EMPLOYMENT TRIBUNALS

Claimant: Mr P Berry

Respondent: Sellafield Limited

HELD AT: Liverpool **ON:** 8, 9, 10, 11 and 12 January 15, 16, 17, 18, 19 January 2018

BEFORE: Employment Judge Robinson
Mr A G Barker
Mrs J E Williams

REPRESENTATION:

Claimant: Mr S Harper, Friend
Respondent: Miss J Connolly, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claims for direct disability discrimination, a failure to make reasonable adjustments and harassment on the grounds of disability all fail and are dismissed.

2. All the claims, save for the last claim concerning the meeting on 21 December 2015 relating to the waiver of notice, have been made out of time and it is not just and equitable to extend time. Consequently the Tribunal have no jurisdiction to deal with those issues.

3. The claimant was ordered to pay a deposit in order to pursue his claims and having failed for the same reasons as set out in Employment Judge Horne's judgment promulgated on 23 January 2017 the claimant is ordered to pay to the respondent forthwith the sum of £19,000 in costs, and forfeit the deposit of £1,000 making a total payment of £20,000 due and payable to the respondent.

4. No further order or direction need be made.

REASONS

The Issues

1. Our decision is unanimous. There are four issues to be dealt with. A direct discrimination claim, a failure to make reasonable adjustments and a harassment claim. The fourth issue is whether all or any of these claims have been made out of time. Some are out of time so the question is do we extend time on a just and equitable basis to allow Mr Berry's allegations to go forward.

2. The protected characteristic of Mr Berry is disability. The respondents concede that the claimant is disabled within the meaning of Section 6 of the Equality Act 2010 because he has a serious foot injury which affects his mobility and he has Herpetic Keratitis and Chronic Depression and Anxiety.

3. The claimant refers to a number of other matters such as Osteo Arthritis, Complex Regional Pain Syndrome and Spinal Column Mis-alignment as disabilities.

4. The respondents did not accept that those are disabilities within the meaning of Section 6. From a practical point of view, however, when coming to our judgment those secondary issues have made little difference. We accept that both Mr Berry's eyesight and Mr Berry's mobility are compromised.

5. In view of Mr Harper's wide ranging allegations made throughout the hearing, but in particular during his closing submissions, we need to say what Mr Berry's claims are not about. There is no claim for indirect discrimination, no claim for discrimination arising from disability, nor can there be a stand alone claim for personal injury. There is no unfair dismissal claim. The personal injury claim was settled in March 2011. This is not a claim about the processes followed by the pension insurers or Medigold, the experts reporting on medical issues for the insurers and Pension Trustees. Mr Harper's specific allegation is that once the claimant received his three-figure sum settlement in March 2011, attitudes hardened in the workplace and his managers treated him both unfairly and in a discriminatory manner.

6. From being a victim of an industrial accident, which happened in 2007, the claimant became an employee who was disabled and, consequently, reasonable adjustments needed to be put in place. Any fall out from the industrial accident with regard to compensation for pain and injury and loss of earning capacity etc were dealt with by the claimant receiving an award in full and final settlement of his personal injury claim in 2011.

7. We have only considered whether the respondent has been in breach of Mr Berry's employment and equality rights. Although Mr Harper says this claim is not made under the Human Rights Act we have kept the principles of that act in mind when making our decision.

8. We accepted that all the witnesses came to this Tribunal with the intention of telling us the truth, as they understood it, and did so. We include both the claimant and his witness (his trade union official) and all the respondent's witnesses. We do not accept that there has been any fraudulent behaviour from the respondent or its witnesses as Mr Harper alleges. The documents that have been produced have not been doctored for the purposes of this litigation or at all. Mr Quinn, and any other manager, is entitled to keep information about employees he is managing even if the employee does not know. There is no breach of Mr Berry's employment rights in that respect.

9. The parties are entitled to bring to our attention any documents they light upon during the course of the proceedings as there is a continuing duty of disclosure. The disclosing of the documents at R2 by the respondents put neither the claimant nor his advisor at a disadvantage. Mr Harper has been able to ask questions about those documents. The period of time this litigation has covered has not helped the recollection of the witnesses and we include Mr Berry in that. It must have been very difficult for witnesses to remember events that took place so long ago. One of the reasons limitation periods in Tribunals are short is so that witnesses have the best opportunity to remember what happened. That is especially so when the events took place over a long period of time as in this case.

