EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104942/2018

Held in Glasgow on 30 April 2019 – 3 May 2019

Employment Judge Neil Buzzard
Tribunal Member N Elliot
Tribunal Member A McMillan

Mr B McCluskey	**Claimant** **Represented by:** **Mr J Komorawski** **Advocate**
Glasgow Life	**Respondent** **Represented by:** **Mr K McGuire** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that it the claimant's claims that the Respondent breached its duties to implement reasonable adjustments for the claimant, pursuant to s21 of the Equality Act 2010, are not well founded and are dismissed.

REASONS

Issues

1. The claimant in this case presented an ET1 on 24 May 2018 in which he raised a number of complaints of discrimination against the respondent. In submissions at the end of this this hearing, the claimant's representative confirmed that the only complaint the claimant pursued was that the respondent had breached its duties to make reasonable adjustments for the

claimant as required by s21 of the Equality Act 2010 (EqA). No other claim against the respondent was pursued.

2. The claimant's claim is that the respondent breached it duties to make reasonable adjustments for the claimant in two respects. These were set out in a Note of Argument, produced by the claimant's representative to support his submissions, as follows:

2.1 by a failure to perform individual assessments, in the form of individual risk assessments and individual personal escape and evacuation plans (PEEPs); and

2.2 by a failure to provide software and equipment to facilitate the Claimant carrying out computer and other office work.

Relevant Law

3. The statutory provisions relevant to the only claim the claimant's pursued are found in the EqA. The jurisdiction for the Tribunals to determine claims under the EqA is found at s120 of that Act.

4. The claimant complains that the respondent unlawfully discriminated against him by breaching their duty to make reasonable adjustments. Part 5 of the EqA, which applies to employees, prohibits discrimination in the workplace. Within Part 5, section 39 states:

> *(5) A duty to make reasonable adjustments applies to an employer.*

5. It was not in dispute that the respondent was the claimant's employer. Accordingly, the respondent had a duty to make reasonable adjustments for the claimant.

Section 21 EqA states:

> *(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.*

6. These three requirements, referred to in s21(1), are set out in s20 EqA. The relevant requirements in this case are found in s20(3) and s20(5) as follows:

> *(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.*
>
> and;
>
> *(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.*

7. As it relates to the claimant's claim, the alleged failure to undertake individual assessments is an alleged breach of the first requirement, and the alleged failure to provide software and equipment is a breach of the third requirement. The second requirement is not relevant to the claimant's claims. It relates to adjusting the physical features of premises, which was not raised by the claimant as a matter in dispute in his claim or at the hearing.

Alleged Breach of the First Requirement: Individual Assessments

7.1 To establish a breach by the respondent of their duty to make reasonable adjustments which relates to the first requirement the claimant has to establish the following:

7.1.1 that there is a provision criterion or practice (PCP);

7.1.2 that this puts the claimant at a substantial disadvantage compared to non-disabled persons; and

7.1.3 that there were reasonable steps the respondent could have taken that would have avoided the disadvantage.

7.2 The claimant's representative submitted that the PCP relied upon for this claim was a requirement to work at the respondent's Dennistoun venue, and to attend a session at their Ruchazie venue, without individual risk assessments or individual PEEPs for either venue.

7.3 The respondent did not dispute that the claimant had been asked to work at Dennistoun and to attend a session at Ruchazie. The respondent did not, however, agree that there were not appropriate risk assessments in place, albeit it was conceded they were not personalised to the claimant.

7.4 The claimant's representative went on to submit that the substantial disadvantage that the claimant suffered from the lack of individual risk assessments and individual PEEPs was, as stated in the Note of Argument, *"the distress he experienced when attending the session at Ruchazie, and the need to take annual leave in order to avoid attendance at a workplace where individual assessments had not been performed."* The

respondent does not accept that there was any substantial disadvantage, or that the claimant was required to take annual leave.

7.5 It is for the Tribunal to determine, from the evidence, if the PCP relied upon placed the claimant at disadvantage as alleged or at all.

7.6 If a PCP which caused the claimant a substantial disadvantage is found to have existed, the question then becomes whether the respondent failed to take steps that were reasonable to avoid that disadvantage. The adjustments the claimant suggests should have been taken were to ensure the appropriate the individual risk assessments and individual PEEPs were in place, and to allow the claimant to take paid leave, which was not part of his annual leave entitlement, until the assessments were in place. There is no scope for justification if reasonable adjustments were made. However, if an adjustment is not reasonable it does not have to be taken.

7.7 It is not the claimant's responsibility to suggest reasonable adjustments. The obligation is upon the respondent to meet their duty to consider adjustments to meet the duty placed on them. That noted, any adjustments suggested by the claimant would have to be considered by a respondent when discharging their duty. In judging a reasonable adjustment, the duty is not to make the adjustments, assuming they are reasonable, that the claimant prefers, provided, when the duty arises, reasonable adjustments that would address any substantial disadvantage are made.

7.8 The claimant's representative submitted that a reasonable adjustment would be to provide individual risk assessments and individual PEEPs. The respondent's representative submitted that this amounts to no more than the provision of information,

and as such cannot, of itself, be an adjustment that would address the claimant's substantial disadvantage. The respondent referred the Tribunal to **Tarbuck v Sainsbury Supermarkets Ltd UKEAT/0136/06** in support of this submission. The claimant's representative's in submissions agreed that this is the normal position, citing **Rider v Leeds City Council, EAT, 27/11/12**. He went on, however, to seek to distinguish the claimant's case from the normal situation. This was on the basis that individual risk assessments and individual PEEPs would reassure the claimant, and thus directly address the disadvantage he was suffering, which was claimed to be distress caused by having to work in venues where he did not feel safe.

