EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Collins

Respondent: The National Trust for Places of Historic Interest or Natural Beauty

Heard at: Southampton On: 21, 22, 23, 24 (in Chambers) October 2019

Before: Employment Judge Dawson, Ms Date, Miss Killick

Representation
Claimant: in person
Respondent: Mr Hignett, counsel

JUDGMENT

The claimant's claims are dismissed.

REASONS

1. The claimant brings claims of disability discrimination and, in particular, discrimination because of something arising from a disability and a failure to make reasonable adjustments.

2. The claimant worked in the role of building surveyor for the respondent It is not disputed that he has the condition of electro-hypersensitivity. The respondent does, however, deny that the condition amounts to a disability within the meaning of the Equality Act 2010.

Issues

3. The issues were set out in the case management order of 26 February 2019, sent to the parties on 4th March 2019 as follows:

> **5. Disability**
>
> 5.1. Did the Claimant have a physical or mental impairment at the material time, namely Electro-hypersensitivity?

5.2. If so, did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities? It is emphasised that in this respect, day-to-day activities includes work and non-work activities.

5.3. If so, was that effect long term? In particular, when did it start and:

5.3.1. Has it lasted for at least 12 months?

5.3.2. Is or was the impairment likely to have lasted at least 12 months or the rest of the Claimant's life, if less than 12 months? N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

5.4. Were any measures taken to treat or correct the impairment? But for those measures would the impairment have been likely to have had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

6. Section 15: Discrimination arising from disability

6.1. The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act is as set out below. No comparator is needed.

6.1.1.The extension of his probationary period.

6.1.2.Being required to work at offices with Wi-Fi/wireless/electrical appliances provision.

6.1.3. The conducting of excessive weekly performance reviews in April and May 2018.

6.1.4. Being dismissed.

6.2. Can the Claimant prove that the Respondent treated him as set above because of the "something arising" in consequence of the disability? The something arising as a consequence of the disability is his inability to work, for any prolonged period, in an office-based environment, due to the use in such locations of wireless technology and electrical appliances.

6.3. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? An order was made for the Respondent to set out their pleadings in this respect.

6.4. Alternatively, can the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability? The Respondent accepts that from 11 January 2018, it was aware that the Claimant was raising concerns about what he states to be his disability.

7. Reasonable adjustments: section 20 and section 21

7.1. Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely the requirement to work in a wireless/electric appliance environment?

7.2. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, in that he would become/suffer:

7.2.1. confused and disorientated;

7.2.2. Stinging sensations to his scalp and skin;

7.2.3. Nausea;

7.2.4. Heart rhythm disruption;

7.2.5. Stress and anxiety.

7.3. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant; however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

7.3.1. To allow the Claimant to work predominantly from home, with the exception of attendance to the offices of the Respondent for monthly meetings and catch-ups with a colleague;

7.3.2. To de-activate wireless facilities in his vicinity at meetings;

7.3.3. To restrict use of mobile phones in his presence;

7.3.4. To provide a shielded computer screen for his use;

7.3.5. To permit him not to have to make extensive use of a mobile phone;

7.3.6. To grant him permission to leave any site if suffering any of the above disadvantages; and

7.3.7. To make allowances, in carrying out performance reviews, for his

condition and its effects upon him.

7.4. Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above? Again, the Respondent accepts that they were aware, from 11 January 2018, of what the Claimant describes as his disability.

8. Remedies

8.1. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy. The time allocated includes time for dealing with remedy.

8.2. Additionally, there may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings and/or the award of interest.

The respondent was ordered to better particularise its case on justification and gave further particulars, including the following:

Legitimate aims

7. The Respondent relies on the legitimate aims set out below.

8. The need for the Claimant to perform his role as Project Building Surveyor to a good standard. This aim encompasses:

8.1. the need for the Claimant to communicate well and build relationships with colleagues, volunteers and third parties including sometimes attending meetings and/or performing some work in an environment in which wifi and electronic devices may be present;

8.2. the need for essential documents such as meeting records, progress reports and planning programmes to be completed on a computer so that they could be easily shared and reviewed by colleagues and other stakeholders;

8.3. the need for the Claimant to carry out site visits in order to provide surveying services to between 125-150 historic and other properties which fell within the remit of his role;

8.4. the need, as a new employee, for the Claimant to get to know both his role and his colleagues by being present in the workplace and for the Respondent to have some visibility of the Claimant;

8.5. the need, because the Claimant's standards of communication and performance were poor outside of the workplace, for the Respondent to have some visibility of the Claimant in order to attempt to improve communication and manage his performance.

9. The objectives for the Claimant's role are set out at paragraph 2.3 of the Respondent's Grounds of Resistance.

10. The need for the Claimant and those in his team to interface with other disciplines (e.g. conservation) within the Respondent's organisation by being present at the Respondent's sites and office spaces.

11. Ensuring smooth communication and team cohesion in a cost effective and convenient manner by holding meetings at the Respondent's sites rather than elsewhere.

12. Supporting the productivity of meetings by allowing immediate access to documents stored on computers and/or online for the

purposes of sharing data, effective communication and progressing projects.

13. Allowing for efficient access to back office services e.g. confidential photocopying, printers and other administrative support for the effective performance of the Claimant's duties and to support team projects.

Proportionality

14. The Claimant's probationary period was extended and his performance actively managed through performance reviews in accordance with best practice because he was performing his role poorly. Ultimately, the Claimant was dismissed for poor performance after these earlier measures failed to have any impact on his poor performance. The Respondent submits that these were entirely appropriate and proportionate actions in the circumstances.

Application to Widen the List of Issues and Adduce Further Documents

4. At the outset of the hearing, the tribunal spent a long time going through the List of Issues with the parties. In the course of that discussion the claimant stated that he may wish to widen the steps which he asserts the respondent should have taken, currently set out at issue 7.3 of the Case Management Order following the hearing on 26 February 2019. We gave him some time to consider that application and, after lunch, he applied to amplify that list with the following 3 additional steps;

    - informing other members of his team about his condition,

    - the respondent should adjust its values and behaviours to take account of his condition- the respondent has a Values and Behaviours document which it applies and a Ways of Behaving document which it considers to be a marker of performance; it should have interpreted those documents in a way which was more understanding. The claimant could not point to any particular part of the documents which he stated should have been amended but believed there was a section about making relationships with people,

    - the Equality and Diversity Policy talks about access to environments; the respondent will have someone who champions that policy and they should have been brought in to advise further.

5. The respondent objected to those amendments on the basis that it was too late, now, to raise those matters. In relation to the 1st suggested step, it stated that it bore no relation to the pleaded provision criteria or practice, in relation to the 2nd step it submitted that it was too vague and the respondent did not know the case it had to meet on how that suggested step related to the claimant's condition and, in relation to the 3rd step, the respondent submitted that the suggested step could not amount to a reasonable adjustment because the law is focused on adjustments to the individual's job.

