EMPLOYMENT TRIBUNALS

Claimant: Mr Abid Raja
Respondent: The Commissioners of her Majesty's Revenue and Customs

HELD AT: Leeds **ON:** 15, 16, 17, 18, 21, 22, 23, 24 January 2019, 20 February 2019 (in chambers)

BEFORE: Employment Judge D N Jones
Mr K Lannaman
Mr D Dorman-Smith

REPRESENTATION:

Claimant: Mr J McHugh, counsel
Respondent: Ms K Knowles, counsel

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The grievance submitted by the claimant on 17 August 2017 was not a protected disclosure, because it was not made, in the reasonable belief of the claimant, in the public interest. The complaints that the claimant was unfairly dismissed or subject to detriments because he made public interest disclosures are, therefore, dismissed.

3. The complaint that the claimant was victimised by being dismissed because he had done a protected act is not well founded and is dismissed.

4. It is not just and equitable to reduce either basic or compensatory award as a consequence of any conduct of the claimant which arose before, or caused or contributed to, the dismissal respectively.

5. Save for the outstanding determination as to whether or not the claimant would or might have been dismissed for having covertly recorded a number of meetings with his managers, it is not just and equitable to reduce the compensatory award on the ground that the claimant would or might have been dismissed in any event.

6. The respondent breached the duty to make adjustments in respect of a failure to provide Dragon software and further training in its use, to provide training in respect of mind mapping software, to provide training in the use of Text Read and Write Gold software, to provide training in work-related dyslexia coping strategies and to provide a quiet work station. Although the last would have otherwise been out of time, it is just and equitable to consider it.

REASONS

Introduction

1. On 6 February 2018, Mr Abid Raja, the claimant, presented a claim to the tribunal that his employers, the Commissioners of Her Majesty's Revenue and Customs, failed to make reasonable adjustments to accommodate him at work as a disabled person.
2. By a further claim, presented on 19 July 2018, Mr Raja complained that he had been unfairly dismissed, subjected to victimisation and to detriments and dismissal because he had made public interest disclosures.
3. The two claims were considered at the preliminary hearings by Employment Judge Lancaster and Employment Judge Wade on 25 May 2018 and 16 August 2018 respectively. Employment Judge Lancaster identified the issues to be determined in the first claim and the parties submitted an agreed list pursuant to the second case management hearing. These were considered with the parties at the commencement of this hearing and finalised as follows.

The issues

4. The duty to make adjustments
    4.1. Did the respondent apply a provision, criterion or practice (PCP) of requiring the claimant to carry out normal duties as a debt collector/collections officer within normal contractual hours with standard equipment?
    4.2. If so, was the claimant placed at a substantial disadvantage as a consequence, in comparison with a person who did not share his disability as a consequence?
    4.3. But for the provision of an auxiliary aid, was the claimant, as a disabled person, placed at a substantial disadvantage and/or did a physical feature of the respondent's premises place the claimant at such a disadvantage?

4.4. Did the respondent know, or ought it not reasonably to have known that the claimant was placed at such substantial disadvantage?

4.5. Did the respondent take such steps as were reasonable to avoid such disadvantages?

4.6. Were any complaints presented more than three months and any relevant early conciliation period (the time period) before the presentation of the claim? If so, was any failure to make adjustments decided upon? If not, did the respondent do an inconsistent act to the duty? If not, when might the respondent reasonably been expected to have acted? If is outside the time period, were the alleged failures part of conduct the last part of which fell within the time period? Is it otherwise just and equitable to consider those claims?

5. Dismissal and/or detriment for having made protected disclosures

5.1. In his grievance of 17 August 2017, did the claimant disclose information which in his reasonable belief was in the public interest and tended to show that the respondent had breached a legal obligation or created a health and safety danger for an individual?

5.2. If so, did respondent not investigate his grievance or subject him to a disciplinary investigation because he had made a protected disclosure?

5.3. Was the sole, or if more than one the principal, reason for the dismissal of the claimant that he had made such a public interest disclosure?

5.4. Did the complaint relating to detriment fall outside the time period, was it conduct which extended into the time period or is it otherwise just and equitable to consider it?

6. Victimisation

6.1. Did the respondent pursue disciplinary proceedings against the claimant and/or dismiss him because he had done the protected act of submitting a grievance on 17 August 2017?

7. Unfair dismissal

7.1. Did the reason, or if more than one the principal reason, for the dismissal of the claimant relate to conduct?

7.2. If so, was dismissal for that reason reasonable in all the circumstances of case, and in accordance with equity and the substantial merits?

7.3. If the dismissal was unfair, would or might the claimant have been dismissed in any event if a fair procedure had been followed?

7.4. Was there any conduct of the claimant which should be taken into account to reduce or extinguish any award which occurred before the dismissal or caused or contributed to it?

8. One of the reasons for considering that the claimant would or might have been dismissed in any event was that he had covertly recorded a number of meetings and this contravened the respondent's policies. The tribunal accepted that such an argument could be pursued, but the parties had not prepared their statements on that basis. The covert recording only became apparent upon disclosure during these proceedings. This aspect shall be addressed at the further remedy hearing.

The Evidence

9. Mr Raja and his union representative, Mr Dickens, gave evidence. The respondent called Ms Vogel, who had been the claimant's manager from 24 May 2016 to 21 January 2017, from Mr Wood, the claimant's manager from 21 April 2017 until the end of his employment, from Mr Eastwood who was deputy head of debt enforcement and the line manager of Mr Wood, from Mr McLean, formerly a senior officer in debt management and the disciplinary officer and from Mr Potter who is deputy head of performance, governance and communication for the debt market integrator programme and who considered the appeal against dismissal.
10. The respondent had served witness statements from the employee who had heard the grievance submitted by the claimant and from the employee who had considered the appeal from the grievance outcome. The tribunal indicated to the parties that it did not consider their evidence would assist. The opinion of others about the complaints raised by Mr Raja, in so far as they duplicated the claims in this case, were not relevant evidence. The respondent did not call these witnesses.
11. A bundle of documents of 2,115 pages was submitted.

Background/findings of fact

12. Mr Raja started to work for the respondent in September 2013, at Shipley, as a debt collections officer. His employment terminated on 8 March 2018, when he was dismissed for misconduct by Mr Gordon McLean. He was paid in lieu of working his notice.
13. The claimant has fibromyalgia. It causes symptoms of pain in the legs, shoulders, back and neck, fatigue, dizziness and sickness. He has associated anxiety, stress and depression. He also has dyslexia. This causes difficulty with communication, memory concentration and organisation. He can become distracted. He has sciatica and lower back pain. The respondent has accepted that the claimant was a disabled person, as from July 2016.
14. Mr Raja moved from the Shipley office to premises in Bradford on 24 May 2016. This was at his request. The relationship between Mr Raja and his managers had become strained.
15. On 1 February 2016, an occupational health advisor submitted a report concerning back pain, sciatica, shoulders and neck pain and pain in the dominant right wrist, numbness in the leg and pins and needles. An ergonomic workplace assessment was suggested.

