working in a contact centre (sometimes called a "Call Centre").

11. The respondent is a business regulated by the Financial Conduct Authority. It specialises in collecting debts on behalf of various financial institutions. That involves engaging with the customers of those financial institutions who are in debt including by telephone call and text/SMS.

12. The customer contact representative roles require significant amount of time on telephone calls, speaking with (and, particularly in the legal customer contact role, negotiating terms with) customers of the respondent's clients who have fallen behind with payments.

13. The respondent is part of a group of companies. Hoist Finance AB (A Swedish company) is the respondent's parent company. At the time that the claimant was employed, some UK employees were employed by the respondent and others by a company called Hoist UK Limited.

<u>The claimant's disability</u>

14. The respondent accepts that, at all relevant times, the claimant had a disability for the purposes of section 6 EQA. The claimant has a hearing impairment. She is deaf in her left ear and has impaired hearing in her right ear. We quote below a description of the claimant's condition as set out in an Occupational Health report dated August 2018, which is not challenged by either party (page 363):

Cara is profoundly deaf in her left ear and also has associated hearing problems, but to a lesser degree in her (good) right ear. This has been the

case since childhood and she is under regular review by a hospital specialist with whom she has been meeting since the age of nine. Over the years, she has had several surgeries with the most recent one being around 2 years ago. In between her specialist appointments she successfully self manages her associated symptoms of tinnitus / glue ear / and potential infections. She has a regime which she must carry out at frequent regular intervals during the day (3 times at work) to clean and protect her ears. She tells me that this will take up to 15 minutes each time depending on what she needs to do. It appears that Cara is highly expert and extremely well versed in managing her condition. Despite her health issues she has always worked (in various settings) and tells me that prior to her current job role has never encountered any issues. Cara has expressed that the practical issues she has impacting on her ability to clean her ears and to manage her environment at work currently is causing her acute stress.

15. The claimant's disability has not prevented her from succeeding in education and employment. She achieved an English degree and then moved into a range of employed roles including over 2.5 years' experience of employment with Scottish Power in a call centre environment.

16. The disability impacts on her day to day. She compensates for her hearing loss by coping mechanisms. She is assisted in telephone discussions by headphones and volume control working with hearing aids.

17. The area in which she takes telephone calls needs to be quiet. Sounds around her are disruptive to her hearing, particularly louder or unexpected sounds which overwhelm her and adversely impact her ability to carry out tasks and concentrate on those tasks. She is unable to locate the source or direction of those sounds. The workplace as described to us has sounds from all directions and sources. She hears sounds but is not aware of where those sounds are from. The claimant needs to have these considerably reduced in order to enable her to concentrate on her role and to avoid overwhelming and exhausting her.

<u>Commencement of the claimant's employment with the respondent.</u>

18. The Claimant started work for the respondent on 6 November 2017. Shortly before then she was required to complete some starter documentation including a medical questionnaire. A copy of the completed questionnaire is at pages 102B to D

19. In this questionnaire the claimant provided information about her impairment and also noted 2 adjustments she required:-

a. Double eared headset
b. Quiet location/no traffic.

20. Only 5 or so weeks into her employment, the claimant raised a concern about hours of work. Whilst this is not relevant to disability it is the first time that the claimant raises an issue of start times – which become more significant in 2020.

21. The claimant was concerned that she was being asked to start work before her start time and was anxious about this as she witnessed employees bring reprimanded about their start times, even where they began working at the published start time of their shift.

22. The claimant was told that the respondent required employees to be at their work desk, logged on to all systems and ready to receive calls at least one minute before the commencement of their shift. Therefore, time was taken up in logging on to the respondent's systems before work started. Employees were told to start work 5 minutes before her shift time. If an employee did not do this then s/he would not be logged on, ready to go, at the start of the shift and would be marked as late. Although there was sometimes reference to this "pre shift" time being advisory, it was accepted by the respondent (CW's evidence) that it was not advisory; it was a requirement.

<u>The respondent's workplace – the Contact Centre</u>

23. The claimant was based at the respondent's Contact Centre offices at Salford Quays. About 300 employees are based here.

24. The claimant was one of 120 or so employees based on the second floor of the Contact Centre. The second floor was a large open plan office space. Various customer contact teams were arranged in "pods" of 8 or 9 employees. There were between 10 and 12 of these pods. Each pod was effectively a circle of desks where the team and their manager sat. There was a "hot desking" arrangement within each pod. Only the manager had a dedicated desk within each pod.

25. The legal team and administration teams were also based on the second floor, within the open plan setting but on rectangular desks nearer to the side.

26. Ijeoma Igbokwe ("II") provided a helpful description of the office environment. It was a noisy environment. The 10-12 teams were all customer adviser teams, speaking on the phone; employees within teams sat close to each other; "buzz" meetings (team meetings) took place within the open plan space itself, rather than in quiet rooms, there were sometimes prize giving events and birthday or other life event celebrations. II explained (and we accept) that the birthday celebrations did not become too jovial – that would have been inappropriate. However' some additional noise was created by these celebrations.

27. The Contact Centre car park had 100 spaces available. As there were 300 or so employees based at the Contact Centre, not everyone who wanted a space could have one. The respondent had a car park policy which provided as follows:-

3.2.1 Employees who wish to request a car parking space should complete the 'Car Parking Request for a Space' form. Once completed the form should be returned to the Facilities Department.

3.2.2. If no car parking space is available, the employees name will be added to the reserve list and a car parking space will be allocated when one becomes available.

3.2.3. Car Parking spaces will be allocated on the following criteria;

- *Seniority – Reasonable adjustments required*
- *Car Sharing*
- *Length of Service*

Request for adjustments.

28. As noted above, the claimant made known, just before her employment started, that she had a hearing impairment and asked for a quiet desk location and an adapted headset. The claimant then discussed these with her first manager Stuart Hawkins during the first 7 or so months of her employment. As of 12 July 2018 the respondent had not sourced a suitable headset for the claimant. We know this because there is a reference on a return-to-work note dated 12 July 2018 to the new headset arriving shortly (page 120).

29. We also find that no quiet location had been identified for the claimant as she requested. The reference to quiet location really covered 2 adjustments that the claimant was seeking:-

a. A seat/place where she could work with reduced/minimal noise
b. A place she could go for her breaks in order to carry out a hygiene regime with her ears and for a period of quiet, which she has explained that she needed because of the impact of her hearing impairment in the workplace. The claimant had started to use her car as a quiet place away from work. In evidence from its witnesses, the respondent accepted that no quiet place was available for the claimant to take her breaks within the Contact Centre itself.

30. In June 2018 (by which time the claimant had been raising a need for adjustments for some time) she was told to obtain medical evidence to support her requests and therefore she arranged for an appointment with her audiologist – which took place on 20 July 2018. A report letter (also dated 20 July 2018) is at page 122.

31. This recommended 2 adjustments.

a. A quiet place for resting/breaks..

b. Written notes of meetings.

32. The Audiologist report assumed that the adjustment of a headset was being made.

33. Making the adjustments was not straightforward. We make further findings about the various adjustments required. Our findings are based on the evidence before us. Some of the complaints require us to make findings about events which happened some years ago and where employees of the respondent who were involved in relevant events, have left the respondent's employment.