6. In Project Management Institute v Latif [2007] IRLR 579, Elias P held "It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made" (paragraph 53).

7. In London Luton Airport Operations Ltd and another v Levick (UKEAT/0270/18/LA) His Honour Judge Richardson reiterated the point found in various authorities that

"Parties are entitled to expect that ET litigation will be conducted in accordance with issues which have been defined at a Preliminary Hearing; see *Scicluna v Zippy Stitch Ltd & Ors* [2018] EWCA Civ at paras 14-16". We observe also, however, that the tribunal has a discretion to depart from the List of Issues where it is in the interests of justice to do so (including being fair to all of the parties).

8. The amendment to the List of Issues would, in fact, bring in matters which are not pleaded in the Claim Form. This is not a case where the claimant was simply seeking to point to something in the Claim Form which had been omitted from the List of Issues. Although the respondent did not take the point expressly, an amendment to the List of Issues of the nature sought by the claimant would have entailed an amendment to the Claim Form.

9. We have considered the overriding objective and the Presidential Guidance on General Case Management and in particular Guidance Note 1. The guidance note requires that tribunals must carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the management. We also considered *Selkent v Moore [1996] ICR 836, 843F.*

10. We have noted that whilst it is not necessary for a claimant to suggest, whilst working, what steps should be taken by an employer, the respondent is entitled to know the case it has to meet by the time it comes to trial, otherwise it will not know what evidence it should call.

11. In discussing the List of Issues the claimant at one point said that "presumably [the Employment Judge recording the issues] knows how to do his job". The tribunal explained to the claimant that whilst that was certainly the case, the Employment Judge would only record the case as presented to him by the claimant. The claimant did not suggest, at that point, either that he had felt under undue pressure by the Judge or that the case management order of 26 February 2019 inaccurately recorded the claimant's case. We record that, in particular, because in the course of his cross-examination, after this application had been determined, the claimant said that the judge had "shut him down" and said that various things were "for the birds". He did not say that during the application to amend the List of Issues.

12. The case management order following the hearing on 26 April was sent to the parties on 4 March 2019. The claimant raised no concerns about the List of Issues. There was then a further case management hearing before a different Employment Judge when, again, the claimant made no complaint about the earlier hearing, nor did he suggest that he wished to widen the list of issues. The first time that these amendments were suggested was on the first morning of the hearing

13. In respect of the first suggested step, we can see there is at least some connection with the pleaded PCP of being required to work in a wireless/electric appliance environment and the suggested step, in that if the claimant's behaviour was affected by such an environment, then it might be useful for him for other members of the team to be aware of his condition. However, in our judgment, the nature of the amendment is such that it does substantially alter the case, since the focus moves from being about how the claimant's line manager dealt with him to how the claimant's colleagues dealt with him (there would be no basis for telling colleagues about his condition unless it was to affect their interaction with him, or modify their perception of him). It would be unfairly prejudicial to the respondent to be faced with that case for the first time at the start of the hearing. The respondent's evidence does not deal with that issue. To widen the issues would require a good explanation as to why the points had not been raised before and no such explanation has been given.

14. The same points can be made in relation to the second additional step contended for and we also agree with the respondent that that suggested step is too vague. It was not clear to us, nor could the claimant clarify, which Values and Behaviours or Ways of Behaving it was being suggested should be adjusted or in what way they should be adjusted. The case could not proceed on the basis of such a vague assertion. We asked the claimant whether he could point to any particular part of the documents, in an attempt to assist in focusing the suggested adjustment, but he was unable to.

15. We also agree with respondent that the third suggested step could not amount to a reasonable adjustment. The point is similar to the situation where it is asserted that an employer should have consulted Occupational Health physicians but failed to do so. That failure may mean that the respondent failed to take a reasonable step, but the failure to consult is not, of itself, such a failure. A champion may have been able to make some additional suggestions as to steps which the respondent should take but it is not suggested that such a champion would have done more than that.

16. The claimant also sought to rely upon additional documents, we permitted the admission of some of those documents but not all of them. We were told that the documents had not been disclosed by the claimant prior to the hearing and we proceeded on that basis.

    - As to document number 1, the claimant was unable to say where the document came from or when he received it. He stated that it might be the job advertisement for his role but was not sure and said that it was relevant to the case because it suggested that somebody might have thought he was not up to scratch to the building surveyor role and then offered him the job at a lower salary before he accepted it. The respondent has considered the document but states that it does not appear to be one of its documents. If the claimant cannot say what the document is, or where it comes from, it seems to us that it is not fair for the respondent to be presented with it for the first time at the outset of the hearing. Moreover, we do not consider that the reason for which the claimant seeks to rely upon the document is relevant to any of the issues that we have to consider and, in those circumstances we do not admit this document.

    - In relation to the documents numbered 2 and 4 it was suggested by the claimant that those documents were earlier iterations of the document which appears at page 155 of the bundle but the claimant was unable to say when they were created and has not dealt with those documents in his statement. Without some evidence as to when the documents were created, even in the claimant's own statement, we did not consider it is fair that the respondent should have to deal with those documents.

    - Document number 3 fell into a different category. The claimant said that was a fuller version of the document which already existed at page 155 of the bundle but that page 155 was truncated. The respondent denied that but, whether it is or not, we consider is a matter for cross-examination. We made no decision, at the admission stage, about the authenticity of document number 3 but we considered that it could be referred to in the course of the hearing. There was no prejudice to the respondent in that respect.

    - Document number 5 is already in the bundle.

- In respect of document number 6, there is an issue as to the authenticity of this document but it is clear what the claimant says it shows, in terms of his expenses and where he was travelling too. We admitted it.

- Document number 7 was not objected to.

17. At the start of the 2nd day of the hearing counsel for the respondent informed us that, in fact, the document we had numbered 4 had been disclosed. In those circumstances we permitted its use in the hearing.

Conduct of the Hearing

18. We sought to establish at the outset of the hearing what adjustments should be made in order to assist the claimant. We explained that the judge was using a laptop computer connected to 2 screens but that his connectivity was entirely on a wired basis rather than a wireless basis (including to the Internet). There was no wireless router in the tribunal room, as requested by the claimant in advance of the hearing. The only other electronic equipment in the room was the equipment for recording the hearing and we noted that counsel for the respondent was using a laptop computer.

19. The witness table was situated very close to the electronic recording equipment and, therefore, we moved that table across the room so that when giving evidence the claimant would not need to sit close to the equipment.