10. We accept that Mr Berry has gone through (and indeed is going through) a period of great stress and anxiety which has continued over ten years. We can only guess at the extent of the upset and distress the accident has caused him and he has our wholehearted sympathy in that regard.

11. We need to comment further on Mr Harper's submissions. We accept he is not legally qualified but he tells us that he knows the processes and procedures of the Tribunal and understands employment law. We have not heard evidence from him, so some of the bold assertions that he made during his final submissions we cannot accept. We can only make our decision on the evidence which has been put before us and tested in cross examination. The one exception relates to Mr Denwood's second statement signed by him which we have accepted. We placed what weight we thought appropriate on that evidence on the basis that Ms Connolly did not have the opportunity to question him in relation to the points raised in that statement. Other than that, we found facts only on the oral evidence we have heard in this Tribunal.

12. Many of Mr Berry's allegations are vague and nebulous. Especially as some of those allegations refer to events that occurred as long ago as 2011. General assertions of wrongdoing do not assist Tribunals nor do they help witnesses remember incidents and answer questions. It is entirely understandable that those witnesses have struggled to remember detail.

The Facts

13. Some of the witnesses, not all, may have known that the claimant had reached a settlement in 2011 with Sellafield's insurers with regard to his industrial

injury. None of the witnesses knew the amount of the settlement until this litigation was under way.

14. The claimant, once he had his accident, was removed from the industrial landscape and employed in an office, at Sellafield, to do sedentary work. He had various managers looking after him during that period including Shaun Allington, Mark Gibson, Peter Quinn, David Pettit and latterly John Stephens. John Stephens never managed the claimant face to face. All, without exception, dealt with the claimant with courtesy and respect and recognised his needs at different times during this unhappy period of the claimant's life.

15. The claimant did not complain by way of grievance about any of the actions of his managers throughout the period in question from 2011 to 2014.

16. He did tell his trade union representative, Mr Denwood, that he was not happy with certain issues. That unhappiness was never communicated to his managers. All the managers, including Mr Quinn who has been the most heavily criticised, felt that they had a good relationship with Mr Berry until they saw the allegations in these proceedings.

17. We accepted the claimant did not want Mr Lewthwaite, the Disability and Welfare Officer, to deal with him after 2010. Mr Lewthwaite had no contact with the claimant between 2010 and April 2014 when the claimant and Mr Lewthwaite had to deal with each other because of the claimant's ill health retirement application.

18. The claimant had trade union support throughout this period from an experienced trade union representative. The claimant had open and regular access to Dr Adkins from occupational health. Medical reports and advice were obtained whenever managers requested that advice. No barriers were put in the claimant's way when help was requested from human resources, occupational health, his managers and his trade union representative.

19. Although there is an allegation from Mr Harper that the claimant never had a workplace assessment, we find that the one time he was offered such an assessment by Mr Lewthwaite, the claimant turned it down.

20. We now deal with some general allegations.

21. The claimant was appointed to be a Scheduler working in an office environment from July 2011. Whenever he went off work he came back to a return to work interview. Sometimes that interview was in the form of an informal chat with his manager. He was given phased returns to work where necessary. He worked half the working week but was paid as a full time worker during those periods.

22. In July 2011 he was given a temporary promotion to Band 4 from Band 5 on the wage scale of the respondents. The claimant never lost out with regard to money until the temporary promotion was stopped in 2014. At that point the claimant decided that he would apply for ill health retirement. He earned more doing his sedentary job than he did when he worked on the MOX plant before his accident.

23. The claimant never carried out the role of Scheduler satisfactorily despite being given easy jobs by his managers. No reasonable adjustment was ever suggested by the claimant to the respondent managers to assist him or take away any disadvantage he may have felt. However, there was no disadvantage to him working as a Scheduler.

24. Dr Adkins never suggested any reasonable adjustments but the claimant's managers put reasonable adjustments in place where necessary.

25. The claimant could not return to work on the plant in his original pre accident role and had to carry out office work. As a Scheduler the claimant, initially, told his managers he was more than capable of doing the role. However because of his many absences the claimant's temporary promotion was extended. The claimant accepted that his targets were modest and manageable. The extension of his temporary role and the modest targets were reasonable adjustments.

