



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Maw

**Respondent:** Secretary of State for Education

**Heard at:** Hull by Video      **On:** 9, 10, 11 and 12 January 2023 and 17 January 2023 in chambers

**Before:** Employment Judge Miller  
Mrs Anderson-Coe  
Mr Eales

## Representation

Claimant: In person

Respondent: Mr M Blitz – Counsel

# RESERVED JUDGMENT

The claimant's claims that the respondent failed to make reasonable adjustments in accordance with sections 20 and 21 Equality Act 2010 are unsuccessful and are dismissed.

# REASONS

## Introduction

1. The claimant was employed as an apprentice Executive Officer (EO) by the Secretary of State for Education in the Department for Education (DFE) working for the Education and Skills Funding Agency (ESFA).
2. He was employed from 15 March 2021 until his dismissal with notice in a letter dated 11 October 2021 with effect from 15 November 2021.
3. The claimant made a claim for disability discrimination and unfair dismissal in a claim form presented on 26 January 2022 following a period of early conciliation from 9 December 2021 to 21 January 2021.

4. There was a preliminary hearing on 5 July 2022 following which the claimant's claim for unfair dismissal was dismissed in a judgment dated 5 July 2022. At that hearing Employment Judge Frazer identified the remaining claims as being for a failure to make reasonable adjustments only. The issues to be determined in respect of those claims are set out in the appendix to this judgment.

### **The hearing**

5. The hearing was heard over 4 days with the parties, and the tribunal met for a further day for their deliberations. We were provided with an agreed file of documents of 848 pages and some other documents were provided during the hearing which we admitted. They related to the recruitment exercise.
6. The claimant had produced a witness statement and he attended and gave oral evidence.
7. The respondent produced witness statements from
  - a. Mr Colin Cartwright – the claimant's line manager
  - b. Dr Kevin Mothersdale – deputy director and dismissing manager
  - c. Mr Owen Jenkins – interim director and appeals officer.
8. All the respondent's witnesses attended and gave oral evidence.
9. The claimant has a significant hearing impairment and osteoarthritis. We therefore took scheduled breaks every hour to allow the claimant to rest and/or move around as necessary. On occasions, the claimant asked to have questions and answers repeated and we are satisfied that Mr Maw was able to participate effectively in the hearing.
10. We record our thanks to Mr Maw and Mr Blitz for the helpful and considerate way both parties presented their respective cases.
11. At the conclusion of the evidence, both parties presented oral submissions. We have taken into account those submissions and all relevant evidence, albeit that we will not set out in this judgment everything we heard.

### **Findings of fact**

12. We make only such findings of fact as are necessary for us to reach our decision. Where matters are disputed we have reached our conclusions on the balance of probabilities.
13. We make the following general observations about the evidence we heard. In our view, the witnesses were doing their best to be honest and generally doing their best to assist the tribunal.
14. We had the benefit of many detailed notes of meetings between Mr Cartwright and the claimant. In order to avoid repetition, we state that, where contested, we prefer Mr Cartwright's evidence about the notes and find that those notes were made with the genuine intention of accurately

and contemporaneously recording the content of the meetings or interactions to which they refer. We find that they are sufficiently accurate (without being verbatim) for us to make findings about the content of those many meetings. Mr Cartwright said that he was making the notes as he went along and we find that he was.

15. We also observe that, because of the nature of the case, we have made findings about circumstances in which the claimant was said to be failing to meet the appropriate standards. We heard evidence from the claimant about his successes and achievements at work. It was not the respondent's case that the claimant was incapable of undertaking every aspect of his role. The respondent's concerns were about explicit, specified matters which will be addressed as necessary. The respondent had a number of positive things to say about the claimant and, particularly, his attitude to work. He was considered to be positive, enthusiastic and professional, the latter characteristic we witnessed ourselves in this hearing.
16. However, our role is limited to making relevant findings of fact about the issues referred to above. This judgment will necessarily, therefore, not be a comprehensive assessment of the claimant's capability or suitability for this job and it should not be considered as such by the claimant or any other person reading it.

### **Pre-employment**

17. The claimant was appointed to his role of apprentice EO following a recruitment exercise in 2020.
18. In his application form the claimant set out that he met all of the essential criteria for the role which were:
  - a. Understanding of using Microsoft (MS) packages
  - b. Ability to speak to people over the phone and face to face
  - c. Good organisational skills
  - d. Able to prioritise workloads
  - e. Good written communication skills
19. The application form refers to "the disability confident scheme" and explained what was meant by disabled for those purposes (which partly reflects the statutory test). It said "Disability Confident employers offer an interview to a fair and proportionate number of disabled applicants that meet the minimum criteria for the job (this is the description of the job as set by the employer).".
20. The claimant responded "yes" to the question on the form which said "Do you feel that you meet the criteria and would like to apply under the Disability Confident Scheme"? The claimant did not provide any further details at that point and there was no space to provide any.

21. The claimant attended an interview on 4 December 2020 and said that he told the panel that he is deaf in his right ear, and used a hearing aid in his left ear so he might need some questions to be repeated. He also, he says, told them that he had osteoarthritis in his knees, hips and lower back so he might need to get up in the course of the interview. We note here that the respondent accepted that both of these conditions were disabilities within the meaning of s 6 Equality Act 2010 throughout the relevant period.
22. The interview was conducted by people in a part of the DFE which was not directly connected with the ESFA. The respondent's witnesses did not know who conducted the interview and they were unable to find out. There were no notes of the interview except for the scores and the questions asked.
23. In the absence of any other evidence, we prefer the evidence of the claimant and find that he told the interview panel that he informed them that he was deaf in his right ear and uses a hearing aid in his left ear and this might mean he needs questions to be repeated. He also told them that he had osteoarthritis in his knees, hips and back and would need to get up from seating occasionally, have a break or move around. We also find that the interview panel accommodated these arrangements and that they did not pass their observations about the claimant's disabilities on to anyone else at the DFE.
24. The claimant was offered the job on 8 January 2021 and Mr Cartwright was informed in January 2021 that he would have a new apprentice EO joining him. The claimant completed a pre-acceptance form in which he declared that he did not require any adjustments to do his job, that he did not have and had not had previously any disability or health conditions that affected his ability to do the job, and that he had no disability or health issues he would like to discuss with occupational health.
25. This was not correct and it was accepted that the claimant had completed the questionnaire in the way that he did on advice from a Job Coach (we presume working for the DWP), on the basis that this might negatively impact on the claimant's employment prospects.
26. We have no reason to doubt the claimant's evidence about this. While we understand why a cynical or uninformed person might think it appropriate to not declare disabilities for these reasons, we state without hesitation that it is not appropriate for a job coach to be recommending such a course of action.
27. There were some pre-work discussions between the claimant and Mr Cartwright and Mr Cartwright had some concerns that the claimant was not suitable for the job he had been offered. His explicit concerns were that the claimant lacked the IT skills required for the job and that he might struggle to process instructions and work at the pace required. This assessment was based on difficulties the claimant appeared to be having with some IT during these conversations and a lack of attention to detail in providing documents and information for the pre-employment checks. We find that Mr Cartwright's concerns were honest and genuine and unrelated to the claimant's disabilities.

