# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr H Ahmed**

**Respondent:** **Department for Work and Pensions**

**Heard at:** **Birmingham** **On:** **24-28 June 2019**

**Before:** **Employment Judge Butler**
**Members: Mrs Fox and Mr Greatorex**

**Representation**
Claimant: In person
Respondent: Mr J Feeny, Counsel

# JUDGMENT

The unanimous Judgment of the Tribunal is that the claims of discrimination arising from a disability, failure to make reasonable adjustments and victimisation are not well founded and are dismissed. The claim of indirect discrimination is dismissed on withdrawal by the claimant.

# REASONS

The Claims

1. By a claim form submitted on 13 January 2018, the claimant brought claims that the respondent acted contrary to the provisions of the Equality Act 2010 ("EqA") by failing to make reasonable adjustments (ss.20-21), indirect discrimination (s.19), discrimination arising from a disability (s.15) and victimisation (s.27). The claimant subsequently withdrew the indirect discrimination claim. The respondent contests all of the claims and claimed some to be out of time.

2. The details of the reasonable adjustments claim are, firstly, that the respondent applied a provision, criterion or practice ("PCP") to him that he achieve a certain level of attendance at work to avoid being subject to the respondent's absence management procedure. This represented a substantial disadvantage to the claimant because his disability (paroxysmal nocturnal haemoglobinuria ("PNH")), which is accepted by the respondent, meant it was more likely he would have sickness absences and therefore harder for him to

achieve the required attendance levels. The reasonable adjustment contended by the claimant is that he should have been allowed 11 sick days in a rolling 12 month period from December 2016 as he said was agreed by the respondent.

3. Secondly, the claimant stated that a PCP was applied to him to the effect that he was required to be flexible in taking his scheduled morning breaks and/or to work during a scheduled break. This was a change to what was agreed by him at the Preliminary Hearing before EJ Harding on 7 August 2018 which he only raised at the commencement of the Hearing and to which the respondent raised no objection. The claimant said his refusal to comply with this PCP resulted in the substantial disadvantage of being unfairly criticised. The reasonable adjustment contended was that he be allowed to take his morning breaks at the allotted time.

4. Thirdly, the claimant claimed the respondent applied a PCP to him that he was required to undertake an excessive workload and the substantial disadvantage this caused was that he was unfairly criticised for refusing to comply with the request. The reasonable adjustment claimed is that he should not have been given work on short notice or asked to carry out the work of others.

5. The claim under s. 15 EqA has not been clearly set out by the claimant despite the efforts of EJ Harding at the Preliminary Hearing to explain the nature of the provision. Ultimately, the detail recorded was that he was unfairly criticised for taking scheduled breaks, blocking out his diary and refusing work because of the tiredness and fatigue caused by his disability.

6. As regards victimisation, the protected act claimed, and accepted by the respondent, is the claimant's previous tribunal claim. The detriments allegedly suffered by the claimant are set out in his lengthy particulars of claim but are summarised here as:

(i) falsely criticising him for missing a customer appointment;

(ii) setting unreasonable tasks and/or an excessive workload by asking him to carry out a one hour customer appointment when his diary was full, asking him to see a customer during his break and asking him to see five additional customers when he already had his own pre-booked appointments to carry out;

(iii) subjecting him to unfair informal action by undertaking an investigation into his sickness absence when he had not reached his trigger point of 11 days' absence;

(iv) not changing his line manager in a timely manner after he had raised a grievance against his then current line manager;

(v) harassing him by his line manager calling him to meetings after he had made clear he would not attend any further meetings with her;

(vi) management making false claims that he had been aggressive and rude, specifically: he had been rude and aggressive to his line manager when it was she who was rude and aggressive to him; and he threw a letter on his line manager's desk when he did not;

(vii) Not dealing with his grievance properly in that key evidence and witnesses were ignored and the manager hearing the grievance was biased against him.

The claimant contends that all of these incidents were designed to build a case for disciplinary action against him because of his previous tribunal claim against the respondent and its officers.

The Issues

7. The issues before us arise principally from the same facts as alleged by the claimant. We regard them as follows:

(i) did the respondent have PCP's of requiring employees to achieve a certain level of attendance in order to avoid being subjected to its absence management procedure; requiring employees to be flexible in the times at which their morning breaks were taken; and requiring them to undertake an excessive workload;

(ii) if so, did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that he was unfairly criticised for refusing to comply with any such PCP?