7.9 It is a question of fact for the Tribunal to determine if the claimant's distress due to the lack of the reassurance of adequate assessments amounts to a substantial disadvantage. If this is the case, then it is clear that an assessment could potentially ameliorate this distress for the claimant. This is a question of fact for the Tribunal to determine. If the Tribunal find for the claimant in this regard, it is clear that the provision of individual risk assessments and individual PEEPs could amount to a reasonable adjustment.

Alleged Breach of the Third Requirement: Software and Office Equipment

7.10 The claimant claims that the respondent was in breach of its duty to make reasonable adjustments to his work computer. These adjustments are argued to be to both to the hardware and software provided to the claimant. In the Note of Argument produced by the claimant's representative, this is argued to be in respect of a requirement to work without:

7.1.1 specialist software for persons with visual

impairments; and

7.1.2 additional specialist equipment.

7.11 There was repeated reference during the course of the hearing of a failure to carry out a Display Screen Equipment ("DSE") assessment following the claimant's return from long term absence. At this point the claimant had been registered as partially sighted. The respondent did not accept there had been such a failure, but in any event, the claimant's representative conceded in his Note of Argument that a DSE assessment cannot amount to a reasonable adjustment as it was no more than collection of information. It was argued, however, that a DSE assessment could have led to reasonable adjustments being identified. Accordingly, no claim that failing to carry out a DSE assessment itself was a breach of the duty to make reasonable adjustments was pursued.

7.12 The claimant argues that the requirement to work without adjustments to the computer hardware and software he was provided with, caused him a substantial detriment. He refers to stress, damage to career prospects, headaches and migraines as amounting to a substantial detriment. These claimed detriments are not accepted by the respondent. It is a question of fact, to be determined on the evidence, whether the claimant has suffered such detriments as a result of having to use his computer at work without adjustments.

7.13 In relation to computer software, whilst the respondent accepted that specialist software was not provided at the relevant time, this was argued not to be a breach of the respondent's duty to make reasonable adjustments. This argument was pursued on two basis:

7.1.3.1 firstly, the respondent was not aware that the claimant was or would suffer substantial disadvantage by the lack of specialist software; and

7.1.3.2 secondly, the respondent states that it was following a process of assessing the claimant and sourcing the appropriate software, which until the claimant's ongoing role was determined could not be finalised.

7.14 It is correct that, if the respondent establishes that it did not know, and could not reasonably have known, that the claimant needed specialist software for his PC, there is no discrimination in not providing such software. This is a question of fact for the Tribunal to determine. If the respondent either did know, or should have known, there will be a breach of duty if reasonable steps were not taken to provide the software.

7.15 It was agreed by both parties, during their oral submissions, that reasonableness of an adjustment incorporates not only the change made but also the speed with which it is made. By definition, some adjustments may take time to be brought into effect. The respondent's case is that specialist equipment and software takes time to provide. There is no specific time frame for a particular adjustment, the question is what is reasonable in the circumstances. If the time taken before provision of the adjustment is reasonable, there will not be a breach of duty. This is a factual issue for the Tribunal to determine.

7.16 In relation to computer hardware, the respondent does not accept that the claimant was not provided with specialist additional computer hardware. It is a question of fact for the Tribunal to determine if specialist equipment was provided, and if so if it was sufficient to meet the duty to make reasonable

adjustments.

The Burden of Proof

8. With discrimination claims the burden of proof is determined by s136 of the Equality Act. The relevant parts of this section state:

> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

9. This in effect reverses the traditional burden of proof so that the claimant does not have to prove discrimination has occurred, which can be very difficult. Section 136(1) expressly provides that this reversal of the burden applies to '*any proceedings relating to a contravention of this [Equality] Act'*. Accordingly, it applies to all the claimant's discrimination claims. It is commonly referred to as the '*reversed burden of proof*', and has 2 stages.

10. Firstly, has the claimant proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination? This is more than simply showing the respondent might have committed an act of discrimination, it requires facts to be shown which without explanation appear discriminatory.

11. If the claimant passes the first stage then the respondent has to show that they have not discriminated against the claimant. This is usually by way of explanation of the reason for the conduct alleged to be discriminatory. If the respondent fails to establish this then the Tribunal must find in favour of the claimant. Additionally, the Tribunal can take into account evidence of an unsatisfactory explanation by the respondent to support the claimant's case.

12. It is not necessary for the Tribunal to approach these two elements of the burden of proof as distinct stages. The court of Appeal in **Madarassy v Nomura International plc** [2007] EWCA Civ 33 gave useful guidance that, despite the two stages suggested by the test, all evidence should be heard at once before a two stage analysis is then applied to the evidence.

Relevant findings of fact

13. The Tribunal had the benefit of hearing evidence from multiple witnesses for both parties as follows:

- The claimant;
- Mrs McCluskey, the claimant's mother;
- Harry Blackwood, the claimant's trade union representative at the relevant times;
- Kirsty McQuillan, Community Services Operator employed by the respondent;
- Pamela Carruthers, HR officer employed by the respondent;
- Stephanie Colgan, People Strategy and Resource Manager employed by the respondent;
- Jackie Sunderland, Community Services Manager employed by the respondent; and
- Jenny Jenkins, HR Business Partner for Communities and Libraries employed by the respondent.