20. We asked the claimant whether any other adjustments were needed and he said they were not. We indicated to the claimant that if further adjustments were needed he should ask and we would endeavour to ensure that his requests could be accommodated. Towards the end of the 2nd day of the hearing the claimant suggested that his symptoms were becoming worse and we asked him whether he sought any further adjustments to the room or whether there was anything else the tribunal could do to assist in him having a fair hearing. He said that there were no such adjustments.

21. The claimant also told us that he was hard of hearing, particularly in the right ear and suffered from tinnitus. The claimant was sitting at the claimant's table which was on the left side of the room (when facing the panel) which meant that his good ear was towards the wall. We suggested that he should swap tables with the respondent but this he declined. When he was giving evidence, he had his good ear to the tribunal but was facing counsel for the respondent and did not appear to be in difficulty hearing. However, we stressed to the claimant that it was important that he played a full part in the hearing and that if he was having difficulty hearing the tribunal or anyone else he should not hesitate to say so. We reiterated that throughout the hearing and endeavoured to keep our voices up.

22. After lunch on the 1st day of the hearing the claimant relayed a message through the tribunal clerk to the effect that he also suffered from short-term memory issues. We asked him how the tribunal could accommodate that and he stated that there were no particular adjustments which could be made but we have, of course, taken that into account in reaching our decision, in so far as our decision relied upon instant answers being given by the claimant during the course of the hearing.

23. Given the length of the hearing it was necessary to set a timetable to ensure that both parties had a fair opportunity to question witnesses and present their case. At the outset of the hearing a timetable was agreed, based on the claimant starting to give his evidence at 2 PM on the 1st day. In fact, because of the resolution of the issues set out above the claimant's evidence did not start until 3 PM. The timetable was therefore adjusted in discussion with the parties. The respondent was given 3 hours to cross examine the claimant, which it stuck to. The claimant was given one

hour and 45 minutes to cross examine each of the respondent's witnesses. The claimant was able to finish cross-examining the 1st witness after one hour and 35 minutes although, following the tribunal's questions, sought to ask an additional question which we permitted. A similar pattern followed with the 2nd witness, namely that the claimant finished cross-examining within the time allowed but then sought to ask additional questions which used the time available. The parties were each given a maximum of 45 minutes to make closing submissions.

24. We heard from the claimant and, for the respondent, from Mrs McLackland and Mrs Taylor. We had 3 bundles of documents, a core bundle, a bundle of supplemental material about the condition of electro-hypersensitivity and a bundle relating to mitigation of loss. The tribunal reached its decision immediately following the close of submissions on day 3 and into day 4. After the tribunal had finished deliberating and had reached its decision on day 4, a further set of emails were received from the claimant. The Employment Judge considered those emails and decided that there was no prospect of them changing the decision of the tribunal and, in those circumstances did not seek to reconvene the tribunal.

Findings of Fact

25. Except where stated, references to page numbers in this judgment are to the hearing bundle.

26. On 23rd of August 1999 the claimant wrote to a Dr Florido setting out a range of symptoms which, he said, became apparent after exposure to his large computer screen. They included mild tingling on the left side of the head, lights in the eyes, dizziness, impairment of memory and a foggy feeling, amongst others. He stated that he had been loaned a LCD screen for the last 3 weeks and had felt only a mild degree of the above symptoms. (Page 243). The claimant clarified in evidence that the screen was a very small one.

27. On 5 October 2005 the claimant consulted Dr Dowson who gave a report dated 6 October 2005 which referred to symptoms from which the claimant suffered, including tingling on the top of the head, memory loss, aches and pains, a woozy head and sleep disturbance. The doctor stated "he has had to adjust his life. He can cope with his condition in that he now switches of the lighting circuits in his house and virtually all electricity at night… He has had to change his occupation to one that does not involve access to computers or mobile phones and is now working part-time… He avoids not only mobile phones but also digital cordless phones." Dr Dowson went on to conclude that the claimant suffered from a neurological impairment which had an effect on his day-to-day activities and that he had to modify not only his lifestyle but also his occupation." (Page 254).

28. On 21 January 2009 the claimant attended his GP when his symptoms were recorded as "tired all the time despite good sleep. Denies depression. He puts it down to being electro-sensitive." (Page 252). There are various other references in the general practitioner reports to electro-sensitivity including on 5 February 2009, 11th December 2009, 31st December 2009, 18th February 2011, 9th November 2011, 4th December 2014, 14th October 2015 and 4 May 2018. However, many of those entries do not show a particular effect of the electro-sensitivity.

29. The claimant's impact statement, made for these proceedings, states that he has "difficulty in sustaining long periods in environments where these technologies are present."

30. Towards the end of 2017, the claimant applied for the role of building surveyor with the respondent. He filled in an equal opportunities monitoring form in which he

stated that he did have a disability but preferred not to give more information (page 78).

31. A job description for the surveyor role exists at page 81 of the bundle. The claimant asserted that he had not seen that description, although he did accept that his role included the planning and organisation of building projects, good teamwork and working collaboratively.

32. We accept the respondent's case that teamwork and working collaboratively was an important part of the role, largely for the reasons set out in paragraphs 4 and 6 of Mrs Taylor's witness statement. She stated that there was a project team "comprising the Let Estate Manager… Archaeologist… Curator… Finance Support… Estate Manager… Project Client" and there was a regular need to work with the conservation team on ecological issues. Mrs Taylor stated "Paul's role naturally involved surveying buildings, but it was also a project management role at its heart, requiring the ability to forecast the work which needed to be done on each property, budgeting for those works, arranging specifications at the appropriate time, tendering for and appointing contractors to carry out the works and managing those contractors while they were on site. In amongst that there is a need to coordinate those works with the work of the wider team mentioned above."

33. The respondent's values and behaviours are set out in a document at page 72 of the bundle. They include working together, trusting and empowering each other to make good decisions and "engaging a wide range of people and communities, building relationships that inspire yourself and others".

34. The claimant was appointed by Mike Buffin and, before he accepted the role, there was an email exchange between him and the claimant which appears at pages 83 and 84. The claimant had asked about the ability to work from home. Mr Buffin had written stating "regarding working from home, we have a flexible approach to occasional home working which is in agreement with your line manager, and in the way you have suggested is fine by me. But for clarification to qualify for home worker status the role would need be based at home for 80% of the time and this role does not qualify… The reason I put down the Wisley hub is so your business mileage can start from there, as a charity we can't claim the private mileage between our home and place of work unless it's the shortest travelling distance."

35. Mr Collins replied "the point for me is reassurance that I won't be travelling every day to Micheldever, to write specs etc. I understand that I can do this remotely using NT intranet. So for instance if I were carrying out site visits I could leave from home (or Wisley) and later head home to write up/compile specs etc as opposed to turning up at the Hub, Slindon or the office other than for prearranged meetings and appointment. The discussion along similar lines I had with Carol was to ensure that I would not be expected to arrive at an office destination purely for the sake of undertaking this type of work. Obviously I will be travelling extensively in the field at all other times."