16. On 9 February 2016 Mr Raja met with his manager to discuss the provision of a specialist chair. He was informed that the occupational health advisers had not recommended that such a chair be provided and, according to a note made by that a manager, his reaction was unreasonable. It resulted in Mr Raja being given a verbal warning for minor misconduct.
17. On 28 February 2016, following a workstation assessment, the occupational health advisor recommended that a new chair with effective support in the seat and backrest be provided. He also recommended a new mini keyboard and mouse to assist with posture and that Mr Raja be allowed to take breaks for 1 to 2 minutes in every 20 to 30.
18. On 21 March 2016 a further occupational health report was prepared. It advised that Mr Raja could undertake his normal duties and normal working hours. It suggested a DSE risk assessment be undertaken in respect of the condition of dyslexia. It was noted that the chair had not been provided after five weeks.
19. On 30 May 2016 an occupational health report was prepared following a telephone consultation. It recommended a phased return to work at the new premises in Bradford. The claimant had been absent 18 days on sick. He told the occupational health advisor that, at the time, he felt supported by his manager. The advisor recommended formal assessment of the dyslexia and a further workstation assessment to ensure that all equipment had been properly set up. He suggested a stress reduction plan and a car parking space be made available close to the office. At a meeting with his manager, on 2 June 2016, Mr Raja declined to complete a fit for work and stress assessment before speaking to his PCS representative.
20. On 27 June 2016 a DSE assessment was carried out and on 12 July 2016 an Access to Work assessment was undertaken by Capita. This identified difficulties Mr Raja had with spelling, grammar, punctuation and reading, because of his dyslexia as well as with memory and concentration, distraction and organisation. It confirmed the symptoms of pain associated with fibromyalgia as well as ‘fibro-fog’. A series of recommendations was made: speech recognition software in the form of Dragon and suitable training, a dictaphone, software to assist with written work called Text Help Read and Write Gold with suitable training, mind mapping software to assist in comprehending information with training, training in work related dyslexia coping strategy for Mr Raja and dyslexia and fibromyalgia awareness training for his colleagues and managers, a heat massage chair with adjusted arm and neck rests, a footrest, an electrical height adjustable desk, a wireless keyboard and mouse, a wireless telephone headset and a fan. It advised that there should be workplace planning to ensure proper posture was adopted and that the workstation be moved from a noisy environment to one with a low footfall.
21. On 15 July 2016, an occupational health advisor recommended that the advice in the Access to Work report should be implemented. He said that the claimant would be able to work his full potential on full hours if the

adjustments were put in place. On 26 July 2016 Access to Work approved funding for the adjustments.

22. Between 24 May 2016 and 8 July 2016 Mr Raja attended at work for three hours a day, part of a phased return. Mr Raja had a number of meetings with his manager, Ms Vogel, and he expressed his frustration at the delays in progressing the recommendations. This led to Mr Raja communicating with the site manager, Mr Chohan, to explain that he wished to pursue a grievance. Mr Chohan wrote to the claimant on 27 July 2016 to inform him that the equipment had been ordered, but that he had been distracting others during his breaks. He criticised the claimant for exhibiting aggressive behaviour when raising his concerns. He stated that Mr Raja had accused him of being a liar on three occasions. He said he would like to work with Mr Raja to implement the adjustments, but pointed out that unacceptable behaviour would not be tolerated and would lead to formal conduct and disciplinary action.
23. Between 29 July 2016 and 22 September 2016 the claimant was absent on disability adjusted leave (DAL), which was fully paid pending the implementation of the adjustments.
24. On 15 August 2016 the Dragon software was installed. A headset and information on training were provided on 17 August 2016. The dictaphone and footrest were supplied on 23 August 2016. The fan heater was provided on 6 September 2016. The heat massage chair and a height adjustable desk of up to 1m were delivered on 23 September 2016, but a 1.6 m desk had been requested.
25. On 8 September 2016 Ms Vogel submitted a report to her manager, Mr Peter Wood. She provided details of 14 occasions between 7 July 2016 and 17 August 2016 when she said the claimant had made inappropriate comments to her such as that she was the reason his relationship with his wife was breaking up, that she was a liar, that he did not want to talk to her. She cited an instance when he had spoken disparagingly of her to her own manager and to others and that her telephone calls to him were beginning to feel like harassment. These were dealt with as a formal disciplinary complaint. It was found proven and the claimant was given a final written warning, on 2 February 2017.
26. In a letter of 25 August 2016, an occupational health advisor reported that Mr Raja's absence was complicated with anxiety and stress and that work issues which were not being resolved. The claimant remained absent for a further 18 days, from 29 September 2016, when his DAL was converted to sickness absence.
27. An occupational health advisor reported, on 4 October 2016, that the failure to deliver some outstanding adjustments and auxiliary aids had triggered psychological symptoms in the light of a long-standing problem with anxiety and depression. She advised that Mr Raja was not fit to work. She advised that the provision of the recommended equipment would minimise stress levels and facilitate a return. She advised he could manage self-assessment

inbound calls without the adjustments. This had been Mr Raja's previous work.

28. On 4 October 2016 a large touchscreen PC was delivered. It was not compatible with Windows 7. Mr Raja had requested this on 26 September 2016.
29. On the 19 October 2016 a DSE assessor repositioned the height adjustable desk. On 25 October 2016 a new keyboard and mouse were provided. These were wired because wireless versions were not compatible with the computer.
30. On 4 November 2016 Mrs Vogel ordered a larger, 1.6 m height adjustable desk. This was delivered on 4 January 2017. On 9 November 2016 Mrs Vogel ordered a 30-inch monitor and an upgrade of the base unit and RAM. The screen was provided on 16 November 2016.
31. Mrs Vogel prepared a stress reduction plan for the claimant on 10 November 2016.
32. Mr Raja reported that he was receiving electric shocks from his equipment and a new keyboard was requested on 29 November 2016.
33. On 15 December 2016, an occupational therapist visited Mr Raja at his workplace. She recommended counselling through 'Well-being at Work' and mediation with management. She canvassed the possibility of Mr Raja returning to his former role. She recommended one-to-one training and the benefit of checklists.
34. On 12 January 2017, the claimant was allocated a new manager and, on 14 March 2017 there was a further change of management. Both managers had difficulties with Mr Raja and reported sick. They said this was because of his challenging behaviour.
35. On 30 January 2017 the claimant's manager prepared a further stress reduction plan.
36. In February 2017 Mr Raja reported that he was receiving electric shocks from the specialist chair. It was returned to the supplier who recommended replacing the adapter. This was ordered on 28 February 2017. The chair was returned on 6 March 2017 but without the new adapter. On 21 March 2017 Mr Raja was advised not to attend work pending replacement of the adapter. He was placed on DAL. On 23 March 2017 the new adapter was provided and fitted. The claimant returned to work on 24 March 2017. He reported experiencing a sharp electric shock from the chair. He was sent home again on DAL on 27 March 2017. He was instructed not return to work until the problems had been resolved. He remained on DAL for 94 days until 10 August 2017. Mr Wood contacted the supplier of the chair, who said that it had been stripped down and tested. The supplier suggested a special mat be placed on the floor to reduce the chance of a static shock.
37. On 22 March 2017, the claimant's manager informed her manager, Ms Burns, that a series of the recommendations had not been put in place. This included Dragon training, mind mapping software, a new monitor (Mr Raja was still working with a small laptop), a means of managing the loose wires under the desk and chair which were becoming tangled, and moving the claimant's workstation to an area with low footfall. She said the claimant had

been preparing a grievance about these delays and had asked to take his laptop home to work upon it. In her reply, Ms Burns said this was a matter which Mr Raja's union representative could assist with.