14. The Tribunal also had the benefit of sight of a significant bundle of relevant documents.

15. The respondent's representative provided a document headed "*Closing submissions on behalf of the Respondent*", to support his submissions on

behalf of the respondent. This helpfully included a section headed "*The Relevant Facts*". During the claimant's representative's submissions he specifically went through this part of the respondent's written submissions paragraph by paragraph, identifying the limited areas where the facts set out therein were not accepted. This significantly narrowed the scope of the disputed facts and events which fall to be determined by the Tribunal.

16. Considering this, and the evidence of the claimant, the following relevant facts were found. On the limited points where there was a factual dispute between the parties, the reasons for the Tribunals determination of the facts are set out below.

17. The claimant was employed by the respondent in 2007, as a play worker. Since around 2012 his role has been as a Learning Assistant. The claimant's duties as a Learning Assistant were to prepare and deliver arts & crafts, and family sessions in a play environment. Approximately a quarter of the claimant's time spent on the planning and preparation for sessions, the rest on delivery. The claimant's role required the use of a computer, in particular when not engaged in delivery of sessions. The sessions the claimant delivered in this role were took place at numerous venues, typically over 10 different venues each week.

18. The claimant began to have issues with his eyesight in 2000. He was diagnosed with Keratoconus disease, and underwent a corneal transplant in his left eye, which was successful. In response to his eyesight deterioration the respondent undertook a DSE assessment for the claimant, which resulted in the claimant being given a large print keyboard. The respondent asserted that the claimant was also provided with a larger screen. The claimant in evidence stated he could not recall any equipment other than the keyboard being provided at that time. In cross examination he agreed that he had been provided with a larger monitor prior to his long term absence. The Tribunal were provided with an additional document, disclosed on the first day of the hearing, in the form of a copy of an email from Kirsty McQuillan dated 14 February 2018. This email clearly refers to the claimant's "*screen and*

keyboard," which clearly indicates both were specific to the claimant and not generic normal computer equipment as generally provided to employees of the respondent. The email related to the need to move the claimant's screen and keyboard between venues for the claimant. The claimant asserted during cross examination that this just referred to his standard screen. This assertion does not appear to be logical, as unless there was a specific characteristic to the screen there would be no need to move a particular one between venues. In addition the Tribunal had sight of a copy of an Occupational Health referral form, which clearly states that a "*bigger computer screen*" had been purchased for the claimant. On balance, the evidence before the Tribunal suggests that the claimant was provided with a larger monitor.

19. Around September 2017 the claimant started a period of long term sickness absence, with stress. This was not the health condition which the claimant seeks to rely on as being a disability under the EqA. The claimant's loss of sight is the condition which the claimant relies on as a disability under the EqA. Towards the end of his long term sickness absence Kristy McQuillan, Community Services Operator with the respondent, was assigned as the claimant's line manager. Following this she became responsible for managing the claimant's ongoing absence with stress. The claimant had previously complained his stress had been caused by the respondent's mismanagement of him.

20. Around October 2017 it was confirmed to the claimant, by his doctors, that Keratoconus disease had spread to his other eye, and caused a significant further loss of sight. On or around 7 January 2018, the claimant was diagnosed as partially sighted. He informed Kirsty McQuillan of this via a short text message.

21. The claimant attended a long term absence meeting with Kirsty McQuillan on 29 January 2018, at Dennistoun Library, along with his union representative Harry Blackwood. At this meeting, amongst other things, the claimant repeated what had been in his text message, namely that he had been diagnosed as partially sighted.

22. The claimant was aware that, as from 7 February 2018, he would only be entitled to sick pay at half of normal pay if his sickness absence continued. At the time of the 29 January 2018 meeting, the claimant's certification as unfit to work was due to expire on 6 February 2018.

23. The claimant returned to work on 7 February 2018. A number of temporary adjustments were made by the respondent to support the claimant's return to work, which included a phased return to work and an interim change of workplace to Dennistoun Library. Prior to his long term sickness absence the claimant had been based at Parkhead Library.

24. The respondent's case is that, prior to the claimant's return to work, his large print keyboard and larger screen had been moved to Dennistoun for him. The claimant agreed that the large print keyboard had been moved, but stated he could not recall ever having a larger screen at Dennistoun. The evidence of the respondent was that the claimant had been provided with this equipment when his sight first deteriorated, and it had then been moved to Dennistoun in advance of his return to work. The Tribunal were also referred to a set of notes from a meeting between the claimant, accompanied by Harry Blackwood, and Jackie Sunderland, where Jenny Jenkins took notes. In these notes it is recorded that the claimant was asked if he would prefer a laptop PC, and is recorded as commenting that "*he would struggle with the size of the screen, and already has a specialist PC screen/keyboard/mouse*". In a detailed email of 12 March 2018 Harry Blackwood went through the notes of the meeting paragraph by paragraph, identifying anything that was not agreed to be accurate. He specifically stated that "*no changes*" were suggested to the paragraph regarding the claimant's computer screen. The Tribunal were also provided with a copy of an email sent to Jackie Sunderland on 5 March 2018, by a Community Service Co-ordinator, Fiona McLeish. In this email, Fiona McLeish states that she will "*pick up [the claimant's] PC Equipment tomorrow from Dennistoun Lib and ensure work station is set up for [the claimant] to access his emails etc. in Shettleston Lib from Wednesday."* Whilst not explicit, the use of the term "*equipment*" is suggestive that what is referred to goes beyond just a keyboard.

