Appeal No. UKEAT/0209/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 20th December 2018
Judgment handed down on 23 July 2019

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

Q — APPELLANT

L — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ALICE MAYHEW (of Counsel) Instructed by: Messrs Womble Bond Dickinson (UK) LLP Oceana House 39-49 Commercial Road Southampton Hampshire SO15 1GA
For the Respondent	MS ANYA PALMER (of Counsel) Instructed by: Messrs Morrish Solicitors LLP Oxford House Oxford Row Leeds West Yorkshire LS1 3BE

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

ET Rules 50(3) and 67

In the absence of wider written consent to disclosure of his medical information, the Employment Tribunal erred in holding that the Respondent was fixed from the outset with knowledge of one of the disabilities the Claimant had disclosed to occupational health. On the facts found by them the Employment Tribunal did not err in concluding that the relevant manager should have made further enquiries about the Claimant's medical condition and sought his consent to the release of information about his disability which was given in his pre-employment interview with occupational health.

The Employment Tribunal failed to consider adequately or at all whether the adjustments in respect of which a claim was made were reasonable balancing any substantial disadvantage suffered by a person with the Claimant's disability with the reasonable needs of the Respondent. The claim in relation to reasonable adjustments is remitted for decision to a differently constituted Tribunal.

The Order that the decision of the Employment Tribunal not be entered on the Register is set aside.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Q, the Respondent employer, appeals from the decision of an Employment Tribunal, Employment Judge Lewis and members, ('the ET') sent to the parties on 21 May 2018 ('the Judgment'). L, the Claimant employee, brought various claims against the Respondent several of which were not upheld. Q appeals from the decision of the ET that the Respondent discriminated against the Claimant, a disabled person, by failing in breach of Section 21(1) of the **Equality Act 2010** ('**EqA**') to make reasonable adjustments. The Respondent also appeals from Orders made by the ET under Rule 50 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ('**ET Rules**') that (1) any report of the proceedings would not identify the Claimant, the Respondent or any of the witnesses; (2) the case will be referred to as L v Q and the witnesses by their initials; (3) the Judgment will not go on the register.

The Judgment of the Employment Tribunal

Outline relevant facts

2. The Claimant commenced employment with the Respondent on 4 December 2015. As at the date of the hearing before the ET he remained employed there.

3. It was accepted by the Respondent that at all material times the Claimant had the disabilities of Tourette's syndrome and Autistic Spectrum Disorder (Asperger's). Those disabilities caused the Claimant stress.

4. At the heart of Ground 1 of the Respondent's appeal is the contention that the ET erred in finding at paragraph 171 that it knew or should have known from the commencement of his employment of the Claimant's disability of Tourette's.

5. The ET found at paragraph 15 that the Claimant had been diagnosed with Tourette's in his 20s.

6. The Claimant completed a Pre-Employment Health Questionnaire dated 6 November 2015 for OH Assist, an occupational health provider engaged by the Respondent. The Claimant answered yes to the following questions:

> **"Other Mental Health Problems including any drug or alcohol problems**
>
> **Are your symptoms well controlled?**
>
> **Do you need any special aids or adaptations to the workplace to assist you to work?**
>
> **Do you have a medical problem, a disability or recent injury that affects your ability to work?**
>
> **Anxiety/Stress or Depression**
>
> **Are your symptoms well controlled?"**

7. The Questionnaire contained the following Consent and Declaration:

> **"Consent for On Line Health Declaration Questionnaire**
>
> **The information you provide on this Health Declaration Questionnaire ("Your Information") will be held and processed by OH Assist for purposes related to your fitness to work. OH Assist will forward an opinion to your prospective employer regarding your fitness to work. Your information will remain confidential to OH Assist and it will not be disclosed to anyone else without your prior consent. You may have rights under data protection legislation to access your information and to ascertain the purposes for which it is processed.**
>
> **Declaration**
>
> **I certify that the information I provide on this Health Declaration Questionnaire is to the best of my knowledge as correct and complete as possible and I consent to the processing of this information as set out in the Data Protection Statement above. I confirm I understand that OH Assist will forward an opinion on my fitness to work to my prospective employer. I give consent for OH Assist to contact me and to be examined if necessary."**

8. At paragraph 32 the ET recorded that following completion of a pre-employment health questionnaire for OH Assist, an external provider of occupational health services for the Respondent, the Claimant saw an OH Assist advisor on 13 November 2015. The ET noted:

> **"32. … He told her he had Tourette's Syndrome from childhood and said he coped well…."**

He mentioned a phobia about crowded trains and said he had wider stress issues.

9. The OH Assist adviser referred the Claimant for further assessment to the OH doctor. He saw the OH Assist consultant occupational physician on 26 November 2015. The ET held:

> **"33. The Doctor's notes record that he told the claimant that he had been asked to provide an impartial report to his employer about his health and work and that the claimant consented to proceed. The notes show that the claimant told the Doctor that he had Tourette's Syndrome since childhood…."**

The Claimant told the Doctor that he had been very stressed by the recruitment process. He had been agitated and had displayed unusual behaviour.

> **"33. …There is no indication on the notes that the claimant asked for any information to be withheld from the employer.**
>
> **34. On 26 November 2015, OH Assist sent their pre-employment health screening report to the respondents. It simply stated 'Flexible start/finish working times may be required; Work station risk assessment; Control work stress'. The report ended 'If you have any queries regarding the content of this report I would be happy to discuss'. The claimant's email to[AA] of 20 January 2016 (referred to below) supports his tribunal evidence that he had expected OH to be passing more information onto the respondents than his brief note."**

The doctor's report also referred to a work station risk assessment.

10. AA did not raise any queries with OH Assist. The ET found that the Claimant emailed on 1 December 2015 to ask what adjustments would be made following the pre-employment medical checks. AA spoke with the Claimant on 2 December 2015 and followed up with an email setting out his response to adjustments requested by the Claimant. These are set out in paragraph 36 of the judgment.

11. The Claimant started work on 4 December 2015.

12. The ET outlined in paragraph 39 the work of the department in which the Claimant was employed:

> **"39. The respondents' department was part of the wider Group Finance function. was split into Front and Back Office, which were located together in London. The Front Office was primarily concerned with day-to-day raising and managing debt. The Back Office managed compliance aspects of work."**

13. The Claimant was based in the Back Office. The only other person in his team was MM. AA, his manager was based outside London. The ET held:

> **"44. When he started, the claimant was given a list of 86 tasks, which had been written by his predecessor. This may not have been exactly 86 tasks, but it has been referred to as such. It lists tasks which must either be done by the claimant or by [MM], for which the claimant would be responsible. During the first couple of days, [AA] discussed with the claimant what his initial priorities should be, i.e. spending time with [MM], familiarising himself with the Back Office and getting to know the activities. [AA] would then gradually hand over other aspects of the role."**

14. There were exchanges of emails between the Claimant and AA.

15. The ET held in paragraph 56 that at a meeting with AA on or about 20 January 2016 the Claimant told AA that he required more support in relation to managing stress and he asked AA to refer him to OH.