28. Mr Cartwright made enquiries with HR whether the claimant could be allocated to a role at a level he considered might be more suitable. He was informed this would not be possible. Mr Cartwright therefore recognised that he might need to support the claimant and manage him through probation.
29. We find that Mr Cartwright had genuine concerns about the claimant's performance before he started, but that he, at that stage, had an intention in good faith to offer support as necessary. Mr Cartwright decided to initially address this by limiting the amount of duties the claimant had, giving him one set of tasks rather than 3 or 4 as the other apprentices had.
30. The claimant said that during the conversations he had with Mr Cartwright after he was offered the job but before he started work he informed Mr Cartwright about his health conditions and how they affected his ability to work. In his witness statement he says:

“I told him about my deafness and its impact that I do not always hear things said on the telephone even though I always have it on loudspeaker and I have the volume on full when there is a video call on Microsoft Teams. I also explained that because of my arthritis I need to get up and move about at regular intervals. Because of this the LM suggested that I should take regular breaks”.
31. Those meeting were by telephone and on possibly on one occasion, although it was unclear, by MS Teams. It was the claimant's evidence that he had discussed his health conditions with Mr Cartwright at some point, or on some occasions, in that period. Mr Cartwright said he did not and that he was unaware of the claimant's hearing and osteoarthritis difficulties. He said he would not have noticed the claimant's hearing aid and the claimant said himself that sometimes he did not wear his hearing aid at home.
32. The claimant said, effectively, that it was inconceivable that he would not have mentioned his problems.
33. On balance, we prefer the evidence of Mr Cartwright that there were no explicit conversations about the claimant's impairments in this period. Given that Mr Cartwright responded positively when he was explicitly informed of the claimant's problems and that he is a thorough and detailed note taker, it seems unlikely to us that Mr Cartwright would have failed to record or address this issue earlier had he known.
34. We also take into account the fact that the claimant had, albeit on advice, stated in his pre-employment form (which he completed after being offered the job around 8 January 2021) that he did not have any disabilities or health conditions that required adjustments. We suspect that the claimant is now misremembering what happened.
35. We find that by the time the claimant started work, Mr Cartwright as an individual was unaware of the claimant's disabilities.

### **Start of the claimant's employment**

36. The claimant started work on 15 March 2021. Because of the Covid-19 pandemic, the claimant was working from home from the outset. In fact, he

did not go into the office to work until 9 June 2021. The claimant did not request to go into work at that stage and was provided with a laptop and mobile phone to work from home (albeit on the second day of his employment).

37. Homeworking staff were, at that time, entitled to up to £250 worth of office equipment for their home working arrangements from the respondent. The claimant was not made aware of this and, we find, he was working at home using a dining chair and small table.
38. Initially, the claimant had weekly one to one meetings (1:1s or one to one's) with Mr Cartwright. However, it was clear that Mr Cartwright, and his colleague Ms Smitton, continued to have concerns about the claimant's level of ability and particularly in respect of his IT skills. They therefore made enquiries with HR as to whether the claimant had demonstrated the appropriate skills in his application process and whether he had been correctly matched. We set out the entire body of the email as it accurately summarises the issues that the respondent was having and continued, in our view, to have in appropriately managing the claimant:

“As you're probably aware Colin is having a few niggles with Adrian. It's becoming clear that Adrian lacks a number of the basic skills (Email, Word, Excel etc.) required for the role which is adding pressure to Colins workload. Would it be possible for you to check the recruitment process that brought Adrian to us to ensure he has been matched correctly? It would be good to understand what skills he put on his application, how these were tested at interview and how he was matched to us.

If he has been correctly matched, could you confirm what the expectations are on us as it's clear that our induction and the buddy system is insufficient for his needs currently? We would urgently need to arrange some basic office training for him plus potentially some other external training”.

39. We find that the respondent, at this time, had genuine concerns about the level of the claimant's IT skills and how that would affect his ability to undertake the role to which he had been appointed.
40. On 26 March 2021, Mr Cartwright received a copy of the claimant's application form which included the fact that he had assessed himself as falling within the disability confident scheme; and the claimant's pre-employment questionnaire in which the claimant said he had no disabilities and required no reasonable adjustments.
41. Mr Cartwright decided that the claimant would need more support than he had initially anticipated and from 29 March 2021 he started daily 30 minute meetings with the claimant at 8.30 each morning.
42. At the first meeting on 29 March 2021, Mr Cartwright asked the claimant about the declaration on his application form about his disability. The claimant informed Mr Cartwright about his hearing problems and osteoarthritis. The notes of that meeting record the claimant as saying he is deaf in one ear with considerable hearing loss in another. In respect of the osteoarthritis, it says as an aside “he also has arthritis in his knees, but not a disability”.

43. Mr Cartwright suggested an Occupational Health referral when there was a likely return to office working as Mr Cartwright understood the impact of the claimant's hearing impairment to be that he would find it harder in an office environment.
44. Mr Cartwright said that this was the first time he found out about the claimant's hearing impairments and arthritis and said he believed that the reference to him not being registered disabled was a reference to the claimant not wanting to identify as disabled.
45. Mr Cartwright had scheduled weekly one to one's with the claimant from 15 March 2021. This means that 29 March 2021 would have been the third (at most) one to one he had had with the claimant two weeks into his job. At that meeting he raised a possible issue about the claimant being disabled arising from the claimant's application form. The claimant explained some of his problems (relating to his hearing). At that time the claimant only said that office work might be a problem because of his hearing and Mr Cartwright suggested exploring the issue further when the claimant was planning to return to work.
46. We find that this was the first time that Mr Cartwright became aware of the claimant's problems. Mr Cartwright clearly looked past the health declaration to the fact that the claimant had indicated he was disabled for the purposes of the Disability Confident scheme and made appropriate enquiries. In our judgment, Mr Cartwright has acted throughout to try to support the claimant and he is to be commended for this proactive approach.
47. We note, and it was agreed, that at that time the government guidance was to work from home where possible because of the pandemic.
48. The claimant described the impact of his disabilities and we accept his account. In respect of his hearing impairments, he is profoundly deaf in his right ear with limited hearing in his left ear for which he uses a hearing aid. The impact of this is that he is particularly affected by background noise, cannot tell from which direction sound is coming and sometimes needs people to repeat themselves.
49. We find that 29 March 2021 was the first date on which Mr Cartwright understood the claimant to have a disability of hearing impairment and he understood that this was likely to have an impact on his ability to hear effectively when working in an office environment. We prefer Mr Cartwright's evidence that the claimant told him that his hearing might be an issue in office environments.
50. However, there is no evidence to suggest that Mr Cartwright made any enquiries about the impact of the claimant's hearing in video meetings. The claimant told him that he had used an aid in a previous job (a Roger pen) in a call centre. There was no discussion at that meeting about any impact the claimant's hearing impairment had on his ability to take part in video calls. A Roger pen is handed to a speaker when talking to the hearing-impaired person and connects, in some way, to a hearing aid to minimise

background noise to enable the hearing impaired person to hear the speaker. It was agreed that it works only in person or on the telephone.

