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# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **AND** | **Respondent** |
|---|---|---|
| Miss Y Iqbal | | Home Office HR Directorate |

**Heard at**: London Central

**On**: 13-16 June 2017 and 19-22 June 2017

**Before:** Employment Judge Glennie
Mr G W Bishop
Mr I McLaughlin

**Representation**
**For the Claimant:** Ms E Lanlehin of Counsel
**For the Respondent:** Mr M Paulin of Counsel

## JUDGMENT

**The unanimous judgment of the Tribunal is that the complaints of direct discrimination because of disability, failure to make reasonable adjustments and unfair dismissal are dismissed.**

## REASONS

1 By her claim to the Tribunal the Claimant, Ms Iqbal, brought various complaints, of which the following remain to be decided after decisions made at a preliminary hearing:

(i) Unfair dismissal.

(ii) Direct discrimination because of disability, relating to the investigation and dismissal.

(iii) Failure to make reasonable adjustments.

The Respondent, the Home Office, disputes those complaints. The Tribunal is unanimous in the reasons that follow.

## The Issues

2 These were the subject of an agreed list, a copy of which is attached to these reasons as an annex.

## Interlocutory matter

3 The hearing was listed for and took eight days, including the Tribunal's deliberations and judgment. It was agreed that in the first instance we would consider and give a judgment on liability, moving to remedy if arising. The Tribunal had very nearly completed its deliberations when on day 8 it raised a particular point with the parties on a document that had not before then been mentioned in evidence or submissions. At the same time the Respondent applied to put in two emails that had not previously been disclosed and which were said to relate to the Claimant requesting British Sign Language (BSL) interpreters (the importance of which will be explained later in these reasons) in January 2016. This application was opposed by the Claimant.

4 The Tribunal concluded that we would not allow those documents to be put in for the following reasons. First, from what we were told, it did not seem to us that they would advance the matter very far. As we will explain, we concluded that the important points relating to reasonable adjustments concern the position on 9 February 2016 and not to the period immediately before that. Second, it is unsatisfactory that the documents should be produced at such a late stage in the proceedings. Third, Ms Lanlehin said that if the application were allowed than she would seek to put in further documents that had not been put in so far on the basis that even-handedness would require that. That scenario, it seemed to the Tribunal, created a clear risk of the case going part-heard and there being a need for further evidence and/or further submissions. We should record, however, that there was no free-standing application by the Claimant to put in the further documents to which reference had been made.

## Evidence and findings of fact

5 The Tribunal heard evidence from the Claimant and in support of her from her former colleagues, Ms Munna Ahmed and Ms Hanifa Begum. For the Respondent evidence was given by Mr Luke Kirkham, Senior HR Business Partner; Mr Harvey Palmer, Grade 7 Civil Servant; Mr Kenny Bowie, a Senior Civil Servant; Ms Laura Weavers, Higher Executive Officer and Ms Andrea Michael, Senior Executive Officer. There was an agreed bundle of documents and page numbers that follow refer to that bundle.

6 The Claimant was employed by the Respondent as an administrative assistant from 3 April 2003 until her dismissal. Her job involved administrative matters such as settling invoices, ordering stationery, up-dating for the team and general admin. The Claimant is profoundly deaf from birth and her hearing loss has been noted as worsening with the passage of time. It is accepted on all sides that her hearing loss is and always has been such that she is a disabled person within the meaning of the Equality Act. We have had it explained to us,

and it is something that we understand from our own collective experience, that individuals who are profoundly deaf may use different means of communication including hearing aids, lip reading, their own vocal speech, writing and BSL, which in the case of communication with someone who does not sign, requires the assistance of interpreters.

7 It is a feature of the case that there is a dispute about the Claimant's relevant use of BSL and so it is necessary to consider the evidence about that. The Claimant's evidence is very firmly that BSL is her first language. By this she means more than that BSL is now her preferred means of communication. In paragraph 5 of her witness statement the Claimant said that, when she joined the Respondent in 2003, she told her manager that she needed communication support, and in her oral evidence she said that BSL is communication support. In relation to a training course in 2007 her evidence was that she said that she needed communication support and she continued "I explained I am deaf. I'm visual. I need BSL."

8 In submissions Ms Lanlehin said that the Claimant's case was that she had been using BSL since before she joined the Respondent: she was not provided with BSL support on joining and she did ask for that support. So, it is evident the Claimant was saying that she was a BSL user from before 2003. The Respondent did not accept this, and Mr Paulin challenged the Claimant on the point with a number of documents, some but not all of which were as follows.

9 At pages 44-45 there is the Claimant's application form for the administrative assistant role. In this the Claimant referred to communication in the following terms: "I am able to communicate with colleagues at work to deal with queries, problems and different case loads" and "I communicate with many people with all different disabilities". Then, referring to her time with the Shaw Trust she said: "I have had such a positive approach to my confidence therefore communicating now is not a problem." The point made by Mr Paulin was that the Claimant did not mention BSL on that form.

10 In cross-examination the Claimant said that someone helped her to fill in the form, that the form identified that she is deaf (which it did), and that this was related to BSL. Then in May 2006 the Claimant attended a Dr Edmonds in connection with a hand injury. Dr Edmonds reported at page 91 as follows: "I note that Yasmin has used hearing aids since birth, she communicates well and there were no difficulties of comprehension between doctor and patient during our consultation. Then at page 93 "she had congenital hearing difficulties, she does not appear to have any difficulty coping with normal communications." The Claimant's evidence about this was that, on the contrary, she did have difficulty communicating with Dr Edmonds.