26. When the claimant failed to get the role of full time Scheduler after an open competition he was given another straightforward role in Maintenance Support. He accepted the role but with hindsight he was not best suited to it. He did not however complain at the time. He was positive about his capabilities. His pay and conditions were not amended. Again, these were all reasonable adjustments aimed at keeping the claimant in work.

27. At the end of Mr Quinn's management and the start of Mr Pettit's management, the claimant's work was reviewed. He received a Red score during that review having previously scored Amber. He was therefore not meeting the objectives of the role. He was demoted to Band 5. He appealed against the decision to take him back to Band 5 but withdrew that appeal and then applied for ill health retirement in May 2014. The catalyst for him doing that was the realisation by the claimant that he was going to be demoted. His trade union representative thought that applying for ill health retirement was the best way forward. He encouraged Mr Berry to go down that route. Mr Berry's managers fully supported that application.

28. A report was obtained from Dr Adkins on 15 May 2014 which confirmed there had been "a number of work adjustments and no reasonable adjustments could be identified". The claimant agreed with that assessment and wanted, from that moment, to leave his employment by taking ill health retirement.

29. The respondents, whilst waiting for the ill health retirement application to be processed, offered the claimant a training role. Both the claimant and respondent recognised that, until the ill health retirement application had been processed, the claimant was still an employee and a role had to be found for him. The claimant did not want the training role despite it potentially suiting his skill set. That was an offer of a reasonable adjustment.

30. Once the claimant went off work on 11 July 2014, and having made his application for ill health retirement, he never returned to work. His last day of employment was 31 December 2015.

31. The claimant was delighted when he got the Medigold appointment. We have seen an email in which he indicates that he was happy at having got his appointment so that a medical report could be prepared and his application for ill health retirement moved on.

32. On 8 July 2014 Dr Adkins confirmed that the restrictions put on the claimant's work by the claimant's GP were appropriate. The claimant was unfit for work.

33. The claimant was suffering substantial pain which affected his ability to concentrate. By agreement with the claimant, his managers did not look for roles for the claimant and he remained absent from work on sick leave. The claimant had exhausted his sick pay but was paid sick pay at pension rate in order to ameliorate his financial problems.

34. The claimant's application for ill health retirement was initially refused but granted on a second application. Throughout that process the claimant made it clear he could not work. He sent a pleading letter to Dr Adkins suggesting that whether he got ill health retirement or not depended on how Dr Adkins expressed the claimant's medical situation in his report.

35. In December 2015 he was awarded his ill health retirement. Mr Berry was happy with that outcome.

36. Immediately after that award, and for the first time, he put in his grievance dated 23 December 2015. His complaint was that both his employer and its agents were negligent as they had failed to uphold his employment rights.

37. The claimant suffered no disadvantage and he has not identified a provision, criterion or practice that places him at a disadvantage although we can assume it is the requirement for him to attend for work. The claimant had reasonable adjustments in place. For example, he had had phased returns to work, he worked half a week, yet received a full week’s wage, he was given extensions to his temporary promotion and changes to his targets. Ultimately there was nothing the respondents could adjust to keep the claimant in work. His performance, even with the modest performance targets he was given, meant that he was not deserving of reward and recognition. Those targets were adjusted, yet he still did not reach the point where he should have received some reward for his work.

38. The financial settlement the claimant reached with Sellafield's insurers in 2011 had no impact on the treatment he received at the hands of his managers. Mr Harper and Mr Berry have suggested that because of the treatment of the claimant between 2011 and 2014 the claimant's position as an employee was untenable. On the contrary, we found that the things his managers did for him were designed to keep the claimant in work. They were not acting in a way that would inevitably lead to him leaving. That was not an aim, either consciously or sub consciously, of his managers or indeed any Human Resources Officers.

39. We now turn to the more specific allegations that have been made. We deal with both the facts and the outcome for each allegation set out below.