16. On 20 January 2016 the Claimant emailed AA:

> **"….**
>
> **I explained, in a 1.5 hours and 1 hour appointment in great length these issues at the OH visits (in November). They have all the details.**
>
> **My understanding was that recommendations would come out of that. I have since been told that due to data protection nothing is passed to you (but a little note), but by filling in this form with full details has the same result, so I am not quite clear.**
>
> **…..**"

17. On 27 January 2016 the Claimant emailed the head of HR Corporate Functions stating that he felt there was insufficient structure and role clarity. The ET noted:

> **"50 …. He finished 'All the above has meant that one of the disabilities mentioned in my OH form is starting to flare up. I have requested an OH appointment but the process hasn't yielded an appointment yet and I am unsure what to do'…."**

The ET held:

> **"53. The claimant also told [AA] on some occasions that he was stressed from 'his disabilities' and struggling to concentrate. [AA] never asked him for any detail about what his conditions were."**

18. The ET held:

> **"58. On 20 January 2016, [AA] referred the claimant to the OH Assist Bespoke Services Team stating '[The Claimant] requires more specific advice to be given with regard to support for his condition as discussed at previous referral ID.' Rather oddly, OH Assist replied that a workstation assessment was not a product which they could deliver. One week later, (on 28 January 2016) [AA] replied to say a workplace assessment was not what was being requested. The requested assistance was specifically around stress management. OH Assist then replied saying they do not do stress management.**
>
> **…**
>
> **60. The OH report was dated 13 April 2016, and sent to [AA] on 11 May 2016. It was based on an assessment which took place on 29 March 2016.**
>
> **61. The report, written by Dr [P], stated that the claimant said he was experiencing stress relating to his work situation and receiving therapy to help him manage his stress. He felt he had had insufficient handover to his current role and insufficient training in the specifics of the role. The claimant said he worked best in a structured way and would like to have clear and measurable objectives from management. He wanted to discuss and agree with his manager how to prioritise his work. Dr [P] recommended that management discussed C's workload with him to ensure it was reasonable and that he should have regular contact with his manager to discuss his progress.**
>
> **62. The OH Physician said he believed the claimant would be considered disabled. The condition was 'the psychological health issues which make it difficult for him to travel in peak travel time'.**
>
> **63. Dr [P] noted that following the consultation, the claimant had subsequently requested the following to be added to the report, which Dr G recommended management to discuss with him:**
>
> > **63.1 No work is given to him at the last minute and advance notice is helpful where possible.**
> >
> > **63.2 He cannot work for long stretches of time and needs constant breaks.**
> >
> > **63.3 He needs extra time to deliver work, at least in the beginning, when stress and physical symptoms emerge.**
> >
> > **63.4 He does not find it helpful to be pulled away at short notice from the work he is doing, particularly not being able to prepare or when he is unclear what the purpose is.**
> >
> > **63.5 He is keen to work together with his line manager to set specific, clear targets that are measurable that will allow his development into the role.**

64. On 13 April 2016, the claimant emailed OH Assist to ask them to clarify that 'the psychological issues do affect travel, but that is not the only thing that is affected'. The OH Doctor did not correctly make the amendment, so the claimant wrote again to the same effect on 3 May 2016. This correction was never made by the OH Doctor."

19. On 4 May 2016 the Claimant sent AA an email regarding the period end reconciliation the previous Thursday. NN had always done the reconciliations but on this occasion the Claimant had to do this unaided and at short notice. He added:

"66. …I have raised this before with you about training and handover. I have disabilities. I cannot simply pick things up without support. I have made this aware to Occupational Health before I joined and to you on multiple occasions. This is very stressful not to have the support. I need time, structure and resource to get this done properly."

20. On 5 May AA met the Claimant. The ET held:

"68. Half way through the conversation, the claimant said that he had felt unable to approach [AA] or [NN] 'due to his neurological disabilities'. He said he had felt like stabbing MP (a colleague in the Front Office team) with a pen and if he did that, it would not be his fault, but his condition. He also said he might jump in front of a train on the way home. [AA] did not feel that was a genuine threat and he managed to calm the claimant down. At that point he talked about putting a plan in place to avoid this issue arising again.

69. As a result of this discussion, [AA] thought he should notify his [BB], , and [FF], . [AA] and [FF] met the claimant the next day by way of a welfare meeting. [FF] had not previously met the claimant.

70. In his meeting on 4 May 2016, [AA] said that in the absence of any information from OH, he had no information other than what the claimant told him to manage his stress load……. He also said that handover notes, processes and training were insufficient for the amount of structure he requires in a role due to his condition. It was agreed that he would share his OH report with [AA]. [AA] said he would carry out an HSE Stress Management Risk Assessment. [FF] agreed to meet with the claimant and keep the lines open to assist in managing his welfare.

…

72. This incident led to the claimant showing [AA] the OH report on 5 May 2016 and OH sending [AA] a copy on 11 May 2016.

73. Either at his first meeting with [FF] or shortly afterwards, the claimant told him he has Asperger's. We think this most likely happened at the first meeting, given that the claimant had referred to his neurological difficulties there. Moreover, in an email dated 29 June 2016, the claimant notes 'You and I also spoke about the disabilities when we first met'. [FF] told the claimant about his step-son who had a range of disabilities, possibly including Asperger's.

…

75. On 18 May 2016, [FF] invited the claimant for a catch up meeting. The claimant was anxious he might be at risk of having his employment terminated or terms and conditions changed. He said '[AA] has often spoken to me about disciplinary meetings, first, 2nd, 3rd strike, etc, so I am conscious about this, given that I have raised much more awareness of my disability now…there has been mention of a number of times about my salary levels, what is expected of me, I get paid more than others etc this makes [me] quite anxious about the intention.' [FF] reassured him that it was nothing of that kind."

21. The ET referred at paragraph 168 to an email sent by the Claimant to FF on 30 June 2016 in which he wrote:

> **"168. …. 'I have told OH of all the conditions and they are aware and said to refer back if further help needed. I want and tried to get as much information as possible to [The Respondents] for that purpose. Again this conveys the picture of someone who expected the information he gave to OH to filter through."**

22. During June 2016 the Claimant produced a list of all the tasks which he was expected to do on which he highlighted those tasks which he was not yet doing because he did not understand how to do them.

23. The ET held:

> **"On 30 June 2016, the claimant emailed [FF], 'Do we need another OH referral? I don't want to be in a position later in the year when I'm told by [Rs] we were unaware of the psychiatric issues and adjustments. I have told OH of all the conditions and they are aware and said to refer back if further help needed. I want and tried to get as much information as possible to [Rs] for that purpose."**

24. On 22 July 2016 the Claimant complained that his current workload was excessive. To help him AA chose three priorities.

25. CC sent the Claimant and AA the finalised action plan for managing his work on 29 July 2016.

26. On 6 September 2016 the Claimant emailed CC to complain about the location of his desk. He asked for it to be moved. The ET held at paragraph 89:

> **"89…The claimant attached a copy of the respondent's own policy, 'Everyone Managing Disability in the Workplace: Asperger's.' He said 'I believe the description in the enclosed [Rs] Policy is helpful, the employer has known about the issues for nearly 8 months. Every time I speak to [BB] he is totally oblivious to how a disability would impact me at work as somehow seems to think I should be 100% operational regardless of disability, pc problems."**

A The ET held that [CC] sent the policy to [AA] on 9 September 2016. [AA] read it and felt it best to work on the assumption that the Claimant did have Asperger's. He felt the adjustments the Respondent was already making through the action plan were in line with what was required under the policy.

B

27. The action plan was updated in September 2016.

C

28. Another OH Report was obtained. The report of 19 December 2016 stated that there were still recurring themes from the Claimant's perception of stress from work. The ET recorded at paragraph 100:

D

> **"…. In relation to management's question whether the advice to reduce the claimant's workload should continue beyond the original 31 December 2016, the Report said yes, and it could be revisited at the next OH Assessment."**

There was a follow-up OH assessment on 12 January 2017 and an OH Report the next day.