36. Mr Buffin replied, "regarding work location, I will add Micheldever as your hub location, and Wisley as a 2nd location, so you have this in an email I would only expect you to visit Micheldever once or twice a month (after we have completed your initial induction training). Beyond that there is great flexibility in how you undertake your role."

37. On 27th of November 2017 the claimant was sent a conditional offer of employment with a start date of 11 December 2017.

38. Around the same time the claimant was also asked to complete a new starter form in which he was asked whether he believed he would need any adjustments to his

workplace to enable him to carry out his duties effectively and he replied "no". The form expressly stated "the Trust has a legal obligation to make reasonable workplace adjustments to remove, reduce or prevent the obstacles a disabled worker or job applicant might otherwise face."

39. The claimant was tasked with the refurbishment/renovation of a number of National Trust properties. He was, as we have described, part of a team in that respect. He was required to liaise with Carol Taylor who was the project manager for the South Downs Let Estate Program. She was not a line manager for the claimant but was closely involved with his work. The respondent's properties where employees worked were set up as any other modern office environment would be. They had Wi-Fi connectivity and members of staff would use mobile phones as well as having access to landlines.

40. The claimant had a meeting with Mrs Taylor on 15 December 2017. He set out his understanding of the works required from him in that meeting, including the need to produce a programme of works (page 95). Mrs Taylor stated, and we accept, that the programme of works could have been completed in around 5 hours, at most 1 to 2 days. The claimant agreed it, in his evidence, that he did not deliver the same until March 2018. This had been a source of frustration to Mrs Taylor.

41. In December 2017 Mrs McLackland became the claimant's line manager.

42. The claimant met with Mrs McLackland on 11 January 2018 and told her about his condition of electro-hypersensitivity. On the same day, she sent an email to the claimant stating "further to our meeting this morning, I have sought further advice from People Services [the respondent's human resources organisation] in order to ascertain what type of adjustments what might be able to make your life more comfortable and to aid your performance. They have advised that a referral to Occupational Health is the best route to get a specialist assessment and therefore I will be making a referral to them." (Sic). She concluded "if you have any queries please don't hesitate to shout." (Page 105). She told the claimant that she was happy for him to work at home on an ad hoc basis if he felt that is what he needed to do.

43. A telephone assessment took place between the claimant and an occupational health adviser on 15 January 2018. The adviser stated "following our discussion today Mr Collins advised that he has electro-hypersensitivity for the last 20 years… The impact of this has been e.g. feeling foggy headed and fatigue. Mr Collins discussed how he can experience a stinging and itching to the head. The threshold for this can vary. Mr Collins has a good knowledge and understanding of the condition and explained how practices prudent avoidance, not using a mobile phone and he prefers to use it hands-free. He has no home Wi-Fi. Recently at work he has felt a stinging sensation to his head when near a router. In his role Mr Collins discussed how he can need respite as he can feel over energised and fatigued at the same time… He reports that he has working from home flexibility and takes a break. In a meeting he can find the optimum time to be in the meeting can be 2 hours…". The report also states "I am hopeful that the condition will not have a significant impact upon his work performance but there is potential for this to. You may wish to consider the following

    - the option to continue working at home (if operationally feasible)
    - a DSE assessment
    - a regular one-to-one is recommended to check on his progress as he is new to the role, to offer support.

- Mr Collins is aware to discuss with his employer if he has any concerns going forward with the condition and is working.

  …

  Given the length of time Mr Collins reports symptoms of the electro-hypersensitivity condition, the terms of the Equality Act 2010 are likely to apply…" (Page 107)

44. Initially, in the hearing, Mr Collins accepted that occupational health report was largely accurate. He was asked whether he had had the opportunity to say what he wanted to and said that he had. He was asked whether what was in the report was what he had said and he replied "I can't give you an accurate account of what I said over the phone but looking at it that is approximately it." It was put to him that he did not write back and say that he did not agree that OH had not properly recorded the condition and he agreed. It was also put to him that he did not say to his manager that he did not agree the report and he agreed with that proposition also. Those exchanges are of some significance since when the claimant was then put under some pressure about the differences between the occupational health report and the List of Issues, firstly he criticised the judge conducting the preliminary hearing for closing him down and then, when it became apparent that, in fact, what the preliminary hearing had recorded was wider, not more narrow, than the occupational health report he stated that the occupational health practitioner had made some errors. We find that the occupational health report does record what Mr Collins said to the practitioner.

45. The claimant agreed that, thereafter, Mrs McLackland told him that he could go home when he needed to, providing that he told her that he was doing so, or take a break when he needed to.

46. On 7 February 2018, Mrs McLackland met with the claimant in what she describes as a "regular one-to-one" to discuss the report. She states that he agreed that the ad hoc working arrangement which had been previously discussed was sufficient and did not ask for any further adjustments beyond the recommendations in the report. There is no note of that meeting which is particularly unfortunate in the circumstances and we note that, in fact, no DSE assessment was carried out. Nevertheless we do accept Mrs McLackland's evidence in this respect. She also states that, at that meeting, discussions in relation to performance matters took place, which we also accept.

47. It is apparent that by that time there were issues in relation to the claimant's performance. On 4th of January 2018, Mrs Taylor had emailed some of her colleagues stating "I was hoping you could let me know if Paul Collins was asked at interview if whether he had ever collated a tender package and written and tendered any specifications and if so did he indicate the extent of his experience?" Following a reply to that email, on 5 January 2018, Mrs Taylor emailed Mike Buffin, then the claimant's manager, stating "it is very early days and I do not have a specific concern. Some flags did arise which are non-specific at the moment. My enquiry was motivated from conversations I have had with Paul when I have tried to talk about the specifications and tendering and have not felt confident he knew what was required. He can have a tendency to go off at a tangent." (Page 97).

48. On the 26 February 2018, Jane Cecil, General Manager – South Downs and Project Client, in respect of the claimant's projects, wrote to Mrs McLackland stating "I feel I ought to write you formally about my concerns with regard to Paul Collins." She went on "I am concerned that he is not part of the team and does not seem to be a team player. He doesn't seem to want to work from any of our offices and was very quick to leave after one meeting that he attended. At the meetings itself he seemed very confused. He was unable to coherently give us an update

on the work that he was doing…" (Page 125). The meeting being referred to was one on 7 February 2018 which the claimant accepted, in his evidence, had not gone well and we accept that email was written in good faith.