38. On 30 March 2017 Mr Wood arranged for the claimant's desk to be moved to a quieter location near to the fridge. He contacted the estates department for funding and relocation of the equipment. He wrote to the claimant to inform him of this. On 9 May 2017 the workstation was relocated near to a window and not, as formally proposed, by the fridge, following discussions.
39. From 21 April 2017 Mr Wood became the claimant's manager.
40. On 3 May 2017 Mr Raja sent an email to the acting director of the debt management department, Mr Hughes, having telephoned him the previous day. He referred to the fact that he was disabled and that adjustments had not been put in place for over a year. He said he felt he had been discriminated against throughout all of the process from start to finish.
41. On 4 May 2017 Mr Raja sent a further email to Mr Hughes. He informed him he had spoken to his union representative. He enclosed a copy of his Access to Work report and a medical letter. He expressed his wish to resolve matters professionally. He said he attributed his fibromyalgia to his work. He stated that he had tried all of the management chain before raising it with Mr Hughes himself. He said that the human resources department (HR) had provided him with Mr Hughes name and details.
42. On 4 May 2017 Mr Eastwood, the manager to whom Mr Wood reported, contacted Mr Raja by email. He informed Mr Raja that he had been contacted by the director's office. He said he welcomed the opportunity to speak to him. He referred to some assurances he had given to Mr Raja when he had visited the premises in Bradford and asked him to contact him to arrange to speak the following day.
43. On 5 May 2017 the claimant sent a further email to Mr Hughes and stated that his mental health was suffering as a consequence of what was happening and he was feeling suicidal. In response an advisor from HR contacted Mr Raja by email and suggested he contact 'Workplace Wellness', a health advisor of the respondent.
44. Mr Eastwood spoke with Mr Wood and a member of the HR case team, Mr Gracie. The deputy director's office had been notified of the contact which Mr Raja had made with the acting director and it had been decided that the issues which Mr Raja had raised concern about should be dealt with at a local level, with the claimant's new manager Mr Wood. During these discussions it was decided, upon Mr Gracie's advice, that Mr Wood should inform Mr Raja that if he contacted senior managers again it would be a disciplinary matter and treated as minor misconduct or it could be considered as repeated misconduct.
45. On 10 May 2017 Mr Wood spoke to Mr Raja on the telephone. He updated him in respect of the position concerning adjustments, namely that the desk had been relocated and an antistatic mat was to be fitted. He invited Mr Raja to attend the office where he and a risk assessor would inspect the workstation. He said he had become aware that Mr Raja had spoken to senior

managers about his case and that this must stop. He said that when Mr Raja contacted senior managers they came straight back to him anyway. He informed him that Mr Eastwood was to contact Mr Raja's union representative and would arrange a meeting to attempt to achieve a resolution to everyone's satisfaction.

46. On 6 June 2017 the antistatic mat was delivered.

47. A DSE assessment was compiled on 16 June 2017 and 30 June 2017. Mr Preston, the assessor, met on the second occasion with Mr Raja. He reported a number of problems. The desk was too small because of the additional equipment required. The antistatic mat was not fitted adequately because it was rucking with movements of the chair, there was still a laptop which required replacement with a base unit, the mouse required upgrading to a larger size, the wires under the chair snagged on its wheels, causing a potential safety hazard. He witnessed Mr Raja receive a number of electric shocks.

48. An occupational health advisor submitted a report on 20 July 2017. She advised that Mr Raja would remain unfit for work while there were outstanding issues in respect of his health and relationship with management. She recommended that the advice in the occupational therapist's report of December 2016 be put into effect, the claimant be given routine work, the recommended mediation be brought forward and consideration be given to the request of Mr Raja to transfer back to his previous job.

49. A replacement cable and remote control for the heated, massage chair were received in July 2017. A larger mouse was ordered, pursuant to Mr Preston's suggestion, on 9 August 2017.

50. On 10 August 2017 the claimant returned to work. He attended a meeting with Mr Wood and his union representative Mr Dickens. Mr Eastwood attended the meeting remotely, by telephone. He informed Mr Raja that it would not be possible for him to return to his previous role. This was because the way in which debt management was handled was evolving and his previous role no longer existed. He informed Mr Raja that he wished to concentrate on the future and ensure that adjustments were put in place. Mr Raja raised his concern that adjustments had not been in place. Mr Eastwood said they had done everything possible and made reasonable adjustments. Mr Raja said that he had been discriminated against, did not have the tools to do his job and had had a grievance thrown back at him. Mr Eastwood pointed out that there were time limits within which grievances had to be brought. At one point in the meeting it was necessary to take a break as Mr Raja had become very distressed and upset. Mr Raja covertly recorded this meeting and a copy of the transcript of it was presented to the tribunal. Mr Dickens was unaware this was taking place, as were the others at the meeting.

51. On 17 August 2017 Mr Dickens submitted a formal grievance to Mr Hughes on behalf of the claimant. Mr Raja complained of bullying and discrimination and having suffered less favourable treatment because of his disabilities. He said this had severely impacted upon his physical and mental health. He criticised his management at Shipley and in Bradford. He said he had been on

an unprecedented amount of DAL, as of August 2017, which was not of his choice but an imposition because of a continual failure to implement reasonable adjustments. He gave a number of examples which arose in 2016.

52. Having taken advice from Mr Gracie, Mr Hughes replied on 18 September 2017 to inform the claimant that it was not appropriate to follow the formal grievance procedure because more than a year had passed since the incidents he had raised and the procedure required grievances to be brought without unreasonable delay and in any event within three months. He informed the claimant that he should take the opportunity to speak with his manager, Mr Wood, who would work through residual issues and provide reassurances. He recommended the claimant contact Workplace Wellness.
53. On 19 September 2017 Mr Dickens wrote to Mr Hughes and asked him to give proper consideration to the resolutions requested by Mr Raja. He pointed out that Mr Raja had tried to raise the matter with his manager and the issues were ongoing so that the complaints were not out of time, as suggested.
54. Mr Dickens wrote again to Mr Hughes on 28 September 2017. He informed him that the local health and safety representative had inspected Mr Raja's new workstation and it was unfit for purpose. He explained that the situation had been ongoing for a year and that Mr Raja had had prolonged absences from work because of the lack of suitable equipment and a failure to make adjustments. He described the position as untenable. Mr Hughes responded on 9 October 2017. He recognised there had been delays, but said that management had worked tirelessly with Mr Raja on a range of reasonable adjustments. He encouraged Mr Raja to work with Mr Wood.
55. Mr Hughes replied on 3 November 2017 to Mr Dickens' earlier email of 19 September 2017. He stated that it would not be fair or appropriate to give consideration to the resolutions requested and this was properly dealt with by the local line management. He encouraged Mr Raja to work with Mr Wood to address issues. He said he believed it had been working well.
56. On 11 August 2017 Mr Wood obtained an extension cable to tidy up the wires under Mr Raja's chair and to fit the adapter. On 14 August 2017 Mr Wood met the claimant to review what was needed. He arranged for the stress reduction plan to be prepared.
57. Between 21 August and 17 September 2017 Mr Raja was on annual leave.
58. On 18 September 2017 a large wireless mouse was provided. On 26 September 2017 Mr Wood authorised the replacement of the laptop with a base unit, which was installed on 29 September 2017. The claimant was placed on DAL from 26 September 2017 until 2 October 2017.
59. On 20 September 2017 an access to work advisor informed Mr Wood that they would not undertake a further assessment because the respondent had not undertaken the recommendations within the timescale given. It followed that it would not fund further adjustments.
60. The Dragon and mind mapping software were not working following installation of the new base unit. Mr Raja was granted DAL again until 5 October 2017.