E

29. By January 2017 the Claimant's desk had not been moved. He emailed AA about this. AA replied he was unaware of this request. This upset the Claimant who replied referring to the policy on Asperger's which he had previously provided. The Claimant thanked AA

F

> **"119. …. for confirming that you have not disclosed my disability to the wider audience. This is private and legally I have done my part to share with OH, HR, a select few of [Rs] employees and the TU rep."**

G 30. The Claimant was absent from work through sickness from 24 May to 26 June 2017.

31. The ET set out adjustments made by the Respondent under headings: The action plan, finding a buddy, the desk move and last minute tasks.

H

Conclusions

Knowledge of disabilities

32. At paragraph 168 the ET found that the Claimant had told both the Occupational Health Adviser and the Occupational Health doctor that he had long standing Tourette's. The ET held that they

> **"168…. chose not to pass this information on to the respondents, but there is no indication that this was because the claimant asked them not to do so. The claimant's email to [AA] dated 20 January 2016 suggests he expected OH to have passed on everything relevant…."**

The ET also referred to the Claimant pressing OH Assist in April 2016 to clarify that his psychological issues were not only related to travel and to his email to FF on 30 June 2016. They concluded:

> **"168…. Again this conveys the picture of someone who expected the information he gave to OH to filter through."**

33. The ET stated that they had considered the cases of **London Borough of Hammersmith & Fulham v Farnsworth** [2000] IRLR 691 and **Hartman v South Essex Mental Health and Community Care NHS Trust** [2005] IRLR 293. In paragraph 164 the ET stated that the court in **Farnsworth** decided that the OH physician in that case

> **"164..… was an agent of the employer who was part of the decision-making process on who should be offered the job. The employer was therefore fixed with the actual knowledge of the OH physician and which was not entirely passed on."**

Of **Hartman** the ET said at paragraph 165:

> **"…Mrs Hartmann had disclosed a recent nervous breakdown in a pre-screening health questionnaire for the Trust's OH department. The CA said this did not put the employer on notice that she was vulnerable because the questionnaire was specifically said to be personal and confidential and for use by the OH service only. It was therefore not right to attribute to the employer knowledge of confidential medical information disclosed by the employee to the OH department."**

34. The ET concluded at paragraph 169:

> **"…. In our view, in the circumstances of this case, where the role of OH Assist was to assess a candidate's suitability for work and to make recommendations to enable him to work, and in a situation where that candidate expected all necessary information to be passed on, the respondents are fixed with the knowledge of OH Assist. It was not like the Hartmann case, where the medical questionnaire was explicitly said to be confidential to OH. We therefore find that the respondents knew about the claimant's Tourette's from the outset."**

35. If they were wrong in their conclusion that the Respondent had actual knowledge of the Claimant's disabilities the ET considered whether and when they should have known of them. The ET held:

> **"170. If we are wrong on that, the question is whether and when they should have known. We take that to be the time when they should have been put on enquiry to ask OH Assist or the claimant exactly what his underlying condition was. The brief OH Assist report lists as one of its three workplace recommendations 'Control work stress'. It adds, 'If you have any queries regarding the content of this report, I would be happy to discuss'. This should have been a red flag to [AA]. It ought to have alerted him to the possibility that there was a mental health problem and he should certainly have asked more questions. Had he done so, it is probable that he would have been told about the Tourette's. We add that the claimant was also sending emails to the recruitment team asking what had been passed on about his medical report and how it would impact on the team, and referring to the 'medical/disability aspects of the situation'.**
>
> **171. We therefore believe that the respondents and [AA] knew, or should have known, from the very beginning that the claimant had Tourette's. We note that on 20 January 2016, the claimant asked [AA] to refer him to OH in order to manage stress. As [AA] recognised, that was an unusual request to come from an employee. It was only 6 weeks into the job and OH had in their initial report stated 'manage workload stress'. This is another point at which [AA] should, as a matter of urgency, have asked questions about the claimant's underlying condition. He could have explored further with the claimant or asked OH. Instead [AA] seems to have regarded it as a matter of the claimant needing more advice, rather than him as the claimant's manager finding out more about the claimant's concerns. [AA] wanted to offer reassurances, but he did not at this stage want to delve deeper.**
>
> **172. The respondents' guide to reasonable adjustments 'Everyone Managing Disability in the Workplace' points out that there are many reasons why a disabled employee might not tell their line manager that they are disabled. Therefore 'managers need to be proactive'. It warns that some staff may only tell managers about their health issues once trust is built."**

36. The ET referred to the April 2016 OH Report which the Respondent saw in May. This did not mention Tourette's but did state 'psychological health issues which make it difficult for him to travel in peak travel time' and referred to 'work-related stress, therapy and some kind of psychological problem.' The ET held:

> **"175. Just before receiving this report, the incident occurred in early May 2016 when the claimant talked about stabbing a colleague, jumping under a train, having been signed off in the past as a suicide risk, wanting to avoid that happening again and having 'neurological difficulties'. The respondents accept that from 5 May 2016, they had knowledge that the claimant had a mental health condition that amounted to a disability, albeit they were not aware of the nature of the disability. If they were not yet aware, we find this is another point at which they could and should have asked considerably more questions."**

37. The ET then considered the date from which the Respondent knew or should have known that the Claimant had the disability of Asperger's. The ET held:

> **"176. In January 2018, the claimant was formally diagnosed with Asperger's, although his own consultant had told him in April 2016 that he believed he was on the autistic spectrum and had Asperger's. On 14 July 2016, the claimant mentioned the words 'Tourette's Autism and Asperger's' to [CC] and on 6 September 2016, he sent her the respondents' guide to Asperger's.**
>
> **177. The respondents accept they were aware or should have been aware that the claimant had Asperger's on 6 September 2016.**
>
> **178. Two members of HR knew long before that date. [FF] knew on 5 May 2016, albeit he was told confidentially. [CC] was effectively told on 14 July 2016. The claimant did not want to be 'labelled' or it to be bandied around loosely, but he had told someone in authority who was helping him negotiate work difficulties. Further [CC] did not ask whether she could tell [AA] at that point or go back to OH."**

38. At paragraph 73 the ET had found that either at his first meeting with FF, which was on 5 May 2016, or shortly afterwards, the Claimant told him he had Asperger's. At paragraph 82 the ET had found that on 15 July 2016 in a telephone conversation with CC the Claimant referred to Tourette's, autism and Asperger's and said he did not want to be labelled, he was just 'throwing these out there.'

Reasonable adjustments

39. In relation to each adjustment the ET held should have been made the ET set out the relevant provision, criterion or practice ('PCP') within the meaning of **EqA** Section 20(3) and the Respondent's knowledge or reasonably expected knowledge that it would put the Claimant at a substantial disadvantage by reason of his disability. They then considered what reasonable adjustments should have been made to assist in mitigating the disadvantage caused by the application of the relevant PCP.