51. On 1 April 2021, the claimant confirmed in his daily meeting that he had no experience of using IT in a work setting – he had gained his experience in training. Mr Cartwright asked if the claimant would prefer more regular and repetitive work but the claimant said he wanted to be pushed out of his comfort zone. We find that Mr Cartwright was genuinely concerned about the claimant's ability to perform his role because of his IT skills and was seeking to support the claimant.
52. The daily meetings continued, and on 14 April 2021 the claimant told Mr Cartwright that he had a bad back. The claimant confirmed that he did not believe that this was caused by his job but Mr Cartwright offered advice about setting up his workstation and taking regular breaks. We find that Mr Cartwright was aware that the claimant's back problems would cause difficulties sitting at least, and possibly standing, (hence his advice on taking regular breaks) but reasonably concluded that the claimant's back problems were not caused *or made any worse* by his job.
53. The claimant said in oral evidence that this particular problem had been going on for years, that he was on morphine-based medication and that he was, generally, open and honest about issues. We find on the balance of probabilities, that the claimant told Mr Cartwright in the course of that meeting that he had had problems for a long period.
54. In this meeting, Mr Cartwright explains some specific tasks that the claimant was not completing to his satisfaction and he was concerned that "the simplest of messages are not registered and resulting in task achievement".
55. This meeting was an ideal opportunity for the claimant to state, if it was the case, that his disabilities were making tasks difficult for him – either because of pain, medication or something else. The claimant did not do so and we conclude that this is because the claimant's difficulties in doing the work to the required standard were, at least as far as the claimant was aware, unrelated to either his back pain or his hearing impairment.
56. In respect of osteoarthritis and musculoskeletal problems, the claimant cannot sit or stand for long periods and needs to change position often. He has back pain which varies depending on his activity. He needs to get up from sitting sometimes and walk around, or sit down if he has been standing too long. He also walks slowly and has limited mobility.
57. The claimant also has, as far as is relevant, diabetes for which he requires medication and medical appointments. He is regularly tested to ensure he is not developing problems with his feet and to monitor his medication. The claimant also has problems with his eyes, but the impact of this, he describes, is that once a year he needs to be tested to ensure that diabetes is not affecting his eyes. We did not hear any evidence about any of these matters impacting directly on the claimant's cognitive abilities.
58. On balance, we prefer the evidence of Mr Cartwright. We find that the first time Mr Cartwright became aware of the claimant's osteoarthritis and musculoskeletal problems was on 14 April 2021.



59. We think, on the balance of probabilities, that Mr Cartwright understood that these problems could cause the claimant difficulties on his return to work but that he did not assume what they were or explore them in detail with the claimant at that stage.
60. He instead undertook to refer the claimant to occupational health for assessment which he did on 30 April 2021. The reason for the referral being made then, rather than earlier, was because the government guidance about Covid-19 suggested that a potential return to work was starting to look more likely from then, although we remind ourselves that matters remained changing and uncertain throughout 2021.
61. Before addressing the occupational health referral, however, we mention some other findings arising in the interim.
62. On 19 April 2021 Mr Cartwright identified that the claimant was having difficulties with some IT skills that would be expected to be 'a given' in the role and in completing some tasks.
63. On 20 April 2021, Mr McDonald (the claimant's "buddy" who was part of the apprenticeship support) identified that the claimant seemed to lack IT experience and missed the urgency with some matters. He recognised that working at home alone may make it more difficult to gain the experience but that the claimant was "getting there slowly".
64. In a weekly one to one on 23 April 2021 Mr Cartwright had concerns about the claimant's pace, note taking and prioritisation. Note taking was a particular concern for Mr Cartwright and an ongoing issue. This relates to the claimant taking notes in conversations when he was being given tasks to do. The claimant did not take notes and he said, in oral evidence, that this was a task he had always struggled with since he was at school. He said that it was for that reason that he was not taking notes, even in the tribunal hearing. This was a separate issue from taking minutes, and we find, on the basis of the claimant's clear evidence, that the claimant's difficulties in taking notes were unrelated to his disabilities. However, we do think it likely that the fact that the claimant did not make notes of his conversations and tasks he was being given contributed significantly to his difficulties in remembering to complete all the tasks he was assigned, or in prioritising tasks effectively.
65. There was a monthly PMR discussion (which we conclude is a performance meeting of some kind although the acronym was never explained) between the claimant and Mr Cartwright on 26 April. Mr Cartwright set out his concerns in that meeting that the claimant was not performing at the grade as expected. His concerns were and remained about pace (of completion of work), note taking and prioritisation. He said that:

"I suggested presently I am unable to allocate tasks which he should really be undertaking for the grade, or of a level responsibility (sic). And to continue our open and honest discussions I need to share my concerns as to not give indication to an unfair view of his progress."
66. The claimant agreed in that meeting that Mr Cartwright's assessment was fair and said that he would have liked and expected to have picked up his IT

skills more quickly than he did. In oral evidence the claimant observed that this was only 6 weeks into his role, and of course it was. However, we find that Mr Cartwright genuinely had the view that the claimant was not performing as required, that the claimant accepted and agreed with that at the time and that the main reason for this was the claimant's difficulties with pace, prioritisation and note taking. Mr Cartwright continued to offer support to the claimant. The claimant did not in that meeting refer to his disabilities as contributing in any way at all to any problems with his performance.

67. On 11 May 2021 in a daily meeting, the claimant told Mr Cartwright that his back, legs and neck were getting worse, but this was unrelated to work. We find that Mr Cartwright reasonably believed from this conversation that the claimant's work was not impacting on his osteoarthritis, but that his symptoms were a continuation of an existing condition.
68. The claimant attended an occupational health (OH) assessment on 17 May and the meeting with occupational health was discussed between the claimant and Mr Cartwright at the daily meeting on 18 May 2021. We set out the relevant findings of the occupational health report.
  - a. That the claimant's "mental state was satisfactory"
  - b. That the claimant is profoundly deaf in his right ear and uses a hearing aid in his left. The claimant used a Roger pen for face to face and telephone meetings previously
  - c. That the claimant has a history of multiple joint pain and he was expecting a referral to a specialist at some point
  - d. That the claimant agreed that his progress at work had been slower than expected and "He attributes this to the length of time he has been out of work and not having used applications such as word and excel for over 3 years. He has also struggled as a result of his hearing difficulties which in my opinion is likely to have contributed to any performance related difficulties".
69. The OH doctor made the following recommendations which we set out in full:
  - a. I would recommend a meeting is arranged at the earliest opportunity with Adrian to discuss his IT difficulties with a view to looking at ways in which he can be best supported which may include refresher training in using Microsoft excel and word and his other work applications.
  - b. He is likely to benefit from being provided with a Roger pen for face to face meetings and telephone work.
  - c. In view of his joint symptoms he will benefit from having an ergonomic assessment of his home workstation and his office workstation when staff return to the office.
  - d. You may wish to consider involving the Access to Work in his case as it is likely that the scheme will fund the majority of the costs of his

workplace adjustments including the cost of any assessments and specialist equipment.

- e. Adrian is likely to benefit from having a work place mentor and I would also recommend that he maintains regular contact with line manager.
70. At the meeting on 18 May 2021, Mr Cartwright asked what further IT training the claimant needed beyond the training already arranged and the claimant said more practice.
71. It was agreed that the provision of a Roger pen would be reviewed when the claimant returned to the office. The claimant acknowledged in the hearing that it would not assist with any difficulties the claimant had using Teams.
72. Mr Cartwright said that he would recommend a workstation review.
73. There is no record of a discussion about a work place mentor or regular contact with the claimant's manager, but the reality is that the claimant already had a buddy (Mr McDonald) and daily, structured contact with his manager. We note at this point that Mr Cartwright was having *at least* 3 ½ hours, structured and supportive one on one contact with the claimant each week. This was followed up in an email on 27 May 2021 to which we will return.
74. We find that Mr Cartwright promptly addressed the occupational health assessment with the claimant and, certainly as at 18 May 2021, started to take steps to address the additional matters that needed to be addressed arising from it.
75. On 26 May 2021 there was a probation discussion between the claimant and Mr Cartwright. The areas for improvement identified by Mr Cartwright were:
  - a. Pace/prioritisation
  - b. Task management/recognition of tasks
  - c. IT skills
76. The claimant agreed in evidence that this was a fair reflection of the issues the respondent was having with the claimant's performance. The claimant's comments were that the pandemic and not being able to go to the office so that he could be physically shown how to do things was the main reason for the pace of his progress. A number of actions were set out including ongoing regular support and that the recommendations in the OH report needed to be addressed and considered on the claimant's return to the office. The claimant was planning to return to the office on 9 June 2021.
77. The claimant did not say in this meeting that any of his performance issues were connected in any way with his disabilities and nor did he contradict the suggestion that the adjustments required consideration on his return to the office (rather than while at home). The claimant put to the respondent's witnesses that more account should have been taken of the OH opinion that

the claimant's hearing impairment is likely to have contributed to any performance related difficulties.