61. On 6 October 2017 Mr Priestley undertook a review of the claimant's workstation. He advised it was electronically fit for use. On 10 October 2017 stronger tape was applied to the antistatic mat to secure it to the floor. On 19 October 2017 the base unit was installed with Windows 7 and additional RAM to accommodate the necessary software. On 26 October 2017 the Dragon software was reinstalled.
62. On 16 October 2017 Mr Wood prepared a discipline checklist for submission to Internal Governance (IG) with a view to formal disciplinary proceedings being considered in respect of the claimant's conduct. He set out five examples of what he considered to be unacceptable behaviour and a failure to follow reasonable management requests.
63. On 30 October 2017 the claimant was signed off sick and never returned to work.
64. On 10 January 2018 an investigation manager, Ms Scott, submitted an investigation report in respect of the claimant's conduct and on 26 January 2018 Mr Raja was invited to attend a disciplinary hearing.
65. On 14 February 2018 the claimant attended the hearing with his representative, Mr Dickens. Mr McLean found five of the allegations to be proven and he dismissed another five. The first proven allegation concerned an email to Mr Wood, sent on 20 September 2017, in which Mr Raja stated he would not speak with management and his phone was on loud. The second and third concerned contact with Mr Hughes on 20 September 2017 and a member of his private office on 9 October 2017, in breach of a management instruction. The fourth concerned an incident on 9 October 2017 when, Mr McLean found, Mr Raja put on his coat and left for the day. The fifth concerned contacting the director's private office on 10 October 2017 twice, on one occasion threatening suicide and in the second being upset.
66. Mr McLean considered that the actions of Mr Raja to management were extreme on some occasions and had been ongoing for some considerable time. He believed there was every likelihood that such unacceptable behaviour would continue and that the relationship between employee and employer had broken down irreparably. Because the claimant was on a final written warning he decided that dismissal was the appropriate sanction. The decision was communicated to Mr Raja by letter of 8 March 2018.
67. Mr Raja submitted an appeal on 15 March 2018. He attended a hearing with Mr Potter on 12 April 2018. He considered the points raised but dismissed the appeal by letter of 23 April 2018.
68. An occupational health report was sent to Mr Wood, by Dr Liu, on 26 February 2018. He stated that a successful return to work would depend on implementation of the adaptations which were required or redeployment to a more suitable role. He advised that a further occupational health review was likely to be beneficial.
69. On 12 March 2018 the claimant lodged a grievance against Mr Wood, Ms Burns and Mr Eastwood. This was considered but dismissed on 15 August 2018 and an appeal of that decision was dismissed on 26 October 2018.

70. Soundboards were installed around the claimant's workstation on 15 March 2018.

The Law

Unfair dismissal

71. By Section 98(1) of the Employment Rights Act 1996 (ERA), it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which relates to conduct, see Section 98(2)(b).

72. Under Section 98(4) of ERA "*where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

73. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA. Material considerations in a case where the reason for the dismissal was conduct, will include whether the employer undertook a reasonable investigation and formed a reasonable and honest belief in the misconduct for which the employee was dismissed[1]. It is not for the Tribunal to substitute its own view, but rather to review the decision-making process against the statutory criteria and, if it falls within a reasonable band of responses, the decision will be regarded as fair[2]. The 'reasonable band of responses' consideration includes not only the determination of whether there was misconduct and the choice of sanction, but will include the investigation[3]. A fair investigation will involve an employer exploring avenues of enquiry which may establish the employee's innocence of the allegations as well as those which may establish his guilt. That is of particular significance in the event the dismissal will impact upon the employee's future career[4]. With regard to any procedural deficiencies the Tribunal must have regard to the fairness of the process overall. Early deficiencies may be corrected by a fair appeal[5].

Public interest disclosures

74. By section 43B of the ERA, a qualifying disclosure is defined as a disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and one or more acts of wrongdoing

[1] BHS v Burchell [1980] ICR 303.
[2] Iceland Frozen Foods v Jones [1983] ICR 17.
[3] J Sainsbury PLC v Hitt [2003] ICR 111.
[4] Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457.
[5] Taylor v OCS Group Ltd [2006] ICR 1602

as defined. Such wrongdoing includes that a person has failed, is failing or will fail to comply with a legal obligation to which he is subject and that the health and safety of an individual has been, is being or is likely to be endangered.

75. By section 103A of the ERA, the dismissal will be unfair if the reason, or if more than one the principal reason, for the dismissal is that the employee had made a protected disclosure.

76. By section 47B of the ERA a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

77. If a disclosure relates to a matter where the interest in question was personal to the employee, it is still possible that it might satisfy the test that it was, in the reasonable belief that employee, in the public interest as well his own personal interest. That involves depends on factors such as the numbers of those affected by the interest, the nature of the interest affected, the nature of the wrongdoing, the identity of the wrongdoer and the extent to which interests were affected by the wrongdoing disclosed[6].

<u>Victimisation</u>

78. By section 27 of the Equality Act 2010 (EqA), a person victimises another if he subjects that other to a detriment because they have done, or may do, a protected act. A protected act includes alleging the contravention of the EqA, whether or not expressly.

<u>The duty to make adjustments</u>

79. By section 20(3) of the EqA, there is a requirement to take such steps as is reasonable to avoid a substantial disadvantage which a disabled person is placed at by a provision, criterion or practice applied by the employer.

80. By section 20(4) of the EqA, there is a similar duty when a physical feature puts a disabled person at a substantial disadvantage. By section 20(5) of the EqA the employer has a duty to take such steps as it is reasonable to have to take to provide an auxiliary aid if a disabled person is placed at a substantial disadvantage but for the provision of that aid.

<u>Burden of proof</u>

81. By section 136 of the EqA, if there are facts from which the tribunal could decide, in the absence of any other explanation, that the employer contravened a provision of the EqA, the Tribunal must hold that the contravention occurred, unless the employer showed that he did not contravene it.

<u>Time limits</u>

82. By section 123 of the EqA, proceedings may not be brought after the period of three months (and any relevant conciliation period) starting with the date of the act to which the complaint relates, or such other period as the Tribunal considers just and equitable.

83. Conduct extending over a period is to be treated as done at the end of the period.

84. Failure to do something is to be treated as occurring when the person in question decided upon it. If the person did not decide upon it, he is taken to

[6] Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979

have done so, in the absence of evidence to the contrary, when he does an act inconsistently with doing it or, when he does no such inconsistent act, on the expiry of the period from which he might reasonably have been expected to do it.

Analysis and conclusions

Unfair dismissal

85. We are satisfied that the reason for the dismissal related to conduct, a potentially fair reason. Mr McLean found five of the ten allegations proven and was satisfied that they amounted to repeated misconduct or a collection of incidents of minor misconduct, within the definitions of the respondent's disciplinary policy and code of conduct. He knew nothing about the details of the grievance which Mr Raja had submitted, nor that it concerned allegations of discrimination. He based his decision upon the information provided by Mr Wood, the investigation of Ms Scott and the evidence she submitted with her report.

86. We are not satisfied that dismissal for that reason was reasonable in all the circumstances of the case, nor that a reasonable investigation was undertaken.

87. In cross-examination, Mr Wood said that four out of the five examples which he had summarised in the disciplinary checklist contained major flaws; that the first, second and fifth of those should not have been disciplinary allegations and that there was little basis for contending that Mr Raja had been unprofessional, in respect of the fourth.

88. The second, third and fifth of the disciplinary allegations were that, by contacting the director and/or his private office by telephone, Mr Raja had failed to comply with a management instruction. Mr Wood had told Mr Raja, on 10 May 2017, to speak only to him about his case and not to go to senior managers.

89. It was accepted by Mr Raja that he had made this contact, but Mr Dickens argued in the disciplinary hearing that the instruction was not reasonable. Mr Raja said that his grievance had been returned to him without action and he viewed that as unfair. Mr McHugh submitted that a reasonable employer would have made further enquiries in the light of these points. We agree. Mr McLean said that he understood the instruction had been given upon advice from the human resources department. He did not regard it as his role to determine whether the instruction was reasonable. That was an error. If a challenge is made to an essential aspect of the allegation, a reasonable employer must address it.

90. Had Mr McLean make further enquiries he would have discovered that the instruction had arisen from concerns Mr Raja had expressed to the acting director, Mr Hughes, by correspondence of 3 and 4 May 2017 and a telephone call. Emails from the deputy director's private office throw some light upon how the instruction came about. The deputy director's private secretary reported to him (copying in Mr Eastwood) that Mr Raja had been subject to disciplinary proceedings and had been given a final written warning

for his behaviour. He had appealed it, unsuccessfully. She said they needed to be careful, the job holder was getting an inordinate amount of time from the business, complaining about everyone, everything and anything. The human resources department were consulted. Mr Gracie, of that department, advised that if Mr Raja contacted senior managers it should be treated as a disciplinary matter.