(a) Giving the Claimant a reduced workload (until late 2016)

40. The ET decided that a PCP was applied by the Respondent to the Claimant

> **"1. *Requiring employees to carry out the duties of their role.***
>
> **215. This provision, criterion or practice was applied. Self-evidently the claimant, and indeed other employees, were required to carry out the duties of their role.**
>
> **216. This requirement put the claimant at a substantial disadvantage compared with someone who did not have his disabilities. As a result of his Tourette's as well as his Asperger's, the claimant needed structure and order in his role, clear communication and instruction and he panicked when given last minute tasks. All this made it difficult for him fully to carry out the duties of his role, especially until he had been fully trained up and he had learned all aspects. Some duties he would always find extremely difficult, ie having to cover [MM] at the last minute and being given last minute tasks."**

41. The ET held at paragraph 217 that the Claimant would be put at a substantial disadvantage by the application of the PCP by reason of his disability. In paragraph 222 the ET held:

> **"222. The OH report seen by [AA] on 11 May 2016 says that the claimant felt he had insufficient handover and insufficient training in the specifics of his role. As stated above, the respondents could reasonably have found this out sooner and indeed from the outset had they made reasonable enquiries."**

42. At paragraph 237 the ET held:

> **"We find that a reduced workload would have helped alleviate the disadvantage to the claimant arising from his difficulties in carrying out the full duties of his role from the beginning, managing a volume of work and the lack of sufficient training on new duties and processes. To a lesser extent it may have helped him cope with last minute demands when he was engaged on other work, but last minute demands would always be a difficulty for him."**

(b) Not giving the Claimant last minute tasks, or too many tasks to deal with at once

43. The ET held at paragraph 242:

> **"The general issue of too many tasks at once, we will deal with under chunks of work and workload. …. The nature of the work meant that a level of last minute urgent enquiries was unavoidable…."**

(d) Giving the Claimant a weekly plan of tasks

44. At paragraph 247 the ET referred to the August 2016 OH report which recommended a weekly plan of tasks to even out the Claimant's workload and tasks spread out evenly on a daily basis. The ET held that although AA held weekly meetings with the Claimant and MM at the start of each week from September 2016 he was not given a written weekly plan of tasks. Whilst

AA referred to the list of 86 tasks which the Claimant had been given with a shortlist of recurring tasks at the start of his employment the ET held that this was not at the level of detail which the claimant meant as a plan. The ET held at paragraph 248:

> **"For reasons explained below when we address the overlapping issues jointly, we find that this system of working should have been adopted from the outset. Failure to do so was a failure to make reasonable adjustments. Moreover, the ongoing failure to provide such a list following the OH report in August 2016 was also a failure to make reasonable adjustments."**

(f) A buddy

45. The ET held at paragraph 225 that

> **"The respondents applied a provision, criterion or practice, of lack of team integration."**

The Claimant complained of lack of interaction with members of the Front Office team. He said at his meeting with CC and AA on 8 July 2016 that he was excluded from meetings, socials and team events.

46. The ET held that this PCP put the Claimant at a substantial disadvantage.

47. At paragraph 249 the ET held that 'a buddy' would have helped the Claimant with team integration. It was not until November 2016 that the Claimant was told that EE did not want to be his buddy.

48. The ET held at Paragraph 251 that FF had made the suggestion of a buddy but:

> **"… The respondents should have established sooner whether or not [EE] was prepared to assist and if not, and if [BB] was going to help, [BB] could have been asked sooner. We therefore find that the failure to find a buddy from May to November 2016 was a failure to make reasonable adjustments."**

(g) Breaking the Claimant's work into chunks

49. The ET found that 'a practice of requiring employees to manage the volume of work given to them' was a PCP which put the Claimant at a disadvantage by reason of his disability. The ET held at paragraph 235:

> **"235. This provision, criterion or practice did put the claimant at a substantial disadvantage compared with someone without his disability. The OH Report disclosed on 11 May 2016 explains that the claimant needed a reasonable workload, guidance from his manager on how to prioritise, extra time to deliver work at least in the beginning and clear targets to be set together with his manager."**

50. The ET held:

> **"253. Breaking the claimant's work into chunks would have helped him carry out the duties of his role and manage his volume of work. This means more than a detailed list of tasks as in the 86 task list. It means giving the claimant work in small portions, especially as he learns the job. As confirmed by the August 2016 [email] where [the] OH report advised that the claimant should not be given too many tasks to deal with at once and that tasks should be spread out evenly on a daily basis. This was never properly done.**
>
> **254. For reasons we explain in detail below, we find the failure to do this was a failure to do this was a failure to make reasonable adjustments."**

(h) Setting clear specific targets for the Claimant

51. The ET stated at paragraph 255 that this adjustment overlapped with 'providing a weekly plan of tasks and, breaking the work into chunks'. It is not clear to what PCP this adjustment relates if it is intended to be additional to those relevant to (a), (d) and (g).

52. The ET stated:

> **"256. For reasons we explain in detail below, we find the failure to do this was a failure to make reasonable adjustments."**

(c) Moving desk to avoid disruption to the Claimant (until 22 May 2017)

53. It is unclear to which PCP this adjustment relates. It may relate to Number 9, 'A practice of requiring employees to manage the volume of work given to them.'

54. The ET held:

> **"243. Moving desk to the end of a row by a window rather than sitting in the middle of a team would have helped the claimant to carry out his duties and manage his volume of work. It may also have helped him feel calmer when faced with last minute interruptions."**

The ET continued:

> **"245. This move could easily have been effected if two individuals including one with a window seat, sitting in another department had been asked to move. …. It would for example be possible to say the claimant needed a quiet desk without giving full reasons why. There was bound to be some way of handling the matter, but instead it was allowed to drift for over 8 months.**
>
> **246. We therefore find the failure to enable the claimant to move desks at any point until his sick leave starting 22 May 2017 to be a failure to make reasonable adjustments."**

Further comments on adjustments (a), part of (b), (d), (g) and (h)

55. The ET held at paragraph 257:

> **"What the claimant needed from the outset until he learned the role was a reduced workload, the work broken down into chunks with clear and specific targets and a weekly plan of tasks, and not being given too many tasks at once. He needed a gradual build-up of his workload task by task until he had learned everything. For this period, he wanted hands on management, targets and feedback. As [AA] explained to the tribunal, the claimant needed to understand things from the bottom up, not from the top down."**

Orders made under Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Rule 50

56. The ET made the following orders under Rule 50:

> **11. Any report of these proceedings will not identify the claimant, the respondents or any of the witnesses.**
>
> **12. The case will be referred to henceforth as L v Q and the witnesses will be referred to in our judgment by initials**
>
> **13. The judgment will not go on the register.**

57. The reasons given for the Orders were set out in paragraphs 6 and 7:

> **"6. We have carefully considered the very high premium placed on the principle of open justice. However, this is one of those rare cases where we consider the balance to fall in favour of the orders we have made. We have taken account of the medical evidence including from a clinical psychologist which explains that the claimant is experiencing adjustment disorder on top of his other disabilities as a result of anxiety about the tribunal claim. He has expressed thoughts of not wanting to wake up, though no intent to harm himself at present.**

7. We were told the claimant was also anxious about other people being in the room. He is self-conscious and embarrassed about the manifestations of his disabilities in the hearing. There is evidence that even in routine situations, 25% of the claimant's concentration is always taken up with managing the impulses and urges of the Tourette's. We are concerned that his added worries about a public hearing will interfere with his concentration and stress levels and affect his ability his ability to give evidence adequately. Indeed, we are told by his Counsel that he is wondering whether or not he would feel able to go ahead if such orders were not made."

The Grounds of Appeal

Ground 1.1

58. Ms Mayhew for the Respondent contended that the ET erred in law by finding that information given to OH Assist ('OH') was attributable to the Respondent in circumstances in which that information was not expressly passed on by OH to the Respondent.