78. We agree that this does call for further exploration, but as mentioned above, there was some onus on the claimant to address this in his discussions with Mr Cartwright and he did not. We have also not heard (except in relation to online group meetings which is addressed elsewhere) what impact the claimant's hearing *actually* had on his performance. In any event, however, as discussed below, the claimant was referred for a further hearing assessment and was having ongoing assessments and intervention outside of work.
79. At or shortly after that meeting, a performance improvement plan (PIP) was implemented with the intention of focussing the claimant's attention on the areas for improvement.
80. We find, and the claimant agreed, that the areas for improvement identified in the PIP were all related to the *quality* of work done rather than the *quantity*. We also find that there is nothing to suggest to Mr Cartwright that the claimant's quality issues were in any way connected with his disabilities. Again, this was the ideal opportunity for the claimant to raise it if they were. We recognise that the claimant was strongly opposed to the idea of making excuses for his performance, but he did attribute part of the reason for his performance to the pandemic. We conclude, therefore, that had he considered that part of the reason for his performance was his disabilities he would have mentioned this.
81. We find that the claimant's osteoarthritis would have had an impact on the amount of work he could do because of the need for regular breaks. However, we prefer the respondent's evidence that the claimant's workload had been reduced compared to his peers. We find that the respondent's main concern was the quality and accuracy of the work done. Although *pace* suggests a link with time taken, we infer that this was inherently linked to prioritisation and productivity (which would have been greater with more effective use of IT) and not just the time taken to complete tasks.
82. From 1 – 9 June 2021 the daily meetings were undertaken by Ms Lill as Mr Cartwright was on leave. On 27 May 2021 Mr Cartwright wrote to Ms Lill setting out a detailed set of actions that the claimant had still to complete and explaining the structured format of the daily meetings. He says:

*"The first thing to note is the daily 8.30am briefing. I have adopted a different approach these last few days which we both reflect is having impact which follows the principles of*

- *5 mins, building relationships, open discussion*
- *15 mins, to discuss yesterday's tasks identified and progress made, agree today's tasks (using action log - focus will be daily to agree what is prioritised and achievable and then set to, reflecting the following day incomplete actions)*
- *5 mins diary review (essential, ideal, not req'd attendance, to maximise task and development opportunities)*

- 5 mins, AOB

*What we have recognised in this process some tasks may require us (CC/SL) to indicate how long we think a task may take to help Adrian gauge time he should be spending on it”*

83. The email also sets out an example of an action log. This email is a reflection of the level and extent of the support that Mr Cartwright was providing to the claimant. In our view and experience the support is exceptional – both in terms of volume and quality – and a genuine attempt to support the claimant to achieve the targets set for him.
84. On the same day, Mr Cartwright emailed the claimant with a summary of the OH recommendations and what had been discussed. Mr Cartwright sought the claimant’s acknowledgment that his planned approach to the recommendations was acceptable.
85. In respect of the Roger pen it was planned that the claimant would feedback following his first visit to the office (on 9 June) to understand potential hearing issues.
86. In respect of the recommendation for an ergonomic assessment Mr Cartwright says “To be scheduled (Adrian can you consider if this is a firm requirement, especially for home?)”. The claimant agreed that discussions about this had been ongoing and this is consistent with our view that the claimant had indicated to Mr Cartwright that he was managing ok at home.
87. The claimant replied “I acknowledge all in this report”. Although this response is slightly ambiguous, as the claimant did not raise any issues in response, we conclude that Mr Cartwright was entitled to conclude that the claimant agreed with his plan.
88. On 9 June 2021 the claimant went to the office for the first time. The claimant was unable to obtain his work ID then (for entry to the office) in part, it appears, because he did not take his laptop with him. The claimant was, from that date, able to go into the office whenever he wanted to. There was no reason that we have heard why he would not have been able to arrange his security pass on another day. The claimant says he was advised by Mr Cartwright not to go in unless there was someone from his team to go in with him.
89. The office in which the claimant was working for the ESFA was shared by other departments, and people in the claimant’s team worked remotely or in the office in accordance with their own arrangements. It was not necessarily the case, therefore, that his direct colleagues would be in the office on any given day in any event. We find that there was a miscommunication and that Mr Cartwright was suggesting that the claimant co-ordinate his days in the office with his colleagues. This was because the claimant’s reasons for wanting to work in the office, rather than at home, were because he believed he would benefit from the presence of and support/assistance from his colleagues in person helping him with his job.
90. The claimant had never said that he needed to attend work because working at home was uncomfortable or difficult because of his osteoarthritis.

Mr Cartwright's suggestion was, therefore, reasonable. However, we find that the claimant was not prevented from going in to work from 9 June 2021.

91. In fact, the claimant did not go in again until 9 July 2021. From then it appears that the claimant went into the office sporadically. In a meeting on 19 July 2021 the claimant said that he was keen to go into the office again. It is clear that the claimant was able to go to the office when he needed or wanted to. In the same meeting, the claimant refers to an issue with his leg which had arisen as a result of putting some blinds up at the weekend.
92. Daily meetings continued throughout this period and on 22 July the claimant expressed concerns about passing his probation (which was due to end on 14 September 2021). He confirmed, though, that he had felt well supported by everyone he had worked with in the division.
93. On 30 July 2021 in the daily meeting, Mr Cartwright and the claimant reviewed the OH recommendations since the claimant had been back to the office "a couple of days" and was planning then to come back 4 or 5 days per week. In this meeting, Mr Cartwright reviewed the OH recommendations, what had originally been discussed and where matters stood at that date. We find that this is an accurate reflection of those matters and we make the following (relevant) findings:
  - a. That IT training had been made available and there was little more training the claimant needed expect perhaps in respect of note-taking
  - b. That using a headset works well for the claimant's hearing issues (for non-face to face meetings) and he will review it as more people return to the office. The claimant suggested that proceeding with the Roger pen would be better off delayed until he had his hearing assessment at the hospital.
  - c. In respect of the claimant's joint pain, the claimant said he would benefit from a rising desk at work, but didn't think he needed anything else. At this stage, it is apparent that the claimant expect to work 4 or 5 days a week in the office. Mr Cartwright records that "And his home work environment for future limited use it suffices, but we can reconsider if we end up wfh more frequently". We find that the claimant agreed to this and that this reflected what he had said previously – that breaks and moving about were sufficient measures for addressing his joint problems (in so far as they applied to working) at home. There are rising desks at the end of each bank of desks in the ESFA office and Mr Cartwright asked the claimant to trial one, along with different chairs that were there, to see if it helped.
94. We find, therefore, that in this meeting the claimant agreed that relevant workplace adjustments as recommended by OH were in place, or being put in place subject to ongoing assessments.
95. On 2 August 2021 the claimant told Mr Cartwright that his back pain had returned, for reasons unrelated to work, and that he needed to chase the hospital about his hearing test and hearing aid.