25. On balance the evidence before the Tribunal supports the respondent's assertion that the claimant was provided with a larger screen, in addition to his specialist keyboard, at Dennistoun. In particular, weight is given to the contemporaneous note of the 5 March 2018 meeting, and the detailed response to the note agreeing to the relevant parts, prepared shortly thereafter. These are more likely to be accurate than witnesses recollections of one of many meetings which took place over a year ago.

26. The claimant attended a return to work meeting with Kirsty McQuillan on 7 February 2018. He had requested that his union representative be permitted to accompany him, but in accordance with the policy of the respondent this was not permitted.

27. At the return to work meeting the claimant signed a completed 'attendance management - return to work form' which noted his phased return to work. This also stated there would be an "*OH referral for support on partially sighted issue*" for the claimant.

28. When the claimant returned to work he did not return to performing the full normal duties of a Learning Assistant. He was not required to deliver any sessions. In addition, he was working part time, using accrued annual leave to facilitate a phased return.

29. On his first day back at work, 7 February 2018, the claimant was asked to catch up with emails and complete some mandatory online training courses. Within the bundle of documents disclosed were two emails sent by the claimant to Kirsty McQuillan on 7 February, one requesting two days annual leave in March and one regarding his phased return. The evidence of Kirsty McQuillan was that the claimant had not raised any concern regarding being asked to work on a computer. The claimant's case was that he complained that he was not able to do work on a PC without adjustments to assist. The claimant gave evidence that he complained on 7 February 2018 to Kirsty McQuillan that he could not do work on a computer without adjustments. Kirsty McQuillan gave evidence that the claimant had not raised any such concerns, and had in fact in the period between 7 February 2018 and 20

February 2018 undertaken some online self-training on data protection and child protection. The Tribunal noted copies of several emails the claimant has sent and responded to on the 7 February 2018, and on various dates shortly after this. At least one of the emails from the claimant, dated 7 February 2018, that the Tribunal has seen, is lengthy and detailed. The Tribunal were also directed to the notes of the meeting referred to above, on 5 March 2018, in which it is recorded the claimant "*confirmed he was fine with emails, folders etc."* The claimant's union representative, in his detailed contemporaneous comments on these notes, stated that "*no change*" was needed to this part of the notes. On balance, noting it has been found that the claimant had his larger screen and large print keyboard available, the evidence does not suggest that the claimant had indicated to the respondent that he was unable to use his computer or significantly struggling with catching up with emails. He appears to have sent emails on his first day back in work. He is recorded, just after his return to work, to have stated he was fine with emails. It is difficult to see how the respondent could be aware that the claimant was struggling with working on his adapted PC with the information available to them at the time.

30. One of the emails the claimant responded to on 7 February 2018, which the Tribunal had the benefit of seeing, provided the claimant with details of the Access to Work Programme. The claimant was given the relevant contact details and asked to make contact with them. The claimant's evidence was that he contacted Access to Work. However, he was unable to be certain when he did this. His evidence was that he had been told that a caseworker would be assigned to him by Access to Work.

31. The claimant was asked, on 13 February 2018, to attend at the Ruchazie venue to observe the delivery of a session that evening and, as stated by the claimant in his email of 16 February 2018 to Kirsty McQuillan, "*to judge how I would feel going into work in this session"*. This was prior to the scheduled date of the claimant's OH referral, which was 16 February 2018. The claimant raised concerns that he did not have an individual risk assessment and individual PEEP in place for the Ruchazie venue. The claimant was given a

standard PEEP and risk assessment for Ruchazie. The claimant was told that if he did not want to attend the session he would be permitted to take annual leave that evening. The respondent was not content to allow the claimant to work in Dennistoun that evening because he would have been alone in the part of the building in which he worked. It was confirmed to the claimant that he was only attending Ruchazie to observe the session, not to participate in the session. The claimant did not accept that non-participation, if he was present, was credible, given the children at the session would be likely to try to engage with him. The Tribunal did not consider the evidence of the claimant in this regard to be persuasive. The claimant was clearly asked to attend the session at the Ruchazie venue in a supernumerary post, with a full complement of other staff running the session he was observing. Whilst it is always possible a child may seek to engage with him, there would be no reason that he could not direct that child to one of the staff running the session. That does not mean he is taking on an active participation role in the session or its delivery.

32. The claimant attended the session at Ruchazie. On arrival at Ruchazie the claimant spent some time, around an hour on the claimant's evidence, checking the premises and the fire muster point. During these checks the claimant took a number of photographs of potential hazards he had identified. The claimant then observed the session until he became concerned that it was becoming too dark for him to safely make his way home. The claimant stated he was "*concerned and frightened*" to the extent that he called his parents to collect him from Ruchazie. The evidence of the claimant's mother was that he called her from Ruchazie in a panic because there was "*no lighting and he could not see".* This does not appear to be consistent with the claimant's lone inspection earlier, or the identification and photographing of potential hazards. It is also not consistent with an email the claimant sent to Kirsty McQuillan raising concerns about Ruchazie of 16 February 2018, a few days after the observation. In this he clearly states he called his parents for a lift home because he was concerned and frightened about travelling home in the dark. This is what the claimant, under cross examination, highlighted as causing him to be concerned and frightened. The claimant's complaint that

there was not an individual risk assessments and individual PEEP for him to attend Ruchazie does not appear to be connected to his concerns at the time, about being able to travel home. The claimant appears to have successfully observed at least some of the session at Ruchazie.

33. On 16 February 2018, Kirsty McQuillan was absent from work, attending a funeral. Harry Blackwood emailed Stephanie Colgan, requesting a meeting be arranged to discuss the claimant's concerns about Ruchazie. A meeting was arranged for 20 February 2018.