59. Further Ms Mayhew contended that the ET erred in holding that confidential medical information given by the Claimant to the occupational health adviser and the doctor at OH was attributable to the Respondent in the absence of evidence of his express consent. Counsel referred to the statutory regime in place for the protection of such information in the **Data Protection Act 1998** ('**DPA**'). OH had a duty to protect the confidential data of their patients which constituted sensitive personal data within the meaning of Section 2. Disclosure of sensitive personal data constituted processing of the data pursuant to Section 1. Disclosure of sensitive personal data in the possession of OH could only be made with explicit consent of the Claimant (Part 1 Schedule 1 **DPA** read with Schedule 3).

60. Counsel submitted that in order to comply with **DPA** requirements it was necessary for OH to be clear to which part of the record of confidential medical information the Claimant provided any consent to disclosure.

61. Ms Mayhew submitted that the written consent given by the Claimant to OH Assist on 6 November 2015 was restricted to consent given for medical information to be 'held and processed by OH Assist for purposes related to your fitness to work.' The declaration made it clear that the consent given by the Claimant was for OH Assist to forward an opinion to Q regarding his fitness to work. It was not consent to disclosure of information provided by him to OH Assist in order for them to make an assessment of fitness to work and to provide an opinion to Q.

62. It was accepted by the ET that OH did not pass on pre-employment information given to them by the Claimant that he had had Tourette's since childhood. Even if the Claimant expected OH to pass to the Respondent all medical information he had given them, absent express specified consent OH could not provide it to Q.

63. Ms Mayhew contended that the ET erred in relying on **Farnsworth** to hold that where the role of OH Assist was to assess a candidate's suitability for work and in a situation where the candidate expected all necessary information to be passed on, the Respondent was fixed with the knowledge of OH Assist. Ms Mayhew submitted that the consent provided to OH Assist by the Claimant was for their report to be disclosed to Q not for all the medical information on which it was based. There was therefore a material factual distinction from the basis of the decision in **Farnsworth**. The decision by the Employment Appeal Tribunal ('EAT') at paragraph 20 that the doctor was not bound by any duty of confidence to Ms Farnsworth not to disclose details of her medical history was based on a finding that:

> **"20**
>
> **….**
>
> **(c) the consent that Ms Farnsworth gave for medical information to be provided was that it could be provided was to the Borough (not simply to Dr Cooper) …."**

A It was submitted that this was not the situation in the case of L.

64. Counsel contended that the ET erred in failing to follow the approach of the Court of Appeal in **Hartman**. In that case the Court of Appeal held at paragraph 33:

B

> **"…it was not right to attribute to the Trust in their capacity as employers, knowledge of confidential medical information disclosed by Mrs Hartman to the OHD….**

Lord Justice Scott Baker held:

C

> **"35 There may be circumstances in which an occupational health department's duty of care to an employee requires the department to seek an employee's consent to the disclosure to the employer of information that the employer needs to know if proper steps are to be taken for the welfare of the employee. No such case was advanced in the case of Mrs Hartman. There was no basis upon which the judge could properly conclude that the Trust was fixed with knowledge of the confidential information disclosed by Mrs Hartman to the OHD."**

D

65. Ms Mayhew also referred to the way in which OH Assist dealt with a further report on the Claimant in April 2016 to illustrate that his consent for disclosure of confidential medical information was limited to reports and consent was not given to disclosure of the information on which they were based.

E

66. Ms Palmer for the Claimant pointed out that no submissions on the effect of the **DPA** were made to the ET. There is nothing about that in the Judgment nor was reference made to it in the ET3.

F

67. Counsel contended that an email of 5 November 2015 from the Claimant to the Respondent seeking written assurances that 'the medical/disability aspects of the situation will not prevent the employment proceeding' showed that the Respondent was aware before the commencement of his employment that the Claimant had disabilities. It was said that the factual basis of the conclusion of the ET that the Respondent was fixed with the knowledge of

G

H

information about his Tourette's given to OH Assist was materially indistinguishable from that in **Farnsworth**. Accordingly, the ET did not err in relying on that authority to reach their conclusion that the Respondent had actual knowledge of the Claimant's Tourette's from the outset of his employment.

Discussion and Conclusion on Ground 1.1

68. Medical information given by the Claimant to OH Assist was confidential. OH Assist were obliged to respect that confidentiality save for and limited to express consent for its disclosure. It is not suggested that such consent was given orally. In any event, oral consent would not have satisfied the requirements of the **DPA**. The consent for disclosure or processing confidential medical information was given in the written consent signed by the Claimant on 6 November 2015. The Consent and Declaration make it clear that:

> **"Your information will remain confidential to OH Assist and it will not be disclosed to anyone else without your prior consent."**

In my judgment this statement makes it clear that medical information provided by the Claimant to OH Assist to enable them to forward an opinion to the Respondent regarding his fitness to work was to remain confidential unless and until further written consent was given. The consent to OH Assist to processing of information was limited to forwarding an opinion for purposes related to the Claimant's fitness to work. An opinion prepared from information supplied is different from the information itself. The Final Report of 26 November 2015 of OH Assist to the Respondent does not set out the Claimant's medical history but an opinion on steps to be taken for the employment of the Claimant which included 'control work stress.'

69. On the evidence before the ET the Claimant had consented to the disclosure to the Respondent of the opinion of OH Assist. Initially this was a pre-employment opinion regarding fitness to work. The consent was limited to the disclosure of the opinion and did not include medical information on which it was based. There was no evidence of written consent being given by the Claimant for the disclosure by OH Assist to the Respondent of such information. The limited consent therefore is to be taken as applying throughout the material period.

70. In the absence of wider written consent, the fact that the Claimant expected information to be passed by OH Assist to the Respondent did not change the binding nature of the obligation of confidence on them.

71. Whilst there were other findings of fact regarding when and of what the Respondent was informed of each of the Claimant's disabilities the ET erred in holding at paragraph 169 that the Respondent was 'fixed with the knowledge of OH Assist' and that they 'knew about the claimant's Tourette's from the outset.'

Ground 1.2

72. The Respondent contended that the ET reached a perverse conclusion in finding that they ought to have known about the Claimant's Tourette's at the start of his employment or soon thereafter.

73. Ms Mayhew contended that the conclusion in the ET to that effect in paragraph 171 was contrary to many of their findings of fact. In paragraph 19 the ET found that the Claimant did not feel comfortable with everyone knowing about his disabilities and prefers to tell people on a

'need to know' basis. Ms Mayhew also referred paragraph 13 of her skeleton argument in which she set out other findings of fact said to be inconsistent with the conclusion that the Respondent ought to have known about the Claimant's Tourette's at the start of his employment or shortly afterwards. Counsel emphasised two findings of fact. The Claimant did not tell AA about his Tourette's until he spoke to HR in about May 2016. Further, the finding of the ET that the Claimant would have volunteered information about his Tourette's if AA had asked him at an earlier stage about the causes of his stress and his behaviour was perverse in light of the Claimant's reluctance to speak about his condition.

74. Ms Palmer contended that the conclusion of the ET that the Respondent should have known about the Claimant's Tourette's from the outset of his employment was amply justified by the findings of fact.

75. Counsel submitted that as early as an email of 5 November 2015 to the Respondent the Claimant referred to the fact that he was concerned that medical/disability aspects would not prevent his engagement. From that date the Respondent knew he had a disability. Even if the Claimant's consent to the release by OH to the Respondent was restricted they could have asked for his consent to the release to them of such information. The ET did not err in concluding that the OH report of 26 November 2015 that steps were needed to control the Claimant's work stress should have alerted the Respondent to make further enquiries as to the cause of that stress.