96. On 3 August Mr Cartwright contacted the Civil Service Workplace Adjustment Service (CSWAS) who agreed to conduct a workplace assessment for the claimant's joint problems and hearing. Mr Cartwright told the claimant that he should complete a Workplace Adjustment Passport and an OH consent form.
97. On 9 August the claimant was working from home because his back was bad. The claimant said that his difficulties were with travelling to work, although subsequently (on 28 September 2021) the claimant said that he thought in fact his back was worse at the office than at home.
98. The claimant also had his formal stage 1 performance discussion on 9 August with Mr Cartwright. The claimant was offered the opportunity to be accompanied but attended alone. The performance concerns Mr Cartwright had at this meeting remained:
1. Pace and Prioritisation
  2. Task management and identification
  3. IT skills, Microsoft and Internal Systems
  4. Note taking to refer to for understanding and consolidate learning to improve
99. We have addressed these previously and we find that they remained genuine concerns of Mr Cartwright.
100. Mr Cartwright invited the claimant to make suggestions of anything else he could offer. He said that the daily and weekly one to ones would continue and the workplace and hearing assessments are in train. The claimant did not raise in that meeting any issues relating to his disabilities except to say that he has a hearing aid test shortly but that if he thinks of anything else he would let Mr Cartwright know. Again, in that meeting, the claimant referred to the pandemic being a barrier to his improvement and a hands-on approach would have helped.
101. We find that at that date the claimant, effectively, communicated to Mr Cartwright that he was satisfied with how the adjustments were progressing and did not identify that his disabilities were impacting on his performance at all. At the conclusion of that meeting, Mr Cartwright extended the claimant's probation period by one month to 15 October 2021.
102. The respondent's policy allows the extension of the probation period by up to three months in exceptional circumstances. We accept Mr Cartwright's evidence that on his assessment the claimant was too far away from the standards expected of an EO to justify a further or longer extension. He said that he did not believe the claimant would achieve those standards in even 6 months. He extended the probation by one month to give the claimant, effectively, one more chance to show that he was capable of achieving the standards. We find that this view was genuinely held by Mr Cartwright and this was the reason for extending the claimant's probation by one month. Mr Cartwright sent the claimant a formal written warning about his capability

the next day, 10 August. Confusingly, that refers to the extension of the probation period to 17 September but in our view nothing turns on that.

103. On 11 August, the claimant agreed that it would be sensible to wait for the outcome of both his hearing aid appointments at the hospital and the CSWAS hearing assessment before obtaining a Roger pen. The claimant was still experiencing some problems with his back in the office.
104. In the meeting on 13 August 2021, Mr Cartwright continued to express some concerns about the claimant's progress – particularly in respect of the claimant still not making notes of his tasks. The claimant confirmed that his back problem was not work related and Mr Cartwright suggested the claimant attend the office less if his back was still causing discomfort. The claimant agreed to chase the workplace assessment and Mr Cartwright prompted the claimant to complete his workplace adjustment passport (WAP). This is a document that records agreed adjustments so that the employee does not have to re-explain them on a change of manager or role.
105. We find that Mr Cartwright genuinely and reasonably believed at this point that the claimant's back condition was potentially exacerbated at work and he offered working from home as an adjustment. It is clear from this communication, and the others, that whether the claimant's back and joint problems were worse at home or in the office was, and remains, uncertain. We find that there is no evidence to demonstrate that the claimant's back and joint problems would be alleviated or reduced by working in the office rather than at home.
106. The claimant was on leave from 20 – 31 August. In the meeting on 6 September, the claimant told Mr Cartwright that he had received some loaned equipment from the hospital for his hearing which he had not yet tried but would when back in the office. The claimant was at this point still waiting for his hearing test.
107. On 6 September the claimant was sent a form to fill out for his hearing assessment which he did the next day, and on 8 September a Virtual DSE assessment was arranged for 17 September. It is clear, therefore, that the OH recommendations were progressing.
108. On 8 September Mr Cartwright sent the claimant an invitation to a formal probation performance meeting, the outcome of which could be another warning leading to dismissal. The claimant was given the right to be accompanied.
109. On 9 and 10 September, Mr Cartwright made enquiries about alternative roles for the claimant. There were only two considered. One was for a PA role which the claimant agreed in evidence was not suitable. The other was for an Executive Assistant role, which is a more junior role to that of EO. We heard no evidence why this was not suitable for the claimant – it appears to have been a joint decision of the recruiting manager and Mr Cartwright or his HR contact. In any event, neither of these jobs were mentioned to the claimant at the time before being rejected as unsuitable.



110. The respondent's evidence was that these were the only potentially suitable vacancies available. It was also that there was no redeployment scheme per se, which we find difficult to believe in an organisation like the civil service, but in any event, these were the only two jobs identified and neither was mentioned to the claimant at the time before rejecting them as unsuitable.
111. At the daily meeting on 15 September 2021 the claimant was trialling a different headset but reverted to the original one and he was still at that point waiting for an update on the internal hearing assessment. By this time, Mr Cartwright had done all he could to progress the OH recommendations and we find, generally, that Mr Cartwright was continuing to support the claimant to try to achieve the appropriate standards.
112. On 17 September the respondent conducted the DSE assessment and on the same day the claimant had his stage 2 performance discussion with Mr Cartwright. Mr Cartwright confirmed that the claimant was still not meeting the requisite standards which, we have found and again find, related to the quality rather than quantity of the work being done. Mr Cartwright therefore decided to recommend to the decision maker that the claimant be dismissed.
113. Again, there was limited discussion of the claimant's disabilities. The claimant said that he would start to use the transcript tool (we conclude in MS Teams) to assist his accuracy.
114. Mr Cartwright explicitly asked the claimant what the barriers to getting work correct were and the claimant said he recognised that his progress was slow but felt it would be getting better now he was in the office more.
115. We refer to the issue of the claimant not taking notes for his own reference to support the completion of tasks. The claimant says that he "does have difficulty in listening and taking notes at the same time". Although this might, on first consideration, appear to relate to the claimant's hearing impairment, we refer to our earlier findings and the claimant's explicit evidence that this has been a problem for him since childhood – before his hearing problems started. It was not part of the claimant's evidence or case that his hearing impacted on his ability to take instructions in one to one meetings. It has only ever been about group meetings (as to which, see below).
116. We find, therefore, that the claimant did not raise at this meeting any link between his disabilities and his performance except in relation to the use of a transcribing tool to assist in note taking. For the reasons already set out, we conclude that this related to the claimant's inherent difficulties with note taking, not his hearing impairment.
117. Mr Cartwright referred the claimant's case to Dr Mothersdale including his recommendation for dismissal. That referral included a summary of the support and chronology as set out above and concludes:

"With the levels of support, reasonable adjustments and clear direction provided through the PIP as to the areas he is to improve I am of the opinion progress is limited, below expected and sadly not achievable within an acceptable timescale. As such I would pass judgement that the 6 month

probationary period has been unsatisfactorily met, and with no reasonable view this could be recoverable under an extended probation period would make recommendation for considering dismissal.”

118. We find that this reflects Mr Cartwright’s genuinely held view of the claimant’s performance.
119. The claimant was invited to a formal meeting with Dr Mothersdale on 5 October 2021 and the claimant was offered appropriate adjustments and the opportunity to be accompanied at the meeting. The claimant sought trade union advice from this point. The relevance of this is that this is the point from which the claimant’s case changes emphasis slightly.
120. After this invitation, on 29 September 2021, the claimant heard from the CSWAS setting out some adjustment recommendations which comprised of a rising desk, a high-backed chair and taking regular breaks. The rising desk had been available from the claimant’s return to the office. The option to take breaks had been available from the outset of the claimant’s employment (as he was working at home) and there were already a number of different chairs available in the office for the claimant to trial.
121. The hearing assessment was arranged for 18 October 2021. In light of the impending meeting with Dr Mothersdale, this timing was unfortunate, but we do not read anything sinister or underhand into it.
122. Notwithstanding the impending meeting, the regular meetings with Mr Cartwright continued and on 1 October 2021 the claimant informed Mr Cartwright that he now had a new hearing aid, which was much better, and that he had been informed by the hospital that a Roger pen is not suitable for use with MS Teams.