34. On arrival at the meeting the claimant's union representative, Harry Blackwood, raised concerns that Kirsty McQuillan was present. Harry Blackwood stated under cross examination that he was aware in advance that Kirsty McQuillan would be at the meeting. The only other person present for the respondent was Pamela Carruthers, a HR officer. The meeting did not go ahead, as Pamela Carruthers was not willing to chair the meeting, and no other manager to stand in for Kirsty McQuillan at short notice, was available. The claimant had by this point worked three shifts at Dennistoun, and attended Ruchazie once as an observer, since his return from long term sickness absence.

35. Harry Blackwood requested that the claimant be sent home on full pay until a safe working environment could be put in place for him. This reference to safety specifically referred to the lack of an individual risk assessments and individual PEEP for the claimant, for the Dennistoun venue. The evidence of the respondent was that the claimant had not, prior to this date, raised any issues with being asked to work at Dennistoun. Dennistoun was a venue the claimant had specifically agreed prior to his return to work. The claimant's evidence was that he did not raise any concerns directly, but did so via Harry Blackwood. The respondent's position was that there were risk assessments in place, and a generic PEEP for both Dennistoun and Ruchazie. The claimant does not dispute this, but argues such generic assessments were not sufficient. The claimant's request, at the aborted meeting, for leave on full pay, until specific assessments for Dennistoun were undertaken, was

refused. The claimant was told that he would be permitted to take annual leave until the meeting could be rescheduled if he did not want to attend Dennistoun, which was a temporary venue, in the interim.

36. Kirsty McQuillan had, immediately following the claimant's return to work, sought to arrange an Occupational Health Assessment, specifically regarding the claimant's sight. The visit to Ruchazie was intended to enable the claimant to better inform the scheduled Occupational Health Assessment regarding who the claimant's sight deterioration might impact his role. The claimant had been specifically told to raise any concerns he had on his return to work with Kirsty McQuillan. He did not raise concerns until after his visit to Ruchazie.

37. The meeting was rescheduled for 27 February 2018. Unfortunately, the claimant and Harry Blackwood were not able to attend on that date, as they had a meeting with the claimant's support worker scheduled. An email of 23 February 2018, a copy of which was before the Tribunal, timed as sent at 1:01pm by Jenny Jenkins, asked Harry Blackwood if he and the claimant would be available on 26 February 2018 instead. This is stated to be in an effort to move matters forward "*as quickly and efficiently as possible*". Harry Blackwood responded to this email at 1:23pm of the same day, and made no reference to the proposed rescheduled meeting date. Neither the claimant nor Harry Blackwood attended the rescheduled meeting of 26 February 2018, or gave notice they would not be attending.

38. The claimant's evidence was that he had relied on Harry Blackwood to inform the respondent that they could not attend the rescheduled meeting of 26 February 2018. Harry Blackwood initially gave evidence that he had not been aware of the rescheduled meeting. When the emails referred to above were brought to his attention, his evidence changed, and he stated that his view was that until he was told who would replace Kirsty McQuillan as the manager at the meeting, he did not think it was appropriate to tell the respondent he could not attend. This was despite him being aware of the intended meeting time and that he could not attend in any event. Instead, he was content to allow the respondent to spend time making arrangements for a manager to

attend a meeting for a time and date when he knew the meeting could not go ahead. It is difficult to see this as anything other than deliberately obstructive conduct.

39. The meeting was again rescheduled to 5 March 2018. At this meeting Kirsty McQuillan was replaced by Jackie Sunderland. This was expressly stated to be agreed on an interim basis to ensure that progress could be made in facilitating the claimant's return to work, and did not amount to an acceptance that Kirsty McQuillan was not the appropriate manager to attend the meeting. The Tribunal had the benefit of a contemporaneous note recording what was discussed at this meeting, which shortly thereafter Harry Blackwood had on a paragraph by paragraph basis responded to. In this response, additions were suggested as well as a number of changes. A significant part of the response confirmed that the note did not need any change or any addition. This has to be read as an acceptance at the time, when memories were still fresh, that the note in those parts was accurate.

40. Particularly relevant parts of the note record as follows:

    40.1 In the sixth paragraph the claimant is recorded as confirming, when asked if he could manage in a building with stairs, that he would be "*fine as long as he was familiar with their locations*". No change was suggested to this paragraph at the time.

    40.2 In paragraph seven it is recorded that there was a discussion about the need for a DSE assessment. It is recorded, in bold, that the claimant agreed to do the online DSE assessment on his return to work. Again, no amendment to this part of the note was suggested at the time.

41. It was noted that during evidence the claimant and Harry Blackwood stated that the claimant had not said either of these things. No explanation was provided as to why, if that was the case, the relevant paragraphs of the note recording the comments had been, contemporaneously, expressly stated to need no change in a detailed response that suggested changes to other parts

of the notes. This is particularly the case in relation to the DSE assessment, where the relevant point appears to be highlighted in bold font in the notes. The evidence of the respondent's witnesses was that the notes were an accurate record of the meeting as far as they could recall.

42. On balance, given the fact that the notes, and response to them, were drafted at or just after the meeting, which was over a year ago, the written record is likely to be a more accurate record of what was said. Accordingly, it is found that the claimant did say that he was fine with buildings with stairs as long as he knew where they were, and that he would do the DSE assessment on his return to his computer.

43. The Dennistoun venue, with which the claimant was familiar, had stairs. When he worked at Dennistoun the claimant worked in a shared office space.