(iii) if so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

(iv) if so, were there steps that were not taken that could have been taken by the respondent to avoid such disadvantage as set out by the claimant and would it have been reasonable for the respondent to have taken them?

(v) Did any of the disadvantages claimed by the claimant arise in consequence of his disability and did the respondent treat the claimant unfavourably in any of those ways? If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

(vi) Did the alleged unfavourable treatment of the claimant by the respondent arise because he did the protected act of bringing a previous tribunal claim?

The Law

8. We have , as a starting point in relation to each of the claims, considered the wording of the relevant provisions of the EqA, namely, sections 15, 20, 21, 27 and 136. These provisions are largely reflected in the issues outlined above. Insofar as they were relevant to the issues, we have borne in mind the judgments in Nagarajan v London Regional Transport [1999] ICR 877, Islington Borough Council v Ladele [2009] ICR 387 EAT, Madarassy v Nomura International Plc [2007] EWCA Civ 33, Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, Sheikholeslami v University of Edinburgh [2018] IRLR 1090 EAT, General Dynamics Information technology Ltd v Carranza [2015] ICR 169 and Chief Constable of the West Yorshire Police v Khan [2001] ICR 1065, HL.

The Evidence

9. We heard evidence from the claimant and, for the respondent, from Myhriam Bi, the claimant's Line Manager at the relevant time, Andrew Hickman, a Work

Coach Team Leader, who mentored Miss Bi, and Elizabeth Ordidge, Miss Bi's Line Manager. We had before us a bundle of 397 pages and a further bundle from the claimant of 27 pages. References to page numbers in this judgment are to page numbers in the bundles.

10. As the claimant was acting in person, the Employment Judge ("EJ") carefully explained the procedure to be adopted in the Hearing. He was told that, once the evidence had been concluded, he would be given some time to prepare his submissions if he needed and wanted it. The effects of his disability were discussed and, in particular, the fatigue arising from his PNH. He was told he could take breaks when he needed to and the Hearing could finish earlier than 4 pm if he felt unduly fatigued by each day's events. He was asked whether he wished the tribunal to build in periodic breaks during the course of each day or would prefer to just indicate when he needed a break. He chose the latter course of action. Notwithstanding this, he was asked by the EJ on a number of occasions whether he needed a break.

11. The claimant was also advised by the EJ that he should be wary of trying to give his own evidence when he was cross-examining witnesses. In the event, this did not seem to register with him as he repeatedly interrupted the respondent's witnesses before they had finished answering his questions. This arose whenever he disagreed with their evidence and he became visibly excitable when this happened. He also had to be told by the EJ to let Mr Feeny finish asking his questions before he attempted to answer them.

12. The claimant was also rude to the witnesses on occasions, to opposing counsel and the EJ. In particular, he accused Mr Feeny of not knowing what was in the bundle, and accused Miss Bi, when she asked for some water, of trying to test him to see if he would ignore her and asked whether she had staged her request. The EJ told him this was a most inappropriate comment but it did illustrate to us that he saw conspiracies in the most innocent situations.

13. In his cross-examination of Ms Ordidge, the claimant was asking about her knowledge of his previous tribunal claim. When she indicated she did not know much of the detail about it he said he would take her answer as a "yes" meaning she did know all about it and had it in mind when dealing with him. He was seemingly incapable of accepting her answer and repeated that he would take it as a "yes". The EJ pointed out to him that Ms Ordidge's answer had been perfectly clear and it was for the tribunal to assess its credibility. He then began arguing with the EJ who patiently explained to him that he had a habit of trying to interpret the evidence of witnesses to his own ends when he did not like their answers. The EJ explained again that credibility of the evidence was a matter for the tribunal but he could raise it in submissions. He replied that he did not intend to wait for submissions. He was reminded that he had been told time would be given for him to prepare his submissions at the conclusion of the evidence. He said he would be leaving at the end of the evidence and that he was clearly annoying people. The EJ explained that it was his role to explain matters to him but his being argumentative was not helpful. He then asked for a break and told the EJ, with more than a hint of sarcasm, "You can make a note of that", meaning the exchange they had had.

13. There was a further altercation when, after the break requested by the claimant when he was becoming irritable in his cross-examination of Ms Ordidge, he resumed his cross-examination with the words, "You're a racist aren't you"

and when Ms Ordidge was clearly shaken by that comment, he repeated it. The EJ told him that his comment was inappropriate and he was haranguing the witness. His cross-examination continued and he again interrupted Ms Ordidge before she had answered one of his questions and when reminded by the EJ to let her finish he said he had no more questions.

