EMPLOYMENT TRIBUNALS

Claimant	***Respondent***
Mr Paul Simpson	Department of Work and Pensions

REASONS OF THE EMPLOYMENT TRIBUNAL

HELD AT North Shields **ON 19th & 20th April 2018**

EMPLOYMENT JUDGE GARNON
MEMBERS: Ms E Jennings and Mr S Carter

Appearances
For Claimant: Mr J Cole Lay representative
For Respondent: Mr A Crammond of Counsel

REASONS (Bold print is ours for emphasis)

1 Introduction and Issues

1.1.The claimant has a physical impairment to his spine which the respondent accepts rendered him a disabled person under the Equality Act 2010 (the EqA) at all material times. After a preliminary hearing, it was agreed the claim is advanced as failure to make reasonable adjustments only by reference to section 20(3).

1.2. Expressed broadly, the issues are
1.2.1. If and when a duty to make reasonable adjustments arose, what steps, if any, would it then have been reasonable for the employer to take to alleviate the adverse effects of disability , which it either did not take, or took later or to a lesser extent, than would have been reasonable?
1.2.2. Were any claims brought outside the period of 3 months starting with the dates of the acts to which the complaints relate (any conduct extending over a period being treated as having been done at the end of the period)? If so, did the claimant lodge his claims within such other period as the tribunal thinks just and equitable?

2 Findings of Fact

2.1. We heard the claimant and, for the respondent, Ms Teresa Haines, Ms Dawn Ruddick and Mr Leslie Weatherson.

2.2. The claimant was born on 28 February 1979. In 2014 he fell down a flight of stairs injuring his back. An MRI scan diagnosed he had two prolapsed discs. We accept the Occupational Health (OH) report is wrong about the date of the scan

which was in January 2015 not summer 2014. The prolapsed discs cause severe low back pain which radiates to his left leg significantly affecting his mobility. At the time he was working for a company with his place of work located a few miles from his home. He used to get a lift to work or go by taxi because he cannot drive.

2.3. He began work for the respondent on 1 March 2015. His home is about 1 mile from the workplace where some 3500 people are employed. He lives in a flat up two flights of stairs which he manages to walk . It is in a busy area of Newcastle with a bus stop outside his flat. By bus a 2 minute journey to a change at a place called Four Lane Ends to another bus journey of a few minutes dependent on the traffic would take him straight to work. The traffic is often moving very slowly. His home journey would involve the same bus back to Four Lane Ends and then a bus to another stop about 3 to 4 minutes walk from his home.

2.4. His difficulties with bus travel is first standing and waiting for the bus, second getting a seat on the bus at peak times, and third, when the bus goes over the many speed bumps that exist in the area, he is jarred which causes pain. Throughout the claimant has always taken a taxi to work which takes about two minutes and costs £3 to 4 each way. He does not know what the bus fare is because he has never taken the bus to work. He has not used. or even looked into using. any form of walking aid.

2.5. In about June 2015 the respondent agreed to grant the claimant the cost of taxi fares to work. The first OH report we have seen ,written by an " Advisor" ,usually qualified nurses, after a telephone consultation, is dated 27 October 2015. It recommends a number of workplace adjustments eg workstation adaptations, all of which were done. It also says in answer to a question as to whether any reasonable adjustments are required to enable him to travel to work " *I understand from Mr Simpson that he travels to and from work by taxi due to restricted mobility and for this reason I suggest that consideration be given to financially supporting him with travel*"

2.6. The next OH report shows he had a nerve block injection which reduced the radiating pain down his leg but his lower back pain became worse. He was, and continues to be, on strong pain relieving medication. He reported he could only walk for a maximum of 5 minutes because before the pain became excruciating. It was said he would be seeing a surgeon in May 2016 . He has throughout been attended by a highly respected consultant Mr Sanderson at the Freeman Hospital in Newcastle

2.7. The next, and crucial, report is dated 25 August written by Dr Tony McGread an occupational health physician. As with most such reports it builds on what has gone before . It says the treatment he has received to date has not led to a significant reduction in spinal back related pain but additional medical intervention in the form of surgery may shortly be undertaken . It confirms he has difficulty with prolonged sitting standing and walking which need to be avoided . It does not say in terms he needs assistance with travel to work but there is one ambiguous sentence "*I also advise that all other previous advised adjustments to his workstation are in place and **all other advice implemented also"**.*

2.8. It is this report which Ms Haines had before her when she took her decision in September 2016 to discontinue assistance with taxi fares. The claimant had been off

sick with sciatica, almost certainly radiated pain from his back injury, in July and August 2016. He returned to work on 29 August.