91. We did not hear evidence from Mr Gracie, but the inference we draw from the documents is that Mr Raja was seen by the deputy director and his staff to be perpetuating a pattern of unacceptable and confrontational conduct in contacting Mr Hughes. They saw the instruction limiting his entitlement to contact Mr Hughes or anyone other than Mr Wood was a means of managing that.

92. In fact, there was justification for what Mr Raja had raised with Mr Hughes and his communication was neither discourteous nor disobliging. There had been delays in providing the aids and adaptations which had been recommended and the claimant's mental health had been adversely affected as a consequence. He had complained to his managers, but the situation persisted. HR had suggested they contact Mr Hughes. The suppression of Mr Raja's request for assistance from the director, by redirecting the claimant to his line manager and forbidding any other route of complaint and discussion, other than with his union representative, was excessive and disproportionate. It would have upset and frustrated any employee, let alone one who had stress and anxiety. Mr Dickens was correct. The management instruction was unreasonable.

93. In summary, a reasonable employer would have enquired about why the instruction had been given, after it had been challenged by Mr Dickens. Had such enquiries been made, Mr McLean would have concluded the instruction had not been reasonable. The allegations about failing to comply with it would not have been upheld.

94. Mr McLean found that Mr Raja had threatened suicide on the telephone and caused alarm. This was part of the fifth allegation. The note of the disciplinary hearing records Mr Raja as having admitted to having said he was contemplating suicide. Mr Dickens had argued that this did not breach the respondent's policies and, furthermore, was not equivalent to threatening suicide.

95. Mr McLean made his finding upon the content of an email of a member of staff from the director's private office, dated 10 October 2017. She had not received either of the calls herself. She said the claimant had threatened suicide during the first call. She made no reference to any alarm or upset having been caused. There was no statement from the recipients of either phone call. What had been said about suicide and its context needed to be determined. Mr McLean could not reasonably resolve that part of the allegation on the basis of a hearsay account which made no reference to any distress and the claimant's acknowledgment of what he had admitted to having said, which differed from the hearsay account. A reasonable employer would have made further enquiries of the recipient of the call. Without that,

there was no evidence of alarm and distress. Mr McLean acknowledged this during his cross examination, saying it was important to seek evidence from the person who took the call. The finding he reached, on the available material, was not reasonable.

96. In respect of the fourth allegation, Mr McLean found that Mr Raja had been disrespectful when he put on his coat and left for the day. That finding was based solely upon a file note of Mr Wood. That record referred to a verbal exchange between Mr Raja and Mr Wood “in raised voices, but not shouting”. Mr Wood wrote that Mr Raja then put his coat on, stated that he was not staying at work and was going home on leave. The note then recorded that Mr Wood asked Mr Raja to join him in a room, but it was unavailable and the two moved towards the lifts. Mr Raja attempted to telephone another manager but Mr Wood told Mr Raja that he should speak to him. In response to being referred to as his friend, Mr Wood told Mr Raja that he was not his friend but his manager.

97. In cross-examination Mr McLean accepted that he was mistaken in finding that Mr Raja left. In re-examination, he said that putting on his coat and saying he would leave would have been disrespectful, although that was not quite what he had found. Substituting one finding with another, as suggested by the re-examination, runs up against another difficulty. The detail in the note was insufficient. It did not explain what Mr Wood and Mr Raja had been speaking about, immediately before Mr Raja acted as he did; or why both were raising their voices. Enquiry would have revealed it was about the workstation and problems which had arisen with the cabling. Mr Raja was sent home many times on DAL because he could not work and his comment needed to be viewed in that context. Mr Wood’s reaction to the word ‘friend’ required clarification. A reasonable employer would have required more information from Mr Wood about precisely what had occurred.

98. The first allegation found proven concerned an email from Mr Raja to Mr Wood, on 20 September 2017, in which he said he was waiting for HR to call, his phone was on loud and he would not speak to any part of management until he had spoken to HR. Mr McLean concluded that this was disrespectful. The email was admitted. At the disciplinary hearing, Mr Raja referred to his frustration in having his grievance rejected. Mr McLean made no investigated into that. Had he done so, he would have learned that Mr Raja had recently discovered that Mr Hughes had refused to accept his grievance. That was contrary to the respondent’s policies. This was the second time this had happened. Mr Raja had been told he would be disciplined if he raised his concerns with any manager other than Mr Wood. Finding himself in that situation, Mr Raja turned to the HR advisors for advice. That was the background to the discourteous email. A reasonable employer would have made some attempts to enquire into the context in which it was sent.

99. In summary, dismissal for the allegations of misconduct was not reasonable in all the circumstances of the case. The level of investigation was outside that of a reasonable employer. Having regard to equity and the substantial merits

of the case, no reasonable employer would have dismissed Mr Raja on such material.

100. Although nothing turns upon it in the light of these conclusions, we should deal with the final written warning. Mr McHugh submitted that the disciplinary proceedings which led to it were unfair and influenced by the fact the claimant had raised his view that there had been discrimination because of his disability in his discussions with Ms Vogel. We reject that.

101. The records which Ms Vogel prepared of the discussions with Mr Raja, both to her, human resources officers and a minute taker, revealed a pattern of behaviour which was discourteous, inconsiderate, rude and, at times, offensive. We accepted Ms Vogel's evidence that this had nothing to do with the references to disability discrimination, but they are included in her report to give context to the events which were inappropriate. No criticism can be made of the disciplinary sanction of a final written warning, having given all due allowance for the compelling mitigation that Mr Raja was placed under considerable stress and frustration because of the failure of his employers to create a workplace which met his legitimate needs.

Public interest disclosure

102. The disclosure of information was contained in the grievance submitted on 10 August 2017. It concerned the failure to provide adjustments for the claimant, as a disabled person, and his belief he had been discriminated against and unfairly treated by management. All of these were personal matters, in the sense that they were complaints relating to how Mr Raja had been treated in his employment. They did not raise issues with a wider public interest. They could not, in his reasonable belief, have been matters of a public interest.

103. The complaint that the reason, or if more than one the principal reason, for the dismissal was that the claimant had raised a public interest disclosure cannot therefore succeed.

104. The complaints that the claimant was subject to detriments for having made a public interest disclosure must, similarly, fail.

Adjustments to the compensatory award for contributory conduct

105. It is not just and equitable to reduce the compensatory award because of conduct which contributed to or caused the dismissal. Mr Raja was not an easy employee to manage. He required a high level of support. In his evidence he became animated and distressed, and often digressed. This gave a limited insight into the challenges. The history of this case, however, is of a repeated delay and failure to create a workplace which was suitable to allow Mr Raja to discharge his work. The frustrations to Mr Raja must have been substantial. Mr Wood departed from the disciplinary policy in failing to advise Mr Raja about when his conduct crossed a line. We have not found any conduct which led to the dismissal would justify reducing the compensatory award.

An adjustment to the basic award

106. For the same reasons but we are not satisfied that there was any conduct which should be taken into account for the purpose of reducing any basic award.

Adjustments to the compensatory award on the basis Mr Raja would or might have been dismissed in any event.

107. The errors in the disciplinary process which we have identified are pervasive. There is not any clear indication what the outcome of a full investigation would have revealed, for example we have no idea what the recipients of any phone calls from the claimant would have said about any concern they had in reaction to what he had said.

108. Subject to the outstanding question as to whether the claimant would or might have been dismissed for covertly recording meetings with his managers, we are not satisfied it would be just and equitable to reduce any compensatory award on this ground.

