Case No: 3325473/2017
3328875/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Galloway	**v**	**Barnet Enfield & Haringey Mental Health Trust**

Heard at: Watford **On:** 3-6 December 2018

Before: Employment Judge R Lewis
Mrs G Binks MBE
Ms J McGregor

Appearances:

For the Claimant: In person
For the Respondent: Ms H Patterson - Counsel

JUDGMENT having been sent to the parties on 21 December 2018 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was the combined hearing of claims presented by the claimant on 25 July 2017 and11 November 2017. They were the subject of a case management preliminary hearing before Employment Judge Bedeau on 11 April 2018. His order was sent on 1 May (96-104) 2018.

2. Judge Bedeau's order identified the issues as claims of discrimination, as well as financial claims. We adopt below his numbering of the issues. Where we refer to issue 6 (eg issue 6.1.3) we incorporate issue 7.1. There was a counter claim. The claims were, in short, that the claimant's management and dismissal had been a series of acts of direct age and or race discrimination, as well as of victimisation. It was alleged that his dismissal had also been an act of direct disability discrimination. There was also a claim of failure to make reasonable adjustments.

Procedural matters

3. The respondent wrote to the Tribunal shortly before this hearing to say that matters of case management remained to be dealt with. The following matters for case management arose at this hearing.

3.1 The counter claim was withdrawn (due to an error by the judge this was not recorded in the Judgment sent to the parties on 21 December).

3.2 The respondent conceded that the claimant at all material times met the Section 6 definition of a person with disability as a result of haematuria, a condition of which the major material symptom was urinary frequency, and that his back pain was another symptom of that disability.

3.3 The claimant relied on a further disability, namely back pain, which was conceded by the respondent to be related to his haematuria.

3.4 The Tribunal offered the claimant the opportunity to take breaks as and when necessary, and was able to provide a supporting cushion. The claimant raised no issue about either of these adjustments to the hearing arrangements.

3.5 There had been some dispute about disclosure. The bundles exceeded some 650 pages, and no disclosure issue arose at this hearing.

3.6 After exchange of witness statements, the claimant had submitted a supplemental witness statement. The respondent objected. Although this was a clear violation of case management discipline, it seemed to us pragmatic to read the statement, and to deal with it on the basis that if it were reiteration of points already made, it was admissible; but that the Tribunal would scrutinise any attempt to introduce entirely new evidence, which the claimant might not be permitted to introduce. Ms Patterson accepted this course.

3.7 It was agreed that this hearing would deal with liability only in the first stage, leaving the fifth day listed for remedy if required. In the event, the hearing concluded on the fourth listed day and judgment was given.

3.8 After preliminary reading, the Tribunal agreed to hear the claimant's evidence first. The claimant was the only witness on his own behalf. He was cross-examined for about 4 hours.

3.9 On behalf of the respondent, the following witnesses provided statements, and were called to give live evidence:

Ms Maria Gregoriou, former Deputy HR Direction;
Mr Brian Cusack, Assistant Director, who had been the claimant's "grandfather" line manager;
Ms Sara Henley, Head of Therapies, who had dismissed the claimant;
Ms Linda McQuaid, Interim Director, who had rejected the claimant's appeal.

3.10 After evidence, but before submissions, it appeared that an issue had been pleaded in the ET1, but not recorded in Judge Bedeau's order, and not dealt with by either side at this hearing. Although Ms Patterson stated that that was not an oversight at the preliminary hearing, and the claimant had not dealt with it in his evidence or cross-examined on it, it seemed to us right to deal with the matter pragmatically. The issue was whether the delay in making arrangements for the appeal hearing had been further acts of detriment, discrimination and/or victimisation. The claimant was briefly recalled to give evidence on the point. A short witness statement was prepared for Mr Peter Couchman, HR Business Partner, explaining the delay, and Mr Couchman was briefly called and cross-examined.