76. It was submitted that a conclusion that at the very latest on 20 January 2016 the Respondent was put on notice that the Claimant had a disability about which they should have made further enquiries was fully supported by findings of fact. The Claimant had asked AA to

refer him to OH and said that he required more support in managing stress. The Claimant's confirmatory email of that date made it clear that he had understood that information he previously gave to OH in November would have been passed to AA. That information included that the Claimant had the disability of Tourette's. It was submitted that there was no evidence before the ET that the Claimant wanted to conceal information from his line manager that he had Tourette's.

Discussion and conclusion on Ground 1.2

77. In my judgment the conclusion of the ET at paragraph 171 that the Respondent and AA should have known from the beginning that the Claimant had Tourette's was fully supported by their findings of fact. Most telling was the Claimant asking AA on 20 January 2016 to refer him to OH in order to manage stress. In his email of the same date the Claimant made it clear that he wanted AA to know relevant details of what he told OH at his pre-employment interview. This included that he had Tourette's. The ET did not reach a perverse conclusion that AA should have made further enquiries about the Claimant's medical condition and sought his consent to the release of such information. Further, the ET did not reach a perverse conclusion in deciding that if such consent had been sought by AA it would have been given by the Claimant.

78. Ground 1.2 does not succeed.

Ground 2

79. Ms Mayhew made a number of challenges to the conclusions of the ET that the Respondent had failed in its duty under **EqA** Section 21 to make reasonable adjustments. It was said that the ET failed to find in respect of each adjustment the substantial disadvantage related

to disability the Claimant suffered by application of the relevant PCP and the reasonableness of the adjustment they found to be required. Further in some cases the factual basis of the conclusions reached by the ET were challenged as perverse.

80. Counsel referred to the adjustments the ET found the Respondent failed to make. The first was 'Giving the Claimant a reduced workload.' Ms Mayhew contended that the conclusion of the ET in paragraph 237 that the Claimant was placed at a disadvantage by 'carrying out the full duties of his role from the beginning' was inconsistent with their earlier findings of fact. The ET found that the Claimant had been told what his initial priorities would be (para 44), that he did not pick up period end work until May 2016 (para 47), that in June 2016 the Claimant prepared a list which set out all the duties he was required to do and on which he noted the tasks he was not doing at that time (para 78), on 22 July 2016 AA prioritised three tasks for the Claimant to perform (para 83), the Claimant did not carry out the final 20% of period end work and this task was taken from him altogether in November 2016 (para 96). Finally, counsel pointed out that the ET concluded at paragraph 128:

> **"Some of the work to be reallocated was work which the claimant had not yet started to do, eg sole responsibility for period ends and twice yearly hedge accounting activity. Those tasks had been covered by other team members or by D."**

It was submitted that the ET failed to consider why or how the Claimant's disability placed him at a substantial disadvantage in carrying out the tasks he was in fact given. In addition, the ET appear not to have considered the reasonableness of removing tasks from the Claimant, a highly paid and expert employee.

81. Adjustment (d) was 'Giving the Claimant a weekly plan of tasks.' Ms Mayhew contended that the conclusion at paragraph 248 that a failure to give the Claimant a weekly plan of tasks

from the outset was a failure to make reasonable adjustments was perverse in the light of the fact that the first time the need for such adjustments was drawn to the attention of the Respondent was in the OH report of early May 2016. Further it was said that in reaching their conclusion the ET failed to take into account that certain tasks recurred and that there was no requirement for them to be mentioned each week.

82. Ms Mayhew challenged the general finding in paragraph 257 in relation to adjustments (a), part of (b), (d), (g) and (h). It was said that in some cases the finding was inconsistent with other findings of fact and there was no or inadequate consideration of the reasonableness of the adjustments found to be required. Nor was there a finding as to how the PCPs placed the Claimant at a substantial disadvantage which was related to his disability.

83. Further it was submitted that despite the finding at paragraph 258 that:

"…. In the event, adjustments have become extremely onerous and time-consuming…."

the ET failed to consider the reasonableness at a particular time or at all of each adjustment.

84. It was contended on behalf of the Claimant that the ET did consider the reasonableness of the adjustments in paragraphs 257 to 259. As for the criticism made by Ms Mayhew of paragraph 258, Ms Palmer contended that the ET implicitly did consider whether a point had come at which adjustments had become so onerous that they were no longer reasonable. It was said that the ET are to be understood as having rejected such a suggestion which was also said to be academic.

85. Ms Palmer submitted that the Respondent did not challenge the findings that they applied the various PCPs. Nor could they challenge that they ought to have known of the Claimant's disability of Tourette's from the outset and that of Asperger's by 6 September 2016 at the latest. They should have been aware that disabilities put the Claimant at a substantial disadvantage in his ability to comply with the various PCPs.

86. Ms Palmer submitted that the Respondent did not challenge the findings that they applied the various PCPs. Nor could they challenge that they ought to have known of the Claimant's disability of Tourette's from the outset and that of Asperger's by 6 September 2016 at the latest. They should have been aware that disabilities put the Claimant at a substantial disadvantage in his ability to comply with the various PCPs.

Discussion and conclusion

87. The relevant duty to make reasonable adjustments is that in **EqA** Section 20 (3):

> **"…. where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."**

Schedule 8 Part 3

Paragraph 20

> **"(1). A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know —**
>
> **…**
>
> **(b) …that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement**
>
> **…."**

88. In this case the ET and the parties appear to have proceeded on the basis that the disability relevant to all of the adjustments was Tourette's and that the disability relevant to the desk move

was both Tourette's and Asperger's. By reason of **EqA** Schedule 8 Part 3 paragraph 20, on the findings of the ET which have not been overturned on appeal, the Respondent could reasonably have been expected to know about the Claimant's Tourette's from about the start of his employment.

89. It has not been submitted that the ET erred by failing to decide the degree to which a PCP placed a person with Tourette's at a substantial disadvantage in comparison with persons who are not disabled. For example, it is not said that the ET erred in failing to consider whether the workload given to the Claimant would have caused a non disabled person stress and whether and to what extent a person with Tourette's was placed under additional stress related to his disability. The issues in considering the appeal against the findings of the ET that the Respondent had failed to make reasonable adjustments focussed on alleged perversity in the factual basis for the found failures and the error in law in failing to make any or any adequate findings in relation to each adjustment as to why and when it was reasonable to introduce it to avoid the disadvantage.

90. In my judgment the implied finding in paragraph 237 that the Claimant was carrying out the full duties of his role from the beginning of his employment was perverse in light of the facts found in paragraphs 44, 47, 78, 83 and 96. It is important for the ET to base their decision of what reasonable adjustments needed to be made on the tasks were in fact required to be carried out by the Claimant. If these changed over time findings should be made as to the times at which these tasks were expected to be carried out by him.