Headset

34. When the claimant started, she asked for a double eared headset. This was the type of headset the claimant had used in other locations to keep out the noise.

35. Unfortunately the claimant found that the double eared headset did not provide her with sufficient protection against external noise and she spoke about this with her manager. The respondent's workplace was noisier than other workplaces where the claimant had worked. It was identified that she needed a headset which had a noise cancelling function as well as a volume control function.

36. A process of trial and error followed, such that the claimant did not have a suitable headset until May 2019. The following occurred in that 18 or so months:

a. A headset ordered from a company called Posturite in the first half of 2018 (we are not clear more precisely when) was not compatible with the respondent's systems.
b. By August 2018, the respondent referred the claimant to occupational health and hoped that they might receive some guidance about headsets. OH stated they were unable to provide the claimant with advice about a suitable headset.
c. On 24 September 2018, Lee McIntyre (one of the respondent's team managers) told the claimant that he would look further into headsets. That task was then taken up by Agi Szeplaki ("AS"), an HR adviser who had at that stage just started her employment with the respondent. We accept her evidence that finding a suitable headset was far from straightforward.
d. By November 2018, AS had identified (and the respondent had purchased) a headset called a "Plantronics binaural" headset. The claimant used this for a time and found that the noise cancelling function was not effective enough.
e. The input of the claimant's audiologist on this issue was obtained in December 2018 (pages 330 to 339). In her response, the audiologist noted:-

"Unfortunately we cannot recommend specific headsets, as every telephony system is different. I have attached a link to Connevans. They are a company who specialise in equipment for people with

hearing loss and have a number of different headphone types including noise cancelling version.

f. The list attached by the audiologist included the Plantronics binaural headset.
g. The respondent's IT department then became more involved. In January 2019 another headset was sourced which the claimant tested alongside the Plantronics headset she was then still using. The respondent also obtained larger, noise cancelling earcups for the Plantronics headset.
h. Whilst the larger earcups assisted (and was the best option to date) the claimant stated that the noise cancelling function was not sufficient.
i. During a period of absence (when the claimant was undergoing further surgery) the respondent's IT department decided that they should try a "gaming" headset. This type of headset had not been recommended previously but a member of the IT team recognised the 2 essential requirements for the claimant – noise cancelling and volume control – and that a gaming headset should meet these requirements.
j. The claimant trialled the gaming headset in May 2019, following her return and found that it worked well.

Quiet place/car park

37. The claimant's initial request for adjustments included "*quiet place, no traffic."* This was a request for a quiet place to work.

38. Once the claimant started work at the respondent, she realised that the contact centre was not quiet. As described above, the floor of the contact centre was noisy and the headphones were not blocking out noise sufficiently.

39. It was also apparent that there was no quiet place within the office that the claimant could retreat to for her breaks. She needed this in order to restore calm after her impaired hearing had picked up noises from around her.

40. The claimant also needed to follow a hygiene routine of cleaning out her ears and she wanted a private space to do this. She started to use her car for this and requested a workplace car park space in order to ensure that her car was close to her; so that her break time was not taken up in walking to her car. The adjustment was not required due to the claimant having mobility issues; it was required because the workplace was designed in a way that meant that the claimant did not have a quiet, private space she could use during her break times.

41. She asked her manager, SH if she could have a car park space to assist in managing her hearing impairment. She had noticed that, whilst she had been told she was unable to park in the workplace car park, she regularly saw empty bays in the car park. We accept the claimant's evidence that she started to ask SH about this in early 2018. As we note above, it was not until June 2018 that SH asked the claimant for some medical evidence to support her request for a car park space – that she needed it to assist in managing her hearing impairment. We have not had the benefit of SH's

evidence on this point but from the evidence we have, we find that the claimant raised the issue of car parking (to assist with her disability) earlier in 2018. We find (based on the evidence we heard) that SH's response was initially tardy. He should have realised earlier that the request was being made in connection with the claimant's disability and acted more quickly.

42. In her report dated 20 July 2018, the audiologist made the following recommendation:

> *Due to the hearing difficulties you have expressed I would recommend that some reasonable adjustments may benefit you in your workplace, in line with the Equality Act 2010.*
>
> *In order to reduce the anxiety and tiredness that the hearing loss creates, I would advise that time to rest in a quieter location would be beneficial. You have advised that having a designated space on the car park would allow you to go somewhere quiet to go and have time for you to reduce the strain on your hearing system and your resulting increased stress levels. Therefore, I would recommend that this be put into place for you in your workplace.*

43. There was an arrangement within the workplace that available car park spaces would be displayed on a whiteboard and they could be used by employees who did not have a permanent space. The claimant struggled to reserve an available space (as shown on the whiteboard) before other employees but was told that she could call in to reception on her way in to work to see if any spaces were available.

44. This arrangement soon proved to be unworkable. Reception staff were unable to identify what spaces might be available and on 25 July 2018, the claimant was told that she should not continue to phone reception staff asking for availability.

45. The claimant was absent from work from around 26 July 2018 until 13 August 2019. In that time the respondent obtained an occupational health report. This report also recommended that the claimant be provided with a designated car park space to assist with the management of her condition.

46. Immediately following the claimant's return to work, the respondent provided car park spaces for the claimant. For the following 12 months or so these were provided on a weekly basis. She would be told each week what space was available; the particular space that the claimant used changed regularly.

47. By March 2019 the claimant was provided with a permanent designated car park space.

48. There were occasions, when the claimant would find that someone else had parked in her space and she would have to park in another space and inform reception.

Whilst the clamant did encounter difficulties on some occasions we find that the system generally worked satisfactorily and the adjustment was made.

Other requirements to reduce noise disruption

49. A “Hot desking” arrangement was in place in the contact centre. 8 or 9 seats were in a pod and a member of that team would attend work and sit in one of the available seats in their pod.

50. The claimant needed a quieter place to work than a hot desk seat on a pod in the middle of the contact centre would provide. The office was generally noisy and busy. The headphones were not doing enough to keep out the noise, even the “gaming” headphones which were eventually identified as the best option.

51. The claimant moved teams and shift arrangements during her employment with the respondent.

52. In August 2018 the claimant made a flexible working application so that she would work fixed shifts which included quieter times of the day. This followed a suggestion made by SH in a return-to-work meeting on 16 August 2018 (page 177)

53. This meeting resulted in the respondent implementing various adjustments and taking forward consideration of other adjustments. By this stage, SH recognised the duties on the respondent to assist the claimant in the workplace though adjustments.

54. One of those adjustments related to attendance at team meetings called Buzz Meetings. It had already been decided that the claimant did not need to attend these as they were held in the busy, noisy environment of the open plan office. Instead, the claimant would be provided with a written note of the meetings and additional time to read through the notes.

55. The claimant’s flexible working application was accepted and the respondent agreed that the claimant could move from a rotating shift pattern to a fixed shift of noon-8pm. This agreement meant that a good proportion of the claimant’s working day was spent in a quieter office. However, the majority of her time continued to be spent in a busy, noisy office and therefore more steps were required. Whilst the headset issue was still being considered, it was not by that stage resolved (see above).