11 In May 2010 the Claimant attended the Royal National Throat Nose and Ear Hospital for hearing therapy and speech and language therapy. The report relating to that (pages 123-124) said that the Claimant was an experienced hearing aid user and that she relied heavily on lip-reading, in which she was proficient. The report made the point that if there was more then one person

involved in communication, the difficulty increased, and it said that the Claimant had recently noticed a deterioration in her hearing.

12 There was then at page 127a an email of 15 July 2011. A clear copy of this was not originally available in the bundle, but was provided in the course of the hearing. This is an email from Claimant in relation to her taking over as the lead of an organisation known as the Buddy Network for people who are hard of hearing, and she was introducing herself to various people. She said in this: "Just to let you know that I am hard of hearing, can lip read and communicate verbally. I do not BSL but hopefully will be starting a course in September."

13 Then at pages 127(c) to (d) there was an email exchange between the Claimant and Ms Saunders, the Departmental Disability Adviser. The latter said that she had been approached by someone who had signing skills and was asking whether she could help out with the Buddy Network meetings, to which the Claimant replied in the following terms:

> "It will be useful to have someone who knows the British Sign Language and is able to help colleagues who may need interpreter services. She is welcome to join the deaf and hard of hearing Buddy Network. I am sure it will give her a chance to build up her signing skills. I also don't use sign language and sometimes find it difficult to communicate with those members who are profoundly deaf and therefore be keen to see if she could support us and help avoid confusion."

Finally in this sequence at page 127(e) there was an email of 20 January 2014 from the Claimant saying, in connection with a job interview, that she was partially hearing but could communicate verbally and lip read. She continued:

> "I will need a BSL interpreter and lip speaker using with voice. Please note that I may not completely understand the BSL interpreter but I do know the basic level."

14 The Claimant's explanation of these emails was that the apparent assertions that she did not know BSL or did not know it to more than a basic level were mistakes that had come about because often colleagues and friends helped her to correct the grammar in emails that she had composed. The Tribunal does not doubt that the Claimant did have such help, and Ms Ahmed and Ms Begum have confirmed that they would from time to time help in that way, but it seemed to us implausible that these assertions could have come about by mistake in that manner: certainly not three times over, where correcting the grammar had reversed the sense (on the Claimant's case) of what it was she was trying to say. Furthermore, the email at page 127(d) goes further than making the opposite assertion to the Claimant's case. It sets out an explanation developing what the Claimant means about not being able to communicate using sign language. Therefore we find that we have to take those emails at face value.

15 Then at page 575 in March 2014 there was a document in which the Claimant sought support in attending a BSL Level 1 course, saying that this

would help with her communication skills. Her explanation about that was that this did not mean that her skills were at the basic level or even below it, but rather that gaining the qualification would allow her to teach others BSL as she would have a recognised qualification. That, however, is not the reason given in the application.

16 All of this led the Tribunal to conclude that, while it may be true that the Claimant's first language now is BSL, this was not the case during her earlier years with the Respondent. That in turn leads us to the further conclusion that the Claimant cannot have been asking for BSL interpreters from the start of her employment, or indeed much before 2014, because on this evidence they would not have been of very great assistance to her.

17 A work based assessment of the Claimant carried out by Ms Paula Smoothie of Action on Hearing Loss in August 2014. This report (pages 192-203) was received by the Respondent on 29 September 2014 and the report, it has to be said, does identify BSL as the Claimant's first language. The report made three recommendations:

(i) Concerned the location of the Claimant's desk, and it was common ground that this was put into effect when the office was rearranged in December 2014.

(ii) Another recommendation was the use of a device known as a radio pen which the Claimant declined, considering that this would not be of any assistance.

(iii) The third, and the one that has become material to this hearing, concerned the provision of BSL interpreters to assist the Claimant while at work.

This last point was addressed on page 201 where Ms Smoothie set out suggestions or identification of when interpreters might be provided. She said that this was based on the information provided by the Claimant during the assessment, and then she set out various activities such as team meetings, other forms of meetings and telephone communication, and support with English. The Claimant presented this as a recommendation for 72 hours of support per month.

18 Correctly interpreted, the Tribunal considers that the recommendation was for 72 interpreter hours per month and not for 72 hours of attendance, because for the longer sessions two interpreters would be needed. The recommendation was further explained as support on a regular basis for between 12 to 15 hours per week, which would come to something like 52 to 65 hours per month, plus additional longer meetings. The report also stated that this recommendation was based on information supplied by the Claimant.

19 No immediate action was taken on the report as the Claimant was off sick from work until early November 2014 for reasons unrelated to her disability. The evidence then about the period November 2014 to January 2015 was, the Tribunal has to say, rather thin on both sides but it is evident from an email

(pages 209-210) which was not referred to in the hearing that the Claimant had returned to work by 7 November.

20 In this email Ms Michael referred to an earlier occupational health report and to a recommendation that the Claimant should not exceed the core hours of approximately 7 hours 12 minutes per day. The Claimant commented that she needed communication support in order to do her job properly within that time. Her email also referred to a forthcoming hospital appointment in December when the Claimant would be obtaining replacement hearing aids. Then at page 217 there is an email from the Claimant to Ms Michael referring to a meeting that had taken place the previous day and referring to communication support. It said that the Claimant's then manager Mr James Davison had agreed to check her emails twice a day and secondly that it had been agreed that the Claimant could arrange a BSL interpreter for meetings that she might have on Mondays or Tuesdays. The Claimant went on to say that she would also welcome having a BSL interpreter for one-to-one meetings because there had been misunderstandings in the past.