3.11 By contrast, when, at the end of submissions, the claimant alleged that his exclusion from a consultation meeting on 30 March 2017 had been an act of discrimination, he was not permitted to proceed with that allegation. There was no indication that it had previously been pleaded, no application to amend, and there was no evidence or cross-examination on it.

General approach

4. In these reasons, we do not deal with matters in pure chronology and then analysis. We think it more helpful to set out our reasons, as we did orally, in terms of a number of strands. We preface our reasons by stating that as is usual in the work of the Tribunal we heard evidence about matters on which we make no finding, and we heard some detailed evidence on matters which we deal with only in outline. That approach does not represent oversight or omission but reflects the extent to which the particular issue was truly of assistance to the Tribunal, no matter the strength of feeling about it.

5. The claimant has acted in person throughout. He has struggled to adhere to the discipline and structure of the Tribunal. It was evident that he does not fully understand all the implications and ramifications of the material considered by the Tribunal. One particular concern was that although the claimant had previously brought Tribunal proceedings, and represented himself up to and in the Court of Appeal, it was important not to fall into the trap of attributing to the claimant any more knowledge or understanding of law and procedure than that of any other litigant in person.

6. At a number of stages in these reasons, we have rejected the claimant's evidence. Our general conclusion is that he was not a reliable narrator. We have not found that he deliberately tried to mislead the Tribunal.

Legal framework

7. The claim presented as a claim of direct discrimination on grounds of race, age and disability. It was therefore brought under the provisions of s.13 and s. 39 of the Equality Act 2010. S.13 provides that, "A person discriminates against another if because of a protected characteristic, A treats B less

favourably than A treats or would treat others." The forms of discrimination are set out so far as material at s.39, of which the material portions were s.39(2)(c) and (d) which provide so far as material: "An employer must not discriminate against an employee… by dismissing B … by subjecting B to any other detriment."

8. The burden of proof provision is set out in s.136(2), and provides, "If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred."

9. We noted also that s.23 provides that when comparing a claimant with an actual or hypothetical comparator, "There must be no material difference between the circumstances relating to each case."

10. We should bear in mind the possibility at least that there are cases in which identification of a comparator is of no or limited value; and that, in the words of Elias P in Ladele v LB Islington UKEAT/0453/08, at paragraph 39,

> "It is now well established that there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for the act or decision. It follows that there will inevitably be circumstances where an employee has a claim for unlawful discrimination even though he would have been subject to precisely the same treatment even if there had been no discrimination, because the prohibited ground merely reinforces a decision that would have been taken for lawful reasons. In these circumstances the statutory comparator would have been treated in the same way as the claimant was treated. Therefore, if the tribunal seeks to determine whether there is liability by asking whether the claimant was less favourably treated than the statutory comparator would have been, that will give the wrong answer."

11. The EAT there set out basic propositions on direct discrimination. We bear in mind that the first is that it is the duty of the tribunal to determine "the reason why the claimant was treated as he was." The second states that, "If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial".

12. Where the burden of proof shifts, "The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has the treated the claimant unreasonably…quite irrespective of the race etc of the employee … Of course in the circumstances of a particular case unreasonable treatment may be evidence of discrimination."

13. There was also a claim for failure to make reasonable adjustment, brought under the provisions of s.20. It is sufficient to note here that the duty to make reasonable adjustment is a duty 'to take such steps as it is reasonable to have to take to avoid the disadvantage.' It is a practical duty, not an abstraction.

Fact find: the past history

14. The first strand in the background facts can be shortly stated. The claimant

was born in 1952 and is of Afro Caribbean origin. He worked for the respondent in its maintenance team between 1994 and December 2006, when he was dismissed for gross misconduct. He brought claims of unfair dismissal and race and disability discrimination, which were heard in the Stratford Employment Tribunal, and concluded in 2010 in the Court of Appeal (2010 EWCA Civ 1368). The final outcome was that the claimant was found to have been fairly dismissed. His claim of disability discrimination was upheld on one point, and he was awarded compensation for injury to feelings. He was also ordered to pay a contribution towards the respondent's costs. We make the following observations:

14.1 The claimant passionately maintains that his dismissal in 2006 was unfair, and that he was innocent of the allegations against him. The respondent maintains that his dismissal was fair.