56. Another outcome of the return-to-work meeting was an agreement to send the claimant for an Occupational health assessment. We note the following recommendations from the occupational health report of 29 August 2018

> *Currently Cara Sargent reports ongoing symptoms affecting her ears but which she can manage with the following required workplace adjustments :*
>
> *1. A permanent designated car parking space - in as private a setting as possible.*

2. A permanent extended lunch break of 45 minutes in order that she can perform her essential routine to care for her ears.

3. Avoidance of the 'Town Hall meetings' and instead to be furnished with written updates instead.

4. Consideration of reducing excessive noise around her : whistling / bells etc

5. Consideration of appropriate location of any additional meetings and avoiding those when people are moving around and behind her whilst the meeting is ongoing

Whilst the above proposed adjustments are for guidance only and the final decision regarding their feasibility is made by the employer, it would be my strong recommendation that they are considered in order to comply with Cara's protected status within the remit of The Equality Act (2010)

57. We find that by the date of this OH report, the respondent had taken steps (or was well underway with them) to deal with recommendations 1 to 3.

58. As for recommendation 4 and 5, they had agreed that the claimant did not need to attend further “Buzz” meetings (see above) and so addressed the issue of noise as far as those meetings were concerned; but they did not also then address the issue as far as her work-space generally was concerned. There might have been an assumption that when sitting at her desk she would be wearing her headphones and they would sufficiently block out all surrounding noises.

59. However they didn’t and, from the evidence we received, we find that the respondent must have realised that more work needed to be done to reduce noise in that part of the workplace in which the claimant was based. If this was not realised as of August 2018 then it must have been clear by January 2019 when an OH report on that date recommended adjustments of further consideration of reducing noise around the claimant where applicable and further consideration of the desk locations and especially considering a corner desk.

60. A corner desk was considered to be helpful to the claimant as it would enable her to continue to work within a pod (one located near the corner of the contact centre space rather than the middle) but with fewer distractions.

61. In fact, a corner desk was not provided to the claimant until October 2019. By that stage she was being managed by Paul Cooper (PC). PC had a corner desk. He offered to give this up for the claimant (page 371B). It was an easy solution that, from the evidence we have, could have been implemented earlier. Corner desks were available and if no one was willing to volunteer their corner desk then the respondent could have required an individual or team to give up a corner desk for the benefit of the claimant. We have no evidence that this was considered.

62. One of the sources of noise which distressed the claimant was the popping of balloons. Prior to November 2019, balloons featured quite frequently at the Contact Centre. They were used to promote competitions (to decorate tables of prizes) and to mark special occasions/life events, particularly birthdays. They were used to enhance a positive atmosphere. Of course it was not the presence of balloons that were disruptive to the claimant; it was the noise made if popped.

63. The claimant first raised a concern about popping balloons in an email of 30 November 2018 (page 209) when she refers to an incident on 27 September 2018 as follows .

> *Thursday 27th September -*
> *Today Lee was popping balloons after I explicitly told him earlier in the day not to do this near me. This was around 8pm as we were due to leave whilst I was on my last call.*

64. Reference to Lee is to Lee McIntyre who was at the time the claimant's manager. He left the respondent's employment in late 2018. She spoke about this incident (alongside various other issues) with Anthony Nunn (senior contact team manager). We have not heard from AN. The claimant's evidence (which was not challenged) was that she spoke with AN the next day and that he told her he would send an email out to others to ensure better support for the claimant.

65. The claimant spoke again with AN, a month or so later because she felt that nothing had changed. We have seen an email from AN to the various contact centre managers in the following terms (email dated 26 October 2018 at page 198). The subject header is *"Cara Sargent"*

> *Hi all,*
>
> *Please see below and ensure your teams are aware.*
>
> *I know Lee has spoken to people about this, but just a reminder*
>
> *• Does not attend Town hall/large meeting with crowd – will have one on one catch up with TM*
>
> *• Additional time for buzz session (already in place)*
>
> *• TM to review any training and send to Cara, If anything may cause an issue Cara to step out of training at this point (if required)*
>
> *• To remain on the edge of the contact centre, not to be seated in the middle*
>
> ***• Staff to be made aware, if sitting with or around Cara not to: Whistle, make loud sudden noises or tapping (anything that is outside the general noise from the office)***

> *Lee (and recently myself) has made Cara aware we cannot control noises within a call centre but that we can ask people to be considerate of her circumstances.*
>
> *If you have staff who sit nearby Cara please make them aware of the bottom bullet point.*
>
> *Obviously it's quite a sensitive issue, so I trust you and your teams will treat it this way*
>
> *Thanks*

66. The claimant did not raise the issue of balloons again until 3 September 2019 (page 358) when she asked if the respondent could put a ban on balloons in the workplace.

67. Initially this was refused and the claimant was told this by both AG and TA. AG told the claimant that it would not be a reasonable adjustment to ban balloons. She explained why in an email to PC (17 October 219 @ 371A)

> *"Following Cara's email on the 3 September 2019 we had a catch up when I advised that the request to ban balloons is not reasonable because:*
>
> *The balloons are used as motivational tools for the call centre team*
>
> *the one balloon popping on that day was an accident that made everyone in the team jump but this doesn't happen on a regular basis*

68. The claimant raised the issue of balloons by email dated 15 November 2019. In this email the claimant indicated her wish to provide the respondent with the opportunity to reconsider its position on balloons before she raised another grievance and pursued a claim of discrimination. (We note here that R accepts this email as a protected act for the purposes of the claimant's victimisation complaints)

69. That email received the attention of a senior manager, Sean Gallagher, who then took the decision to stop the use/presence of balloons from the contact centre altogether. This decision was made on or about 25 November 2019.

70. We also find that the issue of balloons was not trivial. Balloons were frequently in the respondent's workplace. We note the following extract from the witness statement of Michael Wilcock "Balloons were often present in the office to recognise special occasions such as birthdays or during promotions." Of course the offending feature of balloons, as far as the claimant was concerned, was not their presence in the workplace but the noise made if/when they popped.

Grievance

71. The claimant raised a grievance on 30 November 2018. The claimant's grievances can broadly be divided in to 2. (1) a grievance about being overlooked for

the role of legal customer care representative and (2) various ongoing issues the claimant had about noise and other issues in the workplace (the relevant points on which we have made findings on – above.)

72. Although most of the grievance is about recruitment in to the legal customer care role, the claimant did mention (in the second instalment of her grievance, dated 30 November 2019 – page 209) the issue of noise in the workplace including the issue of balloons. This followed emails in late October and November from the claimant to her (then) manager Waqas Farooq complaining of different noises in the vicinity of her desk.

73. R accepts that this grievance was a protected act for the purposes of s27 EqA. In the first part of her grievance, the claimant stated that she believes that the respondent has discriminated against her in overlooking her for promotion. Also, when raising issues of noise, she made clear that she was looking for reasonable adjustments than had by that stage been made,

74. The grievance was investigated and the claimant was provided with an outcome on 22 March 2019. By the time that the grievance outcome was provided the respondent had the benefit of the 2 OH reports- August 2018 and January 2019 (see earlier).

