



EMPLOYMENT TRIBUNALS

Claimant: Mr S Piatt
Respondent: The Commissioners for Her Majesty's Revenue and Customs
HELD AT: Manchester **ON:** 15 – 17 July 2019
BEFORE: Employment Judge B Hodgson
Ms C Jammeh
Mr S Anslow

REPRESENTATION

Claimant: In person
Respondent: Mr A Serr, Counsel

JUDGMENT having been sent to the parties on 9 August 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

REASONS

Background

1. By a claim form presented on 23 July 2018 the claimant brought a complaint of failure to make reasonable adjustments for him as a disabled person
2. At a Preliminary Hearing held on 1 October 2018 ("the Preliminary Hearing"), the claimant was ordered to provide further and better particulars of his claim to which the respondent was ordered to provide an amended response and both documents were provided as ordered (pages 47 – 49 and 60 - 67)
3. The respondent conceded that the claimant was, at all relevant times, a disabled person (as defined) but only by reason of the mental impairment of

"depression" and not, as claimed additionally by the claimant, by reason of his being "on the autistic spectrum"

4. In addition to denying the claim of failure to make reasonable adjustments, the respondent also raised the issue of jurisdiction, contending that the claim was presented out of time
5. At the Preliminary Hearing, the respondent was also ordered to provide to the claimant a draft List of Issues. The draft List was considered and discussed at the outset of the full Hearing and the following issues were agreed

Issues

6. *Disability*

6.1. The claimant relies upon two conditions in bringing his disability discrimination complaints:

6.1.1. Depression and anxiety, and

6.1.2. Being on the autistic spectrum

6.2. The respondent accepts that the claimant is disabled by way of his depression, as defined by section 6 of the Equality Act 2010 ("EqA")

6.3. The respondent does not admit that the claimant is disabled, by way of being on the autistic spectrum, as defined by section 6 EqA. Has the claimant established that:

6.3.1. He has been formally diagnosed as being on the autistic spectrum?

6.3.2. If so, does the claimant satisfy section 6 EqA in terms of his diagnosis of being on the autistic spectrum?

6.3.3. Did the respondent have knowledge of the claimant's disability?

7. *Provision, criterion or practice ("PCP") and substantial disadvantage*

7.1. It is accepted that the respondent has a practice of considering employee behaviours when undertaking the performance review process ("PCP1")

7.2. It is accepted that the respondent applied a PCP whereby it relied in part on employee behaviours when considering whether to submit a Retention of Business Case ("PCP2")

- 7.3. It is accepted that the respondent had a practice whereby it required Hidden Economy Trainees to sit the Assessment under invigilation and with a time limit of 20 minutes ("PCP3")
 - 7.4. Did PCP1 put the claimant at a substantial disadvantage in comparison to persons who are not disabled in that it prevented the claimant from achieving a high mark as an outcome of the performance review process and led to him being assessed as 'needs improvement'?
 - 7.5. Did PCP2 put the claimant at a substantial disadvantage in comparison to persons who are not disabled in that it prevented the claimant from being retained as a Hidden Economy Tax Advisor Trainee?
 - 7.6. Did PCP 3 put the claimant at a substantial disadvantage in comparison to persons who are not disabled in that an invigilated and timed exam causes additional stress, particularly in someone who suffers from anxiety?
 - 7.7. For the avoidance of doubt, the respondent denies that PCP1, PCP2 and PCP3 put the claimant to a substantial disadvantage as alleged above or at all
8. *Reasonable adjustments*
- 8.1. What steps were reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCPs having that effect?
 - 8.2. The claimant asserts that the following adjustments were reasonable:
 - 8.2.1. In relation to PCP1 and PCP2, to have discounted all of his behaviours
 - 8.2.2. In relation to PCP3, for the respondent to have removed the invigilation requirement and the timed element of the Assessment
 - 8.3. What steps were taken by the respondent?
 - 8.4. Did the respondent fail to comply with its duty to make reasonable adjustments?
9. *Time/limitation issues*
- 9.1. When were the acts complained of done?

- 9.2. Does any act (or deliberate omission) done by the respondent extend over a period and, if so, what is the end of that period?
- 9.3. Did the claimant submit his ET1 Claim Form within the relevant time limit taking account of the ACAS Early Conciliation provisions?
- 9.4. If not, can the claimant show that it would be just and equitable for time to be extended?