### **Dismissal**

123. The claimant met with Dr Mothersdale on 5 October 2021. Dr Mothersdale summarised Mr Cartwright’s assessment. The claimant accepted that he had not made as much improvement as he might have done, but again said that the primary cause of his difficulties was the pandemic and remote working. The claimant also accepted that he was behind in his apprenticeship work.
124. The claimant made the reasonable point that he had not had his workplace assessment until 17 September 2021 and his hearing test was not due until 18 October 2021. However, the claimant, even at this meeting, did not draw any correlation between his disabilities and his performance (in relation to pace and prioritisation, Task management and identification, IT skills and note taking).
125. The claimant’s representative did say: “(AM) candour is to be commended and that the department looks to and does recruit a diverse workforce. (NH) stated that the salient facts are that (AM) health does have an impact and the incorrect information provided by his job coach when making his initial application does need to be considered. The OHS has been delayed due to the pandemic and that the adjustments from the hearing test on 18 October with a review period should be considered. He felt that (AM) is at a

disadvantage not having the OHS adjustments in place and the tools to do the job properly.”

126. While he is quite reasonably seeking to draw a correlation between the claimant’s disabilities and his performance, this is no more than an unsubstantiated assertion. The fact remained that the claimant had at that time, and had at the tribunal hearing, produced no evidence (with the exception of the line in the OH report which is addressed above) – whether written or oral – linking his performance difficulties with his disabilities.
127. In respect of the proposed adjustments suggested by the claimant as alternatives to dismissal we find as follows:
  - a. Extending the probationary period – Dr Mothersdale had no basis on which to do this. The evidence provided by Mr Cartwright was that the claimant would not achieve the requisite standard in a reasonable period. There was no link asserted or evidence provided (even in the form of an explanation from the claimant) supporting a link between the claimant’s disabilities and his delay in progressing and no reasonable basis on which to extend the probationary period.
  - b. Putting in place all of the reasonable adjustments that had been recommended by occupational health – the evidence provided by Mr Cartwright was that all of the adjustments were in place or were in the process of being put in place. However, as above, there was no evidence of or assertion to the effect from the claimant that the absence of the adjustments recommended by OH was impacting on the claimant’s performance or progress.
  - c. Allowing the Claimant to work in the office all the time – the claimant had been allowed to work in the office since 9 June 2021 and had been doing so more regularly since 30 July 2021. This had made no demonstrable difference to his performance.
  - d. Redeploying the Claimant – we find that Dr Mothersdale gave no real consideration to this as an option beyond recognising that this had been considered by Mr Cartwright. He did not consider exploring that again or looking more widely for redeployment opportunities at that stage. Dr Mothersdale did not give any explanation for not considering redeployment himself, relying instead on the fact that Mr Cartwright had already considered it and there were no suitable vacancies.
128. Dr Mothersdale’s decision was to dismiss the claimant and that decision was notified to the claimant on 11 October 2021, the claimant’s last day of employment being 15 November 2021. However, the claimant was not required to attend work again from the date of his notice and he did not do so.
129. In the meantime, on 7 October 2021, the claimant had been provided with the recommended chair at the office and we note that the claimant continued to attend work until 11 October 2021. On 11 October 2021 Mr Cartwright cancelled the claimant’s hearing assessment but even at this stage Mr Cartwright indicated that if the claimant did return to work, the assessment would need to be reinstated.

130. The claimant appealed against his dismissal on 20 October 2021 and in his appeal he refers again to the impact of the pandemic and working from home on him. In this appeal letter, he highlights that he was dismissed before the recommended adjustments were put in place and he had had a chance to see if they made any difference. The claimant said that his disabilities should be treated as mitigation, although he does not set out any link between his disabilities and the particular performance issues that were identified and the reason for his dismissal.

## **Appeal**

131. The appeal was heard by Mr Jenkins and the claimant was represented at the appeal hearing. The appeal process is the first occasion on which the claimant sought to make an explicit link between his disabilities and his performance. Specifically, he said that none of the adjustments were in place before the PIP was put in place and he felt that his hearing impairment impacted on his ability to take notes.

132. We have made our findings about that. We also note that the claimant now had the benefit of advice. We do not criticise him for this, but this reflects a change in the way the claimant has described the impact of his hearing impairment. Mr Jenkins explored with the claimant about other adjustments in place to address the claimant's hearing problems – these were closed captions, subtitles and asking people to speak more slowly. The claimant had made use of all of these suggested adjustments. In the appeal meeting there was a discussion about the Roger pen but it was agreed, as discussed above, that this would not help on remote meetings.

133. This discussion refers, as far as is relevant to the issues to be decided, to the claimant being required to take minutes of "group meetings". This is what the second issue (as clarified in the Tribunal hearing) "The requirement to attend online group meetings such as on Microsoft Teams" referred to, rather than just attending general meetings.

134. The claimant initially observed either one, two or three meetings before being asked to take minutes. Although it was unclear how many meetings he observed before taking minutes, he only took minutes on one occasion and his minutes were unsatisfactory so he was not required to do it again. The reason the minutes were unsatisfactory was because the format was wrong and they contained inadequate information. We have seen the claimant's version and a standard version and it is clear that there are problems of form and substance that are not obviously accounted for by any difficulties the claimant had in hearing what was said in the meeting.

135. The claimant agreed that people adjusted their speaking to make it easier for him to hear, subtitles were available and a transcript and recording of the meeting was also available. We agree with the claimant that subtitles and transcripts of MS Teams meetings are not perfect but we have heard no evidence why, taken altogether and given the claimant's apparent level of hearing, these adjustments would not be adequate to allow the claimant to minute the meeting.

136. The claimant also said that there was lots of background noise at home. However, this contradicts the claimant's contemporaneous evidence in his conversations with Mr Cartwright that the headphones he used did block out background noise and background noise only rarely impacted on the claimant at home.
137. The claimant raised other issues impacting on his performance, including the absence of the Talent Coach (part of the apprenticeship), the pandemic and his learning style.
138. Mr Jenkins made some further enquiries after the appeal meeting on 2 December 2021 and decided not to uphold the claimant's appeal. This was communicated to the claimant in a letter dated 9 December 2021.
139. In oral evidence, Mr Jenkins was at pains to point out that the appeal was a review rather than rehearing and consequently, he did not himself consider whether redeployment was an appropriate alternative, or if the recommended adjustments would have made a difference, just that Dr Mothersdale had taken the evidence into account.
140. Having said that, in our view the evidence and findings as we have set out above does support the decision to dismiss the claimant and there was no obvious basis on which Mr Jenkins ought to have overturned the decision.

## **Law**

### **Failure to make reasonable adjustments**

141. Section 20 Equality Act 2010 – Duty to make adjustments says, as far as is relevant:

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

(2) The duty comprises the following three requirements.

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

142. A provision, criterion or practice (PCP) must have an element of repetition about it, or at least the potential to be repeated. It cannot be a one-off act applied solely to the claimant.

143. Section 21 – Failure to comply with duty says

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

144. Paragraph 20 of Schedule 8 – Lack of knowledge of disability, etc provides that:

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

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

145. This requires both knowledge that the claimant was, at the relevant time, disabled and knowledge that the disability is likely to put the claimant at a particular disadvantage,

146. In *Secretary of State for the Department of Work and Pensions v Alam* [2010] IRLR 283, the EAT held that the correct statutory construction of s 4A(3)(b) (the predecessor to sections 20 and 21 Equality Act 2010) involved asking two questions;

(1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then there is a second question, namely,

(2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?

147. The disadvantage relied on by the claimant must be one that arises in some way because of the claimant's disability. In *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, the Court of Appeal held that there could be no duty to make an adjustment for the lack of an ability which was wholly unrelated to the disability.