75. We note the outcome regarding seating arrangements at page 333. Whilst the respondent refers to the recommendation made in the August 2018 report, it does not refer to the recommendation in the January 2019 OH report (although it does refer to the January 2019 OH report but not the specific recommendation that the claimant should be allocated a corner desk).

76. This grievance was an ideal opportunity to better address seating for the claimant but it did not. From the information we have, it appears that the claimant was not given a particular corner seat for hierarchical, seniority reasons. The outcome also appeared to criticise the claimant for not having trialled a seat next to a team manager called Guraim Singh. We note here that the claimant had been absent from work whilst having another operating procedure and certainly by 27 March 2019 was able to provide her new manager (Letitia Kelly) with feedback on this seat.

77. By October 2019 the claimant was being managed by Paul Cooper. It was then that she was allocated a corner seat on a permanent basis (see 61 above). The claimant emailed AS, PC and others on 1 November 2019 to state that she was happy with the allocation of the new corner desk.

<u>The claimant's hours of work.</u>

78. The claimant's contract of employment provided as follows:-

> *" The collections department operates between 8.00am and 8.30pm. Monday to Friday and 9.00 to 4.00pm on Saturday.*

You will be required to work an average of 37.5 hours a week on a rotating shift pattern within these operating hours. Your hours of work will be flexible dependant on the needs of the business."

79. During her employment the claimant raised concerns about what she was being asked to do. She was told at the outset of her employment that she needed to be logged on, ready to start receiving calls, at one minute before her shift time began. The claimant met with her then manager (SH) to discuss this on 14 December 2017.

80. At this meeting, SH told the claimant that the respondent's position was that it was a reasonable request to expect employees to be at their desk 5 minutes earlier than their shift start time, so that they could log on and *"be logged in to the dialler at 07.59 ready to take the first call."*

81. Whilst the claimant did not welcome this, she did continue to work at the respondent on that basis and the issue of working hours was not raised again until after the commencement of lockdown in March 2020,

82. Before we deal with this we make findings about hours.

a. One of the adjustments made by the respondent was agreeing to change her hours from shift working to fixed hours of noon til 8pm. This meant that more of the claimant's working day would be during quieter times at the Contact Centre Provided quieter times.

b. The respondent also agreed to an additional 30 minutes paid break for the claimant so that she could catch up on minutes of meetings she did not attend and could spend time in a quiet space (her car) to carry out her hygiene routine and for some quiet. This (like a. above) was a reasonable adjustment made in accordance with the respondent's duty under s20 Equality Act 2010;

c. During the hearing the claimant gave evidence that requiring her to work an additional 15 minutes before the start of her shift was disadvantageous to her because of disability – but she accepted on questioning that she would have been willing to work if she had been paid. As we explain next, a dispute arose between claimant and respondent about when she was expected to start work during the period that she worked from home as a result of the coronavirus lockdown. That dispute concerned the extent of obligations under the claimants contract of employment. The claimant's disability was irrelevant to the dispute.

d. Flexibility referenced in the contract was about the flexibility of shift start and finish times. However it was not a term by which the respondent expected employees to work such hours as were required to fulfil their duties. This was shift work and employees were paid for the hours they worked. Where for example an employee was on an unfinished call as

their shift came to an end, there was a mechanism to provide that employees were paid for additional time that was necessarily worked after the shift ended.

83. The claimant, and other employees started to work from home when the Coronavirus lockdown measures came in in March 2020. In April 2020 she was asked to change her working hours to fixed 11am-7pm. This would have had no detrimental impact on the claimant as she was at that stage working from home. None of the working hours would be at noisier, busier periods at the Contact Centre.

84. On 9 April 2020, once she had reported some IT issues, the claimant received a response from the respondent's IT Helpdesk*. "I will strongly recommend you login to the system 10 min before your shift starts, so that you will avoid late, especially now, working from home."*

85. The claimant was dissatisfied with this, forwarding the email to her manager (PC) and telling him that she had already logged on 15 minutes before her worktime started. (page 495)

86. More log in issues occurred in May 2020. On 6 May, PC sent an email to the claimant to ask what time she had logged on to the system. The claimant replied stating that she was upset about this.

87. It is not disputed that, when working from home, an employee had to go through additional log in tasks on their computer which required an employee to switch on their computer 15 minutes before their working time. There is some dispute about how much of an employee's attention this would then demand. We find that an employee would have to monitor the computer regularly during this 15 minutes, ensuring that errors/failures did not occur so they had the best chance of being logged on and ready to receive calls at the beginning of their shift. When errors did occur then the employee would need to take steps to correct these within the 15-minute period.

88. We accept the claimant's evidence that this was not a matter of turning a computer on 15 minutes before her work start time and then being able to leave the computer in order to get dressed or have breakfast. We find that the claimant was required to work during those 15 minutes.

89. The respondent's messaging about this time was confusing. For example, in an email to the claimant dated 3 June 2020, CW wrote as follows:-

> *"In relation to start and finish times, the expectation for all employees is that they are ready and set up to start work by their contractual start time. The preparation time beforehand is advisory in order to ensure this expectation is met, which we do not consider an unreasonable or impractical suggestion."*

90. It was not a mere suggestion or advice to start to log on 15 minutes before a shift. It was issued as an instruction, a requirement to start work before contractual working hours. CW accepted this on being questioned about it.

91. The claimant was unhappy about certain home working arrangements; about difficulties in logging on and staying logged on and about the expectation to start work 15 minutes early.

92. On 6 May 2020 the claimant emailed her manager (PC) to tell him that she had been late logging on that morning because she had problems logging on to the system. PC replied by asking her what time she had started to log in that morning. The claimant's response to PC was as follows:

> *"Cheers Paul*
>
> *I always start trying at 10.45/10.50.*
>
> *My actual shift starts at 11am and I'm not prepared to give more of my time to systems not being fully operational from log in/start up as I don't get paid for this time.*
>
> *If you need, my parents who I live with can verify that I regularly spend my own time before my shift starts trying to set up/get on to the dialler at 10.59am.*
>
> *Questions like this really upset me to be honest Paul because I don't understand the reason why it's being asked.*
>
> *Thanks, Cara."*

93. At that stage, the Claimant's mother became involved and called PC. She had obtained PC's number from a WhatsApp group on the claimant's phone. She told PC that she could verify that the claimant had started work when she said she did. We have seen that, as part of a disciplinary investigation (see below) PC appears to have said that he was being challenged in the call and almost threatened. However we have no other evidence of what was said in the call and we have not heard witness evidence either from PC or the claimant's mother.

94. PC sent an email to the claimant shortly after he had spoken with the claimant's mother: *"I have spoken to your mum who suggested there may be a problem with your working conditions and I'm happy to discuss this further with you to see if we can adjust your working from home conditions. When you are ready to chat I am here to speak to you and listen to our concerns and put some actions in place."*

95. The claimant's response included the following: *"I do not need to adjust anything but I will make* you *aware that I am now going to be walking into my office space at home at 10.55am as per the conditions of my mother who owns the property I live in and currently work from."*

96. PC forwarded the claimant's reply to the respondent's HR department (AG) and a decision was taken to conduct a disciplinary investigation.