Facts

10. The parties agreed a bundle of documents and references in this judgment to numbered pages are to pages as numbered in such bundle
11. The claimant gave evidence on his own behalf. The respondent called as witnesses Mr David Smalley and Ms Rachael Corley. The respondent had also exchanged a witness statement from Ms Helen Lush but had decided not to call her. At the claimant's request, her statement was added to the bundle (at pages 608 – 613)
12. The Tribunal came to its conclusions on the following facts - limited to matters relevant or material to the issues - on the balance of probabilities having considered all of the evidence before it both oral and documentary
13. The claimant initially joined the respondent in February 2013 but was promoted into a position in the unit known as 'Hidden Economy' ("HE") in May 2016. He was one of a group of twelve trainees placed into HE at this time, some new to the respondent and some transferred internally. The Job Description for the role is at pages 72a – 72f. All the trainees were appointed subject to a Training Assessment Period ("TAP") scheduled for up to two years with the possibility of that being extended
14. The claimant's Offer Letter dated 9 May 2016 sets out the terms upon which he was appointed (pages 77 – 78). The position was subject to a variable contract (unlike the claimant's previous role) meaning that there were no fixed or core hours specifically expressed but there was a requirement to work a total of 37 hours per week variable across 7 days ... and "may include significant amounts of time away from the office, weekend, Public Holiday and late night working.

Sometimes this will mean that a jobholder has to work late into the evening after they have worked their normal hours for that day" (subject to compensatory time off)

15. The Offer Letter states that "You must tell me if you require any additional aids, equipment or other adjustments made for you in relation to health or disability, please provide me with details as soon as possible. It is important that we have all relevant information to enable us to make any necessary adjustments, which may be required for you during the period of your training, including exams, before you take up your place on this programme." There is no suggestion that the claimant raised any such issue prior to his appointment in response
16. There are two criteria indicated for not passing the TAP:
 - 16.1. you fail to pass any of the required assessments after 2 attempts and there is no evidence to support effectiveness in that specific area; or,
 - 16.2. at the end of the TAP, you are unable to demonstrate that you are effective
17. It is confirmed that failure to successfully complete the TAP will result in the appointment with the respondent being brought to an end
18. The "assessments" referred to are five separate exams to be taken by the trainees. The trainees themselves decide when to sit them. All of the exams were time limited and invigilated. The claimant passed the first four exams with no identified issues arising. It is common ground that the fifth exam ("Powers and Deterrents") is both the most important and the most difficult. Passing it permits the trainee to lead visits to the persons or bodies under investigation rather than have to be supervised. As will be seen, the claimant sat and failed this exam twice and was as a consequence downgraded. The only other trainee in the group to fail this particular exam twice was also downgraded
19. It is accepted by the respondent that at all relevant times the claimant was a disabled person by reference to the mental condition of "depression" and that his managers were aware of this condition, both prior and subsequent to his appointment into HE. An Occupational Health Report obtained by Ms Corley and dated 23 August 2016 (pages 97 – 99) indicated a 20 year history of intermittent mental health issues of depression and anxiety and that the

claimant was then on long term medication and under GP care. It refers to the impact of this upon his ability to sleep and also fatigue during the day which "has an impact on his ability to attend work within the expected core hours and he is struggling to achieve a full 7.5 day ..." The Tribunal was also referred to the claimant's medical records (pages 455 – 523)

20. Ms Corley was appointed to manage the HE trainees including the claimant in July 2016 and her evidence was that she found the claimant difficult to manage. She met with the claimant on 19 July at which, amongst other matters, the fact that the claimant was behind with his flexi-time, such that he had a deficit over the maximum carry forward, and ways in which this may be addressed, were discussed. It was acknowledged that it would be difficult to correct this "as a change of building has restricted later working and the theft of [the claimant's] bike has increased travel times". On the claimant's own evidence, the issues raised by him as to the cause of his difficulty with flexi-time did not include reference to his mental condition or its impact (see page 95)
21. There was a follow up meeting on 28 July in relation to further problems in respect of recording of flexi sheets (see page 96)
22. On 24 August, Ms Corley held a meeting with the claimant to start the formal managing attendance process following a day's absence self-certified as being "digestive system"
23. The claimant was absent from work with viral meningitis from 30 August, returning to work on 3 October on which date Ms Corley held a return to work discussion with him (pages 101 – 102). There was ultimately an agreed phased return to work
24. There had previously (in 2015) been put in place a "Reasonable Adjustment Passport" by which a certain number of days' absence were discounted for disability related sickness absence (page 198) and it was agreed that this would be continued by Ms Corley (see pages 605 – 607)
25. At their mid-year 1-2-1 meeting held on a date in October (there is a degree of uncertainty as to the precise dates of the meetings taking place in the period October and November 2016 but this uncertainty does not materially impact on matters), Ms Corley confirmed that she would be placing the claimant in the