14. When it came to submissions the claimant was adamant he would not make any. He asked if he was compelled to stay and, when it was confirmed he was not, he left without hearing what Mr Feeny had to say.

15. It was clear to the tribunal that the claimant could be very difficult. He reacted badly when anyone disagreed with his point of view and seemingly was incapable of stopping himself from interrupting the evidence when he did not like it becoming excitable and sometimes rude. In giving his evidence he was also at times prone to speculation. For example, he said in evidence that on a day in November 2017, he went to the storeroom to get a form and when he came out Miss Bi was coming quickly towards the storeroom while Mr Hickman looked on. The claimant said it seemed to him that Miss Bi was going to try to provoke him despite the fact that there was absolutely no evidence Miss Bi was actually going to the storeroom – and did not in fact go in.

16. Of course, we appreciate the effect of the claimant's disability upon him, particularly that he suffers from fatigue and can become quite stressed. However, it seemed to us that he was at times quite incapable of accepting any point of view other than his own and this was reflected in his behavior throughout the Hearing. As we shall discuss below, this behaviour was also apparent in his work environment which clearly led to him being very difficult to manage.

17. We found the evidence of Miss Bi to be given in a straightforward manner. She answered questions without having to think about them and we considered her to be open and honest. She clearly lacked experience as a manager and dealing with the claimant would have been an intimidating experience. She explained how she approached managing the claimant with advice and coaching from her mentor, line manager and HR. She was at pains to point out that her intention in dealing with the claimant's sickness absence was to consider with him how she could support him further but, in the event, that was not possible because he refused to engage with her. We accepted Miss Bi's evidence that, although aware of the claimant's previous tribunal case, she was unaware of the details.

18. Mr Hickman was the officer of the respondent who increased the trigger point for the claimant's sickness absences from 8 to 11 days. He said he took advice before meeting with the claimant on 23 December 2015 from the respondent's Complex Case Service who advised him that 11 days would be appropriate in the claimant's case. Mr Hickman was involved in 2 incidents with the claimant which form the basis of his complaints, namely, the letter increasing the trigger point at which he would be asked to attend an Absence Management Meeting (page 88) and asking the claimant on one occasion if he could be flexible with his break time. Mr Hickman's evidence in relation to these matters was consistent with the documents in the bundle and we had no reason to doubt it.

19. It is fair to say that the claimant gave Ms Ordidge a difficult time when cross-examining her. He often asked her to speculate as to why, for example,

Miss Bi had taken a particular course of action. The claimant showed frustration when she could not give a detailed answer. This was because she did not directly manage the claimant and had responsibilities at another of the respondent's offices so was not always there. Miss Ordidge was genuinely upset by the claimant's conduct towards her which included him saying he did not believe her, trying to interpret her answers to his own ends, attempting to finish her answers for her, not allowing her to finish answering questions put to her and calling her a racist. In the circumstances, Ms Ordidge handled the questions well. We did, however, have some reservations about her recollections of receiving emails and conversations with Miss Bi and others but, as will be apparent from our discussion below, nothing relating to the issues in this case turned on this.

The Factual Background

20. In relation to the issues before us, we have made findings of fact to the extent we considered reasonably necessary in order to reach our decision. We have tried to avoid becoming embroiled in discussions about every factual detail, such as every email in the bundle and the circumstances and detail of every alleged conversation, although we appreciate the parties may attach greater significance to these matters than we do. We say at the outset that the statements of Messrs S Ahmed and S Zulfqar produced by the claimant have been given little weight since those witnesses did not attend the Hearing and so were not cross-examined. The claimant confirmed he understood this.

21. The claimant was employed as a Work Coach at the respondent's Washwood Heath Job Centre. His employment commenced in 2007 and is continuing. Briefly, his job was to interview those claiming benefits and attend to people who claimed benefits over a longer period and who needed to "sign on" periodically and for which a short interview slot was given on the assumption this would not take very long.

22. On 20 September 2016, the claimant brought claims of disability discrimination and victimisation under claim no. 1302373/2016. The Hearing took place in April 2017 and he was awarded compensation for injury to feelings in respect of the respondent's failure to make reasonable adjustments due to the claimant's disability, which was conceded. This claim is the protected act for the purposes of the victimisation claim before us.