Disciplinary Investigation and Hearing

97. The outcome of the disciplinary investigation was to proceed to a disciplinary hearing. According to the evidence from the person who chaired the disciplinary hearing (Joanne Hall (JH)) there were 3 charges of misconduct or the claimant to answer. We quote these from JH's witness statement (para 9)

a. *Cara's unprofessional attitude during an email conversations with Michelle Moore on 4 March 2020*
b. *Communicating in an unprofessional manner with Paul Cooper via email on 6 May 2020 in relation to Cara's failure to follow reasonable management instructions for contact centre employees to log in to the dialler 10-15 minutes prior to their start shift time; and*
c. *That Cara had used threatening language during the investigation process specifically advising Antony Nunn that (in connection with an enquiry as to how Cara's mother had obtained access to Paul Cooper's telephone number) that Cara had said "he should be glad that my Dad didn't call him"*

98. We need to record findings about 4 March 2020 (a. above). For a period of time up to 4 March 2020 the claimant had been voluntarily taking part in an SMS messaging element of the services provided by the respondent.

99. On 4 March 2020 the claimant (and other employees) received an email from the person managing the SMS messaging service with a message that effectively told the recipients that too long was being sent dealing with SMS customer enquiries. The claimant replied to MM as follows:-

> *"I'll be honest, I'd rather just get taken off SMS at this point. There's like no trust and I'm not documenting every minute of my SMS life when I'm working hard – it's counterproductive as I'm already sending emails to TM to explain any issues and then have to resend to someone else? As well as constantly watching the SMS timer when I'm responding. It's not conducive to a good working environment /good customer interactions and doesn't inspire me at all. Take me off it if I'm not productive enough."*

100. MM replied to the claimant to inform her that she would be removed from the service. She also replied to the claimant's criticism by explaining the need for participants in the service to give reasons when long times are taken with a customer on the SMS service and to tell the claimant that she needed to think about the tone of her emails when responding.

101. PC was also aware of the claimant's response and spoke with her about this on 20 March 2020, informing her that a manager has the right to ask the claimant for information and that, going forwards, the claimant must be able to respond more positively when challenged.

102. Given that the incident on 4 March 2020 was dealt with by the claimant's manager, we were surprised that it was listed as an allegation of misconduct to be determined at the disciplinary hearing in May 2020.

103. We also need to make findings about the statement made by the claimant during a disciplinary investigation (the third allegation at 102.c above). There was no doubt that the phrase "he should be glad my dad didn't call him" was used by the claimant during the remote disciplinary interview. The claimant explained what she meant by this – that had her dad intervened she would not have allowed the claimant to start at any time before her contractual start time (11am) whereas her mum had said she could start work at 10.55.

104. The disciplinary hearing took place on 3 June 2020 by video conference. The respondent's notes are at pages 593 -598. The claimant was accompanied to the hearing by a work colleague.

105. The claimant secretly recorded the hearing. We make more findings about this below.

Disciplinary outcome.

106. JH decided that each of the 3 incidents noted above (para 96) amounted to misconduct by the claimant and provided her with a first written warning. JH's conclusions against each incident were as follows:-

- *Meeting of concern with your line manager dated 20/03/2020 to address concerns regarding your unprofessional attitude during a conversation with Michelle Moore on 4 March 2020*
- *Communicating in an unprofessional manner with your line manager (see email dated 06/05/2020 10.59-11.20am) where you refused to respond appropriately to a reasonable management instruction.*
- *Investigation Meeting Notes dated 07/05/2020 where you were questioned about why you had provided your line manager's details to your mother without consent. You offered no explanation in relation to this matter and the content of your response was regarded as unprofessional and threatening towards the investigation chair."*

107. The claimant was provided with a right of appeal which she exercised.

Appeal

108. The claimant's detailed appeal document is dated 16 June 2022 (page 619 - 638). The appeal hearing was held on 2 July 2020. II (who chaired the appeal hearing)

overturned the finding that the claimant used threatening language when she indicated that it was good that her dad was not involved. She upheld the other 2 findings. She decided to uphold the decision to issue a first written warning and wrote to the claimant with her outcome by letter dated 15 July 2020. The claimant was on leave at the time and did not receive the outcome until 20 July 2020.

Second Disciplinary investigation.

109. The claimant was contacted on her return from annual leave about a second disciplinary investigation. There was concern about the level of detail that the claimant had included in her appeal notes, which indicated that she had secretly recorded the hearing.

110. This disciplinary investigation was carried out by Michael Wilcock (MW) who interviewed the claimant on the afternoon of 20 July 2020. In the course of this interview the claimant told MW:-

a. That she and her companion had both taken notes and that hers were handwritten.
b. That she was aware of the disciplinary policy and the section about covert recordings of investigation meetings and disciplinary hearings (relevant part of policy at 357) and that it would be regarded as a breach of contract
c. That she had asked previously to record hearings but her request had been turned down
d. That she did not at any time have to ask for a pause to help her detailed note taking.
e. That she had been able to take such good notes (without audio recording) because she had studied English and was good at note taking.

111. After the call MW asked the claimant to provide him with a copy of her notes of the disciplinary hearing. In fact what the claimant provided was a copy of her companions notes. MW already had the companion's notes and could therefore see that the notes allegedly made by the claimant were identical to those obtained by her companion.

112. The conclusion of this second disciplinary investigation was to recommend another disciplinary hearing. The investigation conclusion was not to accept the explanation provided by the claimant in relation to the notes of the disciplinary hearing as the evidence indicated that she had either secretly recorded the hearing or she had secretly arranged for another person to be present (not her named companion) for the purposes of taking notes. Whilst the disciplinary report does not say this in such straightforward terms; it was clear that the claimant was to answer an allegation that she had covertly recorded the disciplinary hearing.

113. MW contacted the claimant by phone on 24 July 2020 to inform her of this decision. The claimant is critical of the decision to speak with the claimant and inform her of the outcome of the investigation. We accept the evidence of MW, that he did so because:-

a. It had been suggested by CW (HR manager)
b. He also felt that it was information that should initially be given verbally, rather than by email.

114. The claimant told MW that she was resigning from her employment. MW refers to the claimant as being "aggressive." We find that she was emotional rather than aggressive. MW told the claimant that if she wanted to resign then she should put her resignation in writing.

Finding of facts relevant to the claimant's recording of the disciplinary hearing

115. As already noted, the claimant did secretly record the disciplinary hearing. She did not admit this until the second day of the final hearing

116. In the witness statement that she prepared for this final hearing the claimant gave no indication that she had recorded the meeting. She maintained the lie that she had not recorded the meeting but that she and her companion had made handwritten notes and that she had been able to make detailed notes because the meeting had been slow. She also said that when she had sent a copy of her companion's notes to MW she had done that by mistake, that she had attached the wrong document to her message.

117. The Tribunal's case management orders included a paragraph requiring parties to disclose any audio recordings (para 3.2 of the Orders made on 7 May 2021, page 65). Those Orders also include a clear message about the potentially severe consequences of not complying (page 68) including on summary conviction to a fine not exceeding £1000 and a strike out of a party's case.

118. During cross examination, the claimant explained that she did not disclose the audio recording because it was on her mobile phone and she did not know how to remove it from there. We do not accept that as a valid excuse for the claimant's non-disclosure. We do not accept either that was the reason she did not disclose the recordings in accordance with the Tribunal Order.