44. In evidence the claimant stated that the 5 March 2018 meeting was the first time he had been asked about potential adjustments to help him cope at work with his deteriorated eyesight. The claimant also gave evidence that he himself did not know what adjustments might be needed until he was asked to do something. The notes record a discussion about the claimant's recent OH assessment, and the subsequent report. It was agreed that it would be helpful for the respondent's OH practitioner to contact the claimant's specialist regarding his eyesight, and the claimant provided the necessary consent for this.

45. During this meeting it was agreed that the claimant could work at the Shettleston library on a temporary basis, whilst further adjustments were explored. Shettleston was one of four venues that the claimant himself suggested as being conducive to "*supporting him in being able to deliver his role*". The claimant's evidence was that he was already familiar with this venue. The claimant never returned to work at Dennistoun.

46. On 7 March 2018 an individual PEEP for the claimant in relation to Shettleston venue was completed. The Tribunal had a copy completed PEEP, signed by the claimant, in the bundle of documents. This PEEP notes that the

Shettleston venue had steps at the rear fire exit. Apart from an instruction to check in with a fire marshal at the muster point in the event of an evacuation, the PEEP noted "*no assistance required*" in the event of an emergency evacuation.

47. When the claimant worked at Shettleston Library he initially did a mix of duties, which included some learning assistant work, but did not include any session delivery or travel to other venues. All the learning assistant work the claimant did at Shettleston was on a computer. This learning assistant work continued, on the claimant's own evidence, for one to two weeks. Initially the claimant's evidence was that when he started at Shettleston he only did learning assistant work. He later clarified this evidence, to confirm that from his first day in Shettleston he was asked to undertake library duties, which he described as below his grade. This library work continued until the claimant was seconded to the European Championships in the summer of 2018.

48. The claimant attended further meeting with Jackie Sunderland, accompanied by Harry Blackwood, on 20 March 2018. A summary of the discussion at this meeting was prepared, and was before the Tribunal. This confirms that the claimant and Harry Blackwood had been in contact with Access to Work, although apparently no substantive conclusion had been reached.

49. At the meeting on 20 March 2018, it is noted that Harry Blackwood asked for the claimant to be given assistance to perform his DSE assessment online. The claimant's evidence was that could not do the online assessment due to his sight difficulties. The evidence of the respondent was that the claimant had agreed to do the assessment module, and had in fact completed other online modules on his return to work, showing that he was able to do online training with the computer equipment provided to him. The claimant is recorded, in the contemporaneous note of the meeting on 5 March 2018, to have agreed to do the DSE online assessment. On balance, the Tribunal find that the claimant was able to do online training and could have done the DSE assessment online, but for reasons not explained chose not to do so, doing other online modules instead.

50. At this time, it was agreed between the parties that the ongoing role the claimant could undertake needed to be determined. The claimant agreed there were difficulties with him returning to the delivery of the range of sessions he had delivered prior to the recent deterioration of his eyesight, and that what he could do needed to be further explored. The search for a permanent alternative role for the claimant was an ongoing process. There was extensive evidence presented about the steps taken in this regard, however, this was not directly relevant to the claim's pursued by the claimant in submissions.

51. Whilst the tribunal heard extensive evidence about events after the claimant's ET1 had been presented to the Tribunal, these were again not directly part of the claim pursued at hearing. Of relevance to the claim were the following points:

51.1 The claimant had, to assist him which seconded to work at the European Championships, been given specialist software for his PC. This was then retained by the respondent on his return from secondment.

51.2 The claimant did, in the summer of 2018, obtain an Access to Work assessment report. This made a number of recommendations for adjustments to assist the claimant. This report and the included suggested adjustments were not available to the respondent until well after the times relevant to the claimant's claims.

51.3 The claimant has now moved to a new role with the respondent. He has almost completed a three month trial in that role, apparently successfully. The role is not similar, or related, to the claimant's previous duties.

Decisions

Individual Risk Assessment and Individual PEEP for Ruchazie

52. It is accepted that there are multiple authorities that state the conduct of an assessment is not of itself capable of being a reasonable adjustment. In all these cases, this conclusion is reached on the basis that the assessment is no more than a means to identify disadvantages and ways to address them, not itself addressing the disadvantage. In this case a different argument is made by the claimant. He states that the disadvantage he was subjected to was, specifically, the absence of the individual risk assessment and individual PEEP itself, which caused him distress and anxiety. For this reason it is clear that the assessment is different to those previously considered, and must be capable of amounting to an adjustment. That noted, this will only be the case if the claimant can show that the lack of these assessments caused him distress to the level that amounts to a substantial disadvantage compared to a non-disabled person.

53. The claimant relies on the PCP that he was asked to observe a session at Ruchazie without an individual risk assessment or an individual PEEP in place for that venue. It was not disputed by the parties that this could amount to a PCP.

54. The substantial disadvantage compared to a non-disabled persons the claimant argues he was subjected to as a result of this PCP was described in submissions made on his behalf, as "*the distress he experienced when attending the session at Ruchazie".* In his evidence the claimant described this distress, stating he was "*concerned and frightened*" to the extent that he had to call his parents to collect him from Ruchazie. This evidence does not, however, appear to be entirely consistent with his own written account, contained in emails sent shortly after the session at Ruchazie. In those emails he describes the distress, which caused him to phone his parents to collect him from work. However, he connects his frightened state to a fear of travelling home in the dark, given the late hour. It appears to be sometime

later that the claimant has ought to assert that the Ruchazie site itself caused him to be significantly concerned and frightened.