23. Although at the Preliminary Hearing the claimant said the relevant period over which discrimination took place is 7 July 2017 until the end of January 2018, it is necessary to begin with the claimant's meeting with Mr Hickman, his then line manager, on 23 December 2016 which followed a Back to Work meeting on 30 November 2016 (page 85). At this time, the claimant had accumulated 22 days' sickness absence in his then current rolling 12 month period. Mr Hickman took advice from the Civil Service HR Casework (page 86) prior to meeting the claimant. In his letter setting out what had been discussed, Mr Hickman expressed concern about the claimant's level of sickness absence and noted that there had been 4 occasions when action could have been taken in the form of written warnings but no action had been taken. Recommendations were made to the claimant regarding seeing his GP and further consulting Occupational Health. The upshot of this meeting was that Mr Hickman altered the trigger point of 8 days absence in any rolling 12 month period (and applicable to all employees) to 11 days. The letter states (page 88), "…however when all adjustments have been

made if further levels of absences occur then formal action will again be considered if the levels remain unsatisfactory in a rolling 12 month period".

24. This letter is a major source of contention between the parties. The claimant insists that its effect was to "wipe the slate clean" and a new rolling 12 month period for calculating his days of sickness absence began immediately after the meeting with Mr Hickman. The respondent takes the view that the current rolling year remained in place and that further absences would be added on to those 11 days already accumulated. Indeed, in his witness statement, Mr Hickman was clear that his intention was that both previous and future absences would be taken into consideration under the respondent's absence management procedure (paragraph 6). We spent some time reviewing this letter. If the claimant is right in his interpretation of it, he would have been entitled to 33 days' absence in the current rolling 12 month period without facing any further absence discussions. Of course, his view is that his rolling 12 month period started afresh from the date of that meeting. We do not subscribe to that view. We find nothing in the letter to support the idea that his 22 days' absence already accumulated was to be ignored. We reach this conclusion having noted the advice given to Mr Hickman by HR (page 86) and also because the claimant did not challenge Mr Hickman on the point in cross-examination. We consider it to be clear from the evidence that the claimant was to be given a further 3 days' sickness absence in his current rolling 12 month period.

25. Mr Hickman noted in his meeting with the claimant that the stress reduction plan put in place for the claimant (page 77) did not seem to have been implemented. We note (page 78) that this suggests the claimant "say no more often", speak to his manager if he felt he was getting behind and to pass customers on to others if they were waiting when he was due to go on his break. There are also a number of stressors affecting the claimant for which he was required to take positive action in speaking to his manager and accessing e-learning materials. There was no evidence before us that the claimant took such action, only that he reacted to matters which he said caused stress.

26. Mr Hickman also recommended the claimant have another consultation with Occupational Health and referred him accordingly although we note the next report is dated 17 August 2017. The outcome of that consultation (page 95) included the following recommendations:

"Monitor the workload to avoid uneven, unexpected or excessive demands, and to ensure that it is commensurate with current capabilities".

"A continuing supportive and empathetic approach would be advised as likely to help him remain in work".

"It is important to recognise stressors arising and to take prompt empathetic action; therefore, you may consider that supportive mentoring may help provide an opportunity to express any workplace needs and concerns".

27. A further stress reduction plan was also put in place on 24 August 2017 (page 97) in which there was a continuing theme to the effect that the claimant should take his breaks on time and that the standards of behaviour policy should be adhered to, presumably by both the claimant and management.

28. The next significant factual issue arose in October 2017 after the claimant returned to work from a period of sickness absence. Miss Bi had indicated to him that she would undertake his back to work interview. The claimant told her he did not want her to do it as he did not want her to look at his OH report. The claimant had returned to work on 14 September. After the initial exchange just referred to, Miss Bi approached the claimant to confirm she would be conducting the back to work interview. He again said he wanted an experienced manager as his case was "complex and sensitive" (paragraph 15 of his witness statement). Miss Bi consulted Ms Ordidge and then confirmed she would conduct the interview. The notes of interview dated 4 October (page 109) do not appear to be controversial. However, Miss Bi advised the claimant he had taken 5 spells of absence since 19 September 2016 and had passed his trigger point by reaching 16 days' absence. The claimant reacted by disputing this and affirming his understanding that the slate had been wiped clean in December 2016 by Mr Hickman. Miss Bi then tried to give a letter to the claimant asking him to attend an absence management meeting in response to which the claimant accused management of victimising him because of his previous tribunal proceedings. He alleged Miss Bi had not followed the respondent's absence management procedure which stated that a formal investigation could not be held before an informal discussion had taken place. He refused to accept this letter.