- 'Needs Development' area, said to be based "purely on his standards of behaviour". The notes of the meeting (at page 109) set out the examples of behaviour upon which this conclusion was based and the claimant at no point raises the matter of his mental condition in addressing the various issues raised
26. At a subsequent meeting held with the claimant, probably on 28 October, Ms Corley raised with the claimant her concerns over comments said to have been made by the claimant at a team meeting. This meeting appears to have become somewhat heated (the claimant's notes of the meeting are at page 110)
 27. The claimant met with Ms Corley's manager, Mr Neil Roden, on 1 November to express his concerns as to the content of that earlier meeting, describing Ms Corley's conduct towards him as bullying (page 111).
 28. This resulted in a meeting between the three of them on 8 November (pages 112 – 113) which resulted in Ms Corley deciding it was no longer appropriate for her to continue managing the claimant. Ultimately, in January 2017, his management was transferred to Mr David Smalley
 29. The claimant was subsequently issued with and agreed a Performance Improvement Plan dated 16 November – this indicated the areas to be improved as being headed Behaviour, Positive interaction with colleagues and Timekeeping and setting out how improvement was to be effected (page 116 – signed copy at page 170). The first monthly review was scheduled to be held on 28 November 2016 but does not appear to have taken place
 30. On 15 December, there arose a further issue between the claimant and Ms Corley as to his leaving work early to attend School Governors meetings. Ms Corley decided not to allow the claimant an early finish for Governor duties (pages 122 - 123). Authority for this was later granted by Mr Roden (page 125)
 31. As indicated, the claimant changed on 3 January 2017 to be managed by Mr David Smalley. As a handover, Ms Corley made Mr Smalley aware of the issues she had been having with the claimant
 32. Mr Smalley held his first 1-2-1 with the claimant on 19 January 2017 (page 127). Issues surrounding training were discussed. The claimant had been late for formal training the previous day and he confirmed that the reason for this was

that he had had a puncture. The following day the claimant attended work after 11am without notifying Mr Smalley, contrary to accepted practice.

33. The claimant also indicated to Mr Smalley that he "had not been feeling great over the last few days", indicating that he had recently been advised by his GP to stop taking his anti-depressant medication and had been off it for a while. (In fact, the claimant's GP later confirmed that the claimant had in January 2017 forgotten to renew his prescription – see page 469 and page 498). The agreement was that the claimant would return to his GP and would let Mr Smalley know if he felt unwell in the workplace
34. The claimant had arranged to sit his final exam on 20 January. Mr Smalley is identified as invigilator in the claimant's request to sit the exam (pages 130a – b). In order to assist, Mr Smalley suggested to the claimant that he should work from home in the morning prior to sitting the exam although this seems to have been overlooked by Mr Smalley the following day when he challenged the claimant over his non-attendance
35. The claimant sat the exam and scored 6 out of 10. This was a fail as 7 was the pass mark. Candidates are allowed a total of 20 minutes to complete the exam – the claimant in fact finished it in under four minutes (see page 454)
36. Feedback was requested from and given (in general terms) to the claimant by the Tax Academy, the body responsible for the exam (pages 131 – 132)
37. The claimant believes that he should as a consequence have been given additional training but no such training was offered to him
38. The claimant and Mr Smalley held a further 1-2-1 meeting on 19 February (see page 135) when there was a general discussion as to his progress
39. At a further meeting on 28 February (page 136), the claimant indicated to Mr Smalley that he had booked his second sitting of the final exam, again naming Mr Smalley as his invigilator. There was discussion as to how best to prepare for the exam including utilising the full amount of time allocated (20 minutes). The potential consequences of failing the exam were outlined and also that it appeared likely at that time that the claimant's end of year review would result in him continuing to be assessed as 'needs development'