Team Briefings

40. The claimant did attend team briefings. They were often ad hoc. He rarely, or at all, missed out with regard to receiving information. The claimant has to prove his case that he has been directly discriminated against. His vague assertions go nowhere near proving those allegations. The burden has not passed to the respondents in relation to this allegation. We go further than that. The respondents are not guilty of not including the claimant in team briefings. If he did miss a meeting it was not because he was disabled. Like any other employee, if absent they could miss a meeting but information would be given to them when they returned. No reasonable adjustment needed to be put in place other than updating the claimant. He was updated as and when necessary. In any event, he could not tell us any specific information that he did not receive. That claim fails.

Toilet Facilities

41. Mr Harper started giving evidence during the course of his submissions at the end of the hearing. Mr Harper suggested that the claimant asked for the key to the disabled toilets on four occasions. The claimant did not. Nor was that specific allegation made by the claimant when he gave his evidence. If the claimant had needed a key, or asked for one, he would have been given it. The claimant could have rung the Business Manager whose information and telephone number was set out on a sign on the toilet door. He never did so. In similar circumstances, the claimant was happy to ask for a convenient car parking space and when he asked for that he got one. There was no evidence to suggest that the claimant did not have the capacity to ask for a key to the disabled toilet. It would not have been difficult for the respondents to give him a key. There was no advice from occupational health suggesting the supply of a key was a reasonable adjustment.

42. The claimant has not proved a claim of direct discrimination. He has not established a detriment and, in the event, he has been treated no less favourably than the respondents would have treated an actual or hypothetical comparator who wanted access to the toilet. That claim fails.

The Building

43. The claimant was on crutches at certain time. He also wore an eye patch on occasion. However, he never complained to his managers that his working day was being compromised by having to climb stairs or wear the eye patch. If the claimant had thought that there were issues which placed him at a disadvantage, he could have raised them with his managers himself or he could have asked Mr Denwood to do so. He never did. The only reasonable adjustment suggested was that the claimant should not have to stand at work. That reasonable adjustment was dealt with because the claimant was given sedentary work in the office and not sent out on to the plant to do his old job. He had a seat available to him always. The claimant has not proved facts which suggest he has been discriminated against. The burden has not passed and the claim is dismissed.

Home Visits

44. The issue of home visits has been a fraught one for us. The evidence from all witnesses was patchy and inconclusive. That is a problem when making claims to the Employment Tribunal so long after the event. However we concluded that, where the claimant wanted home visits or wanted contact with his managers, he got what he wanted. The claimant suggests that this alleged non-communication is direct discrimination. We find that the managers were always at the end of the telephone for the claimant to speak to. There is no evidence that the lack of communication with him was because of his disability. The claimant pointed to the respondent's policy which demand regular home visits. If there were fewer home visits than the claimant now claims he should have had, it had nothing to do with his disability. The claimant never complained at the time and both the claimant and his various managers knew what was needed in terms of the level of contact. In any event, the claimant, at the time, was content with that level of contact. It is only now that he complains, long after the event. The managers considered the individual, and very special circumstances of the claimant, and acted within the terms and spirit of the respondent's policies relating to absences and home visits. The level of contact was a nice balance between being intrusive and too little communication. The claimant has not proved facts from which we could decide he was discriminated against but the explanation as to what happened by the respondent satisfies us and that claim fails.

Sick pay and absence record

45. The claimant was given extraordinary leeway with regard to both sick pay and absence. The claimant received more than two hundred and sixty-one days paid leave over three separate occasions. In July 2014, he was given pension sick pay despite a requirement, for that payment to be made only if the employee would, at some stage, return to work. The claimant had no intention of returning to work, if his ill health retirement application was successful. Paying him this way was an appropriate reasonable adjustment. It is right for disability related absences to be taken into account if all reasonable adjustments have been put in place. No employer can give carte blanche to employees who are regularly absent because of disability. If an employee cannot work, even with reasonable adjustments in place, it is inevitable that that employee will lose his job. It would also be right to take the claimant down the capability route in those circumstances. If the claimant cannot work that is not an act of discrimination so long as reasonable adjustments have been put in place and they were. Mr Harper suggested that all absences relating to the claimant's disability should be discounted and that he be given a job at Sellafield in perpetuity whatever his attendance record. That is not a correct application of the law. This claim also fails and is dismissed. The respondent did all that was reasonably possible to keep the claimant in work between 2011 and 2014.