91. In my judgment the ET did not consider adequately or at all whether the adjustments were reasonable balancing redressing any substantial disadvantage suffered by a person with the

Claimant's disability with the reasonable needs of the Respondent. Whilst as has been established by the Court of Appeal in **Burke v The College of Law &Anor** [2012] EWCA Civ 37 at paragraph 33 that it may be entirely appropriate for an ET to consider the adjustments as a whole that does not diminish the need to consider and decide whether they are reasonable having regard to redressing the disadvantage related to the disability from the application of the PCP and the reasonable needs of the Respondent. For example, the ET failed to make findings as to the practicalities of reducing the Claimant's workload, which tasks could be removed from him and how these could be performed. Further it may have been that a non disabled employee may have found difficulty coping with the volume of work. How much of the work was it reasonable to remove to redress the disadvantage related to the Claimant's disability? Save for moving the Claimant's desk, similar observations may be made regarding other adjustments the ET found that the Respondent had been obliged to make.

92. Ground 2 succeeds. The decision that the Respondent failed to make the specified adjustments and were in breach of **EqA** Section 21 is set aside.

Ground 3

93. The ET made the following Orders under Rule 50 of the **ET Rules**:

1.1 Any report of the proceedings would not identify the claimant the respondent or any of the witnesses.

1.2 The parties and witnesses in the judgment be anonymised.

1.3 The judgment is not to go on the register.

94. **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**

Rule 50 provides:

> **Schedule 1**
>
> **Rule 50**
>
> **(1). A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.**
>
> **(2). In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.**
>
> **(3). Such orders may include—**
>
> > **(a)an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;**
> >
> > **(b)an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record**
> >
> > **….."**

95. Ms Mayhew submitted that the ET failed to consider whether each of the Orders was necessary and proportionate. Counsel referred to the judgment of the EAT in **British Broadcasting Corporation v Roden** [2015] ICR 985 in which the following principles were set out:

> **"1. The principle of open justice is of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice (para 22);**
>
> **2. In that case Articles 6, 8 and 10 were engaged. Each of the rights had to be balanced against the other when reaching a decision (para 23).**
>
> **3. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence…. (para 26)."**

Reference was also made to the judgment of Mrs Justice Simler in **Fallows v News Group Newspapers Ltd** [2016] IRLR 827 in which it was held at paragraph 42 that:

> **"…. It is likely to be a rare case where the Article 8 rights at stake are so strong that it is necessary to grant indefinite restrictions as the means of striking the balance between Article 8 rights on the one hand and the principle of open justice and rights of freedom of expression on the other."**

96. Ms Mayhew submitted that it was a very serious error for the ET to both restrict identification of the parties and witnesses and to order their anonymization as was done in paragraphs 1.2 and 1.3. It was also said that the Claimant did not apply for both the Orders made in 1.2 and 1.3. There had been no application for a Restricted Reporting Order.

97. Ms Palmer pointed out that whilst the hearing before the ET has taken place and to that extent the appeal concerning the hearing before the ET is academic counsel recognised that Ground 3 is relevant to any future ET hearing in the case. Counsel referred to a letter dated 9 April 2018 from a clinical psychologist which was before the ET. The psychologist recorded the concerns of the Claimant that if his diagnosis of Tourette's and Asperger's were made public his career would be over and it would be impossible for him to return to work.

98. It was pointed out by Ms Palmer that the initials used in the current judgment could easily lead to the identification of witnesses. The Claimant remains employed by the Respondent and has real concerns that he may be identified. Further counsel submitted that the discharge of the Orders made by the ET under Rule 50 would be a failure to grant the Claimant a reasonable adjustment and would deter him from pursuing his claim.

99. Whilst the **Employment Appeal Tribunal Rules 1993** do not contain a provision similar to ET Rule 50, Ms Palmer referred to **A v B** [2010] ICR 849 in which Mr Justice Underhill (as he then was) in the EAT held at paragraph 10 of the powers of the Employment Appeal Tribunal to make an anonymity order:

> **"If the loss of the claimant's anonymity would involve a breach of his convention rights it would be the duty of this tribunal, pursuant to section 6 of the Act, to interpret its powers, so far as possible, so as to protect that anonymity."**

100. The reasoning of the ET for making the orders under Rule 50 set out in paragraphs 6 and 7 is slender. They stated:

> **"We have carefully considered the very high premium placed on the principle of open justice. However, this is one of those rare cases where we consider the balance to fall in favour of the orders we have made..."**

The ET referred to evidence from a clinical psychologist who referred to the Claimant experiencing adjustment disorder as a result of anxiety about the tribunal claim. Observations in paragraph 7 related to the conduct of the hearing before the ET in private which is not the subject of any order under appeal.

101. The principle of open justice is of great importance. Where, as in this case, Orders were sought which result in restrictions on publication of the names of the parties and the witnesses, the court must balance that principle against the Claimant's rights to protection of his reputation under Article 8 and to access to the courts under Article 6 of the European Convention on Human Rights. It can also be said that making an anonymisation order in this case was a reasonable adjustment within the meaning of **EqA** Section 21. The reasoning for anonymising parties and witnesses is scant with only one reference to evidence to support such orders. However, it appears that evidence from a clinical psychologist supported a contention that the identification of parties and witnesses would or could cause the Claimant to suffer psychological harm. The weight to be attached to such evidence was a decision to be made by the ET. Unless the decision of the ET to accept such evidence as justifying making an anonymity order could be said to be perverse this EAT will not interfere with the Order made under Rule 50(3)(b).

102. Rule 67 of the ET Rules provides:

> **"Subject to rules 50 and 94, a copy shall be entered in the Register of any judgment and of any written reasons for a judgment."**

Rule 50 (3) (b) gives an ET power to order that the identities of parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public in a document entered on the Register. For a full discussion of the requirement to enter the judgment of an Employment Tribunal on the Register reference should be made to the helpful analysis of HH Judge Eady QC in **Miss Ameyaw v PriceWaterhouseCoopers Services Ltd** UKEAT/0244/18/LA 4 January 2019. Rule 50 does not empower an ET to order that the judgment will not go on the Register. It may be that in rare cases the principle of interpreting powers under the Rules so as to comply with Convention rights as was referred to in respect of Rule 50(3)(b) in **A v B** may be used to disapply Regulation 67. However, the ET made no findings of fact nor gave reasons which would support such a conclusion. Accordingly, in my judgment the ET erred in making such an order in 1.3 and it is to be set aside.

103. As the judgments of the ET will go on the record the parties have been given the opportunity to make suggestions of redactions to the original ET Judgment to minimise identification of the parties and witnesses. The opportunity to make similar suggestions for redactions was given in relation to this judgment. The initials used in anonymization should not be related to actual names.

Disposal

104. Ground 1 is dismissed.

105. The appeal is allowed on Ground 2. The claim for failure to make reasonable adjustments under **Equality Act 2010** Sections 20 and 21 is remitted to a differently constituted Employment Tribunal for determination on the basis that the Respondent could reasonably be expected to

know within the meaning of **Equality Act 2010** Schedule 8 paragraph 20 that the Claimant had the disability of Tourette's from the outset of his employment and of Asperger's from 6 September 2016.

106. Ground 3 is allowed in respect of order 1.3 which is set aside. The appeal from the orders in 1.1 and 1.2 is dismissed. In exercise of powers under the **Employment Tribunals Act 1996** Section 35 some of the initials used in anonymisation will be changed and passages in the Judgment of the Employment Tribunal redacted to the extent reasonably necessary to preserve anonymity of the parties and witnesses.

Applications after the hearing of the appeal

107. Shortly before this judgment was to be handed down, in addition to making agreed redactions to preserve anonymity, on 10 May 2019 counsel for the Claimant made written application for adjustments in light of the setting aside of the order by the ET that their judgment not be entered on the Register. It was submitted that the disabilities which form the basis of the Claimant's claims be anonymised, together with redaction of the descriptions of the direct effects of those conditions on the Claimant and of an incident in which he spoke of two disturbing matters said to be related to his disabilities.