14.2 We had no power to re-open or re-hear any matter in the past history;

14.3 The findings of previous Tribunal and Courts were binding on this Tribunal;

14.4 The protection against victimisation enjoyed by the claimant arose from his having made allegations of discrimination, not (as he seemed to think) from his having brought Tribunal claims, an unfair dismissal claim, or having been part successful in his earlier case.

The second strand: Lorne Stewart

15. The second strand was that after 2006 the claimant continued working in facilities management. In due course he was introduced by an agency to work for Lorne Stewart plc. On 5 August 2016, after working for Lorne Stewart as an agency worker, he completed an application for employment (204-207), after which he became an employee of the company.

16. The form contained a section for employment history. The claimant wrote that that between 1994 and 2005 he had been employed by an agency (Team Work NHS) based in London SE11. He gave as his reason for leaving "went into housing." The form concluded with a declaration in which the applicant declared, "I understand that withholding or misleading any of the facts called for above may result in the refusal or summary termination of my employment." The form was signed underneath the declaration.

17. We find that the form was, as the claimant must have known when he wrote it, factually inaccurate and deliberately misleading. It did not give an accurate account of the claimant's employment between 1994 and 2006, when the respondent employed him. The reason for leaving was not truthfully stated. The effect was to create a misleading impression of the claimant's employment history.

18. When asked about these points, the claimant told the respondent, as he told the Tribunal, that he had in fact been originally employed by an agency which introduced him to the respondent; that as there was no-one left at the

respondent who knew his work, he had named the agency as his employer, so that an agency representative could be his referee.

19. That was a thin reply, rendered threadbare by section 7 of the job application form, in which the claimant was asked to put forward referees. The form did not require references to be from a previous employer, and the claimant did not put forward the referee from the agency whom he said he had had in mind.

20. The claimant stated that the signature on page 207 was not his. We make no finding on that, save to say that the claimant, in light of his seniority and maturity, must have known that a job application is intended to be true, and that there are risks to any candidate who submits an inaccurate or untruthful and / or misleading job application.

21. The claimant's employment with Lorne Stewart began on 30 August 2016, and he therefore had one year's continuous employment at time of his dismissal. In the course of his employment with Lorne Stewart, the claimant worked on the respondent's premises, as Lorne Stewart held the contract to provide maintenance services to the respondent.

The transfer

22. In due course, the maintenance contract on which the claimant was working for Lorne Stewart was taken back in-house by the respondent, and it was recognised by the respondent's managers that he was an ex-employee who had been dismissed for gross misconduct. Ms Gregoriou had had some marginal involvement in the claimant's disciplinary many years previously. She could see an immediate problem about his return, as did Mr Cusack. On one hand, the claimant had been dismissed for gross misconduct; on the other, there had been a lapse of over a decade since then. Both also appreciated that the issue of what to do about the claimant's return would not be for them to deal with, but would require due process. The claimant was one of a team of about five who were due to transfer. One to one meetings were held with each of them on 14 March 2017. Events at the claimant's meeting were one of the two primary pillars on which he rested this case.

23. The claimant attended his meeting unaccompanied. The meeting was with Ms Gregoriou, Mr Cusack, and a note-taker. The claimant's allegation was stark. He said that at the meeting, he was told by Ms Gregoriou and Mr Cusack that when the transfer took place he would be suspended and then dismissed; and that they said in plain terms that they wanted to replace him with a younger white person. It was also pleaded that they 'would dismiss the claimant because he had brought an earlier tribunal claim against the respondent.'