55. The provision of an individual risk assessment and/or an individual PEEP for the Ruchazie site, the PCP the claimant relies on, does not appear from the evidence before the Tribunal, to be what caused the claimant the distress he described at the time, in emails. Accordingly, the finding of the Tribunal is that the substantial disadvantage the claimant relies on is not found to have arisen from the PCP relied upon. It follows that adjustments to that PCP could not directly reduce the claimant's distress. If the claimant had been in Ruchazie with an individual risk assessment and individual PEEP, and all the hazards in the venue he photographed and recorded were removed, he would still have had to travel home at the end of the observation.

Individual Risk Assessment and Individual PEEP for Dennistoun

56. As with the claimant's claims about Ruchazie, the claimant relies on the PCP that he was required to work at Dennistoun in the absence of an individual risk assessment and the absence of an individual PEEP.

57. In relation to Dennistoun, the claimant did not seek to argue, or present evidence, that this PCP caused him distress that amounted to a substantial disadvantage compared to a non-disabled person. In fact, the evidence was that it was not until after he had completed at least two shifts at Dennistoun that the claimant raised any concerns that an individual risk assessment and individual PEEP were not in place. Instead the claimant argued that the substantial disadvantage he suffered was that he had to take annual leave to avoid carrying on working at Dennistoun.

58. The evidence was that the claimant had agreed to return from long term sick leave, on an interim basis, at Dennistoun. This was a location with which the claimant was familiar from his work prior to his sick leave. The claimant initially did not raise any concern that there was no individual risk assessment or individual PEEP for Dennistoun. From the evidence this was first recorded

as raised as an issue at the aborted meeting of 20 February 2018. Before this date there is no documented evidence that the claimant had raised any concerns regarding a risk assessment or PEEP for Dennistoun. The claimant's own evidence was that the concerns over Dennistoun were identified by Harry Blackwood, and he trusted his expertise.

59. Concerns regarding individual risk assessments and an individual PEEP were raised with the respondent on 19 February 2018 by Harry Blackwood, by email to Stephanie Colgan. A copy of this email was before the Tribunal. In this email the only concerns being raised appear to relate to placing the claimant in sessions, implicitly referring to the visit to Ruchazie. In response to these concerns a meeting was arranged for 20 February 2018. This shows a desire on the part of the respondent to deal with the claimant's concerns expeditiously.

60. The claimant worked two shifts at Dennistoun prior to 20 February 2018. During those shifts, the evidence was that the respondent ensured the claimant was not working alone in the part of the building where he was based. This was why, when the claimant initially suggested he was not happy to observe the session at Ruchazie the respondent stated he would not be permitted to work alone at Dennistoun instead.

61. It was accepted by the claimant, and Harry Blackwood, that there was a standard risk assessment and individual PEEP in place for Dennistoun. No argument that the claimant was subjected to any substantial disadvantage in relation to the two shifts worked there was pursued.

62. The claimant and Harry Blackwood were both aware, in advance, that Kirsty McQuillan would be the manager at the 20 February 2018 meeting. Before the meeting commenced the claimant and Harry Blackwood asked to speak to Pamela Carruthers, who was present from HR. Harry Blackwood told Pamela Carruthers that he and the claimant were not willing to proceed with the meeting if Kirsty McQuillan was present. This had not been indicated in the days before, when the arrangements for the meeting were discussed and agreed, including that Kirsty McQuillan would be in attendance. Harry

Blackwood went on to tell Pamela Carruthers that the claimant could not return to work at Dennistoun until an individual risk assessment and individual PEEP were completed.

63. The purpose of the 20 February 2018 meeting was to discuss the claimant's concerns that the working arrangements in place were not safe, i.e. that the reliance on standard risk assessments and PEEPS for sites the claimant was asked to attend were not sufficient. The claimant then refused to discuss this with his line manager, and insisted on being given leave with full pay, because no other manager was available there and then.

64. The meeting could not go ahead, as Pamela Carruthers did not believe she had the authority to make relevant decisions, being a representative of HR and not the claimant's management. Despite suggestions to the contrary by Harry Blackwood, it is not reasonable to expect a member of HR to take decisions beyond their remit and chair a meeting in such circumstances. In effect, the claimant had announced that he was no longer willing to continue working at Dennistoun under a standard risk assessment and PEEP, and unwilling to discuss this with his line manager. In the interim he wanted to be on fully paid leave. Pamela Carruthers told the claimant that if he was not willing to continue to attend at Dennistoun as he had been, he would be permitted to either take further sickness absence or annual leave. The claimant chose to take annual leave, because he understood he would have only received half pay for any further period of sickness absence at that time. At that time it was not anticipated that the claimant would need much leave, as a further meeting would be arranged very quickly.

65. Due to the unhelpful conduct of Harry Blackwood, regarding the arranging of another meeting, it was not until 5 March 2018 that a further meeting took place. At this meeting the claimant listed four sites he would be happy to work from, and the respondent agreed to one of these. Further, the respondent agreed to do an individual risk assessment and individual PEEP for that site. The claimant then commenced work at that site on 7 March 2018.

66. The claimant argues that the fact he used annual leave between 20 February and 7 March 2018 was a substantial detriment, which a non-disabled person would not have been subjected to. The Tribunal do not agree. The claimant raised a concern, at the earliest, on 19 February 2018. The respondent arranged a meeting the following day to discuss and resolve this. The claimant refused to participate because, his then line manager, was at the meeting. The respondent sought to rearrange the meeting for 27 February 2018, with a different manager, and when that was not convenient tried to rearrange for an even earlier date of 26 February 2018. This shows a positive desire to deal with the claimant's concerns, despite his prior refusal to discuss them. Neither the claimant, nor Harry Blackwood, gave any indication they could not attend the 26 February 2018 meeting, and simply did not attend. The respondent, having had staff waiting for the claimant at the arranged time on 26 February 2018, took no action other than to seek to rearrange the meeting again. It was rearranged for 5 March 2018. At the 5 March 2018 meeting a discussion took place and the adjustments the claimant sought to his working location were all agreed.