40. At the claimant's choosing, he resat the final exam on 13 March. This was arranged by Mr Smalley to be taken in a private room and was again invigilated by him. The claimant raised no objection or issue arising out of these arrangements. There was in the course of the claimant sitting the exam what has been described as 'a disruption'. This comprised an individual knocking on the door of the room, to be told by Mr Smalley that he could not come in and thereupon leaving. It is not in dispute that this incident lasted approximately 30 seconds
41. The claimant's score in the second sitting of the exam was 5 out of 10 – constituting a further fail. On this occasion, he had taken 9 minutes of the allotted 20 minutes to complete the exam (see page 454) despite having been advised in advance by Mr Smalley that it would undoubtedly assist him to use the full time allotted to give himself the best opportunity to pass. In the circumstances, he had triggered the potential failure of his TAP
42. Mr Smalley discussed the position with the claimant at a meeting on 16 March (the notes of which are at page 152) having been called to that meeting by letter dated the same day (page 150)
43. The claimant made a Request for Special Consideration on 20 March to the Tax Academy (pages 154 - 156) – effectively an appeal against his failure of the exam. He put forward medical reasons for both failures and the fact of the 'disruption' at the second sitting (the guidance in this regard is set out at pages 552 – 561 with further guidance at pages 562 – 578 and 597 - 601)
44. The Tax Academy did not uphold the appeal (page 159). The reason for this was that each candidate is advised in the preamble to the exam not to sit it if there are any medical concerns - "By launching the link you are confirming that you are fit to sit the exam. If you are not, please cancel the exam and reschedule. Appealing against exam results because you are unwell will not be accepted" (see the claimant's booking at page 142). The timing of the exam is not prescribed by the employer but rather is at the choice of the employee. The 'disruption' was regarded as 'minor'
45. The process following failure is outlined at page 571. By e-mail dated 30 March, Mr Smalley asked Ms Corley for her view as to whether or not he should be

- preparing Retention of Business Case for the claimant (page 163) – Ms Corley was not in favour of that step
46. Mr Smalley then met with the claimant on 30 March at what constituted an end-of-year meeting to discuss matters further (page 167). The end of year marking continued the mid-year assessment of 'needs development' given the improvements still required. The claimant was told that although a final decision had not yet been made and further evidence was awaited, it appeared unlikely that a Retention of Business Case would be put forward. Further statements were taken (pages 165 and 166)
 47. The claimant was officially notified of the decision by Mr Smalley by letter dated 31 March 2017 (page 168) – the rationale for which was set out in a Summary document (pages 160 – 161) - giving him notice of downgrading effective from 14 May 2017 at which point he would be moved into the redeployment pool unless attempts to find him a suitable role elsewhere within the respondent organisation in the meantime were successful.
 48. There was a further 1-2-1 meeting with Mr Smalley on 28 April 2017 (pages 177 - 178). The claimant had the right to appeal against the decision relating to his end of year marking which he exercised but this was rejected (pages 174 – 175)
 49. The claimant then raised a formal grievance over the decision not to put forward a Retention of Business Case on 11 May 2017 (page 180)
 50. Following the internal process, the grievance was rejected on 8 September on the basis that the decision was not tainted by disability discrimination but with a number of recommendations, including that the business reconsider whether or not to submit a Retention of Business Case (pages 244 - 248).
 51. In the meantime, the '2 attempts' rule had been changed. The claimant resat the final exam on his own initiative and passed (page 252). He informed Mr Roden of this on 18 September 2017. Mr Roden responded saying that he did not think it would change the decision (page 253)
 52. Having considered the recommendation, Mr Roden decided not to reconsider, a decision he notified with reasons to the claimant by e-mail on 27 October 2017 (page 299)

53. In the meantime, the claimant had appealed against the grievance rejection on 21 September 2017 (page 255)
54. The appeal process commenced with a meeting with the claimant on 20 October 2017 (page 268) and the ultimate decision, to reject the appeal, was notified to the claimant on 2 January 2018 (pages 309 -310 with reasoning at pages 311 - 316)
55. On 2 January 2018 the claimant submitted a Subject Access Request under Data Protection legislation and subsequently made follow up requests
56. He remained in the employment of the respondent having been successfully redeployed
57. The Tribunal was directed to various policies of relevance to the evidence and issues which it considered. These comprised the Civil Service Competency Framework (pages 524 – 537), Performance Management Policies (pages 538 – 540), Rating Performance Policies (pages 541 – 551) together with the Civil Service Code and further Guidelines (pages 579 – 596)

Law

58. The definition of a disabled person for the purposes of the statute appears at section 6 EqA. This is supplemented by Schedule 1, Part 1 to the Act, headed "Determination of Disability"
59. Section 6(1) EqA states:
"A person (P) has a disability if –
 - a) P has a physical or mental impairment, and
 - b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities."
60. Within the interpretation section, section 212 states that, "in this Act ... 'substantial' means more than minor or trivial"
61. "Guidance on matters to be taken into account in determining questions relating to the definition of disability" was issued in 2011. This guidance does not

impose any legal obligations in itself, nor is it an authoritative statement of the law. Any aspect of this guidance, however, which appears to the Tribunal to be relevant in determining whether a person is a disabled person must be taken into account