Allegations thirteen and fourteen

46. Allegation 13 suggests that the respondent did not deal with the claimant's health retirement application in a timely manner. This is not an issue for which the respondents have any culpability. They attempted to get the process moving. No one from the respondents fraudulently presented documents to the organisations dealing with the claimant's pension application as has been alleged by Mr Harper. That allegation is not part of the claimant's claim before this Tribunal. Nonetheless

we had to deal with it as Mr Harper suggested that documents have been doctored. We have no idea who tampered with those documents if indeed anybody did. The allegation made by Mr Harper made no sense. There is no reason for the respondent or its officers to alter documents. The claimant wanted ill health retirement, the respondent managers were happy to support an ill health retirement application, as was the Human Resources Department and as was the claimant's trade union representative, and Mr Lewthwaite. Dr Adkins emphasised, as requested by the claimant, certain elements of the claimant's medical condition in order to get Mr Berry what he wanted, which was a pension.

47. If there was any wrongdoing, negligence or tardiness with regard to the application for ill health retirement (we are not suggesting there was) it could only be the fault of either Medigold, the trustees of the two pension funds or their insurers. It was not the fault of the respondent. The claimant has not satisfied the burden of proof here. The respondent's explanations that it was not them holding the process up is utterly compelling. That claim is dismissed. We deal with allegation 14 later.

Emails and Bullying

48. This claim fails. The emails do not show that the claimant was the object of bullying. The claimant knew nothing of them when he was working for the respondents. The emails, which the claimant says show bullying and harassment, have only just come to light during this litigation. Therefore, as the claimant did not know of them whilst employed, the content of those emails cannot have created an intimidating, hostile, degrading, humiliating or offensive environment nor has that conduct had the purpose or effect of violating Mr Berry's dignity. It is appropriate for Human Resources Officers to express concerns that annual leave is being used instead of sick leave when an employee is going for surgery. It is not in the interests of any employee for sick leave to be masked by holidays taken. This allegation fails.

49. Allegation sixteen was withdrawn.

50. Allegations ten and seventeen relate to the telephone calls and monthly management meeting respectively. We say the same here as we have said with regard to home visits and other contact. Where managers were asked to meet with the claimant, it happened. The claimant had unprecedented levels of contact with the managers. We dismiss this claim for the same reasons as we dismissed the claim with regard to the other issues of contact between the claimant and his managers.

51. We then considered allegation 18A which relates to the occupational health assessment on returning to work. Whenever the claimant or his managers wanted an occupational health report one was provided by a doctor who clearly knew very well the claimant's difficulties and background. That was Dr Adkins. The claimant's capabilities were assessed and he was appropriately placed in jobs which everyone felt (including the claimant) he could do. So far as this claim for direct discrimination is concerned it fails at the first hurdle. No explanation is needed.

52. We turn to return to work interviews not given.

53. This was another vague and generalised allegation by Mr Berry. The claimant has failed to prove these did not take place. In fact they did take place. The claimant never complained about not having them at the time. The documents at R2 came to light during the hearing and they show, contrary to the claimant's allegation, that some meetings did take place. Despite Mr Harper's protestations that he only got those documents late in the day, they are an accurate record of what went on. The claimant eventually accepted those meetings did take place. If the claimant had brought his claim earlier it may well be that the respondents would have been able to preserve information from their ICASE ONE system or their processes generally. Instead, because there is a new system in place, all the information potentially available to them at the relevant time has either been lost or it is difficult to obtain. This claim fails.

The Discovery Request

54. Any request for documents by the claimant or his representative were properly processed. The claimant now accepts that. The claimant got what he needed when he asked for and therefore this claim fails.