21 There evidently was on the face of that email agreement, at least to some extent, but it was not clear on the evidence before us what, if anything, actually happened following that. The same is true of an email (pages 238-239) of 19 December 2014. In this the Claimant, writing to a Mr Anderson, said that she was pleased that she was now allowed to have a signer at meetings and that this would be very important in her development. She said, however, that she had been told that she was unable to have further support due to budgetary constraints and over the page she referred to the duty to make reasonable adjustments, saying further that she was awaiting a dyslexia assessment and that she felt that this was being delayed.

22 The dyslexia assessment was carried out in due course and stated that the Claimant was not subject to that condition, although it made some observations about her abilities with the written word. In the present hearing, although the Claimant said in evidence that she considered that dyslexia was in issue, it was clear from the list of issues that it was not, and we were not addressed with any submissions related to dyslexia or any similar matter.

23 Returning to the period November 2014 to January 2015, in short neither party directly addressed the question of what was or was not happening in relation to BSL interpreters during this period. We concluded that in those circumstances we should not engage in speculation based on documents to which we had not been taken and about which we had heard no explanation.

24 In any event, we were satisfied that the important issues about reasonable adjustments really began with a meeting that took place on 9 February 2015 and which was the subject of an email of 11 February 2015 from Mr Davison to the Claimant (page 264). This referred to the meeting on 9 February, said that the Claimant had been assisted by a signer on 10 February, and contained a note of what Mr Davison stated had arisen from that meeting. This included at point 1 the following:

> "It was agreed that for a trial period of one month you may book a BSL signer for communication and support for three hours twice a week. Your preferred days were Monday and Tuesday. If you would like a BSL signer on any other days you will need to seek approval in advance of booking signer through Action on Hearing Loss."

There was then reference to the dyslexia assessment that has been mentioned.

25 This email was relied upon by the Claimant in her evidence and by Ms Lanlehin in her submissions as supporting the Claimant's case that the Respondent agreed to provide BSL interpreters for a trial period of one month only. Taken in context, it is clear to the Tribunal that the trial period referred not to the provision of interpreters as such, but to these particular arrangements for booking them.

26 In this connection the Tribunal was referred to page 491, which identifies dates on which BSL interpreters were provided. In submissions in connection with a document that the Tribunal raised with the parties, to which we will refer in due course, Mr Paulin asserted that this was Ms Weavers' note of interpreters that she had booked. The evidence had not included that. The Tribunal had not understood this to be a note made by Ms Weavers and indeed it seemed to us that it could not be that, because it referred to periods before she had management responsibility for the Claimant in February and March. We have therefore taken it as a record that was prepared on behalf of the Respondent at some point.

27 The important point, however, is that this note shows that BSL interpreters were provided on February 10, 17, 19, 23, 24, 25, 26; March 2, 3, 9, 10, 16, 17, 23, 24, 30 and 31 and April 7, 15 and 22. There was then a gap, and provision was made on June 15, 17, 22 and 29. Then there was later provision in July and in later months to which we will refer in due course. Ms Weavers' evidence, which the Tribunal accepted, was that interpreters could not be arranged in May because the Claimant's attendance was too erratic and because she did not provide dates when the interpreters were said to be needed.

28 There was then at page 267 an email from the Claimant to Mr Davison of 17 February 2015, and this is the document that we have mentioned to which we were not taken in the course of the hearing but which we raised with the parties on Day 8 before completing our deliberations. This says that the Claimant had had a meeting with Ms Katherine Allen who would clarify the process of approving and booking interpreters. The Claimant wrote:

> "I now understand that I have approval to go ahead and book a sign language interpreter on Mondays and Tuesdays (3 hours). If I need an interpreter for any other times or dates I need to seek approval from you first."

28 That corresponds with the arrangement that Mr Davison had set out in his email and which referred to the trial period of one month. The Claimant then said:

> "The dates I would therefore like approval to book sign language interpreters are as follows."

The dates then follow from 17 February to 10 March inclusive, in exactly the same terms as appear on page 491, but with some further explanation in relation to 23-24 February where the Claimant said:

> "I will need two interpreters for a full day on both occasions."

29 This appears to give the Claimant's understanding of the position, and it is the same as what Mr Davison was putting forward. The dates on which the Claimant was seeking support correlate to those given on page 491 when interpreters were provided.

30 From all of this the Tribunal concluded the following:

> 30.1 The Claimant understood the arrangement whereby she could book two three-hour sessions with the interpreters, but that beyond that she needed prior approval for additional bookings.
>
> 30.2 The provision of interpreters was not restricted to February 2016 or to a trial period of one month commencing in February 2016. Interpreters were provided beyond that through March and into April.
>
> 30.3 The provision of interpreters was not restricted to six hours per week. That was the limit that the Claimant herself could book without prior approval, but there was the facility for more hours than that being arranged if prior approval was sought.
>
> 30.4 From 17 February until April 2015 the Claimant was provided with the support that she asked for. Further to this last point, Ms Lanlehin asked Ms Weavers in cross-examination whether the Claimant had ever been refused interpreter assistance when she asked for it. Ms Weavers' reply was that this had only happened once in connection with an e-learning course, and she explained that it was thought that the interpreters would not be useful for that. Her answer was not challenged in that regard and the Tribunal accepted this from her.