108. Ms Palmer also sought an order that any publication of the judgment of the ET and of the Employment Appeal Tribunal be put on hold for the duration of the appeal window and that if any application is made to appeal by either party, until the application for permission, if there is one, has been dealt with.

109. Counsel also sought an order that the Employment Appeal Tribunal give the Claimant the option of withdrawing his claim rather than having the judgments made public and time to consider that option.

110. All three orders were sought on the basis that they represent reasonable adjustments for the Employment Appeal Tribunal to make.

111. Ms Mayhew for the Respondent resisted the applications. Counsel pointed out that the further redactions were not sought before the ET. Reference was made to the written application for anonymization and redaction made on behalf of the Claimant to the ET. In a letter of 10 April 2018, the Claimant requested that if the judgment were made public 'his identity and those of all others involved be anonymised.' Ms Mayhew submitted that the Claimant clearly anticipated that the judgment of the ET may be entered in the Register. Whilst redaction of his name and that of others involved be anonymised was requested he did not apply for the orders now sought, that his disabilities be anonymised and that no reference be made to a particular incident related to his disabilities.

112. Ms Mayhew contended that the request that neither the judgment of the ET nor that of the Employment Appeal Tribunal be published until after time for appeal has elapsed or an application for permission to appeal has been determined against him should be refused. An appeal does not prevent the execution of a judgment. The Employment Appeal Tribunal has held that the ET had no power to order that its judgment should not be entered in the Register.

113. Further it was said that any restriction on publication would cause real prejudice to the Respondent. Amongst other matters their employees would not have access to relevant information to determine what reasonable adjustments should be made in respect of the Claimant's ongoing employment.

114. The Employment Appeal Tribunal has remitted certain matters to be determined by the ET. Ms Mayhew observed that the Claimant's request to withhold publication in anticipation of a possible appeal would affect the remitted proceedings.

115. Ms Mayhew submitted that the Employment Appeal Tribunal has no power to make an order enabling the Claimant to withdraw his claim to avoid the judgments of the ET and the Employment Appeal Tribunal being published.

Discussion and conclusion

116. Ms Palmer contended that the substitution of initials for the two named disabilities and redaction of a passage in the ET judgment which refers to an incident said to be related to those disabilities are reasonable adjustments. Apart from referring to the Claimant's 'reasonable concern that his private data should not become publicly available and in particular available to his colleagues' Ms Palmer did not advance an argument that if his disabilities and their effects were made known the Claimant would be subjected to a substantial disadvantage in comparison with persons who are not disabled. Claimants in cases before the ET may be concerned and upset that knowledge that they had brought a claim or a particular type of claim may prejudice their future employment prospects or their relationship with colleagues. They may be caused stress and other physical or mental effects by the thought that details of their case be made known. In

specific cases a Restricted Reporting Order may be made. Such an Order was not sought in this case.

117. An order that the disabilities upon which the Claimant relies to pursue his claim not be named but be referred to as disability A and disability B was not sought in the proceedings before the ET notwithstanding that those representing the Claimant appreciated that their application for the judgment of the ET not be entered on the Register may be refused. More importantly the nature of his disabilities and their effects are at the heart of the Claimant's claim that the Respondent had failed in their duty to make reasonable adjustments within the meaning of **EqA** Section 20. In order for the duty to arise the employee must be subjected to a substantial disadvantage in comparison with persons who are not disabled. The purpose of the comparison is to determine whether the disadvantage arises because of the disability or something related to the disability. It is central to the determination of the claim and understanding of the judgment that the nature of the disabilities and their consequences are set out.

118. The Claimant may be embarrassed or discomforted by the statement of his disabilities. However, he brought the claim based on them. He has the protection of an anonymity order. To preserve anonymity, where there are quotations from the judgment of the ET initials have been changed and where necessary passages omitted. To extend redaction to the disabilities and their consequences which are the foundation of his claims would fundamentally undermine understanding of the judgment.

119. The application for substitution of condition A for Asperger's/Autism and condition B for Tourette's is refused as is the redaction of reference to the incident in which the Claimant spoke of stabbing a colleague and having been a suicide risk.

120. The Claimant seeks a delay in publication of the judgments of the ET and the Employment Appeal Tribunal.

121. Employment Appeal Tribunal Rule 31(3) provides:

> "....
>
> **Subject to any order made by the Court of Appeal or Court of Session and to any directions given by the Appeal Tribunal, an appeal from the Tribunal shall not suspend the enforcement of the order made by it."**

122. If the Claimant were to challenge the judgment of the Employment Appeal Tribunal allowing Ground 3 it may be said that such an appeal would be rendered useless if the judgment were executed before it had been decided whether permission for such an appeal should be granted.

123. In exercise of its power under Rule 31(3) the Employment Appeal Tribunal suspends the enforcement of its order setting aside the Order of the ET that its judgment not be entered in the Register consequent on allowing Ground 3 of the appeal to the Employment Appeal Tribunal. That suspension shall be for the period of 21 days from the Order made on handing down of this judgment within which application to the Court of Appeal for permission to appeal the decision to allow appeal Ground 3 would have to be lodged and, if made within that time, until that application is determined. For the avoidance of doubt all applications to appeal are to be made to the Court of Appeal not to the Employment Appeal Tribunal.

124. The hearing before the ET was held in private but that before the Employment Appeal Tribunal was held in public. No application was made that the judgment of the Employment Appeal Tribunal should not be put on its website. Nor does Rule 31(3) confer such powers on the Employment Appeal Tribunal to make such an order.

125. In my judgment with appropriate anonymisation of the Claimant and others involved in the case there is no reason why open justice should be curtailed by not handing down this judgment or publishing it.

126. The Employment Appeal Tribunal has no power to make an order giving the Claimant the option of withdrawing his claim rather than have the claims made public and time to consider that option. The decision whether to withdraw was and is one for the Claimant.

Disposal of applications made by the Claimant

127. The application for substitution of initials for the Claimant's disabilities and for redaction of reference to effects of those disabilities including statements by the Claimant regarding harming another and being a risk to himself is refused.

128. The application for suspension of execution of the decision allowing Appeal Ground 3 is granted for 21 days from the date the Order on handing down of this judgment and if an application to appeal the decision allowing Ground 3 is made within that time, until determination of the appeal.

129. The application not to publish the judgment of the Employment Appeal Tribunal until determination of any application for permission to appeal, and if granted, of any appeal from the Order allowing Ground 3 is refused.

130. No order is made relating to any possible withdrawal of the claim.

131. By even later application of 10 July 2019 Ms Palmer asked for a reconsideration of the refusal of the application to delay publication of the judgment of the Employment Appeal Tribunal until determination of any application to appeal its Order on appeal Ground 3. There is no reason to depart from the original reasons given in paragraphs 124 and 125 to refuse such an order. The application for reconsideration is refused.

132. If the application for reconsideration were to be refused, counsel requested a stay of 48 hours on publication of the judgment of the Employment Appeal Tribunal on its website to enable an urgent application to be made to the Court of Appeal. In accordance with the overriding objective there will be stay on such publication for 48 hours from the date of the Order made on handing down of this judgment

Postscript

133. The handing down of this judgment has been delayed to deal with applications and consideration of redactions to this judgment and that of the ET. Counsel are thanked for their consideration of the redactions.