Allegations against Mr Lewthwaite and Mr Quinn (Allegations 23 to 33)

55. We dealt with these applications against Mr Lewthwaite and Mr Quinn together. Both men have been sorely criticised by Mr Harper. We find that they both behaved properly as you would expect a Disability and Welfare Adviser to act (Mr Lewthwaite) and as a Manager (Mr Quinn) to act. Unfortunately, the claimant did not like what he heard from them. In Mr Lewthwaite's case the claimant was advised he might not get ill health retirement. That was the correct thing for Mr Lewthwaite to say. He would have been unprofessional not to, at least, warn the claimant that his application might not be successful. There may have been other roles that the claimant could have been considered for if he had allowed a workplace assessment to take place. The claimant, when he was asked, did not want such an assessment. Mr Lewthwaite's comment that there were other people in a worse situation than the claimant was not inappropriate. We do not accept that he used foul language during that discussion. We recognised that Mr Lewthwaite has dealt with a number of these cases over the years and seen a lot of employees in similar circumstances to Mr Berry. Some of those employee's circumstances would be better and some worse than Mr Berry's situation. Even if Mr Lewthwaite said any of these things he was not wrong to do so. We then turned to the way in which he said them. On the balance of probabilities Mr Lewthwaite did not express himself in the way that the claimant suggests. The content of what Mr Lewthwaite said was simply not to the liking of the claimant. In any event Mr Lewthwaite had no influence over the process with regard to ill health retirement. We have no criticism of Mr Lewthwaite whatsoever. These are all harassment claims and Mr Lewthwaite did not engage, for the reasons set out above, in unwanted conduct relating to a relevant protected characteristic and the conduct did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether that conduct has that "effect" we took into account the perception of the claimant, the other circumstances of the case and

whether it was reasonable for the conduct to have that effect. We found that it was not reasonable for the conduct to have that effect.

56. Turning now to Mr Quinn. We have no criticism of him. We accepted his evidence. He did have difficulty answering some of Mr Harper's questions. That was because the questions were either not clearly put or it was difficult for Mr Quinn to remember the fine details of his involvement with Mr Berry. Changing his evidence when reminded of something does not mean Mr Quinn was being untruthful.

57. Mr Berry has lived and breathed this case ever since he retired. That is natural. Mr Quinn had difficulty remembering things in the same way as Mr Denwood had difficulty remembering. The allegations against Mr Quinn are general allegations but actually what they amount to is Mr Berry not liking what Mr Quinn said to him as his manager. We emphasise those last few words. Mr Quinn treated the claimant appropriately. He wanted some output from Mr Berry. He was entitled to push for that output even though the claimant was disabled. Disabled employees still have to do the job. When pushing Mr Berry he never overstepped the mark. He took Mr Berry's disabilities into account. In the same way as Mr Lewthwaite we do not believe that Mr Quinn has been in breach of Section 26 of the Equality Act 2010.

58. Mr Quinn like Mr Lewthwaite was sympathetic to the claimant. The claims relating therefore to Mr Quinn and Mr Lewthwaite's involvement with the claimant are dismissed.

59. Our conclusion thus far is that all the claims up to July 2014 have no merit and are dismissed. Having heard however all the evidence and noting the difficulties for the respondent's witnesses when trying to remember issues we turn to the question of time. These claims are substantially out of time. Employment Judge Horne set that out in his very clear decision. The claims up to July 2014 are separate allegations from the allegations relating to the notice waiver issue which we will come to in a moment. There is no connection between the allegations up to July 2014 and the allegation in 2015 involving Mrs Holliday. There is a gap between July of 2014 and December 2015. Nothing that we have heard, bridges that gap. In other words, the 21 December 2015 issue is not the last in a continuing series of actions. It is an isolated incident and sits alone.

60. We have heard no convincing evidence from the claimant as to why the application to the Tribunal took so long to send in. The claimant said he did not wish to compromise his ill health retirement application. But his trade union representative could have advised him that such an application was entirely separate and unconnected and that there was no obstacle in him putting in a grievance or issuing proceedings in, say, July 2014 if he felt unjustly dealt with. Furthermore, before he decided to go down the ill health retirement route, he could have issued proceedings especially as he now says he was so upset about his treatment for so many months and years before July 2014. It is not just and equitable to extend time. Leaving the matter so long has been problematical and prejudicial to the respondent because their witnesses had difficulty remembering the fine detail of the allegations. All the claims are dismissed for want of jurisdiction for exactly the same reasons as

Employment Judge Horne suggested in his earlier judgment when he ordered Mr Berry to pay the deposit.