24. We find that on 14 March 2017 Ms Gregoriou and Mr Cusack told the claimant that an issue arose about his transfer. The issue was that he had previously been dismissed by the respondent for gross misconduct. We find that they told him that when the transfer took effect, he would be suspended pending inquiries which could end in his dismissal. We accept

the evidence of both witnesses, and we find that they made no reference to the claimant's age or race, or to his previous claim, and that they did not use the language attributed to them. It follows that we find that the first pillar of the claimant's case did not happen, and that issue 9.2.1 fails. We reach this finding for a number of reasons:

24.1 Although both Mr Cusack and Ms Gregoriou could see an issue, they both knew that they had no power to determine its outcome. They both knew that any question of the claimant's dismissal would be decided by somebody else.

24.2 The outcome would be determined independently, and neither of them would have power to direct it;

24.3 Both knew that the claimant had a history of making discrimination allegations and was not shy of standing up for what he perceived as his rights. Both would have known that the flagrant language alleged would without fail lead to recrimination, and possibly Tribunal proceedings.

24.4 The allegation against both is an allegation of gross misconduct of an order of gravity which would have led to the dismissal of both, potentially with long term consequences on their employment in public sector management.

24.5 If they wanted to bring about the claimant's dismissal, they had no need to consider any protected characteristic: they had a potential reason for dismissal in the claimant's own employment history.

24.6 On 22 March the claimant emailed the first contemporaneous response to the meeting (215). It was sent to Ms Gregoriou and Mr Cusack among others. In the second paragraph the claimant wrote:

> "Just to recap on the meeting with you Brian, and Angela, on Tuesday the 14 March 2017, I was quite shocked and surprised at Brian Cusack behaviour where he said that I would be suspended on the 3 April 2017 on full pay whilst I am investigated and then sack."

24.7 The email continued with an allegation of what Ms Gregoriou said. Nowhere does it set out the allegation of language referred to above. It does not refer to age or race. It is utterly inconceivable to this Tribunal that if such language had been used, the claimant would not have quoted it in the very first communication he sent after the event.

Suspension and disciplinary

25. The date of the transfer was Saturday 1 April 2017. On the claimant's first working day, Monday 3 April, he was suspended on full pay, and sent a letter by Mr Cusack (217) in which Mr Cusack set out, in language conventional in such situations, the basis of his decision to suspend, and

the process to follow. As is usual, he stated that suspension was not a form of disciplinary action.

26. Issues 6.1.1 and 9.2.2. were that the claimant's suspension was an act of direct discrimination and victimisation. We find that the reason for the claimant's suspension was to enable proper inquiries to be undertaken, and proper process followed, before any return to the workplace.

27. Ms Bobadilla-Jones was then tasked with investigating and reporting on the claimant's position. Shortly afterwards, the claimant's job application to Lorne Stewart came into the respondent's possession. It was considered by the respondent to constitute a separate matter which required inquiry.

28. There was therefore an investigation into two matters; whether, in light of the claimant's dismissal for gross misconduct in 2006, he could be taken back into employment by the respondent in 2017; and whether, by giving a factually inaccurate job application to Lorne Stewart (which by operation of TUPE could be said to have become a factually inaccurate job application to the respondent) he had committed a separate act of gross misconduct. The procedure was lengthened by operational requirements, and by delays in arranging a meeting with the claimant.

Mr Paziresh

29. The next strand concerned a Mr Paziresh, who had worked below the claimant at Lorne Stewart, and was part of the group to transfer. In his new starter form he identified as "white/Asian," and was referred to at this hearing by those who knew him as white.

30. The claimant appeared to us gripped to the point of fixation by the proposition that Mr Paziresh had been appointed promptly to his job, and that what he repeatedly called "his job" had been given to him. As Mr Paziresh was white, and about 15 years younger than the claimant, this alleged appointment constituted the second major pillar of the claimant's case, namely stark evidence that he had been replaced by a younger white candidate. The claimant took this to prove that the respondent had made good on what he had been told on 14 March.

31. The language of this allegation was confused by the repeated use of the overlapping words job, work, role, duties. In order to make our approach clear we use two words consistently. We refer to the claimant's post to mean the post which he held contractually at the time of transfer and which transferred to the respondent. His post was working maintenance supervisor, i.e. a supervisor who also undertook hands on a range of maintenance tasks. The second word we use is tasks, meaning the functional things which the claimant (and his colleagues) actually did.