31 Moving away for the moment from the question of adjustments, in March or April 2015 Ms Weavers took over line management of the Claimant from Mr Davison. An issue arose about the timesheets or update sheets that members of staff completed for the purposes of the flexi-time scheme that the Respondent operated. The relevant features of this scheme were as follows:

> 31.1 The staff had a number of hours per week to work according to their contracts, in the Claimant's case 36.
>
> 31.2 The individual member of staff could start work at some point between 7.30 am and 10.00 am and could finish between 4.00 pm and

6.00 pm. The core hours therefore for the day, when they were required to be present, were between 10.00 am and 4.00 pm.

31.3 In approximate terms each individual could carry over a maximum debit of around 10 hours or credit of around 12 hours.

31.4 The individual members of staff would clock in and out so as to record the time that they were working. The system worked in a particular way in that if the member of staff did not clock out and in for lunch, then it would be assumed that they had taken a 30 minute lunch break. If they wished to take more than that, they were required to clock out and clock in so as to show the time actually taken.

32 There was some dispute in the evidence about whether the necessary sheets had been provided to the Claimant during January to March (during Mr Davison's period as her line manager); whether she could have obtained them if they were not provided; and whether she was being chased for them. There was also evidence about difficulties that the Claimant had with Mr Davison in terms of his management of her. Ultimately, the Tribunal concluded that it was not necessary to resolve these issues. This is because on around 13 May the Claimant provided Ms Weavers with her flexi-time updates and the latter noticed that these did not make any reference to lunch breaks of longer than 30 minutes. In an email of 1 June 2015 at page 327 Ms Weavers wrote:

> "Please can you check that you fully accounted for any time that you are not working for over the 30 minutes and if you haven't done this please can you let me have a flexi update for deducting any time where you forgot to clock out at lunch."

33 It was common ground that Ms Weavers and the Claimant then spoke about this matter. Ms Weavers' evidence was that the Claimant said that she did not go out for lunch. This was more or less consistent with what the Claimant wrote in an email later on 1 June (also page 327) in which she said:

> "As discussed now that's fine. I usually have a very quick lunch or hardly have lunch at my desk while I was working. This is because I was busy with my work and my BSL interpreter."

34 We note in passing the reference to the presence of a BSL interpreter, indicating that this form of assistance was being provided at the time. When cross-examined about what she said here, the Claimant stated that she had not understood Ms Weavers' email, and that when they spoke Ms Weavers appeared to be asking whether she had had lunch that day, to which she replied she was having lunch at her desk. This was an explanation that she also gave or in her written representations to Mr Palmer in connection with the disciplinary hearing. We found this explanation to be inconsistent with what the Claimant wrote in her email, which is expressly about what she usually did for lunch.

35 Ms Weavers, who believed from her own observations that the Claimant took longer breaks than 30 minutes on occasions, was concerned about the

Claimant's failure to reflect her lunch breaks in her flexi sheets, and so she took advice from HR. That in turn led to Mr Kirkham investigating the matter. Originally his brief was to investigate the flexi time aspect but other matters came to light and he also investigated the Claimant's presence in the office outside of normal hours and her use of the internet, the latter relating to time spent rather than to the types of site involved. Although Ms Weavers was not aware of this at the time, it was possible for Mr Kirkham to ascertain the times when the Claimant entered and left the building from data collected when she used her swipe card on the external doors. He could then compare that to the Claimant's clocking in and out record, which was captured on a separate system.

36 Mr Kirkham then produced a table (pages 662-663) containing discrepancies that he had found. This showed in summary that there were times out of the office that were not reflected in the clocking-out and in record to the extent of one in January; two in February; seven in March; six in April; three in May and four in June. One of these relating to 8 May contained an error as was demonstrated in cross-examination, but the others were not challenged as such. The total that M Kirkham found of uncounted time was 12 hours and 35 minutes, from which a period of possibly one hour should be deducted because of the error to which we have referred.

37 Then on 13 July 2015 Mr Kirkham interviewed Ms Weavers. The note of that interview is at page 563 onwards and in the course of it Ms Weavers said among other things that it was correct that, so far as she knew, the Claimant had had no interpreter support over her 12 years of service until November 2014, but she had never requested any. She referred to the question about the Claimant's BSL ability and then on page 565, in relation to the flexi working process, Ms Weavers said that she could confirm that the Claimant did understand the procedure and so far as she was aware had done so for the whole time that she had been on the flexi system. She said that the Claimant had in the past corrected Ms Weavers herself on the procedure when requesting flexi for a doctor's appointment; and that she did not believe that the Claimant was not able to understand the policy or the process.

38 On 17 July Ms Kirkham interviewed the Claimant. She was accompanied by her union representative and by a BSL interpreter. The notes of that meeting begin at page 568. The Claimant said that she grew up signing and lip reading and she said that it was clear that BSL was her first language. There was some discussion about that issue. She said (page 570) that for 12 years she had asked for an interpreter every time she started with a new team but had not pursued the matter once she had been told that she could not have one.