62. Section 20 EqA states that:

... (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

63. Section 21 EqA states that:

(1) A failure to comply with the first ... 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

64. The burden of proof in discrimination claims rests initially with the claimant but section 136 EqA provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has acted in a way that is unlawful, the Tribunal must uphold the complaint unless the respondent shows that it did not so act

65. This requires a two-stage process. First, the complainant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the complainant. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' (namely, that a reasonable Tribunal could properly conclude from all the evidence before it) that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act. However, it is not necessary for the burden of proof rules to be applied in an overly mechanistic or schematic way

66. A complaint of this type must be presented to a Tribunal before the end of the period of three months beginning when the act complained of was done (section 123(1)(a) EqA) or such other period as the Tribunal thinks just and equitable (section 123(1)(b) EqA)

Submissions

67. The respondent's representative produced written submissions to which he spoke and, being on record, the Tribunal does not propose to repeat them
68. The claimant made oral submissions which the Tribunal sets out in summary as follows
- 68.1. The respondent was fully aware of his disabilities at all relevant times and was aware of its obligations to make reasonable adjustments in regard to the Performance Management Review process which feeds into the decision not to submit a Retention of Business Case
- 68.2. There was nothing to prevent the respondent submitting a Retention of Business Case and the decision not to do so was made prematurely
- 68.3. Other than timekeeping issues, the behaviours relied upon went back to the time he was managed by Ms Corley and there had been a relationship breakdown between the two of them
- 68.4. He only failed his final exam after coming off his medication, he had been on medication when passing the other exams and the letter from his GP dated 20 June 2017 (page 469) indicates there is a possibility that his not taking his medication at the relevant time may have impacted on his performance for his internal examinations
- 68.5. He had not been made the subject of any disciplinary proceedings, whether formal or informal
- 68.6. There is no evidence to suggest that the time element of the exam was needed to reflect the position in performing the role 'in the field' (as contended for by the respondent)
- 68.7. There is no documentation to suggest the change in rules in April 2017 only applied to new trainees

- 68.8. In terms of time limits, his grievance process was not concluded until January 2018 and there was then a lengthy process for him to obtain background paperwork
- 68.9. He had taken advice from his Trade Union throughout but had also felt it necessary to undertake his own research as he was not satisfied he was being advised correctly and ACAS do not give advice as to time limits
- 68.10. It is accepted that there is no formal diagnosis of autism but the respondent was aware he had problems and the Occ Health report in Summer 2017 referred to learning difficulties and accordingly the respondent was aware that he had problems in this regard

Conclusions

69. The Tribunal duly noted that there is a jurisdictional point which if successful on the part of the respondent would mean that the claim could not proceed. Having heard significant evidence on the entire case, however, the Tribunal determined that it would be appropriate to reach its conclusions on the substantive merits of the claim and, in fact, to do so prior to determining the jurisdictional point to seek to ensure no element of prejudging its conclusions
70. As an initial general point also, the Tribunal noted that the claimant in the hearing alluded to aspects of the various internal procedures and actions on the part of the respondent as being unfair. He had however been very specific and clear as to the allegations he was making in his claim and these were the matters upon which the Tribunal reached its conclusions

Disability

71. It is conceded by the respondent that the claimant was at all relevant times a disabled person (as defined) but only by reason of the mental impairment of "depression"
72. The claimant sought additionally to argue that he was also disabled person (as defined) at all relevant times by reference to what he described as "being on the autistic spectrum"

73. The claimant could produce no medical evidence to support the contention that he had such an additional mental impairment. The only reference to which the Tribunal was directed was a referral for assessment made on 8 May 2018 (page 520) (repeating a referral made on 14 September 2017 – page 485) but no follow up was produced to the Tribunal other than an indication dated 2 November 2018 that the claimant was "on a long waiting list" (page 494). These references post-date the issues raised by the claimant in his claim
74. Further, the claimant produced no evidence as to the possibility of there being any adverse effect upon his ability to carry out normal day to day activities as a result of any such impairment
75. In the circumstances, on the evidence produced, the Tribunal rejects the claim for an additional basis (beyond that conceded) for the claimant to fall within the definition of a 'disabled person'
76. In practical terms, it would not in fact appear to the Tribunal that this conclusion has any material impact on either the claimant's ability to pursue his claim or the outcome of such claim