32. We find that the post of maintenance supervisor was held by the claimant at the time of transfer and transferred to the respondent. That post was the claimant's post until his dismissal in August. We were shown documents which the claimant contended were advertisements for that post. We accept Mr Cusack's evidence that they were possible proposed

advertisements for the lower level job of maintenance worker or craftsmen. We saw no advertisement for the claimant's post and we find that it was not advertised, and that no-one was appointed to it. We accept Mr Cusack's evidence that the post was still vacant at the time of this hearing. Issues 6.1.2 and 9.2.3 therefore fail.

33. One task within the claimant's post was what Mr Cusack called "dishing out" i.e. allocation of tasks to other craftsmen. Mr Cusack asked Mr Paziresh to cover that task while the claimant was suspended, and Mr Paziresh did so. When Mr Paziresh resigned unexpectedly in May, he was temporarily replaced by an agency supervisor (201, 241c) who then carried out that task.

34. In addition, the claimant's hands-on tasks had to be carried out during his absence on suspension. The hands-on tasks which would have been done by the claimant (in addition to his supervisory and allocation tasks) were shared out, and done by a number of other maintenance staff, including Mr Paziresh. That was simply routine cover for an absent colleague, of a type which the claimant must have seen countless times in his working life time. We heard another example in the late evidence of Mr Couchman, who in September 2017 found himself having to cover Ms Gregoriou's tasks after her resignation.

35. We summarise: we find that the claimant's post was left vacant after his suspension. We find that his 'dishing out' task was done first by Mr Paziresh and then by an agency supervisor. We find that the claimant's hands on tasks were shared out among the maintenance team. Mr Paziresh was not appointed to the claimant's post, and took over only some of his tasks. Issue 6.1.3 therefore fails.

36. It follows that we find that the second pillar of the claimant's case, which was that he had been replaced with a younger white colleague, did not take place.

Disciplinary process

37. In due course Ms Bobadilla-Jones completed her investigation report (248) and advised that there was a case to answer on each of the grounds of alleged misconduct. We find that her advice that the disciplinary procedure be initiated was given entirely for objective professional reasons, and was wholly untainted by any protected characteristic or act. Issue 6.1.4 therefore fails. The claimant was invited to attend a disciplinary hearing. It took place on 20 July and 9 August. The meetings were recorded and transcribed at length. The claimant was offered the right of accompaniment, which he exercised. Ms Henley was the decision-maker. The claimant had had no previous dealings with her.

38. We accept that the notes have been transcribed accurately and indicate a lengthy and meticulous consideration of the points, and of all that was said by the claimant and on his behalf.

39. By letter dated 23 August 2017 Ms Henley informed the claimant of her

decision to dismiss. The letter is long (415-418) and should be read carefully in full. Ms Henley dealt with the two separate allegations, namely re-employment after a past dismissal, and the Lorne Stewart application form. She found that the claimant had provided false information to Lorne Stewart which transferred to the respondent. She found that he committed gross misconduct.

40. In her dismissal letter she wrote the following:

> "'When asked if you thought you had done anything wrong in putting an inaccurate employment history on your application form to Lorne Stewart, you explained that you would repeat the same action again if it were to happen today and you had done nothing wrong…
>
> I noted that when asked you indicated that you would not include your employment with the Trust on application forms in future, which shows that you have no insight into the seriousness of your actions and that the Trust can have no confidence that you will not behave in a similar manner again…..
>
> Even if I had decided not to dismiss you summarily for gross misconduct, it would have dismissed you for "some other substantial reason" namely the fact that you have been dismissed from the Trust previously for gross misconduct which involves a complete breakdown of trust and confidence between you and the Trust."

41. We find that the reasons for dismissal were both stated by Ms Henley. We attach significant weight to her findings on the claimants' lack of insight, which he continued to demonstrate at this hearing. The claimant's denial of wrongdoing was significant, because it showed Ms Henley that the Trust has reasonable grounds on which to doubt that its trust and confidence in the claimant could be re-established.