2.9.The respondent has a written policy about reasonable adjustments and travel to work contained in the bundle in separate section pages P to S. The crucial sentences are:
There may be times when disabled staff need a reasonable adjustment to help them with travel costs to get them to and from work . It is appropriate when

- *a disabled member of staff is* ***unable to use public transport*** *(our emphasis) to get to work as a direct result of their disability* ***and***
- ***has to use*** *alternative methods of transport which are more expensive*

It is said the reasonable adjustments may include taxi fares but also other things such as mileage costs for friends. The claimant has never asked any colleague for a lift to work though several are likely to pass his door. There is a good deal more detail on the policy but it need not trouble us today.

2.10. We accept the step of paying taxi fares should have been reviewed regularly . The claimant's position that the concession should have remained in place automatically until his "back was fixed" is one we cannot accept .

2.11. Ms Haines had a lengthy conversation with the claimant and had had other conversations with him throughout his period of sickness as part of normal management of sickness absence The claimant told her he had been advised to walk more, take some exercise and lose weight . He would take the bus when he had an appointment at the Freeman Hospital and at the time to a gym he was attending to help him lose weight where he could not use a treadmill but was using the reclining cycling machine and doing some bench presses. We were convinced by Ms Haines evidence she did not robotically view the absence of any mention in the OH report that taxi fares should be awarded as decisive . Rather she took the view that although she too would have granted the taxi fares when they were originally were by a previous manager, this was a time when the claimant needed to do more to help himself which would include **trying** to walk **and** to use public transport. They too talked about medication and the claimant said it did take time to "kick in" between him taking it with his breakfast and leaving the house. She made the reasonable suggestion he do both earlier. On that basis she could not bring herself to say the claimant was **unable** to use public transport and therefore took the decision to withdraw the funding for taxis.

2.12. The documents show she had two more meetings where the claimant attempted to persuade her to change her view and she gave serious consideration to his arguments on 6 and 22 December. She remained of the same view.

2.13. The mechanism by which the claimant could object to that was the raising of a grievance which is exactly what he did on 31st January 2017. The grievance was dealt with by Ms Ruddick. She confirmed, as later did Mr Weatherson, she knows of only one other person , a permanent wheelchair user, based at the same DWP premises who is awarded taxi fares. She knows the area well. She does not accept, and neither do we, buses taking the speed bumps would jar the claimant's back any more than a taxi. She did not have any fresh OH report before her when she decided on 7th March 2017 to uphold Ms Haines decision She accepted the claimant had

difficulty walking. They too talked about medication and had a detailed discussion about where the bus stops were and how busy they were. She said it was a finely balanced decision and "*it's a two-way thing*" She does not detract from the severity of the claimant's symptoms and neither do we. All she was saying is that he should at least try more to help himself and cannot expect public funding if he does not.

2.14.The appeal against the grievance went to Mr Weatherson . By that time there was another OH report available dated 12 May 2017 which talked of the claimant's continuing medication and that he had had a facet joint injections on 11 April 2017 which had not produced any significant improvement. Facet joint injections are a mixture of anaesthetic and anti-inflammatory, used partly for diagnosis purposes, to find out precisely where the prolapsed disc is affecting the central nervous system. The report says there is a possibility he will require surgery at some point in the future but that was going to be discussed at his next consultation with Mr Sanderson in June 2017. The claimant confirmed he had been attending a weight management program but the gym aspect had now stopped. This report ,written by an Adviser not a doctor, said he should discuss continuing gym work with his GP and includes the sentence:" *He states that he has been having a taxi funded to and from work this has now been stopped. He would **find it difficult** to use public transport due to his back pain* ". On the next page it says " *Mr Simpson has been assisted with travel to and from work by the Department but this was discontinued after a period of sick leave. I would advise that **consideration is given** to with reinstating the support.*"

2.15. Mr Weatherson did give it consideration. He confirmed the instances in which taxi fares are given to staff are those where the inability to use public transport is marked and extreme.. When the claimant was receiving assistance for taxi fares the cost was £8.00 per day for four days per week, namely £32.00 per week. However, the reasonableness of the step he suggests must be viewed in the context that others with a similar level of need may live further away and have far higher taxi fares.