39 Mr Kirkham then asked about the question of the flexi system, following policies and procedures, and use of the internet. In relation to the first of these the notes record that Mr Kirkham asked the Claimant if she agreed that the data about her times in and out was factually correct, and she confirmed that it was. She then said that there was a reason for her being out of the office for more than 30 minutes; that is that she was so stressed as a result of bullying from her line manager that she was very confused and forgetful. When Mr Kirkham said that the incidents had continued to occur after Mr Davison had

ceased to be her line manager, when Ms Weavers had taken over, the Claimant said that the problems had built up over time and she was still affected by them. She then went on to refer to personal issues involving her family that had caused her to experience a lot of conflict at home.

40 Mr Kirkham then referred to 10 June and asked why it was that, as the record showed, the Claimant had clocked out and in for 30 minutes at lunch time and immediately after that had left the building for another period of about 30 minutes without clocking out or in. In answer to Mr Kirkham saying that this had been cited as an example of an apparent attempt to deceive the Respondent after the Claimant had been reminded to clock out at lunch time, the Claimant said that she could not remember that occasion. The union representative, Ms Martins suggested that it would have been helpful for the policies to have been signed to the Claimant and this would have made "a massive difference". Mr Kirkham asked whether the Claimant understood the flexi working policy and process and if she had always understood it since January 2015. The note recorded that the Claimant confirmed that she did, and that she had always understood the policy.

41 Following this Mr Kirkham asked about internet use. The Claimant said that she went on the internet to take her mind of the stress that she was suffering. That and the issue concerning disobeying management instructions about remaining in the building were not in the event given any great prominence in this hearing because they were not relied on in respect of the Claimant's dismissal, and for that reason we similarly say very little about these.

42 Mr Kirkham additionally considered an email of 15 July 2015 (page 614) in which three interpreters who had worked with the Claimant gave their impressions of her use of BSL. Each of these said that there were limitations to this. The first said that the Claimant's spoken production was better than her sign production; the second said she had problems understanding BSL interpretation; and the third that she had a limited BSL vocabulary. In his report Mr Kirkham commented adversely on the Claimant's general credibility and then stated that there was a case to answer in respect of abuse of the flexi system, and that this was he said potentially fraudulent. He also said that there was a case to answer in respect of each of: poor timekeeping (but that this should not be pursued if there had been an improvement); internet use; and failure to follow management instructions in relation to being at work alone.

43 From 20 July 2015 onwards the Claimant was signed off work sick suffering from stress and depression. On 6 October 2015 (page 423) Mr Palmer wrote to the Claimant inviting her to a disciplinary hearing on 22 October. He enclosed relevant documents including Mr Kirkham's report and said that if the Claimant decided not to attend she could send written representations or arrange for her union representative to attend, or both. In the event the hearing was rearranged to 4 November and the Claimant elected to send written representations, which are at pages 439(a) – (e). In these the Claimant referred to her disability and said that in February it had finally been agreed that she should receive interpreter support on a one month's trial basis. She said:

> "I'm really grateful for this but I was disappointed that interpreter support did not continue."

Earlier she said that she had been concerned about the lack of understanding and patience about her disability and she said: "I have had little support (interpreter for only six hours a week over one month on a trial basis which they refused to continue afterwards)".

44 The Claimant referred to her complaints about Mr Davision and his, as she put it, bullying and harassment of her. Then, addressing the flexi issues, she said:

> "I would like to say that none of this was deliberate action by me. I'm sorry that this situation has occurred. I asked that you deduct the time I owe from my annual leave allowance."

45 As to why this happened, the Claimant said that she was under great pressure because of the difficult relationship with Mr Davison and she said:

> "I believe this pressure was the reason for discrepancies between my flexi sheets and the circle lock data [i.e. the external door]. I cannot recall when I clocked-in and out and when I left the building…" [and then she referred to personal and family pressures and her own reaction to these].

The Claimant then continued:

> "I was not aware that these discrepancies existed as I have not seen my flexi sheets since January"

and she referred to asking for them and the conversation with Ms Weavers about a lunch break. The Claimant said that she had only recently understood the entire flexi guidance because it had been explained when the investigation started. Then she referred to the other matters concerning being in the office unsupervised and use of the internet.

46 Mr Palmer gave the outcome of his deliberations in a letter of 9 November 2015 (page 440). He began by expressing some agreement with Mr Kirkham's view of the Claimant's credibility and referring to the issues about the use of BSL. Turning to the allegations against the Claimant, he said that her total flexi deficit was currently 22 hours and 15 minutes as against the maximum permissible deficit of 10 hours and 48 minutes. He referred to the stresses that she said had been affecting her. He said that the data showed that the Claimant continued to take longer lunches after Ms Weavers became her manager which he said considerably weakened her mitigation.

47 Then Mr Palmer wrote:

> "An incident occurred on 10 June which management view as a direct attempt of deception in relation to the length of your lunch break. The

> evidence confirms that at lunch times you clocked in and out of the flexi system which matched the circle up-data accurately. However, some three or four minutes later you left the building again without clocking out of the flexi system. You were out of the office for 1 hour 8 minutes. You had been told to clock out correctly. At interview you claimed no recollection of this incident and you did not address it directly or provide any credible explanation in your written representations."

Mr Palmer concluded that there had been repeated and deliberate abuse of the flexi system; that he was not satisfied by the mitigation put forward; and that this amounted to gross misconduct under the discipline policy.