42. We bear well in mind that our task was not to consider whether this dismissal was fair, or to apply to it a Burchell test. Our finding is that the claimant was dismissed by Ms Henley and by no other persons. We find that the reasons for dismissal are truthfully and comprehensively set out in the dismissal letter. We find that the claimant's protected characteristics, or his history of having previously raised discrimination claims played no part whatsoever in her decision.

43. The claimant appealed. It was common ground that on 22 September Mr Couchman acknowledged his appeal and that there was then a delay between that date and 8 December 2017 before arrangements were made for the appeal to be heard. The claimant alleged that that period of delay was a further act of discrimination or victimisation. The Tribunal accepts Mr Couchman's explanation, which was that a combination of work pressures, including having to cover the work of an absent colleague, caused delay. We find that the delay was wholly untainted by any of the protected considerations.

44. The claimant did not attend the appeal hearing before Ms McQuaid, who in

due course decided to proceed in his absence. She considered the material before her on paper, and upheld the decision to dismiss (439). We find that on the material before her, Ms McQuaid was entitled to reach that conclusion, which we find was wholly untainted by the protected matters.

45. The claimant raised in cross-examination, and seemingly for the first time, an issue about Ms McQuaid's decision to proceed in the claimant's absence. We accept that Ms McQuaid undertook a balancing exercise of the various interests at stake, including the claimant's right to attend, his failure to arrange representation, his health, the delay, the issues which arose from leaving his post vacant, and the overall merits of the matter, and that her decision to proceed was one which was both reasonably open to her and wholly untainted by any of the protected matters.

Pension contributions

46. The claimant complained that he had unlawfully suffered deduction of pension contributions in his few months of employment. This was pleaded as an act of victimisation. When the claimant rejoined the Trust he was automatically enrolled in the NHS pension scheme. He was sent an opt out form which he said he completed and returned to Ms Gregoriou (209-211). In fact, the form should have been sent to payroll, and Ms Gregoriou's evidence was that she did not remember having seen it. She said that if she had seen it she would have sent it to payroll.

47. The claimant must have seen from his first pay slip at the end of April 2017 that pension contributions were deducted (493a).

48. There was no evidence to show how, why, by whom or when the opt out was not acted upon. It is possible that it never reached the payroll team. There seems at least to have been an administrative muddle which the claimant asserted was still unresolved. However, this part of the claim was pleaded as a claim of victimisation. As a matter of logic, that claim would require some evidence that a decision to enroll him in the NHS pension scheme, and not to process his opt out, was taken by a person with knowledge of his past history as a person who had complained of discrimination. There was no evidence whatsoever to that effect and the claim, which forms issue 9.2.4, fails.

Holiday pay

49. The claimant complained that he had not been paid his holiday pay. The calculation of the amount of his holiday pay required the Tribunal to find his effective date of termination. This point was more complicated than it needed to be.

50. The claimant's terms and conditions with Lorne Stewart on holiday (200d) transferred to the respondent. He was entitled to statutory holidays plus 21 days per annum.

51. The claimant was unable to transfer holiday from Lorne Stewart because Lorne Stewart gave the respondent Trust no information about individual

holidays taken in the previous year.

52. The claimant's employment began on 1 April and it was common ground that he took paid holiday from 14 August onwards, and was in fact paid up to 31 August.

53. The claimant advanced the argument that his Lorne Stewart terms and conditions meant that his entire holiday entitlement for the year 2017-2018 transferred instantly and that he was entitled from date of transfer, and therefore on dismissal, to be paid for 21 days holiday and statutory days for the whole of 2017-18. That was contrary to the wording of the terms and conditions, and a startling proposition. We find that the Lorne Stewart conditions quite clearly embodied the pro rata approach to calculation of holiday in the event of an employee leaving employment during a holiday year.