49. Mrs McLackland replied "hopefully it will reassure you to know that I do have concerns about Paul's ways of working and in particular his interactions with and impact on other people. I have picked this up with him informally and also at his mid-probation meeting. This will be a significant consideration that I take into account when we come to the end of his probation period later this month." (Page 124)

50. On 9 March 2018 Mrs McLackland wrote to the claimant stating that she was extending his probationary period until Sunday, 15 April 2018. She stated "this will provide you with a full 3 months with me as your line manager and therefore a clear opportunity to address the performance concerns that I have raised with you. Whilst we have discussed at length the areas of your performance which are currently giving rise to concern, I will write you under separate cover setting these out so that you are completely clear about the concerns and also what we need to do to address them." (Page 127).

51. On 22 March 2018 a one-to-one meeting took place between the claimant and Mrs McLackland. This was one of a number of one-to-one meetings which Mrs McLackland carried out.

52. On 23rd of March 2018, Jane Cecil emailed Mrs McLackland again stating "Paul was unable to present his programme of work in a coherent way. He said he had a chart which is what we had asked for but then he refused to share it – saying that it was just for his information.… He seemed to be worrying about listed building consent (he has never applied for one before) but hadn't done a drainage survey. He seemed to have the wrong dates for some of the cottages. He was also very reluctant to discuss the following year at all but I had to leave that point. He seems to be very nervous, he arrives just before the meeting and leaves immediately afterwards. Not quite sure how to put this, but he has a very odd manner and says the sort of things that were probably considered appropriate in the 1970s. I can't give you an example which is a bit poor but he's just not very aware of the type of language he uses – he makes off-the-cuff, nervy asides that make me wince. Sorry – that probably isn't very helpful but he has no rapport with the team which worries me. He just seem to be a team player and I think it hard to think of a role in the Trust where you work mainly on your own." (Page 146, it seems likely that Ms Cecil intended to write "he just *doesn't* seem to be a team player)..

53. Mrs McLackland replied on 28th of March 2018 stating "sadly this all aligns with my own observations and feedback from others…".

54. Around this time the claimant's father had died and his funeral took place on 6 April 2018.

55. On 10th of April 2018 a meeting took place between the claimant and Mr McLackland following which she emailed notes including short objectives for the coming week. She set out in those notes that she had continued to receive negative feedback about his impact on the team dynamic, lack of communication and engagement with his team and also ineffectual delivery at project meetings. She reiterated the importance of the claimant spending time at the Slindon property. She recorded that the claimant had "acknowledged that at times he is underprepared for meetings and may appear disorganised but said that he felt this was largely due to lack of formal agendas for meetings. With regard to not spending time at the Property, he reiterated his previously stated view that he couldn't see why this was necessary as he was delivering his tasks and that if the Property team wanted him to be more involved, it was their responsibility to invite

him to things. In mitigation, [the claimant] also referred to the recent death of his father, the fact that he found the drive from home to Slindon hard as it required continuous clutch work and that the office environment at Slindon was particularly deleterious in relation to his electro-sensitivity." However she also recorded that he had "continued to challenge the need for different ways of working and that his current way seemed to be the "only sustainable model" due to his electro-sensitivity". Mrs McLackland therefore decided that a 2nd occupational health referral was appropriate (page 151). She listed as a short-term objective of the claimant that he should spend at least one half working day working from the Slindon office each week. In that meeting the claimant's probationary period was extended for a 2nd time for a further month.

56. Slindon was the office where most of the claimant's team was based. He accepted in cross examination that he had attended that office twice in January, no times in February (in which month had done 7 other journeys), twice in March (in that month he had done 7 other journeys, once in April (when he had done 6 other journeys). As we have alluded to above, the respondent considered the claimant's role to be a team role. It is clear that the respondent puts a heavy emphasis on collegiate relationships and teamwork. The claimant did not have the same understanding of the need for teamwork. We have set out above that he stated, to Mrs McLackland, that if the Property team wanted him to be more involved to it was their responsibility to invite him to things. It is not clear to us why it should be their responsibility. We note that in the claimant's grievance dated 10 June 2018 he stated "so-called Teamwork is a multifaceted dynamic involving reciprocation from all parties, this was never the case as it was not fundamentally essential". The claimant was cross-examined on the question of teamwork. He accepted that working from home raised issues about interaction with colleagues. He accepted that he could work around those issues by making a huge effort with colleagues when he met them, by hanging around after meetings and by making appointments to see colleagues when he went into the office. It was put to him that it ought to have been possible within the limits of his condition to build a good relationship with colleagues and he replied "yes". Mrs McLackland and Mrs Taylor both gave evidence that employees would carry out "walking meetings" in the grounds of properties away from Wi-Fi which the claimant could have engaged in but did not do so. We also noted the suggestion of the claimant to Mrs Taylor that she should have organised a social for him to get to know the team better but, if he could have engaged in such a social meeting, we struggle to see why he could not seek to make his own arrangements to meet with colleagues outside of the working environment. We also record that at one of the respondent's premises, Saunderton, there was a restaurant with no Wi-Fi or other connectivity which had been used for a meeting with the claimant which he told us he had found helpful. That would, therefore, be a potential meeting place for the claimant and his colleagues.

57. A further one-to-one took place on 17 April 2018 when, again, the claimant was set a series of short-term objectives (page 160). The short-term objectives were based on the Performance and Development Review document which had put in place various objectives. We do not know when that document was started (it sets annual objectives) but we accept Mrs McLackland's evidence that the short-term objectives were a breakdown of the objectives within that Review. Her intention was to attempt to assist the claimant in managing his workload bearing in mind that he was, by now, in an extended probationary period and it was apparent to her that he was struggling. We find nothing inappropriate in her breaking down the objectives in that way, indeed to the contrary we think it was supportive and appropriate management.

58. A team/hub meeting took place on 18 April 2018. The claimant arrived 25 minutes late. The meeting had been chaired by Tina Cook, a consultancy manager for London and the South-East. Mrs McLackland emailed him stating "I was

disappointed to hear that you were 25 minutes late for the hub meeting today – this is not acceptable as these are important meetings…". He replied stating "re lateness for Hub meeting – yes apologies for the late arrival. Out of interest who relayed that to you so rapidly? I did explain that I had car issues…" (Page 165). Given that, by this time, he was in the second extension of his probationary period, one would have expected a more concerned response rather than the somewhat combative "who relayed that to you so rapidly?". The claimant confirmed in his evidence that his late arrival was nothing to do with his condition.