48 Mr Palmer then referred to two instances that he found to amount to serious misconduct, which is a different level of misconduct under the relevant procedure. His evidence was that these latter two alone would not have led to dismissal and that it was his finding about the flexi abuse that caused him to decide that the Claimant should be dismissed.

44 When cross-examined, Mr Palmer said that he did not accept the Claimant's explanation that she forgot to clock out because she was stressed because he did not see how stress would affect such a simple process. With regard to the issue about the flexi sheets, Mr Palmer said that the Claimant would not need to see these in order to know that she had taken more than 30 minutes for lunch. The Tribunal found his views on these matters to be reasonable.

45 When it was suggested to Mr Palmer that he dismissed the Claimant because the Respondent did not want to provide her with further support in respect of her disability he denied that, and replied that he had dismissed her for gross misconduct.

46 The Claimant appealed against the decision and Ms Lanlehin sent written submissions on her behalf (pages 464-468). The appeal was considered by Mr Bowie, who described his approach as that of asking whether the process had been procedurally correct and whether the decision to dismiss was within the range of reasonable responses. On the first point he noted that Mr Kirkham's report had not been sent to the Claimant at the earliest possible opportunity but had been sent before the disciplinary hearing, with which he was satisfied. He concluded that the decision to dismiss was reasonable and rejected the appeal.

**The applicable law and conclusions**

47 The Tribunal first considered the issues relating to the dismissal. In this connection section 98(1) of the Employment Rights Act states that the burden is on the employer to show the reason or, if more than one, the principal reason for the dismissal, and that it is either a reason falling within subsection (2) (which includes a reason related to conduct) or some other substantial reason of such kind as to justify the dismissal of an employee holding the position which the employee held.

48 The investigation and the dismissal are also relied on as acts of direct discrimination because of disability. In that regard section 13(1) of the Equality Act provides that:

*A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.*

49 In relation to the burden of proof, section 136 provides that

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

50 The burden of proof provisions in the earlier anti-discrimination legislation were considered by the Court of Appeal in **Igen -v- Wong** [**2005] ICR 931** and **Madarassy -v- Nomura [2007] ICR 867** and later by the Supreme Court in **Hewage -v- Grampian Health Board [2012] UKSC 37**.

51 The approach advocated in **Igen** and **Madarassy** is a two-stage approach in which the Tribunal makes the primary findings of fact and then asks whether those are such that it could properly conclude, in the absence of an explanation, that discrimination had occurred. In **Madarassy** the Court of Appeal emphasised that for this to be a proper conclusion there would have to be something in the evidence beyond a difference in status or protected characteristic and a difference in treatment. There would have to be something in the evidence that would point to discrimination and could be a sufficient basis for that finding, if not explained. If the first stage is met than the burden is on the Respondents to prove that discrimination did not occur. In **Hewage** the Supreme Court said that the burden of proof provisions did not have a role to play in the event the Tribunal was able to make findings of fact about why the events had actually occurred.

52 In the present case, we found that the different approaches produce the same result. Looking first at direct discrimination, it was put to Mr Palmer that the Respondent wanted to dismiss the Claimant because it did not want to go on making adjustments for her, and it was put to Ms Weavers that she had orchestrated the Claimant's dismissal for the same reason.

53 There was, we found, no evidential basis for those suggestions. Mr Palmer had no managerial connection with the team in which the Claimant worked and there was no suggestion of any reason why he should be concerned by the fact that adjustments were being made for her. Nor could the Tribunal identify any reason why he might be concerned by that. So far as Ms Weavers is concerned, there was no evidence that she orchestrated the Claimant's dismissal in any way. She simply reported the situation to HR and then when interviewed by Mr Kirkham gave a factual account and answered the questions that he asked her. Again, there is no suggestion of any reason why she should have been troubled by the making of adjustments for the Claimant or that she did so

reluctantly. As we have found, the adjustments made were in fact more extensive than the Claimant has alleged in connection with this claim, and we found no unwillingness on the part of the Respondent to make those adjustments.

54 Therefore in relation to the dismissal itself the first limb of the **Madarassy** test is not satisfied. Furthermore, we are satisfied on the evidence that Mr Palmer's reason for dismissing the Claimant was his belief that she had committed misconduct.

55 It was also a limb of the Claimant's case that the instigation of the investigation was an act of direct discrimination. That was not put to Mr Kirkham, and there was equally, we found, in his case no evidence and no reason to think that he was averse in any way to the adjustments that were being made for the Claimant. It seemed to the Tribunal more likely that this was an alternative formulation of the complaint against Ms Weavers that she had instigated the process, which as we have said we found was unsupported by the evidence.

56 Both elements of the complaint of direct discrimination therefore fail.

57 In relation to the complaint of unfair dismissal, the Tribunal found for the reasons given above that the Respondent had established that the reason for the dismissal was a reason related to conduct. Therefore we turn to the well known test in the case of **British Home Stores -v- Burchell [1980] ICR 303.** This involves the Tribunal asking whether the Respondent had a genuine belief based on reasonable grounds that the Claimant had committed the conduct concerned, whether there was a reasonable investigation, and whether dismissal was within the range of reasonable responses. It was clarified by the Court of Appeal in **J Sainsbury PLC -v- Hitt [2003] ICR 111** that the test to be applied at all stages is that of reasonableness and that the Tribunal must be careful not to substitute its own view of a particular case for one that has been taken by a reasonable employer acting reasonably.