54. The claimant's dismissal letter was sent to him by email mid-morning on 23 August. The claimant was then in Jamaica. His evidence to the Tribunal was that he received the hard copy of the dismissal letter on his return to England on or about 28 August, which was the first he knew of his dismissal. That evidence was plainly wrong, because the bundle contained emails which he sent on 24 August replying to the emailed dismissal letter (421).

55. We find that the effective date of termination was 24 August (recognising that with the time difference between transmission in England and receipt in Jamaica it might have been the day before).

56. We accept Ms Patterson's calculations, which we do not set out in full. The claimant was paid up to 31 August. His pay included holiday from 14 August onwards. The period for which he was paid, but for which he was no longer entitled to be paid, which was 24 to 31 August, represented an overpayment which we find extinguished any claim to payment for the four statutory bank holidays which had arisen during his employment.

Notice

57. It was not clear to us if a claim for notice pay was pursued. For avoidance of doubt we find that it has been shown to us on evidence at the hearing that the claimant committed the gross misconduct for which he was dismissed (the job application) and that any entitlement to notice pay was forfeit a a result.

Reasonable adjustment

58. We turn finally to the claims for failure to make reasonable adjustments. Although the phrase was used repeatedly at this hearing it was not clear to us whether the claimant fully understood it, and fully understood that a reasonable adjustment is one which will in practice avoid the substantial disadvantage caused by the disability. It is not an abstraction about general support for people with disabilities.

59. The claimant complained that at a number of the meetings with which we were concerned, reasonable adjustments should have been made in two respects. The first was toilet breaks and accessibility. We find that the claimant was entitled, like any adult, to toilet breaks when he needed them. We accept that the meetings with Mr Cusack and Ms Gregoriou in March and April were each no more than 15 to 20 minutes in duration and that no question of adjustment arose in practice. We accept that at the long meetings in July and August, the claimant was able to take toilet breaks when he requested them. We accept that both meetings were scheduled to take place in offices which were located closely to toilets.

60. The second reasonable adjustment was what the claimant referred to as an ergonomic chair, by which he meant a chair with additional back support. We accept that such a chair was provided at the two long meetings and that no question of adjustment arose at the short meetings.

61. We find that the respondent made the reasonable adjustments which were required in the circumstances and the claims fail.

Costs

62. After judgment had been given, the respondent applied for costs. It had put the claimant on notice on 9 April of an intention to make the application.

63. We understand that we must approach a costs application through three steps. The first is to ask if he has as a matter of fact conducted the claim unreasonably; if not, that is then of the matter. If he has, we next ask if it is in the interests of justice to make an order, having regard to the balance of factors in play: the right of access to the tribunal; the right of respondents not to have to defend weak claims; and the tribunal's need to apply its resources proportionately. We may, at any stage, have regard to the paying party's ability to pay.

64. At the first stage, we find two elements of unreasonable conduct. By far the more important was that the claim had at its heart a document written by the claimant, which was materially untrue when written in a number of major respects, and which can only be seen as an attempt to mislead by concealing his past employment history. The claimant had given the respondent a poor explanation at the disciplinary, and had stood by his own untruthfulness. It was unreasonable to bring and pursue a claim in which the integrity of the job application would be central. A less important matter was that judge Bedeau had ordered payment of a deposit in relation to the reasonable adjustments claim; as the claim had failed on broadly the same basis, that part of the claim was unreasonably pursued in accordance with rule 39(5).

65. We find that the interests of justice favoured the respondent, and the making of a costs order. Given the history of the claimant's first dismissal, and the circumstances of the second, there could be little interest of justice in the application to this dispute of the public resource of the respondent and the tribunal.

66. We had scant information about ability to pay. We find that the claimant has had some odd paid work since his dismissal, and has lived on pensions. He said that he has no savings. In reply, Ms Patterson reminded us that the respondent's total costs were about £45,000.00, from resources intended to be dedicated to health care provision. In the circumstances, ew have made an award of £4,000.00.

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Employment Judge R Lewis

Date: 11 / 2 / 2019

Judgment sent to the parties on

12 / 2 / 2019

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For the Tribunal office