3 The Relevant Law

3.1. Unlawful discrimination requires a **discriminatory act** and a **type of discrimination**. The **acts** are in s. 39

(2) An employer (A) must not discriminate against an employee of A's (B)—

(b) in the way A affords B access, or by **not affording B access, to opportunities for** promotion, transfer or training or for receiving **any other benefit,** facility or service;

(d) by subjecting B to any other **detriment**.

3.2. Section 39 (5) imposes the duty to make reasonable adjustments and section 20 explains it. There are **three** requirements, the first only being relevant
(3) The first requirement is a requirement, where a **provision, criterion or practice** of (the employer) puts a disabled person at a **substantial disadvantage** in relation to a relevant matter **in comparison with persons who are not disabled**, to take **such steps as it is reasonable to have to take to avoid the disadvantage**.

3.3. Section 21 says :

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

3.4. Mummery LJ said in Stockton Borough Council-v-Aylott :
the .. duty to make reasonable adjustments…is the concept central to the scheme of the Act. As Lady Hale said in Archibald v. Fife Council at paragraph 57 the 1995 Act entails a measure of "positive discrimination", in the sense that employers are required to make such adjustments as are reasonable in all the circumstances to help disabled people, which they are ***not required to make for others****.*

3.5. The words "*provision, criterion or practice"* are commonly abbreviated to "PCP" and there is a common tendency to view "defining the PCP" as a complex exercise in precision pleading. Contrast Lord Hope's simple approach in Archibald v Fife Council

11. Mrs Archibald was employed by the council as a manual worker. It was an implied "condition" or an "arrangement" of her employment ..that she should at all times be physically fit to do her job .... She … became disabled. As a result she was no longer physically fit to do this job. This exposed her to another implied "condition" or "arrangement" of her employment, which was that if she was physically unable do the job she was employed to do she was liable to be dismissed.

12. Her disability placed her at a substantial disadvantage in comparison with others in the same employment who were not at risk of being dismissed on the ground that, because of disability, they were unable to do the job they were employed to do. These persons, a limited class, were her "comparators"….

13. So the question comes to be whether there were steps which the council could have taken by way of adjustment to the conditions of her employment to remove the disadvantage which she was under because she was at risk of dismissal because she was unable to do the job she was employed to do because of her disability.

3.6. The concept of "*arrangements*" originally contained in the Disabilty Discrimination Act 1995 (DDA) was replaced by that of a PCP "***applied*** *by* ***or on behalf of*** *the employer*" It covered not only what the employer insisted upon but what it **expected** of an employee. Moreover, what an employer "provides" **should** happen (a **provision**) or a standard it says should be met (a **criterion**) may differ from what in **practice does** happen or the standards which are in **practice** expected to be met .Any one of the three may trigger the duty. If a manager, or colleagues, have a practice, s 109 applies The effect is that a Manager's practice IS a practice of the respondent . We find nothing in any section of the EqA or Schedule 8 to support Mr Crammond's suggestion that for a PCP to be applied it is confined to matters the respondent applies at the workplace so as to exclude PCP's about getting to work

3.7. Environment Agency v Rowan 2008 IRLR 20 gave guidance for tribunals applying these provisions. As well as identifying the offending PCP– and, where appropriate, the identity of non-disabled comparators – the tribunal must establish the nature and extent of the substantial disadvantage suffered by the disabled employee. Further, it must be clear what 'step' the employer has allegedly failed to take to remedy that disadvantage and whether it was reasonable to take that step.

3.8. The PCP must disadvantages the claimant *in comparison to persons who are not disabled* . If the practice disadvantages everyone to whom it is applied **equally**, whether they are disabled or not, there is no comparative disadvantage . But if it disadvantages the claimant **more for a reason inextricably linked to his disability**, it is self evident he is at such a comparative disadvantage . Authority for this fundamental proposition is per Cox J. in Fareham College-v-Walters

59. In the present case the provision, criterion or practice identified by the Tribunal was the Respondent's refusal to permit this Claimant to have a phased return to work. That meant, in this case, that it required her to return and to resume her work without a phased return. It is entirely clear from this that ***the comparator group is other employees*** *of the Respondent* ***who are not disabled and who are able forthwith to attend work and to carry out the essential tasks required of them in their post.*** *Members of that group are not liable to be dismissed on grounds of disability, whereas because of her disability the Claimant could not do her job, could not comply with that criterion and was liable to dismissal. This, in our view, was effectively what the Tribunal was saying at paragraph 30 when they found that this Claimant was, as a result of her disability:*

"in a position where her return to work was seen by the respondent as unusually problematic, such that the College was not prepared to countenance what were assessed by Mr Groves to be unacceptable adjustments."