119. Earlier in her employment (15 January 2019) the claimant had asked for permission to record a grievance hearing. She asked for that for a number of reasons (email at p270):-

a. She had experience of transcribing during her English Language degree studies and said that she knew how difficult it was to take a note of a hearing

b. She wanted a recording to ensure that both parties addressed all points.
c. The request was a reasonable adjustment in light of her hearing difficulties
d. That the respondent recorded calls with customers.

120. The claimant's request was refused. She was told that she would have an opportunity to review notes provided, that measures would be in place to ensure that all points were addressed and that the respondent would carry out a thorough review of all information provided. She was also reminded of her right to attend with a companion.

121. We have considered the respondent's record keeping of its formal procedures. The grievance procedure in 2019 was well documented which provided a good record of relevant evidence, findings and procedure. The disciplinary procedure in 2020 was similarly well documented.

122. For the avoidance of doubt, the claimant's decision to record the meeting was not by way of a reasonable adjustment to overcome disadvantages related to her disability. The claimant was able to hear and participate fully in the meeting. The claimant's disability did not prevent her from hearing and participating in conversations – so long as there were not background noises (particularly unexpected ones) interfering with her hearing and concentration.

123. The respondent carried out a second disciplinary investigation was made because of its reasonable suspicion that the claimant had recorded the earlier disciplinary hearing and for no other reason.

Why the claimant resigned.

124. This was put to the claimant in the hearing; her response was that she could not face more meetings *"about the same thing"* and that she did not trust the respondent *"would do what they should do and look at it with their whole eyes. I was hoping they would understand but they didn't."*

125. The claimant also told us that she tried to go through the process but the process was making her "*feel weaker, crazy and telling things that were untrue."*

126. We make the following findings about the claimant's reasons for resigning:-

a. The claimant's persistence in her reasonable adjustment requests had not made for a healthy working relationship between claimant and respondent but was not a significant part of her decision to resign. Those issues had by the date she resigned, been resolved for many months.

b. She had been disciplined for what she saw as validly raising her reluctance/refusal to work beyond her contractual hours and her appeal had been largely rejected. We find that her evidence at the Tribunal – effectively about the respondent not looking at the issue with their whole eyes, was a rough summary of the reasons for resignation recorded at 15.2; 15.3 and 15.4 of the List of Issues above.

c. She was also by then being challenged about her covert recording, she recognised that she had lied about this and she was continuing to lie about it rather than tell the truth. She did not want to face up to this or go through the second disciplinary process. That would have meant either continuing to lie or admitting the truth.

Respondent's Collective Consultation forum.

127. The claimant gave evidence that she did not know about the respondent's collective consultation forum. There is plenty of evidence of the forum meeting and discussing workplace issues. However, we also note that at no stage during any of the disputes that the claimant had in her employment, was she referred to this forum or any member of the forum. We accept that the claimant did not know about it.

E. Submissions

128. The claimant made brief submissions, thanking us for hearing her case.

129. For the respondent, Mr Proffitt provided a written document and also addressed us on various points raised in there.

F. The Law

Claims under the Equality Act 2010 (EqA)

Time limits

130. Section 123 EqA provides that complaints may not be brought after the end of 3 months "starting *with the date of the act to which the complaint relates"* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

131. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *"such other period as the employment tribunal thinks just and equitable."*

132. We note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre [2003] IRLR 434**:-

"If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so." (para 23)

"…the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule." (para 25 of the Judgment)

133. The EqA itself does not set out what Tribunals should take into account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

a. **British Coal v. Keeble UKEAT 496/96** in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

b. **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT**. This case noted that the issue of the balance of prejudice and the potential merits of the (in that case) reasonable adjustments claim were relevant considerations to whether to grant an extension of time.

c. In **Adedeji v. University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ. 23** noted that Tribunal's should not rigidly adhere to the Keeble checklist (above*). "The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular … "the length of and the reasons for the delay". If it checks those factors against the list in Keeble, well and good but I would not recommend taking it as the framework for its thinking."* (from para 38 of the Judgment).

d. This case tells us that the checklist in Keeble can be a valuable reminder but the relevance and importance of some or all of the factors listed in there will depend on the facts of the particular case.

134. We need to consider whether the allegations of discrimination might amount to a continuing act for the purposes of section123 EQA. A leading case, providing guidance to Employment Tribunals on what may amount to a continuing act is **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530 CA,** In this judgment the Court of Appeal said that Tribunals should focus on the substance of the allegations and whether a respondent was responsible for an continuing discriminatory state of affairs rather than isolated and unconnected acts of less favourable treatment.

Harassment– section 26 Equality Act 2010 ("EqA")

135. Section 26 (1) states:

" *A person (A) harasses another (B) if –*

(a) A engages in unwanted conduct relating to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of

(i) Violating B's dignity, or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B

136. The EAT decision in **Richmond Pharmacology Limited v. Dhaliwal [2009] IRLR 336** emphasised the need for Employment Tribunals when deciding allegations of harassment to look at three steps, namely:-

a. Whether the respondent had engaged in unwanted conduct

b. Whether the conduct had the purpose or effect of violating the claimant's dignity or creating an adverse environment

c. Whether the conduct was on the grounds of the applicable protected characteristic?

Duty to Make Reasonable Adjustments

137. The claimant raises claims under s20(3) EqA. This imposes a duty on an employer *"where a provision* criterion *or practice of [the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

138. We note that, for the duty to make reasonable adjustments to apply, a claimant needs to show that s/he has been put to a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled.

PCPs

139. For a provision criterion or practice to be a valid PCP for the purposes of s19 and 20 of the EQA, it must be more widely applied (or would be more widely applied).

140. Chapter 4 of the EHRC Code of practice on Employment 2011 (Code) concerns indirect discrimination. Paragraph 4.5 says this in relation to PCPs:-

> *"The first stage in establishing indirect discrimination is to identify the relevant provision criterion or practice. The phrase provision criterion or practice is not defined by the Act but it should be construed widely so as to include for example any formal or informal policies rules practices arrangements criteria conditions prerequisites qualifications or provisions. A provision criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a one off or discretionary decision."*

Victimisation – section 27 Equality Act 2010.

141. Section 27 states

> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *(a) B does a protected act all;*
>
> *(b) B believes that A has done or may do a protected act.*
>
> *(2) Each of the following is a protected act –*
>
> *(i) bringing proceedings under this act;*
>
> *(ii) giving evidence or information in connection with this Act;*
>
> *(iii) doing any other thing for the purposes of or in connection with this Act;*
>
> *(iv) making an allegation (whether or not express) that A or another person has contravened the act.*

142. For an act such as a grievance to be a protected act, the context of that act has to indicate a relevant complaint. It is not necessarily enough that a grievance refers to "discrimination" or "harassment" although that will depend on the particular circumstances (**Fullah v. MRC EAT 0586/12; Beneviste v. Kingston University EAT 0393/05)**

143. The word "because" used in s27(1) appears to allow for multiple causes of the detrimental treatment. We note here para 9.10 of the Code:

> *Detrimental treatment amounts to victimisation if a "protected act" is one of the reasons for the treatment but it need not be the only reason."*

Burden of Proof

144. We are required to apply the burden of proof provisions under section 136 EqA when considering complaints raised under the EqA.