148. Once a potentially reasonable adjustment has been identified, the burden of showing why that proposed adjustment is not reasonable falls to the respondent.

149. We refer to the EHRC Employment Code. That says, at paragraph 6.28 and 6.29

“6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

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

6.29 Ultimately the test of the ‘reasonableness’ of any step an employer may have to take is an objective one and will depend on the circumstances of the case”.

150. The question of whether it is reasonable for the employer to take a step is an objective one (*Royal Bank of Scotland v Ashton* [2011] ICR 632). The focus of the question is on the practical results of the proposed step.

151. In *Romec Ltd v Rudham* UKEAT/69/07 the EAT said that the correct question for the Tribunal to ask itself is “the extent to which the step would prevent the effect in relation to which the duty is imposed”.

## **Disability**

152. Although it is agreed that the claimant as at all times disabled within the meaning of the Equality Act 2010, it is necessary to briefly set out the definition for the purposes of determining the notice that the respondent had of this, and when. Knowledge requires knowledge of all elements of the definition.

153. Section 6 Equality ACT 2010 says,

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

154. This question comprises of four separate tests as set out by the employment appeal Tribunal in the case of *Goodwin v the Patent Office* [1999] IRLR 4, EAT
- (1) The impairment condition
- Does the applicant have an impairment which is either mental or physical?
- (2) The adverse effect condition
- Does the impairment affect the applicant's ability to carry out normal day to day activities...., and does it have an adverse effect?
- (3) The substantial condition
- Is the adverse effect (upon the applicant's ability) substantial?
- (4) The long-term condition
- Is the adverse effect (upon the applicant's ability) long-term?
155. Paragraph 2 of schedule 1 of the Equality Act 2010 says
- (1) The effect of an impairment is long-term if—
- (a) it has lasted for at least 12 months,
- (b) it is likely to last for at least 12 months, or
- (c) it is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
156. The relevant provisions of Appendix 1 of The Equality and Human Rights Commission Code of Practice on Employment - The Meaning of Disability say that a substantial adverse effect is something which is more than minor or trivial. In determining whether something has a substantial adverse effect, account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of the loss of energy and motivation.
157. The code says that normal day-to-day activities are those activities which are carried out by most men or women on a fairly regular and frequent basis. Day-to-day activities include activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing, going to the toilet, talking, listening to conversations of music, reading, taking part in normal social interaction or forming social relationships, nourishing and care for oneself. This is not an exhaustive list.
158. Where someone receives treatment, that should be ignored and the impairment should be taken to have the effect it would have had without such treatment.



## Conclusions

159. We set out our conclusions by reference to the list of issues as identified at the case management hearing on 5 July 2022.

## Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

### 160. Working From Home

161. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability namely Osteoarthritis? From what date?

162. We refer to our findings above. On 14 April 2021, the claimant told Mr Cartwright that he had long term back pain and referred to morphine medication.

163. On the basis of this, Mr Cartwright knew from then or, if he did not, was on notice to make further enquiries about it. The stated impacts of the claimant's disabilities were that it was having an impact on his day-to-day activities (sitting and standing) which was more than minor or trivial so that he could reasonably have been expected to know that the claimant was disabled by reason of Osteoarthritis.

164. However, the claimant did not mention back problems on 29 March when Mr Cartwright raised the issue about the potential difference between the claimant's application form and the pre-employment questionnaire.

165. However, the respondent more generally knew about the claimant's back and mobility problems at the date of his interview in December 2020. The claimant explained his problems then and it would have been clear that this was likely to have been a long-term problem having an impact on the claimant's day-to-day activities. Even if it was not explicit how long the claimant had had the problems at this point, there was sufficient information available for the Respondent to be on notice that further enquiries would be necessary were the claimant appointed.

166. Therefore, the respondent had this institutional knowledge from December 2020 and had there been communication between the interviewers and Mr Cartwright, the likelihood is that this would have been investigated earlier.

167. However, the earliest Mr Cartwright could have had any idea about this was 8 January 2021 when the application form was sent from the central recruitment department to ESFA. This included information about the disability confidential scheme and, had Mr Cartwright read and considered this, ought reasonably to have prompted some enquiries from him of the claimant.

168. We find that Mr Cartwright *actually* knew on 14 April 2021 that the claimant was disabled by reason of osteoarthritis but that the respondent as a whole ought reasonably to have known by 4 December 2020 at the interview.

169. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: The requirement to work from home.

170. There was a requirement to work from home where possible at the time. Most people did and the respondent was encouraging people to work at home, albeit that there was the right to come into work if necessary. This applied to almost everybody employed by the respondent and we find there was a practice of requiring people to work from home.
171. It is unclear when this practice ended but certainly by 9 June 2021 the respondent's practice had loosened. This loosening is more appropriately addressed in respect of the adjustments below.
172. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he suffered pain at his workstation owing to his osteoarthritis.
173. The problems the claimant had were difficulties sitting or standing for a long time and a need to change position. In oral evidence, the claimant said that the greater space at work alleviated his discomfort and we observed that to an extent in the hearing. We find that this did put the claimant at a disadvantage – he was caused discomfort by his working arrangements at home. This was because of his osteoarthritis and knee and back pain, and the same difficulties would not have arisen for someone without the claimant's disabilities.
174. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?
175. Mr Cartwright, and consequently the respondent, clearly did know that the claimant was experiencing discomfort at home. Mr Cartwright suggested taking breaks and moving around to alleviate the disadvantage. This demonstrates to us that the respondent knew initially that the claimant was experiencing discomfort while working.
176. However, we have also found that after the initial enquiries, Mr Cartwright reasonably understood the claimant to be telling him that his problems were not made worse by working and that the claimant had made arrangements himself (in terms of breaks) to alleviate the discomfort as much as possible.
177. What steps could have been taken to avoid the disadvantage? The Claimant suggests:
- a. Working in the office
  - b. The provision of a suitable desk and chair
178. Was it reasonable for the Respondent to have to take those steps and when?
179. Did the Respondent fail to take those steps?
180. We address these questions together.
181. In respect of working in the office, the claimant was allowed to do that as soon as government policy allowed it. However, the respondent could not

have known that working in the office would have helped alleviate the disadvantage for the following reasons:

- a. The claimant never suggested it. He said that working in the office would be beneficial for his learning, not his osteoarthritis. There were numerous occasions when the claimant's pain was discussed but on no occasions did the claimant suggest that working in the office would be better.
- b. It was not until the tribunal hearing that the claimant first mentioned that a lack of space at home (as opposed to the type of desk and chair) was causing him any difficulty.
- c. In any event, when the claimant did first return to the office he did not report any improvement and, in fact, it appeared that on some occasions working in the office was detrimental. Once the claimant had returned to the office, he still initially worked from home the majority of the time, apparently out of choice.
- d. When the claimant was working in the office, he was not availing himself of the facilities (rising desk and adjustable chairs) that were available.

182. We conclude, therefore, that firstly working in the office, rather than at home, would not have allowed the claimant to have avoided the disadvantage. When he did work at the office, there was no appreciable difference in the problems the claimant had. They were dependent on other factors such as his activities at the weekend and as noted above on some occasions it was worse for the claimant to work in the office. Further when the claimant was explicitly given the option to attend the office, he chose not to do so on many occasions, suggesting that working in the office would not have had an appreciable positive impact on his discomfort.

183. It would not have been reasonable for the respondent to have allowed the claimant to work in the office earlier. Office working was restricted due to the pandemic, and the risks in spreading Covid -19 outweighed the benefits to the claimant in attending work (in relation to his disability) because there was no appreciable advantage to the claimant in attending work in respect of his disability.