29. The claimant then alleges that Miss Bi went into a nearby room and he saw her discussing some papers with a manager, Mr Hunt, and his deputy, Mr Singh. He says at paragraph 21 of his statement, "The impression I got was that (Miss Bi) was discussing my case with (them)". Since the claimant could not hear what Miss Bi was discussing with Messrs Hunt and Singh, we find his evidence on this point to be pure speculation.

30. Ms Ordidge asked to see the claimant on 6 October and asked to discuss Mr Hickman's letter which increased his trigger point. The claimant did not dispute in his oral evidence that he raised his voice (he says to match the level of Ms Ordidge's) and said that neither she nor Miss Bi knew what they were doing (incidentally, the same phrase he used towards Mr Feeny). He also said he was leaving when Ms Ordidge confirmed the meeting was not formal.

31. Subsequently, after seeking the counsel of Ms Ordidge and HR, Miss Bi left the letter inviting him to an absence management meeting on the claimant's desk. He took it to Ms Ordidge and said he was not attending the meeting. She left the letter again and he returned it to her, dropping it on her desk. He subsequently raised a grievance against both Miss Bi and Ms Ordidge claiming, inter alia, bullying and harassment and that the absence management process had been applied incorrectly. He had by this point written to Miss Bi in rather curt terms (page 111 and 121) and to Ms Ordidge to confirm he would have no further meetings with Miss Bi (page 112 and 157). In fact, he subsequently wrote to Ms Beech, who was investigating his grievance clarifying that he did not just want to deal with either of them during the investigation, but did not want to deal with them again (page 158).

32. We do not agree with the claimant in this regard. His opinion is that no formal action may be taken until after an informal process has been followed. He relies on the wording of the policy (page 333) which states, "Your manager is likely to discuss any concerns about your sickness absences with you informally to begin with". However, at page 334, the policy states, "Your manager will begin the formal absence management process when you have been absent for either

8 days or 4 spells or more, within the current 12 month rolling period". This is then amended for those employees whose trigger points have been increased, as with the claimant. The policy also requires employees to engage in the process at both formal and informal levels. The claimant clearly refused to do this. We find he did so in the mistaken belief that Mr Hickman's letter should be interpreted his way and not the way it was meant.

33. As the claimant refused to attend the meeting, Miss Bi reached her decision on his absences and wrote to him to advise she was not going to issue a warning but encouraged further engagement with OH (page 166).

34. Miss Bi had continued to line manage the claimant and there were 2 further altercations between them. The first occurred on 5 October 2017 when Miss Bi approached the claimant while he was on his break asking if he could see a customer after it. He took umbridge at this and, although their accounts differ, it is clear he flatly refused to help out, told Miss Bi he had asked her deputy to tell her he did not wish to speak to her, not to interrupt him on his break and that she asked if he was refusing a reasonable management request. Then on 30 October, the claimant returned from his break to find papers for 5 customers on his desk who had not been booked in to see him. He asked them who had told them to put the papers on his desk and they pointed to Miss Bi who he says was glaring at him. He told the customers to give their papers back to Miss Bi which they did.

35. During the course of the investigation into his grievance, the claimant asked Ms Beech to change his line manager. This was done but it took around 6 weeks. The delay was due to pressure of work, absences from the office and the claimant's refusal to allow a number of people to line manage him. In effect, the respondent was running out of people to undertake this task.

36. At around the same time, Miss Bi was actively taking advice from HR and was told to continue with the absence management process and the claimant's mid-year review, which he refused to attend with her. Miss Bi was an inexperienced manager and it was entirely appropriate for her to take such advice. Her email exchanges with HR were produced to the claimant as a result of his subject access request. The claimant takes issue with the comments Miss Bi makes about him in these emails and the log she kept (page 313). He says the comments are unfair but, given his admissions about what he said to Ms Ordidge, we consider them to be reasonably accurate. We bear in mind two things here. Firstly, Miss Bi was seeking advice on how to deal with the claimant's behaviour and, secondly, he received no warnings whatsoever for his absence or his conduct. We accept that Miss Bi was genuinely trying to do her best to understand the claimant's disability and to support him. With his conduct at the Hearing and the comments made about him in evidence, he was clearly a very difficult person to engage with and his behaviour was prompted by others disagreeing with him as much as him believing he was having worked "dumped" on him.