59. On 3 May 2018 the chair of the meeting emailed Mr Collins with feedback from the meeting. It was apparent that she been asked to do so by Mrs McLackland. She stated that she was disappointed by the claimant's late arrival stating "many team members travelled a considerable distance to get to Mottisfont that morning but you were the only one that was late. Also, you made no effort to contact myself… or one of our Business Support Coordinators… I also think that it is unprofessional of you to have failed subsequently to apologise to me for your lateness on this occasion… It is vital that as a Consultancy we act in a professional and credible way at all times." She went on "… I think it is also important that I feedback to you very honestly about the nature of your impact that you had on the meeting through your attempts to engage. Firstly, you spoke very frequently, and besides myself (as chair), you were far and away the most verbose person in the room. It is very noticeable and came across as unusual. We have a very collaborative and trusting culture within our team and it is deeply important to me that everyone feels able to say what they want in an open and honest way – but when one person seeks to dominate every discussion it stands out as being out of alignment with our normal ways of working as a team.… Also I have some serious concerns about the relevance of several of your comments. Again, I could see that you are trying hard to be part of the conversation and to contribute to the discussion – but the truth is that sometimes… you would be better off listening to the contribution of others… You have a tendency to assume an air of expertise in all subjects and make suggestions that are just not relevant. Also, when others politely dismiss the suggestions or try to turn the subject you don't appear to realise that this is happening and you continue to try and make yourself heard. One example of this was your suggestion about chickens in the frameyard at Mottisfont. It just wouldn't be appropriate for many reasons, you kept reiterating it – even doing an impression of a chicken at one point. I'm sure that was intended to add humour to discussion – but my point is that you really need to show greater respect for other people's areas of expertise… You demonstrated a real lack of understanding of the team culture and way of working in that meeting and afterwards to team members specifically commented to me about your odd behaviour." (Page 207).

60. Mr Collins replied "thank you for your frank and honest feedback. Lessons learnt here, perhaps my enthusiasm came across as arrogant? My input was partly driven by a genuine desire to show those that were presenting that I cared and I was truly interested in what they had to say.…" (page 205).

61. The tone of that response was appropriate but we note the claimant did not suggest that his condition had any impact on his behaviour. That is consistent with the claimant's answer to the questions in his cross-examination in this respect. Having confirmed that he was not late because of his electro-hypersensitivity was then asked "you have never said you overcompensate in meetings because of electro-hypersensitivity, he replied "not everything is about EHS, I have a condition but I also have a character and personality." He was then asked, "do you accept that what happened on 18 April was unconnected with electro-hypersensitivity?", to which he replied "99 – 98% yes".

62. A further one-to-one meeting took place on 25 April and again there was an attempt by Mr McLackland to break down the claimant's overall objectives into shorter ones (page 178).

63. On 1 May the claimant had a further consultation (face-to-face) with an occupational health practitioner.

64. On 2 May , the claimant met, again, with Mrs McLackland. Mrs McLackland fed back to the claimant that whilst his task-based performance was satisfactory she still had significant concerns about his performance in relation to people and was concerned about his ability to manage his workload going forward. She made clear the probationary period would be reviewed on 10 May and she explained that there were 2 possible outcomes, namely that he would be deemed to have reached the required standard and his employment would be confirmed or his employment would be terminated. The claimant then expressed concern about the respondent's motivations for putting him through the extended probation process and that his perception was that the respondent was unwilling to work to accommodate his electro-hypersensitivity. Mrs McLackland offered that the claimant should bring somebody with him to meeting of 10 May but he declined. She also suggested that if he was concerned about the way the process was being conducted he should contact People Services.

65. That evening the claimant sent a lengthy email in relation to his electro-hypersensitivity. He set out a number of symptoms. Whilst we do not find that those symptoms were simply generic symptoms of the condition, and that they did affect him, we do not find (and it was not the claimant's evidence) that all of the symptoms listed in that email affected the claimant all of the time (page 190). The claimant set out certain things which would assist him. They were:

    - working from home for all computer-related tasks
    - limit computer use to 4 hours per day split into manageable sustainable blocks
    - only attending hubs/offices for essential meetings with a preference for max 2 hours duration
    - conducting admin/PC-based tasks that could be done at home, at home rather than at Slindon.

66. The claimant emailed the same list to the occupational health physician on that evening. She reported on 3 May 2018 (page 209). It is apparent that she had seen the email since she refers to it in her report. She states "In summary, Mr Collins suffers from hypersensitivity to electromagnetic environments. Reports physical sensations when being in close proximity to electromagnetic fields. In my opinion, he would be fit for the role with adjustments in place which would include limiting his exposure to electromagnetic fields contained within the offices. As outlined by the specialist in the previous occupational health report, his case is likely to be covered by disability legislation. It is the employer to determine what adjustments are reasonable, balancing a duty of care towards the employee with your business needs. I see no reason why he should not be able to attend work reliably in the future with adjustments in place."

67. On 8th May 2018 the claimant emailed Mrs McLackland stating that he was not fit to attend work on 10 May due to stress and anxiety. He had been issued with a certificate stating that he was not fit for work. Surprisingly, Mrs McLackland replied stating that whether the claimant attended or not the meeting would go ahead in his absence.

68. The meeting did go ahead in Mr Collins' absence. We accept that Mrs McLackland considered the occupational health report as well as the claimant's email. She considered that the manner in which the claimant had been working went beyond the occupational health recommendations for adjustments. She considered the

adjustments suggested in the claimant's email of 2 May and concluded that Mr Collins did not attend the offices at that time save for essential meetings and worked from home almost exclusively. We accept that was the position. His role involved a mix of computer-based and non-computer-based tasks and although it would not have been realistic to say there would be no days on which the claimant might need to spend a total of 4 hours or more on a computer, most days would not require that level of use. She took the view that over 5 months the claimant had demonstrated that he was underperforming and failing to build relationships. Therefore, she decided to terminate the claimant's employment on the basis that he was not "building relationships with the property and hub teams which enabled effective hands-on support to meet property needs" and he was not taking an active role in hub and property teams which demonstrated the respondent's core values and behaviours of "Inspiring People and Sharing our Common Purpose"(page 221).

69. Mrs McLackland also gave evidence as to some of the other adjustments suggested in the List of Issues. She stated, and we accept, that the Trust is a modern place of work and the offices are equipped with technology which would be expected accordingly. It would be impracticable, she stated, to switch off Wi-Fi and other technology to accommodate the claimant's attendance at the office as all other work would grind to a halt, moreover, the claimant and occupational health had not suggested that such a step was necessary. The claimant had not suggested a computer shield or that mobile phone usage caused him difficulties. We record that the claimant accepted that at many of the respondent's offices there were traditional telephones rather than mobile telephones and the claimant was able to use his own mobile phone with a special hands-free kit.

70. We find there is little evidence that links the concerns about the claimant's performance with his condition of electro—hypersensitivity. The claimant does make the assertion at paragraph 9.3 of his witness statement that "as a consequence of my EHS I struggled to research and produce lengthy documents which I had to type myself and when problems were encountered business support was hit and miss." However he did not point to any particular piece of work which he said had been affected by his EHS and at other times he seemed to suggest that working from home (and using his electronic/electrical resources there) was a solution to any difficulties he had. His witness statement also states "Survey work and performance – I considered this far from poor."