58 Our findings about the reason for the dismissal mean that we are satisfied that Mr Palmer had a genuine belief that the Claimant had committed the conduct concerned. He had reasonable grounds for that belief because of the contents of Mr Kirkham's report and the evidence before him, and indeed the Claimant's own admissions about the matter.

59 The Claimant had, as we have said, confirmed that she understood what it was that she had to do in relation to the flexi time system. The Tribunal would add that the Claimant further explained her understanding of that system in answer to a question from the Tribunal, in which Mr Bishop asked the Claimant whether she understood the flexi system. She replied that she did and then gave an explanation of what it was that was required, saying that she knew about the start and finish times and then she volunteered: "I knew for lunch I needed to clock in and out. My manager would then calculate the figures for me."

60 The Tribunal found that Mr Palmer had a reasonable belief that the Claimant knew what she was required to do, that she knew what she was doing and that

her failure to clock out and in was deliberate. That was particularly so in the light of what he found and the evidence about what had occurred on 10 June.

61 So far as the reasonableness of the investigation is concerned, there was no particular challenge as a matter of the fairness of the process and we that we could not identify any procedural failing.

62 This brought the Tribunal to the question of the range of reasonable responses, and here we reminded ourselves once more that it is not for the Tribunal to decide whether we ourselves would have dismissed the Claimant in these particular circumstances. We have to assess the question whether the decision to dismiss was one that no reasonable employer acting reasonably could have reached in the circumstances.

63 Given the Claimant's failure to correct the matter, particularly on or after 1 June when Ms Weavers had sent the email to her asking her about lunch breaks, and in the light of her explanations that Mr Palmer did not accept, we find that dismissal was within the range of reasonable responses. The Claimant had an opportunity on 1 June at the very least to say something to the effect that she knew that she had taken longer lunches than she had accounted for. She might not have been able to give the details of what she had done, but she could at least have accepted that and volunteered to try and sort matters out, which she did not do. As Mr Palmer pointed out in his outcome letter, the Claimant had again failed to clock out correctly on 10 June (after her conversation and emails of 1 June with Ms Weavers): there were also other instances found on 2 and 8 June.

64 The Tribunal found that Mr Palmer was acting reasonably when he concluded that he did not accept the mitigation that was put forward, and that therefore he was entitled to take the view that the default had been intentional. We concluded that realistically Mr Palmer could take that view, and that these failings could only have been accidental if the Claimant really did not understand the system at all, which we found to be implausible given her long service with the Respondent and her own statements about being able to understand it.

65 Out of consideration for the Claimant, we have not set out in detail the personal pressures that she was under at the relevant time, but we have concluded that Mr Palmer was entitled to take the view that they did not explain or justify the failure to follow the rules about clocking out and in. As he observed, it was not a complex process.

66 The Tribunal had regard to the definition of gross misconduct in the Respondent's HR Policy and Guidance on Discipline. We found it realistic to say that the conduct could be categorised as fraud or falsification of records, or unauthorised absence, or some combination of those.

67 Finally, we reminded ourselves that a finding of gross misconduct does not automatically mean that the decision to dismiss is reasonable: but having regard to the matters found by Mr Palmer, we found that dismissal was within the range of reasonable responses.

68 If we are wrong about any of those matters then there clearly would have been a very substantial element of contributory conduct on the Claimant's part. Given her evidence about her knowledge of the applicable system, and her failure to follow it even after the need to do so had been drawn to her attention, we would assess that at 100%.

69 There remains the complaint of failure to make reasonable adjustments. Here section 20(2) of the Equality Act states that the duty to make reasonable adjustments comprises three requirements of which the first is relevant here, being found in subsection (3) in the following terms:

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

70 It is worth emphasising that the duty refers to steps that it is reasonable for the employer to have to take. It is not a question of whether reasonable steps were taken. It is whether it was reasonable for the employer to have to take the steps that are being put forward.

71 Mr Paulin submitted that the first limb of the test for reasonable adjustments is the existence of a PCP (as indeed it is) and that the complaint fell at the first hurdle because the PCP as formulated could not be upheld. The Tribunal noted that there were two different versions of the PCP put forward in this case. The first of these in time (page 34(g)) was identified by Employment Judge Wade in the preliminary hearing on 21 July 2016. That says that the reasonable adjustments claim is based on a recommendation in the August 2014 report to provide 72 hours BSL per month, and that the Respondent imposed a PCP that treated the Claimant the same as other staff who did not need BSL support.

72 In the list of issues before the Tribunal, which was presented as agreed, the formulation of the PCP was in fact rather different to this, because it was said to be treating the Claimant in exactly the same manner as any non-disabled employee with regard to her working patterns. This second formulation was not entirely clear to the Tribunal, in the sense that there was no clear explanation of what was meant by working patterns. Seemingly this referred to working time or possibly to the difficulty the Claimant might have had in having to work longer in order to get her job done.

73 The first formulation, namely that there was a PCP of treating the Claimant in the same way as other staff who did not need BSL support, seemed to be more closely related to the issues that we actually heard about, relating to the provision of such support. But it could said that neither of these was correct in terms of the evidence that we have heard because the Claimant was not treated in the same way as other staff who did not need BSL support, since she was provided with that, and that equally the Claimant was not treated in exactly the same manner as any non-disabled employee.