37. It also became apparent to Miss Bi that the claimant was blocking out periods in his diary so that no appointments could be made during those periods. In her evidence, Miss Bi confirmed this was a perfectly acceptable practice provided the employee had previously cleared it with his or her manager. The claimant had not done this. Whilst he says he did it because he was tired due to the effects of his disability, we consider it entirely reasonable for this to have

been cleared with his manager first. This is all part of the engagement encouraged in his stress reduction plan. Any criticism leveled at the claimant in this regard was entirely justified.

38. The claimant's grievance was thoroughly investigated but not upheld (pages 246 and 248) as Ms Beech found no evidence of bullying or harassment by either Ms Ordidge or Miss BI. The claimant appealed this outcome but his appeal was dismissed by Ms S Jury-Onen, Black Country Service Leader (page 417).

Submissions

39. The claimant made no submissions and left the Hearing without listening to the respondent's submissions.

40. Mr Feeny produced written submissions which he supplemented with oral argument. We summarise these with an apology if we have missed a point he considers important. On ss. 20-21, he submitted that there were 3 complaints. The first was invoking the absence management procedure. There was a PCP of a requirement that the claimant, in line with other employees, had to achieve a certain level of attendance to avoid being subjected to the procedure. The claimant's disability put him at a disadvantage because his levels of absence were likely to be higher but a reasonable adjustment had already been made for him by increasing his trigger point from 8 to 11 days. There was no agreement, as suggested by the claimant, that the slate had been wiped clean in December 2016 and it would not have been reasonable to do this.

41. The claimant's second complaint was of not being able to take his morning breaks and/or being required to be flexible in taking them to accommodate customer appointments. The PCP applied was requiring employees to be flexible in the times at which breaks were taken. The claimant refused so there was no disadvantage to him.

42. The third complaint arose out of the allegation that the PCP was the requirement to take on an excessive workload. As with the second complaint, there was no disadvantage to the claimant as he refused to undertake extra work.

43. In relation to s.15, the claimed unfair disadvantage was being subjected to criticism but it was unclear what the "something" was that the claimant alleged was the reason for his treatment. He discussed causation and asked whether this was a case where the effects of the claimant's disability led to unfavourable treatment, which was denied. If it was such a case, the requests made to the claimant were reasonably necessary to achieve the legitimate aim of ensuring employees comply with reasonable management requests.

44. As for victimisation, the previous tribunal proceedings were accepted as being a protected act. It was for the tribunal to determine whether that protected act was the reason for the treatment complained of in the sense of being a material influence on the decisions.

45. Mr Feeny argued that any act or omission which predated 16 August would be out of time and this caught the alleged unfair criticism from Mr Hickman on 7 July 2017. Further, it was arguable that the respondent might reasonably

have been expected to make the reasonable adjustments sought by the claimant before 16 August 2017.

Conclusions

46. Our discussion begins with the claimant's character and issues. The Preliminary Hearing refers to his social anxiety but we heard nothing further on this as to how, for example, this affects him and whether it is a consequence of his disability. The judgment in his previous tribunal claim describes him as "difficult and prickly". Considering our own observations and the exchanges that took place between the claimant and the Employment Judge, and the claimant and the witnesses and opposing counsel, it is a very apt description. He certainly identified as excitable and rude and became rather truculent when anything was said by anybody with which he did not agree. He is clearly a very difficult employee to manage and his responses during exchanges in the events leading up to his current claims were to refuse to engage with the person on the other side of the disagreement. Further, he did so, both verbally and in writing, in a manner which, at the very least, amounted to insubordination. This is not an attempt to assassinate the claimant's character but it is necessary to record for reasons which will become apparent below.

47. We note the burden of proof in disability claims. It is for the claimant to establish facts from which we could decide in the absence of any other explanation that discrimination has taken place in which case the burden shifts to the respondent to show it did not discriminate against the claimant. We have considered the totality of the evidence in relation to each of the claims.

48. We firstly consider the s.15 claim. S.15 EqA states that treatment of a disabled person amounts to discrimination where: an employer treats the disabled person unfavourably; because of something arising in consequence of the disabled person's disability; and the employer cannot show that this treatment is a proportionate means of achieving a legitimate aim. It is accepted that the respondent had knowledge of the claimant's disability.