71. We find that the claimant could attend meetings of up to 2 hours duration and his inability to attend for longer than that did not impact on his ability to operate as a member of a team and build relationships.

Law

72. A person has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on his ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.

73. We have had regard to the following sections of the Equal Act 2010

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, 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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

74. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England [2016] IRLR 170 at paragraph 31.

75. In respect of the duty to make reasonable adjustments we have noted, in particular Environment Agency v Rowan [2008] IRLR 20 paragraphs 27 and 56.

76. in assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuit of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim

77. In R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213., Mummery LJ said: "151 … The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

78. In Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601 it was noted that "To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so." (para 22)

Conclusions

79. We state our conclusions by reference to the List of Issues. However we have found it helpful to address those issues in the same way in which counsel for the respondent addressed us, namely by dealing with the questions on reasonable adjustments first, then the question of whether the claimant was subjected to discrimination arising from his disability and thirdly, if necessary, considering the question of whether the claimant is, in fact, disabled. We, therefore, address the questions of reasonable adjustment and discrimination arising from disability on the assumption that the claimant is disabled, without deciding that question at this stage.

Reasonable adjustments

80. Issue 7.1 requires us to consider whether the respondent applied a provision criteria or practice (PCP) that the claimant work in a wireless/electric appliance environment.

81. Mr Hignett submits that the PCP applied was limited in that the claimant only had to work in a situation with Wi-Fi from time to time and for short periods. We do not agree with his characterisation in this respect. It seems to us that the PCP he has identified is the working practice which existed for the claimant after the respondent had applied the adjustments which it says is reasonable. We have concluded that the PCP which was applied for the purposes of section 20 Equality Act 2010 was that for those employees who were not properly described as home workers (such as the claimant), they should regularly attend an office to work and that office would be an environment in which there were wireless and electrical appliances.

82. In respect of issue 7.2, the respondent's submissions were that whilst it knew of the symptoms set out in paragraphs 7.2.1 to 7.2.3 (confusion and disorientation, stinging sensation scalp and nausea) it did not know of the other conditions. We did not understand Mr Hignett's submissions to be to the effect that the claimant did not suffer from those symptoms and, in those circumstances, we accept that being required to work in a wireless/electric appliance environment would place the claimant at a substantial disadvantage in comparison with persons who are not disabled.

83. In paragraph 7.3 of the list of issues, the adjustments asserted as reasonably required are identified. We will address each of them in turn.

84. In respect of 7.3.1 the claimant was, in general, allowed to work from home with the exception of attendance at the offices of the respondent for monthly meetings and catch ups with a colleague. However, the claimant was also required to meet with contractors as necessary and to attend at the Slindon office for one half day per week from April (in fact the claimant did not attend as required but that is not relevant to the question of what adjustments were made). We find that the actions of the respondent in this respect were reasonable. The claimant's own evidence in his disability impact statement is that he had difficulty in sustaining "long periods"

in environments where those technologies are present. Whilst we note that, in closing, the claimant sought to move away from that position by defining "prolonged periods" as being anything from a few moments, we also note the claimant's email of 2 May 2018 to his line manager and to occupational health which suggested, as an adjustment, that he only attend hubs/offices for essential meetings with a preference for maximum 2 hours duration. We find that the claimant was not, generally, at a disadvantage by being required to attend meetings for up to 2 hours. Moreover whilst the claimant was required to attend at Slindon, he had been expressly told that he was free to leave if his symptoms troubled him, as long as he told his line manager. We find that those adjustments were reasonable and in terms of his required attendance at the respondent's offices the respondent did take such steps as were reasonable to avoid the disadvantage.

85. In respect of paragraph 7.3.2, deactivating wireless facilities in his vicinity at meetings, given that numerous employees were working in the respondent's offices we accept Mrs McLackland's evidence that it would be impracticable and unreasonable to switch off Wi-Fi and other technology to accommodate his attendance at the office. Other people needed to be able to work and were reliant upon those technologies to do so. The suggestion that the respondent should deactivate wireless facilities must be seen in the light of the other steps taken by the respondent, including largely allowing the claimant to work from home and allowing the claimant to leave meetings etc if he needed to do so. Given the claimant's acceptance in evidence that there were other ways of building relationships with colleagues even though he had difficulty attending the offices for long periods, we do not think that it was necessary for the respondent to take this step.

86. In respect of paragraph 7.3.3 of the issues, we note that the claimant did not raise this as being an issue whilst employed. Although that does not stop him raising the suggestion now, it does raise the question of how necessary the step was if the claimant did not think to suggest it at the time.. The restriction would be imposed while the claimant was attending the respondent's offices would, therefore, impact on the claimant's colleagues. Mobile phone communication is integral to modern life. It is likely that the claimant's colleagues used their phones on a regular basis for contacting each other and other people with whom they had working relationships. It is likely, also, that they were used for things other than making calls. We reiterate what we have already said, generally the claimant was not required to attend at the respondent's offices, he was not required to attend meetings that lasted for more than 2 hours, his email of 2 May suggested that he could attend meetings for that long, he could leave meetings or other events if he was suffering from the symptoms of his condition and, in the circumstances, we do not think it was necessary for the respondent to go further and restrict the use of mobile phones in his presence.

87. In respect of paragraph 7.3.4 of the issues, there is no evidence that the claimant's laptop with which he had been provided caused him any difficulties. He did not raise that with the respondent at the time and he gave no evidence as to the extent he used the laptop (if at all, given that he did not need to use it at home where he had a computer which suited him). We were provided with no evidence as to the extent to which a shielded computer screen would assist the claimant and, even though he sought to widen this to include the provision of a computer with a solid-state drive, there was no evidence as to the extent to which that would have ameliorated any problems which he had. On the evidence that we have, we are simply not able to conclude that the laptop computer which the claimant had caused him any difficulties. We do not find it self-evident that it would do so. Most computers have the ability to turn off wi-fi and bluetooth connectivity and we heard no evidence as to whether the claimant's computer was not able to do that or, if it could, why a problem remained.

88. In respect of paragraph 7.3.6 of the issues, the respondent did grant the claimant permission to leave site if suffering any of the above disadvantages.

89. In respect of paragraph 7.3.7, that the respondent should make allowances in carrying out performance reviews for his condition and its effects upon him we have concluded as follows:

    - The PCP relied upon is that the claimant had to work in a wireless/electric appliance environment. As we have stated, we do not find, on the evidence before us, that being required to work in such an environment, especially in the light of the other adjustments made, impacted his performance. In this respect we note that the claimant has set out in paragraph 7.2 of the List of Issues the ways in which working in such an environment affected him. The claimant has not established that those things, in turn, affected his performance. The issues with the claimant's work were, largely, around his ability to inter-relate with colleagues, carry out teamwork and engage in collaborative working. As we set out below we are not satisfied that, in relation to those matters, the claimant was affected by his condition.