She was thereby placed at a substantial disadvantage in comparison with other, non-disabled employees. ".

3.9. In Gallop v Newport City Council the Court of Appeal held an employer could not defend on the basis of lack of knowledge of the employee's disability when it had 'unquestioningly' accepted the opinion of its occupational health adviser. We think the same applies to advice about "steps" which may help . Goodwin v The Patent Office emphasised the law is concerned not only with things people cannot do but things they can do only with difficulty.

3.10. In Newham Sixth Form College v Sanders [2014] EWCA Civ 734 Laws L.J. approved the Rowan steps and said

14. In my judgment these three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable.

3.11. The test of what is reasonable is objective (Smith-v-Churchills Stairlifts). What Parliament has always intended was explained by Baroness Hale in Archibald

57. … the Act entails a measure of positive discrimination, in the sense that ***employers are required to take steps to help disabled people which they are***

not required to take for others*. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take.*

58. … ***The control mechanism lies in the fact that the employer is only required to take such steps as it is reasonable for them to have to take. They are not expected to do the impossible.***

3.12 The DDA spelled out in s 18B **some** relevant considerations as
(c) the financial and other costs which would be incurred by him in taking the step ..;
(d) the extent of his financial and other resources
(f) the nature of his activities and the size of his undertaking.

These details are not in the EqA but live on in the EHRC Code of Practice. HH Judge McMullen in Chief Constable of Lincolnshire –v- Weaver EAT /0622/07said *the Tribunal assessed the reasonableness of allowing the Claimant onto the scheme merely by focusing on his own position. They were obliged to engage with the wider operational objectives of the Force,*

3.13. .The fact some steps are taken does not mean another step may not also be needed , as Lord Hope said in Archibald v Fife Council

16. As the determination of the .. tribunal makes clear, a substantial number of adjustments to the normal procedures were made in Mrs Archibald's case. Some of them involved positive discrimination in her favour, … This was within the scope of the duty, as it was necessary for the council to redress the position of disadvantage that she was in due to her disability. ***The crucial question is whether the council should have taken one more step and simply transferred her to a sedentary job for which she was suitable, or at least dispensed in her case with the need for competitive interviews.***

3.14. **Reasonableness of steps is about striking a balance.** Another concept in equality law is " proportionate means of achieving a legitimate aim" which used to be called "Justification". Originally, the DDA permitted justification of a failure to make reasonable adjustments. Collins-v- National Theatre held the " justification test" added nothing to the test of whether it would be reasonable to take the step. The DDA was amended to remove that tautology. However, the test is so similar that cases about justification are good guidance. Balcombe LJ said in Hampson v Department of Education and Science [1989] ICR 179, 191: *"justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.".* Pill LJ in Hardys and Hanson -v-Lax quoted Sedley LJ in a sex discrimination case Allonby v Accrington and Rossendale College [2002] ICR 1189.

28. Secondly, the tribunal accepted uncritically the college's reasons for the dismissals. …
29. … Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum ***a critical evaluation of whether the college's reasons demonstrated a real need*** *to dismiss the applicant;* ***if there was such a need, consideration of the seriousness of the***

disparate impact *of the dismissal on women including the applicant; and an* ***evaluation of whether the former were sufficient to outweigh the latter.***

Then Pill L.J. himself said

*32 .. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary****. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.***

33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight.

Justification also is about striking a balance

3.15. O'Hanlon-v-Commissioners of Inland Revenue does contain dicta by Elias P that it is **very rare** that giving financial assistance to an employee would be a reasonable step It does not say it can never be or that no duty to consider it arises.

3.16. As for he time limit issue , Section 120 includes:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

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

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

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) **failure to do something is to be treated as occurring when the person in question decided on it.**

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

3.17. In Matuszowicz-v-Kingston-Upon-Hull Council 2009 IRLR 289 Lloyd L.J. said

22. …... In Humphries v Chevler Packaging Limited…….. His Honour Judge Reid QC, said at paragraph 24

"the failure to make adjustments is an omission. The respondents are omitting to do what (on the appellant's case) they are obliged to do. They are not doing any act, continuing or otherwise."