145. Section 136 states:

> *This section applies to any proceedings relating to a contravention of this Act.*
>
> *(1) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(2) But subsection 2 does not apply if A shows that A did not contravene the provision."*

Constructive and unfair dismissal

146. The claimant claims (1) that her resignation amounted to a constructive dismissal and (2) that this dismissal was unfair under s98 of the Employment Rights Act 1996 (ERA).

147. Dismissal for the purposes of s98 includes the circumstances stated at s95(1)(c). *"…..an employee is* dismissed *by his employer if…….the employee terminates the* contract *under which he is employed (with or without notice) in circumstances in* which *he is entitled to terminate it without notice by reason of the employer's conduct."*

148. When deciding cases of constructive dismissal, an Employment Tribunal is required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts to a fundamental breach of the contract (**Western Excavating (ECC) Limited v. Sharp [1978] QC 761**).

149. It is an implied term of every employment contract that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see for example **Malik v. BCCI [1997] IRLR 462** at paras 53 and 54). I refer to this term as "the Implied Term."

150. In considering the Implied Term, Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666** (Woods"), said that the tribunal must *"look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

151. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" is not, by itself, a breach of contract: **Lewis v Motorworld Garages Limited 1986 ICR 157 CA**.

152. In the judgment of the Court of Appeal in **Omilaju v Waltham Forest London Borough Council [2005] 1 All ER 75**. Dyson LJ stated as follows in relation to the last straw.

> *"A final straw, not in itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach although what it adds may be relatively insignificant."*

153. The Court of Appeal decision in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833** ("Kaur"), commented on the last straw doctrine. The judgment includes guidance to Employment Tribunals deciding on constructive dismissal claims. At paragraph 55 of the judgment, Underhill LJ states:-

> *"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in* [LB Waltham Forest v. Omilaju [2005] ICR 481] *of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the* [implied term of trust and confidence]*? ……*

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

154. A breach of the Implied Term is inevitably a fundamental breach of contract **(Morrow v. Safeway Stores EAT/0275/00 at para 23)**

155. Once repudiatory breach of contract has been established, it is necessary to consider the part it played in the claimant's decision to resign. The following passage from the judgment of the Court of Appeal in **Nottinghamshire County Council v. Meikle [2004] IRLR 703 ("Meikle")** is helpful:

"33. *It has been held by the EAT in Jones v Sirl and Son (Furnishers) Ltd [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the Western Excavating case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation."*

156. In the event that an Employment Tribunal decides that the termination of a claimant's employment falls within s95(1) the employer must show the reason for dismissal *and* that the reason for dismissal was a potentially fair one under s98(1) and (2) ERA. In a constructive dismissal claim, the reason for dismissal is the reason why the employer breached the contract of employment (**Berriman v. Delabole Slate Limited [1985] IRLR 305** at para 12). As already noted, the respondent in this case does not look to advance a fair dismissal in the event that a finding of constructive dismissal is made.

Potential reductions to unfair dismissal awards.

157. When determining compensation for unfair dismissal, employment tribunals must apply s123 ERA

> *"s123(1) ….the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*
>
> *….*
>
> *S123(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

158. Compensation is reduced under just and equitable principles under s123(1) in 2 broad categories of cases:-

(1) Where the employer can show that the employee was guilty of misconduct which would have justified dismissal, even if the employer was not aware of this at the time of the dismissal.

(2) Where it is just and equitable to apply a "Polkey" reduction (applying the case of **Polkey v. AE Dayton Services Limited [1988] AC 344)**.

Both categories potentially apply here.

159. Evidence of misconduct discovered after a dismissal is irrelevant to the issue of whether the employers acted reasonably in treating the reason for dismissal as a sufficient reason. However, when awarding compensation, a Tribunal is entitled to have regard to subsequently discovered misconduct and, if they think fit, to award nominal or nil compensation. **Devis and Sons Limited v. Atkins [1977] IRLR 314**.

160. Whilst this case was decided well before the ERA came in to effect it is clear that a Tribunal's discretion as described is that now exercised under s123(1).

161. Provisions providing for an adjustment to the basic award are at section 122(2) ERA which requires a tribunal to reduce the amount of a basic award where it is just and equitable to do so, having regard to the claimant's conduct before the dismissal.

162. When considering section 122(2), it is the employee's conduct alone that is relevant; the conduct of the employer is not relevant (**Williams v. Amey EAT 0287/14**).

G. Conclusions

Jurisdiction issues (1) are the discrimination claims in time and (2) if not, is it just and equitable to extend time?

163. With the exception of the complaints of victimisation and the harassment allegations 9.9 and 9.10 (which we comment on separately below), every complaint made under the EQA is out of time. The most recent acts complained of (failure to provide appropriate seating and/or refusal to remove balloons from the workplace) were resolved by November 2019. By then, the respondent had provided the claimant with a desk to the claimant's satisfaction and balloons had been banned from the workplace.

164. The Claim Form was issued on 23 September 2020. The claimant notified ACAS of her intention to bring a claim on 27 July 2020 meaning that the complaints arising from November 2019 were presented some 5 months out of time.

165. We do not find that the acts complained of amount to a continuing act. The complaints arise on separate occasions and are about the alleged behaviour of many different individuals. Further:-

a. there is no one senior employee who is "pulling the strings." In fact, when more senior employees become involved, steps were often taken for the benefit of the claimant (balloon banning for example).
b. A line was drawn under the various complaints in November 2019, various different managers having been involved up to then.

166. For the avoidance of doubt, when deciding that the complaints do not amount to a continuing act we have considered the *"in time"* harassment and victimisation complaints. We note particularly that individuals who were involved and making decisions in the 2020 disciplinary procedures had not been involved in the allegations of discriminatory treatment in 2018 and up to November 2019. If we are wrong about the complaints in the period up to November 2019 being a continuing act, it is abundantly clear that November 2019 represents a cut off date and there is no link between the claimants previous attempts to get reasonable adjustments and the disciplinary incidents of June 2020.

167. Having decided that all complaints up to and including the ones in November 2019 are out of time, we considered and decided that it is not just and equitable to extend time for any of the out of time complaints. These are our reasons:-

a. The delays are substantial. The minimum delay is 5 months; the maximum over 18 months (going back to 2018).
b. The claimant was aware of the option that she had to bring employment tribunal proceedings – particularly more recently when in November 2019 she expressly raised the option of pursing a complaint of discrimination (see earlier).
c. Having raised the possibility of a discrimination claim she chose to see what the employer's decision would be about her adjustment request, which was positive. Having been met with a positive response, she then chose not to bring employment tribunal proceedings. The delay therefore

was through the claimant positively exercising a choice not to bring proceedings. It was only when, some months later, disputes arose which were factually unrelated to the earlier complaints, that the claimant decided to go back to matters which had been resolved.

d. The parties had resolved all adjustments requests by November 2019 (and many had been addressed much earlier than then). It would not be just and equitable to then, many months later, reopen those disputes that had been resolved within the workplace.
e. There are some clear evidential gaps, particularly in relation to the older complaints. Employees have left and the respondent is at a disadvantage in providing evidence which may have explained for example some delays in finalising reasonable adjustments or in relation to harassment complaints (particularly complaints under issues 9.1 to 9.5).