Victimisation

[i] Dismissal

109. Mr McLean had not asked to see the grievance. He had a limited knowledge about its contents. His decision was based upon his belief that Mr Raja had committed acts of misconduct. It was not because he was aware that Mr Raja had done a protected act in submitting a grievance, within which there were complaints of disability discrimination.

110. For the purpose of determining whether the dismissal was a detriment because Mr Raja had done the protected act, the law requires the tribunal to decide what the decision-maker knew and why he acted as he did[7]. We accepted Mr McLean's evidence that the grievance had no part to play in his decision.

[ii] Detriment

111. We are satisfied that there are facts from which we could decide, in the absence of any other explanation, that the pursuit of disciplinary allegations, an admitted detriment, was because the claimant had done a protected act by submitting a grievance on 17 August 2017 in which he had complained of disability discrimination.

112. The reaction of Mr Hughes and the deputy director's office, in May 2017, to concerns about delays in adjustments which forced him off work and led to ill-health, was to instruct Mr Raja to work through his problems with Mr Wood and to make it clear that if he contacted a senior manager it would be met with disciplinary action.

113. At the meeting on 10 August 2017, Mr Eastwood's desire to look to the future rather than dwell on the past gave the impression to the claimant that his concerns about how badly he had been treated was being swept under the

[7] CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439

carpet. That impression had first been given by Mr Eastwood in May 2017. It was he who contacted Mr Raja in response to his emails to Mr Hughes on 4 May 2017. Although he promised to speak to him, Mr Eastwood had been on a train when Mr Raja called and so could not discuss anything meaningfully. He did not return the call nor follow it up. He informed Mr Wood, by 8 May 2017, that he had given Mr Raja an opportunity to speak and that had now passed.

114. The concerns expressed to Mr Hughes in May 2017 were not responded to appropriately. It is apparent from the email traffic between the office of the acting director, the deputy director and the human resources advisor that Mr Raja was considered to be pursuing an unjustified course of conduct, which had been reflected by a recent final written warning. In reality, there were shortcomings in the implementation of the aids and adaptations the claimant was entitled to expect as a disabled person, a factor partly recognised in private emails of Mr Eastwood and later Ms Burns. Rather than acknowledge that, Mr Eastwood told Mr Raja, on 10 August 2017, that the managers had done everything possible.

115. This history was the unhappy and unsatisfactory background to the handling of the formal grievance submitted to Mr Hughes on 17 August 2017. The rejection of it as being out of time was not a justifiable application of the respondent's grievance policy. Part of it was plainly in time. The tribunal did not hear from Mr Gracie, whose advice led to this decision. The obvious inference is that the reason for the response to claimant's emails in May, continued to influence the decision to reject the grievance in August. It covered largely the same ground.

116. The initiation of the disciplinary process was a response to the advice of Mr Gracie, in May 2017, that inappropriate behaviour of Mr Raja could and should be treated as minor or repeated misconduct. The claimant was on DAL at the time that advice was given and the first opportunity to 'review' the behaviour (as Mr Wood put it) was upon his return to work following his annual leave on 18 September 2017.

117. Rather than discuss each incident which caused concern with Mr Raja when it arose, Mr Wood collected them together in a disciplinary checklist. The disciplinary procedures of the respondent contemplate advice being given about inappropriate behaviour which constitutes minor misconduct, as and when it arises. Miss Knowles pointed out that the unacceptable nature of certain types of the claimant's behaviour had been pointed out in the past, for example by Mr Chohan. In fairness, Mr Wood had raised his concern about the claimant's conduct with Mr Dickens on 21 September 2017 about his contact with a human resources advisor. Had the applied the procedure properly, we would have expected all of issues which the claimant was to be disciplined for, at the end of 2017, to have been discussed directly with him before formal proceedings were launched.

118. The refusal to process a grievance about discriminatory matters in breach of the respondent's policies and the failure to acknowledge that, after Mr Dickens drew attention it, the speed with which a number of allegations were collated

shortly after the protected act occurred, the lack of substance to half of the allegations, which were dismissed, the lack of investigation into those which were found proven and the admitted deficiencies in Mr Wood's report, cumulatively raise the inference of a causal connection; that is that misconduct proceedings were initiated because the claimant had complained of discrimination. For the purpose of section 36 of the EqA, the burden of proof passes to the respondent to provide an explanation which satisfies the tribunal that the detrimental treatment was not influenced in any way by the doing of the protected act.

119. Both Mr Eastwood and Mr Wood were adamant that there was no connection between the claimant's complaint of discrimination, in his written grievance which was sent to Mr Hughes, and their review of his conduct which was reduced to a disciplinary checklist and submitted for consideration of disciplinary proceedings. Whilst we accept that was their genuine belief, it is necessary to examine that with care. People frequently rationalise why they behaved in a particular way, eliminating in that process inappropriate influences. It is often said one is unlikely to advertise one's prejudices and even admit them to oneself. Discrimination, of which victimisation is a form, is often subconscious.

120. The complaints in the grievance included criticisms of Mr Eastwood and Mr Wood. They were both sent a copy of this grievance. so were aware of its contents. That was contrary to good practice. These complaints would be expected to be communicated in confidence to the recipient, pending a grievance process.

121. Mr Eastwood sent an email to the deputy director on 19 September 2017 referring to Mr Hughes' response to the grievance as not having "landed well" and Mr Wood being in a very difficult position. It was understood that the decision to reject the grievance would cause Mr Raja upset. In a file note of Mr Wood, of 20 September 2017, the reaction is recorded as one of distress and upset. It was expressed to HR in a number of calls from Mr Raja. This was the occasion when Mr Raja sent the email to say that he would not speak to management until he had spoken to HR. Such was the level of distress, the HR officers were concerned about Mr Raja's welfare.

122. Mr Eastwood was sensitive to the criticisms which had been made of him by Mr Raja. In an email to the deputy director he said, "it is strong and highly critical of me". In his evidence, Mr Eastwood said he was not dancing in the street when he learned of this complaint, but it did not affect his professional handling of matters.

123. Mr Wood was sensitive about what the claimant had been saying to others. In a file note of 21 September 2017, he recorded that Mr Raja had been overheard in the canteen and his name had been mentioned. He recorded that it had to stop. In evidence, however he said he did not know what had been said, nor whether it was disparaging.

124. Mr Wood spoke to Mr Dickens on 21 September 2017 and, as recorded in his file note. He told him that Mr Raja had upset a human resources advisor who had become concerned for his welfare and that it must stop. He told Mr

Dickens that Mr Raja was on a final written warning for his behaviour and had to be careful. This was an occasion when we consider Mr Wood should have taken matters up with Mr Raja himself, under the disciplinary guidance.

125. On 26 September 2017 Mr Wood was approached by a union representative who said he was not prepared to represent Mr Raja who had been trying to put words into his mouth.

126. On 5 October 2017 Mr Wood telephoned Mr Raja at home. Mr Raja queried what had happened to his grievance. Mr Wood updated him on progress with the adjustments. Mr Raja informed Mr Wood that he would be attending work the following morning with his brother and his union representative. He informed Mr Wood that his brother was an HEO for the respondent and he needed him for support. Mr Wood said that would not be possible, whereupon Mr Raja became heated and asked why not. The call was ended with Mr Wood saying he would take formal advice.

127. On 6 October 2017 Mr Wood sent an email to Mr Gracie to update him on what had happened since 2 October 2017. Concluding, he stated "I will continue preparing the case for IG upon my return from lunch".