49. The case summary from the Preliminary Hearing records that EJ Harding spent much time explaining this concept to the claimant who did not understand why he had to consider what was in the minds of those he alleges treated him unfavourably. He fared no better in his email to the tribunal (page 248A-B) where he said, "The EJ infers I do not understand my s15 claim. My ET1 states "I was repeatedly unfairly criticised by managers because I took my breaks on time, blocked my diary out and declined certain work; I only did this to manage my disability related tiredness and fatigue". The Equality and Human Rights Commission Code (EHRC) acknowledges, in reference to s15 of the Equality Act 2010, "The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability".
The EJ states in the same section: "The claimant queried why it was necessary for him to say what he thought was in the respondent's mind (that caused them to act as they did)." The same way my query wasn't answered at the PH it is not answered by the EJ in the Order. The way the question came across to me at the PH was that I had to propose an objective justification for the respondent's behvaiour (sic) and I couldn't; that is a matter for the respondent."

50. This passage illustrates two things. Firstly, the claimant did not understand the nature of a s.15 claim (for which we make no criticism of him) and, secondly, his propensity for blaming others – in this case, EJ Harding. Of course, properly addressing the point would have been a matter for submissions but the claimant chose not to make any.

51. Since the claimant did not address the point, the tribunal considered the evidence to try to establish whether he had been treated unfavourably because of something arising in consequence of his disability. We note there must be a connection between whatever led to the unfavourable treatment and the disability. The unfavourable treatment relied on by the claimant is the unfair criticism already mentioned. We have to consider whether the unfair criticism as alleged by the claimant arose in consequence of his disability. The exchanges between the claimant and Miss Bi were addressed by both of them in their evidence. There is some dispute as to who was guilty of the more aggressive behaviour with each blaming the other. Miss Bi recorded in her emails to HR and her log that the claimant was verbally aggressive and physically intimidating. She sought advice on how to deal with this and thought the claimant had failed to follow a reasonable management instruction. Miss Bi was an inexperienced manager dealing with a difficult employee. We accept her evidence that she sought advice from HR in good faith detailing what had happened with the claimant. In essence, she wanted to run an efficient team and the claimant reacted badly to what she saw as reasonable requests. We do not consider that she had the claimant's disability in mind when she criticised him. The claimant said that he became stressed as a result of his disability and we understand that may well be a consequence. However, by his own admission, and the tribunal's experience of him, he was argumentative and simply not willing to engage with those who disagreed with his point of view.

52. In assessing the s.15 allegation we have considered the Sheikholeslami decision in terms of the potential causation being rooted in the claimant's disability. We do not find that Miss Bi's criticism of him was either consciously or subconsciously as a result of his disability. She criticised him because of his behaviour and the refusal to help out by seeing additional appointments. In our view, if the claimant's disability had any bearing at all in relation to s.15, and we do not find it did, it was no more than trivial.

53. The tribunal considered that this alleged unfavourable treatment arose not because of the claimant's disability, but as a result of his behaviour and we conclude, therefore, that s.15 is not engaged.

54. We next consider the alleged failure to make reasonable adjustments. It is clear from the decision in Griffiths that applying a PCP which requires a certain level of attendance and puts an employee at risk of disciplinary action if that level is exceeded, may put a disabled employee at a substantial disadvantage. In the claimant's case, this was addressed by the respondent increasing his trigger days from 8 to 11 in a rolling 12 month period. If we understand the claimant's case correctly, the reasonable adjustment would have been to wipe the slate clean in December 2016 and allow him to take further days of sickness absence. If the claimant's interpretation is correct, that would have meant he could have taken 33 days of sickness absence in a rolling 12 month period. As we have already found, we do not agree with the claimant's interpretation of the outcome of his meeting with Mr Hickman.

55. We have considered the decision in Carranza in relation to the steps necessary to avoid any disadvantage to the claimant. We are not convinced by Mr Feeny's argument that there was no step to take, only a failure to wipe the slate clean. In our view, wiping the slate clean would equate to a step for the purposes of s.20(3). However, we do not think that an exercise in semantics will assist us in this case. We consider that increasing the claimant's trigger point from 8 to 11 days was a reasonable adjustment and, incidentally, one which the claimant seems to have readily accepted at the time it was made. This part of the claim relies on an interpretation of Mr Hickman's letter and we find the claimant is wrong. It would not be reasonable for the respondent to allow the claimant to take more than 11 days' absence without the absence management procedure being invoked. We find no merit in the claimant's argument that inviting him to an absence management meeting was a failure to make reasonable adjustments.