    - The claimant willingly accepted in cross examination that the respondent should not lower the standards for the job he was doing in order to accommodate him. There is no suggestion that, if the standards had been lowered, the claimant would have been able to perform any better.

    - In any event, we find that the respondent did make allowances for the claimant's condition when it carried out performance reviews- which is why the probationary period was extended twice. The respondent could do little else in the circumstances where the claimant accepts that it was not reasonable to lower the standards for the job, and in any event, there is no evidence that doing so would have assisted him.

    Thus in the circumstances, we have concluded that the respondent did take such steps as were reasonable to avoid the disadvantage and, therefore, the claim in respect of reasonable adjustments fails.

Discrimination because of something arising from disability

90. In respect of issue 6.1.1, we accept that, depending upon the context, an extension of a probationary period could be unfavourable treatment. Such an extension is not automatically unfavourable treatment, if a person faces dismissal unless a probationary period is extended then the extension would be considered favourable. Nevertheless we accept that if the person faces dismissal because of their disability, or because of something arising from a disability, then the extension of a probationary period as opposed to the confirmation of that person's employment may well be considered to be unfavourable treatment. Thus, for purposes of this case we accept that the extension of a probationary period could be considered to be unfavourable treatment.

91. In respect of issue 6.1.2, we accept the respondent's argument that the claimant cannot be said to have been required to work at offices with Wi-Fi/wireless/electrical appliances because of something arising from his disability. However, that is to pre-empt issue 6.2. For somebody with the claimant's symptoms, we accept that being required to work at those offices could be unfavourable treatment.

92. We do not accept that the conducting of "excessive" weekly performance reviews in April and May 2018 was unfavourable treatment. We do not accept that the weekly performance reviews were excessive. We find that they were good management practices in circumstances where the claimant was struggling to

perform his role adequately. They favoured the claimant in that he was being given extra support and assistance to work in his role.

93. It is not in dispute that being dismissed amounts to unfavourable treatment.

94. In respect of issue 6.2 the question is whether the unfavourable treatment was because of something arising in consequence of the disability namely his inability to work for any prolonged period, in an office based environment, due to the use in such locations of wireless technology and electrical appliances. As we have already stated that is not the case in relation to issue 6.1.2.

95. The question in relation to 6.1.1 is more difficult. The claimant's probationary periods were extended because of concerns about his performance, however we must analyse whether the concerns about his performance arose because of his inability to work for any prolonged period, in an office based environment, due to the use in such locations of wireless technology and electrical appliances.

    - Concerns were raised in January 2018 in respect of the claimant's abilities to collate tender packages and write tender specifications (page 97). The claimant did not suggest that that was because of his inability to work for any prolonged period, in an office based environment

    - As we have indicated the claimant should have provided the programme of works within a very short period but had not done so by March. That was a matter of concern for the respondent and, again, the claimant has not suggested that he could not do that because of his inability to work for any prolonged period, in an office based environment. The claimant could work at home as his email of 2 May indicates.

    - The failings referred to by Mrs McLackland on 5 March 2018 (in response to Jane Cecil's email of 26 February 2018) in respect of the claimant's ways of working and his interactions with an impact on other people were not connected with his inability to work for any prolonged period, in an office based environment.

    - The failings in respect of the meeting on 7th of February were, on the evidence of Mrs Taylor, partly due to a lack of preparedness and, in particular, not printing off copies of the relevant documents for the meeting delegates. The claimant's case, at its highest, is that Jane Cecil's email refers to him being confused in the meeting but we have no doubt that even if that confusion had been caused by the claimant's condition and even if that had been ignored by Mrs McLackland, his probationary period would still have been extended. In any event it is difficult for us to be satisfied on the balance of probabilities that the claimant's confusion in that meeting was because of his condition or his inability to work for any prolonged period, in an office based environment, given his seeming acceptance in his email of 2 May that he could attend offices for essential meetings with a preference for a maximum 2 hour duration and the statement in his impact statement that his difficulties arose when "sustaining long periods in environments where these technologies are present".

96. Thus, on the balance of probabilities, we do not find that the probationary period was extended because of something arising in consequence of the claimant's disability, namely his inability to work for any prolonged period, in an office based environment, due to the use in such locations of wireless technology and electrical appliances.

97. In respect of the decision to dismiss the claimant, the concerns of Mrs McLackland were around the claimant's interaction with others and his ability to build

relationships. Those things were not affected by his inability to work for any prolonged period, in an office based environment or even the claimant's condition, for the reasons we have given. The claimant's evidence in relation to the meeting of 18 April was significant, even on his own case his behaviour in that meeting was not because of his electro-hypersensitivity. Thus we do not find that the claimant was dismissed because of something arising from his disability.

98. Had it been necessary for us to consider the question of justification we would have accepted that the aims set out in paragraphs 8.1, 8.4, 10 and 11 of the respondent's document setting out its position on justification were legitimate aims of the respondent. In respect of the question of proportionality we bear in mind that we must consider whether the same objectives could have been achieved by a less discriminatory or severe way. There was no alternative to extending the probationary periods unless the respondent was to lower the standards for the job role. We do not conclude that the lowering of the standards for the job would have assisted the claimant, he was dismissed because of concerns about his relationships with colleagues. In respect of the decision to dismiss the claimant, that is, of course, the most draconian sanction. However, dismissal can be a proportionate means of achieving a legitimate aim. In this case given the concerns which the respondent had about the claimant and that they, primarily, related to his inability to relate to team members and given further, the very clear values and behaviours of the respondent in requiring working collaboratively and building relationships, it is difficult to see that a less draconian sanction, such as redeployment, would have achieved the respondent's aims. In any event as Ms Cecil said in her email of 23 March 2018 "I think it hard to think of a role in the Trust where you work mainly on your own". Thus, had it been necessary, we would have accepted that the unfavourable treatment of the claimant was a proportionate means of achieving a legitimate aim.

99. In those circumstances, even if the claimant was disabled, the claim under section 15 of the Equality Act 2010 would fail.

100. In circumstances where both the reasonable adjustments claim and the claim of discrimination arising from disability would fail even if the claimant was disabled, it is not necessary for us to determine the question of whether, as a matter of law, the claimant was disabled within the meaning of the Equality Act 2010.

101. The claimant's claims are dismissed.

Employment Judge Dawson

Date: 5 November 2019

Judgment sent to parties: 7 November 2019

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.