Provision, criterion or practice ("PCP") and substantial disadvantage

77. As indicated within the agreed issues, the respondent does not dispute that it had the three PCPs contended for which were applied to the claimant
78. In respect of PCP1 and PCP2, the factual findings show that the behaviours considered were not related to the claimant's disability.
79. The Tribunal notes the reference in the claimant's medical records to the potential for his disability impacting on his timekeeping but which was one only of the behaviours relied upon. Lateness can however have many reasons and it was never put forward by the claimant to his managers that his medical condition was at any stage the actual reason for his lateness. The reasons he did put forward – for example, childcare responsibilities and tyre punctures to his bicycle – are clearly unconnected with his medical condition
80. In respect of PCP3, no evidence has been produced to the Tribunal to indicate that the fact that the exam was timed or invigilated adversely impacted on the claimant's ability to pass the exam at all
81. He had previously passed exams under those conditions

82. He had the opportunity to indicate if he had any concerns over his ability for reasons of health to perform properly under the exam conditions. Indeed he was expressly warned of this in the preamble to the examinations. The timing of when he sat the examination he twice failed was at his choosing - it was not a requirement that he sat it on the days he did
83. He did not on either occasion make use of the full time he had available to complete the exam (contrary to advice given to him).
84. The "interruption" (which does not in fact form part of the claimant's claim) was very minor and the claimant raised no issue about it at the time or immediately after the conclusion of the exam
85. The Tribunal accordingly rejects the argument that any of the agreed PCPs put the claimant to a significant (namely, more than trivial) disadvantage or indeed any disadvantage whatsoever in comparison to persons who were not disabled
86. On the above findings, the burden of proof does not shift to the respondent

Reasonable adjustments

87. In the light of the above conclusions, it follows that no duty to make adjustments arises
88. The Tribunal does not accept that the adjustments contended for would, in any event, be reasonable. In summary, it would be reasonable at the very least to consider all non-disability related behaviours and, as indicated, no evidence has been produced to the effect that timing or invigilating the exams impacted on performance. The respondent has shown itself willing to make other adjustments in relation to the claimant's medical condition
89. The claim would accordingly fail

Time/limitation issues

90. The last element of the claim identified in terms of timing (the decision not to prepare a Retention of Business Case) arose on 31 March 2017. There is no argument pursued – and the Tribunal's conclusion is that it is clear that there is no valid argument to be pursued – to the effect that this, or either of the two earlier claims made, can or do constitute a continuing act. They were stand alone, one-off, decisions which were immediately actioned

91. There is no dispute as to the material dates. The ET1 claim form was presented on 23 July 2018. The ACAS Early Conciliation Certificate was issued on 1 May 2018 following notification of a prospective claim being made on 9 April 2018 (see pages 1 – 3)
92. The claimant is clearly well out of time for bringing the claim and the ACAS early conciliation process does not assist him in this regard
93. The question for the Tribunal therefore is whether it is just and equitable to extend time
94. The Tribunal accepts the respondent's submission that time limits are generally enforced strictly
95. There is clearly a significant lapse of time before the claimant decided to pursue his claim. This is despite the fact that the claimant was advised throughout the process by his Trade Union representative and on his own evidence also carried out his own research into the prospect of bringing an Employment Tribunal claim
96. Reference to the timing of the grievance appeal outcome (which in any event was issued on 2 January 2018 and would therefore, were it to have formed part of the claim itself, still leave the claim out of time) and the time taken for his requests for release of data to be answered, do not in the Tribunal's view constitute good reason for exercising its discretion to extend time. The claimant was fully aware of the matters which ultimately formed the basis of his claim from the time they arose and awaiting the outcome of his grievance appeal and a response to his Subject Access Request does not justify or satisfactorily explain the delay
97. The resultant delay has inevitably impacted on witness recollection (as was expressly evident in oral evidence given by the respondent's witnesses)
98. The Tribunal notes the nature of the claimant's disability but no argument is advanced by the claimant that this played any part in the timing of the claim or its significant delay
99. In terms of balance of prejudice, the Tribunal's conclusions on the merits of the claim are set out above

100. In the circumstances, the Tribunal concludes that the claim has been significantly delayed without any valid or cogent reason and it is not just and equitable to extend time
101. The claim is therefore dismissed by reason of lack of jurisdiction

Employment Judge B Hodgson

Date 19 November 2019

REASONS SENT TO THE PARTIES ON
25 November 2019

FOR THE TRIBUNAL OFFICE