56. The claimant also complains about being asked to not take his breaks at the allotted time and for being unfairly criticised when he refused to be flexible. His reasonable adjustment would appear to be that he is not asked to be flexible. The fact is that he was asked and steadfastly refused. No disciplinary action was taken against him as a result of this refusal. The question is whether the PCP of requiring employees to be flexible in order to meet the business needs of the respondent put the claimant at a substantial disadvantage because he was unfairly criticised for refusing the request. We find that it does not and did not in the case of the claimant. He did not address the point as to whether, in being flexible, he would have suffered increased fatigue as a result of his disability.

57. In relation to the claimant's allegation that he was asked to take on an excessive workload falls at the same hurdle. He was asked to see additional customers but refused. He does not claim that seeing them would have increased his fatigue only that he was substantially disadvantaged by being subjected to unfair criticism for refusing to undertake this work.

58. In relation to paragraphs 56 and 57 above we cannot see that the criticism of him by Miss Bi and others put the claimant at a substantial disadvantage. It is entirely appropriate for them to note the difficulties they faced in their exchanges with the claimant. Had he been disciplined as a result, with no further enquiry, it would have been a different matter, but he was not. Generally speaking, we did not consider that the alleged unfair criticism of the claimant was either unjustified or a substantial disadvantage.

59. S.27 EqA deals with victimisation. It provides that:
(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
(a) B does a protected act.

60. The protected act in this case is the claimant's previous tribunal claim and this is accepted by the respondent. He lists the detriments he suffered as follows:

(i) Setting unreasonable tasks/excessive workload and using his refusal to comply to set him up for a written warning for not complying with a reasonable management instruction. We find this to be speculation on his part as no action was ever taken against him.

(ii) Subjecting him to unfair formal action. This related to Miss Bi's letter requesting the claimant to attend an absence management meeting. Given our

previous findings of fact, we consider the invitation to be perfectly justified and there was no detriment to the claimant. Indeed, he was notified that he would not receive a warning despite exceeding his trigger point.

(iii) Not changing his manager in a timely manner. Again, we have already dealt with this allegation which we do not find to be substantiated. At page 17, the claimant said the delay allowed Miss Bi to continue her campaign of bullying, harassment and victimisation as a means of punishing him for his previous tribunal claim. This leads into his next detriment of:

(iv) Harassment by Miss Bi repeatedly calling him to meetings while his grievance against her and Ms Ordidge was being investigated despite his earlier refusal to attend any more meetings with her. As Miss Bi was still the claimant's line manager, we do not find her invitations to amount to harassment (which is not a claim before the tribunal in any event) or to be because of his protected act.

(v) There was a management witch-hunt against him as a result of false claims that he was aggressive and rude and threw a letter onto Miss Bi's desk and this was in retaliation for his previous tribunal claim and an attempt to take disciplinary action against him. We consider this to be further speculation by the claimant against whom no disciplinary action was taken. We accept that he was rude and appeared aggressive towards Miss Bi (who was also found to have acted inappropriately by Ms Beech in the grievance outcome).

(vi) Not dealing with his grievances against Miss Bi and Ms Ordidge properly. The claimant alleged that Ms Beech's behaviour was biased and unfair only because she held a negative opinion of him due to his protected act. The claimant withdrew his allegations against Ms Beech who was consequently not called to give evidence so this element of the claim is not substantiated.

61. Following the decision in Chief Constable of the West Yorkshire Police (which cited Nagarajan), we must decide whether the protected act was the reason for the alleged detriments in the sense that it was a material influence on the decisions. Given our findings of fact, we find no evidence that this treatment was influenced by the claimant's previous tribunal proceedings.

62. As to the respondent's out of time point, it is academic to address this in detail. The allegation in respect of Mr Hickman which concerned his alleged unfair criticism of the claimant on 7 July 2017 is clearly out of time but other matters were not. For the avoidance of doubt, we do not accept Mr Feeny's argument that the reasonable adjustments claimed by the claimant could have been expected to have been made outside the limitation period with the result that the tribunal has no jurisdiction to hear them.

63. For the above reasons we dismiss the claims.

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Employment Judge Butler

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Date 12 August 2019