3.18. In Matuszowicz the claimant gave the employer some time to remove what the claimant saw as the impediments to doing the job. The argument the claimant should have realised earlier they would not and brought the claim earlier did not find favour with Sedley LJ who said such contentions *"demand a measure of poker faced insincerity which only a lawyer could understand or a casuist forgive ".*

3.19. A most valuable guidance on when it is just and equitable to consider a claim which is out of time is British Coal Corporation v Keeble [1997] IRLR 336. The length of and reasons for the delay, whether the claimant was being advised at the time and if so by whom and the extent to which the quality of the evidence is impaired by the passage of time are all relevant considerations. Using internal proceedings is not in itself an excuse for not issuing within time see Robinson v The Post Office but is a relevant factor. This has recently been affirmed in Abertawe Bro Morgannwg NHS Trust-v-Morgan

4.Conclusions

4.1. The respondent argues a claim should have been presented within three months of Ms Haines first decision. The claimant after her withdrawal of the assistance in September 2016, raised the matter through internal grievance procedures and appeals . Assistance was only finally refused on 1 July 2017. Looking to s 120(3) (b) "***the person in question"* is the DWP not a single individual .** If there is an appeal procedure, it is the final decision which triggers the time limit not the first one. The claim filed on 6 October 2017 relying on an early conciliation certificate on which Day A is shown as 7 September 2017 and Day B as 21 September 2017 has been issued in time. Our primary decision is that the respondent's submissions are without merit.

4.2. If we are wrong about that, ,time limits are short for a good purpose- to get claims before us when a fair but inexpensive resolution is possible . If people come to the Tribunal promptly when they have reached a point where the employer has said it will not take a step which the claimant believes should be taken, then, if we agree with the employee to any extent ,we can make a constructive recommendation Left unresolved, even minor omissions by employers often have devastating consequences which it is too late to remedy in that way. However, for over a decade Parliament has tried various means to ensure that before employees rush to a Tribunal , they try to resolve problems internally with the employer. That is exactly what the claimant did. If giving the respondent the opportunity to remedy the situation were to be rewarded with a decision that wrong was done to him but he can have no remedy because he waited too long that is not just or equitable.

4.3. The respondent always knew the claimant was disabled and it is clear today they knew he had difficulty walking and using public transport . The duty to make reasonable adjustments arose from the time he started work.

4.4.. When we discussed the issues at the start of the hearing our Employment Judge suggested the PCP's were
(a) Employees are to get to work in their own time and at their own expense

(b) On arrival they are expected to be fit to do their work, not exhausted and in pain
(c) If they are late, or fail to do their work properly, they are liable to be disciplined.

Mr Crammond said no more than (a) had been "pleaded" and did not concede even that to be a PCP because it was not something the employer applied at work rather it was before the claimant arrived at work. We find these were the PCP's applied

4.5. A non disabled worker, who cannot drive and lives roughly where the claimant lives, would have choices of how to get to work . In ascending order of expense they are (a) walk (b) cycle (c) use the bus, (d) take a taxi. Because of his prolapsed discs the claimant could not without substantial, ie more than trivial difficulty walk, cycle or use the bus. If he was obliged to use a taxi to get to work on time and fit for his day's tasks, unlike non disabled people he was at the comparative disadvantage of having to spend a considerable sum of his taxed income on transport . The step he says would have solved that would be to pay his taxi fares, as the respondent for some time had done. All but the last step in Rowan, in our view present no problem

4.6. We come to what in our view was always the only real issue. Reasonableness of steps is about striking a balance. We have made the critical evaluation and find the respondent's witnesses gave careful consideration to the request and reached a conclusion which objectively was right. The claimant never **tried** walking, perhaps with some walking aid, using the bus, any combination of the two or asking anyone for a lift . The respondent has a policy of paying taxi fares as a last resort to people who are truly unable to get to work by other means. That is more than achieving equality which could be done by paying them the difference between public transport costs and taxis. All non disabled employees have to get to work in their own time and at their own expense and it is a legitimate aim of the respondent to safeguard public money by keeping to a minimum exceptions to that. It is a proportionate means of achieving such an aim to require those who ask for the benefit to do their best to help themselves and get to work by other means . The claimant did not , so in our judgment paying his taxi fares would not be a step it would be reasonable for the respondent to have to take

T M GARNON EMPLOYMENT JUDGE

REASONS SIGNED BY EMPLOYMENT JUDGE ON 1st MAY 2018