128. On 9 October 2017 Mr Raja spoke to Mr Wood about ongoing problems with the antistatic mat, unsafe cabling and sparks emanating from the back of the base unit. Mr Wood obtained some alternative cables to reduce the crackling which he had observed. There was a further discussion later about the cabling which led to raised voices and the incident which constituted the allegation of the claimant behaving disrespectfully by putting his coat on and saying he was going home on leave.

129. Mr Raja was becoming increasingly frustrated by his employer's refusal to process his grievance and ensure his workplace was fit for purpose. He did not communicate his concerns with tact; his discussions with the HR advisors, Mr Wood and another union representative became agitated and forthright, generating tension. That provided material to progress a disciplinary action for repeated misconduct, which had been contemplated in May 2017.

130. Having regard to that history, we are satisfied there is compelling circumstantial evidence of a causal connection between the complaints of discrimination and the initiation of a disciplinary case, but that was in May 2017. It was because the human resources advisor and the deputy director's office had assumed that Mr Raja's approach to the acting director in May 2017 had been improper and unjustified. The submission of the later, formal grievance, in August 2017, did not influence Mr Eastwood and Mr Wood in the collation of material in support of a disciplinary case. Even though both were aware they had been criticised by Mr Raja in his grievance and were sensitive to it, their actions were a response to the earlier advice from Mr Gracie in May 2017. Mr Wood would have prepared the disciplinary case when he did and in the way he did even had Mr Raja not submitted the grievance of 17 August 2017.

131. It follows that the respondent has discharged the burden of proof and the allegation of victimisation does not succeed. Whether it would have succeeded if the protected act had been alleged to have been the complaints

raised in May 2017, remains to be seen. The respondent did not call Mr Gracie and Mr Hughes to give evidence. Although they were instrumental in the decision to reject the grievance, the pleaded case of victimisation about instigation of a disciplinary investigation required an explanation from Mr Eastwood and Mr Wood. In this respect, we have accepted them.

Breach of the duty to make adjustments

132. In paragraph 9 of the first claim form, Mr Raja identified 10 recommendations from the Access to Work report which he said had not been implemented. During the hearing he accepted that a specialist chair and footrest, a dictaphone, an electric operated height adjustable desk and a wireless mouse and keyboard had been provided by 6 February 2018 when the claim was issued. In closing submissions Mr McHugh refined the complaint concerning the breach of the duty to make adjustments, to 5 areas: a failure to provide dictation software (Dragon) and training, a failure to provide training in the use of Text Read and Write Gold software, a failure to provide training in mind mapping software, a failure to provide a quiet workstation away from high footfall and a failure to provide work-related dyslexia coping strategy training.

133. The combination of the conditions of fibromyalgia and dyslexia with an overlay of anxiety created significant problems for Mr Raja in the workplace. These could be met, but required many aids, adaptations and adjustments to working practices. The respondent is a large State Department with the resources to meet such challenges, but its procedures in obtaining advice about medical conditions and commissioning and securing the recommended workplace adaptations are cumbersome and not swift.

134. Putting in place the recommendations of the Access to Work advisor proved a challenge. It took nearly 2 months to provide the chair, but within a matter of weeks it was giving out electric shocks and had to be returned to the supplier. Upon its return, problems continued but were addressed by the application of an antistatic mat to the floor, which created its own problem because it did not fit flushly and caught in the wheels of the chair. The height adjustable desk arrived after two months but it was the wrong size and its replacement took a further four months. A large touchscreen was provided after three months but was not compatible with Windows 7. Mr Raja was working with a laptop and, although Ms Vogel ordered a base unit and updated Ram on 9 November 2016 this was not installed until October 2017.

135. This led to sustained and long periods during which Mr Raja was unable to attend work, because there were delays in arranging for the significant additional aids and adaptations being put in place and synchronising them. Although Mr Raja received full pay during these periods he was becoming increasingly isolated from the workplace and his duties. From the end of March 2017 he was placed on DAL for 4½ months. The previous year, Mr Raja had been placed on DAL for nearly 2 months from the end of July 2016 and he did not return to work because of a succeeding sickness absence until mid-October 2016.

136. On behalf of the respondent, Ms Knowles submitted that Mr Raja was not subject to the PCP of being required to carry out the normal duties of a debt collector/collections officer within his normal contractual hours and with the standard equipment. She submitted that the respondent had taken steps to implement the recommendations in the Access to Work such that, by the time of the material complaints, that requirement no longer applied.
137. We reject that. The respondent does not dispute that the adjustments recommended in the Access to Work report were appropriate and reasonable. They were required because the claimant was unable to discharge his duties as a debt collector/collections officer within normal contractual hours and with standard equipment, the role he was contractually obliged to discharge. The PCP was one the claimant had been subjected to when the occupational health advice was obtained. At the heart of this case is the question whether the steps which were being taken to implement those adjustments, some of which were still outstanding at the termination of the claimant's employment, were reasonable.
138. It is not appropriate to take a snapshot in time, somewhere between 2016 and 2017, when some of the adjustments had been put in place, or whilst the claimant was on DAL awaiting them, and to say by then there was no longer a PCP for the claimant to undertake normal hours with standard equipment. The claimant remained at a substantial disadvantage and unable to discharge his duties without the broader range of adjustments recommended. In 2016 the PCP applied and disadvantaged him, and this was recognised by the occupational health advisor. During the succeeding 20 months the recommendations were not suitably and reasonably put in place.
139. We find the PCP did apply and it placed the claimant at a substantial disadvantage compared to a person who was not disabled. That comparator could do his job under those circumstances. The claimant could not. In a number of written reports, the advisors expressed the opinion that with all the adjustments the claimant could return to full time hours and discharge his duties. The respondent therefore knew of the disabilities and the disadvantages at work to which they substantially disadvantaged the claimant. Some of the recommendations concerned auxiliary aids, without which the claimant was placed at a substantial disadvantage because of his disability.
140. Should the five adjustments have been implemented at an earlier stage?
141. Ms Knowles submitted that although further training in respect of the Dragon software, training in respect of the Text Read and Write Gold software and training in mind mapping had not been provided, that this was a consequence of the claimant not have been having been present. He was only at work for the second part of 2017, for a week before his annual leave on 18 August and for six weeks before being continuously off work from 30 October 2017 on sick leave.
142. The Dragon software was initially installed in August 2016 and information on training sent at the same time. There has been some Dragon training provided by 25 January 2017 but there was further "official" training outstanding. The claimant had been booked for 7, 15 and 21 March 2017 but this did not take

place. At this time the problems relating to the chair were being addressed. By the end of March 2017, it had been acknowledged that there were problems with background noise and the use of Dragon and Mr Wood was to take steps to ensure partitions were fitted to the claimant's workstation to eliminate it. These were not installed for another year. The Dragon software became inoperative when other computer equipment was installed on 29 September 2017. On 2 October 2017 Mr Raja was granted three days DAL because neither the Dragon nor mind mapping software were operating, being incompatible with the new program. By 26 of October 2017 the Dragon software had been reinstalled after the base unit had been reprogrammed with Windows 7 in place of Windows 10.

143. Given the history of problems and the extensive periods of DAL which had been provided, we would have expected any reasonable employer to have rectified the failures to install the Dragon and mind mapping software within a matter of days, not a further 4 weeks. The contractor which installed the new base unit would have been expected to check all the software was working properly and if it was not, we would have expected that contractor to return immediately to correct the deficiency. In these circumstances we accept the complaint that there was a failure to install the software and provide the Dragon training in early to mid October 2017.