168. Having made the decision that these claims are out of time and that time limit should not be extended, we do not comment further and we make no findings on their merits.

Harassment allegations 9.9 and 9.10

169. The claimant alleges that the respondent's instruction to log on 10-15 minutes prior to the start of their shift amounted to harassment, contrary to section 26 EQA. 2010. Whilst we have been critical of the respondent's actions in relation to working time, this instruction was not an act of harassment under the EQA. It was unwanted by the claimant but was not in any way related to her disability. The instruction was given to other contact centre employees, regardless of disability.

170. Further, whilst it was unwanted, it did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

171. As for the allegation at 9.10, regarding the decision to discipline the claimant, the claimant was disciplined because she refused to comply with the respondent's instruction (however reasonable or unreasonable that was). The decision was not in any way related to the claimant's disability.

Victimisation allegations – issues 13 and 14.

172. The respondent has accepted that 2 of the 3 alleged protected acts raised by the claimant are indeed protected acts for the purposes of section 27. The one that is not admitted is at issue 13.3 *"The claimant sending an email to Paul Cooper on or around 12 May 2020 requesting compensation for logging on 5 minutes before her start time."*

173. We agree that it is not a Protected Act. See para 142 above. There was not a hint in this email that the claimant's complaints were anything other than a complaint of unfairness and/or a complaint that she was being asked to do something that was

outside of the terms of her contract. Although the issue of balloons was mentioned at the end of the relevant email, this was in the context of claiming financial recompense for absence, she was not making an allegation of a contravention of the Equality Act 2010.

174. As for the 9 allegations of victimisation, they all relate to the disciplinary processes from May 2020 onwards. We are satisfied that the decisions and actions in relation to these disciplinary processes were not in any way carried out or influenced by the claimant's grievance some 18 months earlier or her email in November 2019 indicating that she would make a discrimination claim if the respondent did not enforce a banning of balloons in the workplace. The disciplinary procedures were followed for the reasons set out in them.

175. If we are wrong in our decision about the protected act at 13.3 then, for the reason stated immediately above, we do not find that the decision to follow disciplinary procedures were because of the contents of that part of the claimant's email of 12 May 2020 which mentions the circumstances of balloons in the workplace.

Constructive Dismissal

176. We find that the claimant was constructively dismissed. These are the reasons stated by the claimant in her list of issues and our comments against the alleged breaches which the claimant claims gave rise to a fundamental breach of contract:

> *15.1 The Respondent's conduct as part of the Claimant's complaints of discrimination, individually or cumulatively, including the appointment of Michael Wilcock as the investigatory officer:*

177. We have found that the claimant's earlier complaints of discrimination had no significant bearing on the claimant's decision to resign. As for the involvement of Michael Wilcock as an investigator; we have no criticism of this.

> *15.2 The Respondent marking the Claimant late for her shifts when she did not log on 10 - 15 minutes early as instructed by the Respondent;*
>
> *15.3 The decision to discipline her for the nature of the Claimant's communications towards her managers regarding the Respondent's instruction that all employees log on 10 - 15 minutes before their shift start time;*
>
> *15.4 The imposition of a first written warning concerning the nature of the Claimant's communications towards her managers regarding the instruction for employees to log on 10 - 15 minutes before their shift start time;*

178. We find that these did have a significant bearing on the claimant's decision to resign. We find that the respondent's insistence on the claimant starting work 15

minutes before her contractual start time, to be a breach of contract by the respondent. The respondent's confused messaging – of suggesting but actually insisting on starting 15 minutes before the contractual start time; together with its decision to discipline an employee who had been reasonable in persisting with her objections to the respondent's demands; amounted to a breach of the Implied Term and a fundamental breach of contract. The claimant's persistence and messaging was challenging; it was not (as put by the respondent's in evidence) aggressive.

179. Sometimes employees will challenge their employer. Where those challenges are reasonable and the employer is not engaging (as here) then it is perhaps inevitable that the nature and messages challenging the employer will become more persistent and desperate.

180. The respondent was insistent that asking employees to start work before their contractual start time was reasonable. It was not. It had no reasonable or proper cause to insist on this and refuse to engage with the claimant. Whilst we accept the respondent had a collective consultation forum that met regularly there is no evidence that the issue was discussed collectively or individually. The requirement to start work before contractual start times was imposed on the claimant (and presumably other employees). Its conduct of insisting on these earlier start times and then disciplining an employee in the circumstances they did, amounted to conduct likely to destroy or seriously damage the relationship of confidence and trust.

> *15.5 The conduct and outcome of the Claimant's appeal meeting, which the Claimant alleges was biased against her, specifically because her representative was asked questions that the Claimant alleges should have been put to her; and*
>
> *15.6. The Respondent's conduct on 24 July 2020 in relation to the Respondent's decision that there was a disciplinary case to answer concerning the allegation that the Claimant had covertly recorded disciplinary hearing(s).*

181. Whilst we are critical of the outcome of the appeal (in that it upheld the disciplinary sanction) we have no criticism of the appeal process or hearing. It appears that the claimants criticism of the appeal meeting was that the claimant's representative was asked a question or two about her notes of the disciplinary hearing. Given that the respondent's notes were being challenged and an alternative version of the notes was being put, there was nothing wrong with this line of questioning.

182. As for the conclusion that there was a disciplinary case to answer concerning the covert recording by the claimant; this was a reasonable and understandable conclusion.

183. Having made a finding that the respondent did fundamentally breach the contract, we moved on to consider whether the claimant resigned as a result of that breach. We find that she did accept the respondent's repudiatory breach by ending her

contract. It was not the only reason she resigned; her decision to resign was in part because of the difficult position she found herself in as a result of her untruthfulness. However, having considered the judgment in Meikle, we find that the claimant resigned as a result of the breach. That was the effective cause.

184. We then moved to consider some of the remedy issues relevant to the finding that the claimant was constructively dismissed. We note the concession by the respondent that there was no fair reason for the constructive dismissal.

185. The claimant seeks compensation. We have considered arguments made by the respondent in relation to compensation. We agree with the respondent, that the claimant would have continued with her lie about the covert recording of the disciplinary hearing and that the respondent would have dismissed her. We agree with the respondent that this dismissal would have occurred 2 weeks or so following her resignation.

186. We have considered whether the claimant should be provided with compensation of 2 week's pay. In exercising our discretion under s123(6) ERA we have decided that she should not, such is the seriousness of the claimant's misconduct in covertly recording the hearing and then being persistent in her untruthfulness about her actions during the remainder of her employment and then following the termination of employment, up to the final hearing itself. That persistence has included expressions of outrage at being questioned about the possibility she may have recorded the hearing, her failure to comply with case management orders in these proceedings.

187. As for a basic award, we have exercised our discretion under s122(2) in the same way and for the same reasons.

Employment Judge Leach

Date 18 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21 November 2022

FOR EMPLOYMENT TRIBUNALS