74 Therefore it might be said that the PCP as formulated cannot be upheld. It is clear, however, from the Claimant's evidence that her complaint was in essence about a failure to provide sufficient BSL support, and so rather than deciding the matter on any technicalities about the PCPs that have been put forward, the Tribunal has approached the matter on the basis that the duty to make reasonable adjustments in that respect has been engaged. We have considered whether the Respondent discharged the duty of taking such steps as it was reasonable for it to have to take. We have taken this approach because the Respondent effectively has agreed that reasonable adjustments were required and its case in essence is that it provided them.

75 Turning the meeting on 19 February and to the emails that followed it (pages 264 and 267), our conclusion is that (as we have already stated) the Claimant was given extensive BSL interpreter support. In addition to the 6 hours per week that she herself could arrange there was the provision for more than that to be provided if she sought approval. The Tribunal accepted Ms Weavers' evidence that there was only one refusal regarding an e-learning course, and that it seemed to us was a reasonable stance to take in the circumstances.

76 In short, we found that there was satisfactory performance by the Respondent of the duty to make reasonable adjustments. We emphasise once again that this has to be looked at in terms of the duty and the question of what steps is it reasonable for a respondent to have to take to avoid the disadvantage to a claimant. That is not the same as asking ourselves whether the Claimant was provided with all the support that she asked for, or would have wished to have. That could be something entirely different: we have to ask whether there has been a failure to comply with the duty. The Tribunal has concluded that there has not been such a failure and that there was satisfactory performance of that duty.

77 This finding is made in relation to the period that we know about and which was central to the case; that is the period starting on or about 9 February when the arrangement was put in place. As we have said, what happened before that has not been the subject of detailed evidence.

78 The complaint of failure to make reasonable adjustments therefore fails on the merits. There was a further element relied on by the Respondent, being a contention that the claim in this regard was presented out of time. Given our decision on the merits it might be said that it is not necessary for us to decide this; but we have considered this issue in any event.

79 Section 123 of the Equality Act makes the following provision about time limits:

*(1)……Proceedings on a complaint….may not be brought after the end of –*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

80 The claim was presented on 2 March 2016. The Claimant was dismissed on 9 November 2015 but she had been absent from work because of ill-health from 20 July 2015 onwards. It is clear that, to the extent that BSL Support was required for the disciplinary process and the investigation, it was provided. The Claimant's complaints about reasonable adjustments really cover at the fullest possible extent the period up to her stopping work because of ill-health in July 2015. So the primary limitation period of three months was clearly exceeded by March 2016 when the claim was presented.

81 The Claimant did not give any evidence on the question of time limits or timing. In submissions Ms Lanlehin said on her behalf that she had been hoping that the situation at work would get better. This must apply, it seemed to us, to the period from February to July 2015 because there could not have been hope for that once she was absent on sick leave. Ms Lanlehin also said that the Claimant's dismissal had highlighted the extent of her other problems. It seemed to us that the latter point has some plausibility in the sense that the Claimant's dismissal might well in a practical sense have made her think about all of the complaints which she might have to raise in respect of her employment with the Respondent.

82 However, the Claimant could have brought her complaints about the adjustments that were made at some point during the period February to July 2015 if she considered that the duty to make reasonable adjustments had been breached. It is evident that there was some involvement by her union at this stage because her union representative assisted her at the investigatory stage with Mr Kirkham.

83 It is also the case that, as will have been apparent from some parts of that our reasons the Respondent has had to meet a somewhat unclear case on reasonable adjustments. The Tribunal has commented that some of the evidence on the Respondent's side has been rather thin at points, but equally it has not been entirely clear what the precise complaints have been at any given point, and as we have said the PCP itself has not been clearly identified in a way that has remained fixed throughout the proceedings. The Respondent was in this way prejudiced in dealing with the complaint.

84 For those reasons, if it were material to decide the point about time limits, the Tribunal would decide that it would not be just and equitable to hear the complaint about reasonable adjustments and that it would fail additionally on the basis of having been presented out of time.

85 It follows from the above that the complaints in this matter are all dismissed.

**Employment Judge Glennie**
**25 August 2017**

ANNEX TO REASONS

CASE NUMBER: 2200324/2016

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL

BETWEEN:

YASMIN IQBAL

*Claimant*

- AND -

HOME OFFICE

*Respondent*

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**AGREED LIST OF ISSUES**

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**Unfair dismissal**

1. What was the Respondent's reason for dismissing the Claimant from her employment?

2. Was the Respondent's dismissal of the Claimant fair or unfair?

**Section 13 EqA 2010: Direct Discrimination**

3. Does the Claimant rely upon an actual or hypothetical comparator?

4. Did the Respondent's investigation into the Claimant's misconduct constitute less favourable treatment because of the Claimant's disability?

5. Was the Respondent's dismissal of the Claimant less favourable treatment because of the Claimant's disability?

**Section 20 & 21 EqA 2010: Reasonable adjustments**

6. Did the Respondent subject the Claimant to a PCP of treating the Claimant in exactly the same manner as any non-disabled employee with regard to her working patterns?

7. Did the Claimant suffer the substantial disadvantage: (a) taking longer to complete work (b) not being able to communicate fully and (c) not being able to participate fully in the workplace as a consequence of the PCP in question?

8. What steps if any did the Respondent take to avoid the disadvantage?

9. Were those steps reasonable?

10. Did the Respondent fail to comply with its duty to make reasonable adjustments?