184. Finally, we conclude that the real reason the claimant wanted to work in the office was his perception that he would have had a better opportunity to learn his job and progress. Whether this is correct or not, it is unrelated to his disability.

185. In respect of a suitable desk and chair, they were available in the office to trial and the claimant did not do so. A chair was finally provided, but it was not reasonable to provide a chair until a proper assessment had been undertaken – either by the claimant trialling the chair or by a formal assessment. The claimant did not trial, as far as we heard, any chairs and he was at least partially responsible for the delay in the assessment. While no criticism is intended of the claimant about this, it does tend to suggest in our view that it was not as a high a priority for the claimant at the time as he now says.

186. A rising desk was always available at the office.
187. For these reasons, the respondent did not fail to provide a desk and chair at the office.
188. In respect of the provision of the desk and chair at home, we have still heard no clear evidence about the problems this caused the claimant at home beyond the limited space (which the respondent did not know about before this hearing). The respondent generally (and Mr Cartwright particularly) reasonably believed that the claimant was making, himself, all the adjustments that were required at home. This was apparent from the communications after the OH assessment from which we have inferred that the claimant was content with his arrangements at home on a temporary basis. (We refer to the email of 27 May 2021).
189. We find, therefore, that the respondent has not failed to take the steps either because it was not reasonable to do so, or they did take them in a way or at a time that was appropriate and reasonable in all the circumstances.
190. Consequently, this claim by the claimant of a failure to make reasonable adjustments is unsuccessful and is dismissed.

**191. Attending Group Meetings**

192. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability namely a hearing impairment? From what date.
193. For similar reasons as set out above in respect of the claimant's osteoarthritis, the respondent knew about the claimant's hearing impairment on 4 December 2020. Any reasonable person, hearing that a person was deaf in one ear and used a hearing aid in the other would reasonably conclude that this was a long-term impairment that would have an adverse impact on the day-to-day activity of hearing and communication – particularly when the claimant has expressly stated that he might need things to be repeated.
194. We find that Mr Cartwright *actually* knew about the claimant's hearing impairment and had enough information to conclude that it was a disability on 29 March 2021.
195. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: The requirement to attend online group meetings such as on Microsoft Teams.
196. This was not disputed. It was part of the claimant's role, initially, to attend these meetings with the intention to minute them. (This is the PCP as clarified at this hearing).
197. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was less able to hear what was being said?

198. We find that it did. This is reflected in the adjustments that were proposed by the respondent.
199. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?
200. We find that it did know. There was discussion of the proposed adjustments implemented by the claimant and the respondent (subtitles, transcripts and recordings and the parties speaking more slowly).
201. What steps could have been taken to avoid the disadvantage? The Claimant says that there were some steps taken but he says that these were not reasonable as they did not cure the disadvantage (i.e. subtitles and headphones). The Claimant says that the Respondent was looking into finding him equipment through its disability partner but it never materialised.
202. It was never made clear what steps the respondent should have taken that it did not take. The respondent had explored mechanical adjustments with the claimant but was, at the claimant's suggestion, awaiting the outcome of a hearing assessment by his doctors. There was, in the circumstances, nothing further that the respondent could have done at that stage.
203. However, we have found that the claimant was not required to minute the meetings after one attempt. Although the problems with the quality of the minutes were unrelated (as far as the evidence we have heard shows) to his hearing impairments, any disadvantage was completely alleviated by the claimant no longer being required to minute the meetings.
204. There was, therefore, after the first try at minuting no further disadvantage to the claimant. He was not admonished for not taking the minutes and nor was that any part of his capability process.
205. In so far as the claimant's hearing problems impacted more generally on remote meetings, there was simply no evidence to support such an allegation. It is clear that the claimant participated in the daily one to one meetings and he raised no concerns about that. His problem was that he did not take notes of what he was required to do. We have found that that was unrelated to his hearing impairment as set out above.
206. For these reasons, the respondent did not fail to make any required reasonable adjustments in relation to the obligation to attend online group meetings and this claim is also unsuccessful and is dismissed.

**207. Dismissal**

208. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disabilities? From what date?
209. This is addressed above separately in respect of each disability.
210. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: The Respondent's performance improvement plan

211. We conclude that this PCP is in fact an expression of the requirement to work to the standards of an EO and that a failure to do so will result in the application of the performance improvement plan.
212. We find that there was such a PCP.
213. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was less able to perform to the requisite standard owing his disabilities?
214. In our view, it did not. As should be apparent from our findings, the areas in which the claimant was not performing were:
- a. Pace and Prioritisation
  - b. Task management and identification
  - c. IT skills, Microsoft and Internal Systems
  - d. Note taking to refer to for understanding and consolidate learning to improve
215. These are all criteria related to the quality of the claimant's output. We have explained our understanding of Pace above – in that it relates to efficiency, productivity (by using IT) and prioritisation. The respondent had already significantly reduced the claimant's workload to account for a reduced output.
216. There was no evidence before us that either of the claimant's disabilities had any impact on this. The claimant's view was that the main factors were the pandemic and the resulting home working, and his agreed slower than expected progression in IT skills. He also agreed that note taking was not his forte.
217. We have found that Mr Cartwright genuinely and reasonably believed that the claimant had no realistic prospect of reaching the appropriate standards in a reasonable time-scale.
218. We are aware that the effects of hearing loss can, in some circumstances, extend into difficulties of learning and written communications. However, this case was not made or even alluded to by the claimant and there was certainly no evidence to support such an impact in the claimant's case.
219. We refer, at this point, to the comment of the OH advisor that "He has also struggled as a result of his hearing difficulties which in my opinion is likely to have contributed to any performance related difficulties". The claimant did not provide any evidence or examples (either during his employment or at the tribunal) of this being the case in reality. We find, therefore, that this must have been a generalised view by the OH advisor of a possibility but that there was no evidence to support this in the claimant's particular case.
220. We find, therefore, that the claimant's performance was unconnected to his disabilities and consequently the respondent was no under any obligation to

take any steps to avoid such a disadvantage and this claim is also unsuccessful and is dismissed.

221. It is unnecessary, and in fact not realistically possible, to address the remaining question in respect of knowledge of disadvantage, as we have found that there was no such disadvantage.

222. For all these reasons, the claimant's claims are unsuccessful and are dismissed.

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Employment Judge **Miller**

15 February 2023

## **Appendix – list of issues**

### **Reasonable adjustments**

#### **1. Working from home**

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

1.2.1 The requirement to work from home.

1.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he suffered pain at his workstation owing to his osteoarthritis.

1.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

1.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

1.5.1 Working in the office

1.5.2 The provision of a suitable desk and chair

1.6 Was it reasonable for the Respondent to have to take those steps [and when]?

1.7 Did the Respondent fail to take those steps?

## **2. Attending Group Meetings**

2.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability namely a hearing impairment? From what date

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

2.2.1 The requirement to attend online group meetings such as on Microsoft Teams.

2.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was less able to hear what was being said?

2.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

2.5 What steps could have been taken to avoid the disadvantage? The Claimant says that there were some steps taken but he says that these were not reasonable as they did not cure the disadvantage (i.e. subtitles and headphones). The Claimant says that the Respondent was looking into finding him equipment through its disability partner but it never materialised.

2.6 In the premises was there a failure to make reasonable adjustments?

## **3. Dismissal**

3.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disabilities? From what date?



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

3.2.1 The Respondent's performance improvement plan

3.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was less able to perform to the requisite standard owing his disabilities?

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

3.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

3.5.1 Extending the probationary period

3.5.2 Putting in place all of the reasonable adjustments that had been recommended by occupational health

3.5.3 Allowing the Claimant to work in the office all the time

3.5.4 Redeploying the Claimant.

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

3.7 Did the Respondent fail to take those steps