144. The recommendation that Mr Raja should be found a place of work away from heavy footfall had been made in July 2016. Mr Wood had taken steps to relocate Mr Raja in March 2017 and by May 2017 this was done. However, in March 2017, when Mr Wood spoke to the claimant, he said that the move would include the provision of partitions "to help with his Dragon". Mr Wood's handwritten note of that date records him having requested the partitions but they were not installed at the time of the move in May 2017. When the Dragon software was reinstalled on 26 October 2017 Mr Wood noticed that it was working so well that it was picking up background noise. He was aware of another Dragon user whose work station was fitted with partitions which eliminated 75% of the background noise. He took steps to requisition partitions which arrived in March 2018. In his evidence Mr Raja said he could have been allocated to one of a number of rooms to work from in a quiet environment. We are satisfied the partitions would have eliminated the problem and were a reasonable adjustment in conjunction with the move which had already taken place. Mr Wood failed to follow up the request for partitions in March 2017 and, from his email of October, appeared to have overlooked the fact that he had previously considered them as necessary. In the circumstances, we find the measures taken to provide a quiet workstation were not reasonable and sufficient and that if partitions could not have been provided an alternative room or situation was necessary.

145. Mind mapping software had been installed by January 2017. No training in this was provided and there was no explanation for why this had not occurred. Such training was not subject to the problems arising from training in Dragon because of background noise. Mr Raja had been in work at the beginning of 2017 and for several weeks in the autumn. There were opportunities which

were missed and we are satisfied the respondent breached its duty in not providing this training.

146. The Text Read and Write Gold software was installed in August 2016. In her witness statement Ms Vogel said she believed the claimant had received some training by 25 January 2017 after she ceased to be Mr Raja' manager, but the document she relied upon, an email form the successor manager, only refers to Dragon training having commenced. In cross-examination Ms Vogel said she recalled Mr Raja had been given a number for the training, but he needed to be in the office. In his statement Mr Wood said that training in this respect was to be provided upon Mr Raja's return to work and that he was advised to let management know about any training he required. The email in support of that, of 17 March 2017, does not bear that out. Rather it informs Mr Raja that his new manager would speak to him about support with training the following week. An email from that manager, dated 22 March 2017, confirmed that training had not been given and she said that Mr Raja complained to her that he had been informed that he could not have it. She advised her manager, Ms Burns that the trainer in Dragon software would be able to provide the mind mapping training. That was never done. For the reasons we have set out above we consider it would have been reasonable to provide that training by mid October 2017 at the latest. The failure to provide it earlier that year and the previous year was never satisfactorily explained.

147. There is no evidence that dyslexia coping strategy training was implemented. It was recommended specifically in the Access to Work report in July 2016. The author said Mr Raja would be better able to cope with his job if he could develop additional long-term coping strategies and that five, one-to-one sessions should be arranged to develop his weaker skills. Eight months later, in the email of 22 March 2017, the claimant's manager queried whether they were obliged to provide it and stated she would discuss it with Mr Wood. Neither Mr Wood nor Ms Vogel addressed this in their evidence. We are satisfied it was a reasonable step to take to reduce the adverse effect of the PCP and it was never actioned. The burden of proof had passed to the respondent to provide an adequate explanation for not providing it. It has failed to discharge it.

148. In summary, we find that there was a breach of a duty to make adjustments in providing Dragon software, further training in Dragon and training in Text Read and Write Gold software, provision of mind mapping training, the provision of dyslexia coping strategy training and the provision of a quiet workstation away from high footfall.

<u>Time limits</u>

149. The claimant presented this part of the claim on 6 February 2018, having notified ACAS for the purposes of early conciliation on 20 December 2017, the certificate being issued on 8 January 2018. The time limit would therefore be effective in respect of any relevant breach after 21 September 2017.

150. Section 123 of the EqA makes special provision for time limits in respect of omissions which we summarise above. In *Hull City Council v Matuszowicz*

2009 ICR 1170, the Court of Appeal considered comparable provisions under the Disability Discrimination Act 1995. Omissions of inadvertence will arise when no decision has been made about the adjustment. An inconsistent act with making the adjustment would trigger the time limit, but in the absence of that, the end of the period within which an employer could reasonably he expected to act will be deemed to be the point at which the time limit for bringing a claim commences to run. For this purpose, the time limit must be calculated by taking into account what the claimant reasonably knew[8]. He may well be waiting some time, patiently, in the belief his employer is taking steps to put in place what is required. In *Matuszowicz* the Court recognised that where the complaint concerns a series of omissions there can be conduct which extends over a period, a point Mr McHugh raised by reliance upon the earlier Employment Appeal Tribunal decision *of The Secretary of State for Work and Pensions v Jamil and others [2013] UKEAT/097/13 BA*.

151. In respect of the failure to provide Dragon software, our finding is that arose following the replacement of a base unit for a laptop on 26 September 2017, which did not have the correct Windows and Ram which then had to be reinstalled. Dragon software was replaced on 26 October 2017. This breach occurred within the time limit. The claimant could not have presented a complaint about it in September 2017 or before, because it had been installed a year before; so the time limit for bringing a claim in respect of that breach would have to commence after it was removed from the system.

152. In respect of the failure to provide training for mind mapping, dyslexia coping strategy and Text Read and Write Gold, this seems to have largely escaped the attention of the managers. There was reference to mind mapping in the email of the manager on 22 March 2017, suggesting it could be delivered by the same trainer who was to address the Dragon software, but the same email raises a query by her about whether the respondent was obliged to provide it. This was never followed up and no action was taken.

153. We accept the submission of Mr McHugh that these circumstances reflect a course of conduct which extended in to the time period and so is in time. Mr Raja raised formal written requests in May and August for all adjustments to be put in place and made a series of additional verbal requests during that time. The December 2016 occupational therapist report and the 20 July 2017 occupational health advisor's report continued to press the respondent to implement the recommendations. A response was still being awaited to Mr Dickens' request for the matters to be put in place and a grievance to be processed until the final reply came from Mr Hughes in November 2017.

154. In respect of the Dragon software training, we are satisfied that this was also conduct extending over a period, although unlike the other training, a decision had been taken about it and some had been provided by January 2017. There were dates for it to be concluded with formal training, in March, but these were vacated. That would be an act inconsistent with providing the duty, from which time would have started to run, but for the further complaints and requests made by the claimant and recommendation from Occupational

[8] Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194

health later in the year. That gave the failure to provide the remainder of the training the quality of continuing conduct, which together with the failure to implement the rest of the training extended into the time period.

155. In respect of the failure to provide a quieter workstation, Mr Wood arranged for a different workplace in May 2017. This was insufficient to remove the disadvantage because there continued to be sufficient noise to interfere with the use of the Dragon software. We find that the move of workstation was therefore an act of the respondent which was inconsistent with its failure to do something, namely take steps to remove the disadvantage. It follows that the time period would start to run from 9 May 2017 and would have expired on 8 August 2017. This aspect is out of time by nearly 6 months.

156. We consider it is just and equitable to entertain that claim nevertheless. It is fair to say that Mr Raja was aware of the right to take a claim to a tribunal and had referred to it in discussions with his employer. He had a union representative and access to advice. But he did not resort to litigation as early as he could have, but took steps to redress the problems through use of the respondent's policies by pursuing a grievance, both in May and again in August. For the reasons we have set out the respondent wrongly rejected that request. The claimant was absent in May and also absent when the time limit expired in August on DAL. He could reasonably have hoped his employers were finally putting things straight. When he returned, a few days later, in August the continuing problems with the equipment meant that he had little opportunity to work and evaluate the adequacy of his work station. It became obvious there was a problem on 26 October 2017 when the software was reinstalled. But within 4 days the claimant had to take sick leave attributable to the stresses at work. The evidence has not been significantly affected by the delay. Other failures, which we have found to have been brought in time, were part of the same systemic shortcoming. Having regard to all of this context, we consider justice and equity is met by considering the complaint in respect of a quiet workstation.

<u>The Tribunal decision</u>

157. The members of the tribunal were unanimous in all findings and determinations.

Employment Judge D N Jones

Date: 4 March 2019

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