61. Finally we now deal with the waiver of notice issue (allegation 14). We can be brief. It is interesting that the third person of three at that meeting on 21 December 2015 has not given evidence to us. That is Mr Harper. The claimant signed a form agreeing his employment would end on 31 December 2015 and that he was not entitled to notice pay. Mr Berry should not have signed it if he was not happy about that. This is not a contractual issue as Mr Harper now suggests. What we have to consider is, did the respondent directly discriminate against the claimant or did they fail to make reasonable adjustments? The answer is that Mrs Holliday did her job. She explained all that needed to be explained to the claimant at a meeting which lasted between forty minutes and an hour. The claimant had the benefit of Mr Harper with him to be his eyes and ears. The claimant was not asked to waive his notice because he was disabled. The claimant was treated no differently, at that meeting, from any other employee, whether disabled or not, over that notice issue. It is the respondent's policy to ask all employees in those circumstances to waive notice pay. That did not put the claimant at a disadvantage compared with a non-disabled employee. He has not been treated less favourably because of his protected characteristic. We heard no evidence to suggest that the claimant's disability caused him not to understand the consequences of signing that document. The claimant is an intelligent man, he was in the comfort of his own home, he wanted ill health retirement and he was not coerced into signing the document. In short, the claimant must have known, or should have known, his employment was to end on 31 December 2015 without any payment of notice pay. Consequently, that claim, which has been deemed by Employment Judge Horne to be the only claim in time, fails and is dismissed.

The Law

62. In view of the fact that we have now dealt with each of the allegations and given our judgment on those allegations we set out the law that we have applied to the issues before us and to the facts we have found.

63. For each of the discrimination claims we considered the burden of proof and judicial guidance contained in the case of Igen -v- Wong 2005 IRLR Court of Appeal.

64. S. 136 of the Equality Act 2010 requires us to go through a two-stage process if necessary.

65. The first stage requires the claimant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent has committed or is to be treated as having committed the unlawful act of discrimination against the claimant. The Tribunal is required to make an assumption in the first stage which may be contrary to a reality. The purpose being to shift the burden of proof at the second stage so that unless the respondent provides an adequate explanation the complaint will succeed. The second stage which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act if the complaint is not to be upheld. If the second stage is reached and the respondent's

explanation is inadequate it will not be simply legitimate but also necessary for the Tribunal to conclude that the claimant should be upheld.

66. Having regard to direct discrimination the claimant has to establish the detrimental actions relied upon. If the Tribunal find that the respondent has treated the claimant less favourably than the respondent treated or would treat others (i.e. an actual or hypothetical comparator) the claim must succeed.

67. With regard to the comparator there must be no material difference between the circumstances relating to the claimant and his comparator.

68. The Tribunal will then go on to decide whether the less favourable treatment is because of the protected characteristic and if they so find then the claimant will succeed.

69. With regard to harassment it is a requirement of the Equality Act that the respondent must not harass the claimant and not engage in unwanted conduct related to a relevant protected characteristic and the conduct must have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

70. In deciding whether the conduct has that "effect" the Tribunal must take into account the claimant's perception, other circumstances of the case and whether it is reasonable for the conduct to have that effect.

71. With regard to the breach of the duty to make reasonable adjustments, the claimant must establish the detrimental action relied upon, the Tribunal must establish what the provision, criterion or practice is that puts the disabled person at a substantial disadvantage in comparison with a non-disabled person. The respondent is then required to take such steps as it is reasonable to have to take to avoid that disadvantage.

72. Where a physical feature of premises occupied by the respondent puts an interested disabled person at a substantial disadvantage in relation to a relevant matter in comparison with a non-disabled person the respondent again is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

73. There is no issue in this case as to the claimant's disability nor whether the respondents knew that he was disabled. They have known since his accident, settled in 2011, that he was likely to be or was disabled.

74. With regard to deposit orders, Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide "where at a Preliminary Hearing the Tribunal considers that an allegation or argument has little reasonable prospect of success it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that argument or allegation.

75. Rule 39(5) provides that if the Tribunal at any stage following the making of a Deposit Order decides the specific allegation or an argument against the paying party for substantially the reasons given in the Deposit Order:-

a. The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of Rule 76, (Rule 76 is the costs rule) unless the contrary is shown; and

b. The deposit shall be paid to the other party.

76. Under Rule 76 of the 2013 Rules a Tribunal may make a costs order where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted.

77. Having regard to time limits it is essential to establish the date and time of the act or omission that took place which is the subject of the proceedings. In these proceedings the time limit is three months together with any additional period that the ACAS early conciliation adds to that period.

78. Having regard to the facts of this case all the allegations occurred well before the three month limitation period started save for the one issue set out in paragraph 61 above. It would be necessary for the claimant to show the conduct extended over a period of time which ended in time or if they were out of time it would be necessary for the claimant to show that it would be just and equitable for time to be extended. If the claimant does that, then the Tribunal may decide that it has jurisdiction.

Summary

79. In applying that law to the facts of the case as set out above we have given our reasons for finding against the claimant. In this case the claim form was received by the Manchester Tribunal Office on 25 May 2016.

80. Employment Judge Horne allowed an extension of time on a just and equitable basis so that the waiver of notice issue could proceed, without hindrance, to a final hearing. That meeting with regard to waiver of notice occurred on 21 December 2015.

81. Mr Berry sent in his grievance on 23 December 2015 referring to that issue.

82. All the complaints up to, and including, June 2014 are at least eighteen months out of time.

83. We noted that the witnesses, including the claimant, had difficulty remembering what happened during that period (2011-2014).

84. Time limits are there for a purpose. The claimant was aware of all the issues of which he eventually complained at the time they happened. Section 123 of the Equality Act provides that proceedings on a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to

which the complaint relates or such other period as the Employment Tribunal thinks just and equitable.

85. In deciding whether we should extend time we consider the length and reasons for the delay, the effect of the delay on the cogency of the evidence, the steps which the claimant took to obtain legal advice, how promptly the claimant acted once he knew of the facts giving rise to the claim and the extent to which the respondent has complied with requests for further information.

86. We considered where the balance of prejudice would lie with regard to any extension of time.

87. We came to the conclusion that the respondents have been prejudiced by these proceedings being issued many months after the events.

88. In paragraph 54 of his full reasons, promulgated on 23 January 2017, when making the Deposit Order, Employment Judge Horne found that it was at least fourteen months between the latest of the earlier discrimination allegations and presentation of the claim.

89. In paragraph 55 Employment Judge Horne said that it was likely that a Tribunal would find that the long delay had caused memories to fade. We find that that is exactly the situation here. It was difficult for the respondent witnesses to cast their mind back over a period that spanned 2011 through to 2014.

90. On that basis we found that, for the same reasons as Employment Judge Horne, the claimant could have brought all these matters to his managers' attention in 2014. He chose not to do so. We accept that he was not in the best of health and also that he was anxious, after July 2014, to obtain ill health retirement. But he cannot now complain that we have found his claims are out of time, especially as he had trade union assistance throughout the relevant period.

91. We also noted the difference in the type of allegation between those made up to July 2014 and the final allegation relating to notice pay in December 2015. Not only is there a gap in time, but the accusation is very different from the other accusations against his managers. That gap has not been bridged.

92. Dealing now with all the allegations that the claimant has brought, none find favour with us.

93. Any employee who is not disabled but who is in the same situation in the work place as the claimant would have been treated in exactly the same way as the claimant. The reasonable adjustments that were requested or thought appropriate were put in place by the claimant's managers. The provision criterion or practice pleaded was the requirement for the claimant to attend work. The claimant's managers, without exception, were anxious to keep the claimant in work if they possibly could. When needed, they put in place reasonable adjustments.

94. There was no evidence that the claimant was harassed contrary to the provisions of Section 26 of the Equality Act 2010.

95. In all those circumstances the claims fail .

96. We then considered the claimant's financial situation after listening to the application for costs from Ms Connolly and Mr Harper's response.

97. We find that the claimant has sufficient funds to pay the sum of money requested which was £20,000 as a contribution towards the much greater costs of the respondent. The claimant is deemed to have acted unreasonably.

98. The question then was whether it was right to order costs against him. In these circumstances the claimant has been given a very clear signal in previous proceedings that his claim were made out of time and had little reasonable prospect of success. We felt it appropriate that some of the extensive costs of the respondent in defending these proceedings should be borne by the claimant.

99. His deposit of £1,000 is forfeited and we order him to pay the sum of £19,000 to the respondents forthwith.

10-04-18

Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON

17 April 2018

FOR THE TRIBUNAL OFFICE

[JE]