67. The substantial disadvantage the claimant argues he suffered, was a result of his own unhelpful conduct in refusing to proceed with the meeting on 20 February 2018, and then failing to attend the meeting on 26 February 2018. It does not flow from the PCP identified by the claimant's representative. The respondent showed a positive desire to discuss and agree adjustments with commendable urgency, and despite the conduct of the claimant and his representative continued to persevere to find a way to facilitate the claimant's successful return to work. When faced with the claimant putting obstacles in the way of resolving matters, he was given choices about what to do in the interim and chose to take annual leave. This was carried over annual leave that the claimant would have lost, in any event, if not taken by 31 March 2018.

68. Accordingly, it is found that the disadvantage the claimant refers to was a result of his own conduct and choices, not the PCP of the respondent. For this reason the claimant's claim of discrimination by the respondent by not making reasonable adjustments in this regard cannot succeed and is

dismissed. The respondent is not under a duty to make adjustments to avoid the claimant's own unreasonable choices and conduct, and that of his union representative, putting him at a substantial disadvantage.

Computer Hardware

69. The claimant conceded that he had been, at all relevant times, provided with a large print keyboard.

70. The claimant did not accept that he had been provided with a larger PC screen. The evidence clearly indicated that the claimant was provided with a larger screen at all relevant times.

71. The claimant was asked to undertake a DSE self-assessment, and agreed to do so. He then did not undertake the assessment. The claimant was referred to Access to Work. Whilst Access to Work did prepare a report with recommendations, this was not available to the respondent until after the time relevant to the claimant's claim. There was some evidence of poor response times from Access to Work, but it is noted this is a third party organisation not within the control of the respondent.

72. The evidence was that the claimant not only appeared to be managing to deal with emails, and did some online training, but that he confirmed this to the respondent. Specifically, the claimant told the respondent he was "*fine with emails, folders etc."*

73. There was no evidence presented that, at the relevant times, the claimant had requested or suggested any additional adjustments to the computer hardware equipment he had been provided with. This is unsurprising, as the assessments of what the claimant needed were ongoing up to the time that he stopped, on an interim basis, performing duties with that needed a computer.

74. The duty on an employer in relation to auxiliary aids is to make adjustments that are reasonable. The claimant's representative agreed, during submissions, that part of what is reasonable is an allowance of time for the

correct adjustments to be identified and then implemented. With the exception of his keyboard and screen, which were already adjusted, there was no assessment that would provide a credible basis for making further adjustments to hardware prior to the claimant's interim role ceasing to involve the need to use a computer. The respondent's position was that it could not properly assess the suitability, availability and cost of additional computer equipment in the absence of an assessment of the claimant's needs in his role. This is an inherently logical and reasonable approach. Accordingly, there cannot have been a breach of any duty to make reasonable adjustments to computer equipment in the relevant period, and this claim must fail.

Computer Software

75. The claimant argued that the respondent was in breach of its duty to make reasonable adjustments by failing to provide specialist software to assist the claimant in using a computer. The claimant's representative submitted that because software was not provided the claimant was put at a substantial disadvantage. This was submitted as a clear breach of the respondent's duty to make reasonable adjustments. Specifically, this was argued to be on the basis that the claimant could potentially be deployed into a role that needed the use of a computer, and as such the adjustments would reduce the risk of the claimant suffering a disadvantage in such a role. In the claimant's representative's Note of Argument it is argued that it is sufficient that the claimant *"Might find himself deployed into an office based role"*.

76. The respondent's position was that the provision of specialist software, or any other equipment, would not be reasonable until it was determined what role the claimant would undertake, and accordingly what his needs in that role would be. In addition, the respondent argued it could not, without further research, be aware of what was potentially available by way of software, and what would work for the claimant. Before this information was available to the respondent, the claimant ceased to do computer based work as part of his interim duties. This cessation was within two weeks of the claimant moving to

Shettleston. Before moving to Shettleston the claimant attended Dennistoun three times, and observed a session at Ruchazie.

77. It is not accepted that the claimant would be at a substantial disadvantage because software was not provided to assist with something that was not part of the claimant's role, or even part of a future role that had been actually identified. As such, the only basis this claim can succeed, is if the claimant suffered a substantial disadvantage prior to the cessation of computer based work as part of his role.

78. Whilst at Dennistoun the claimant told the Kirsty McQuillan that he was "*fine with emails*". This was the computer work he was tasked to do at Dennistoun. Accordingly, the evidence does not suggest that the claimant suffered any substantial disadvantage whilst at Dennistoun due to the lack of additional software.

79. It is noted that the claimant had computer duties which software could potentially have assisted with for one or two weeks at Shettleston. The duty is not to make instant changes, especially where they are to things like the purchase of appropriate software which can take time, as the various options are explored, to see which are most effective for the claimant and which are available with appropriate licences. The claimant's representative agreed during oral submissions that such adjustments to computer software would take weeks.

80. In this case the respondent was in the process of seeking to assess the claimant's needs, and determine if he would be able to perform the non-computer based aspects of his learning assistant role and if not what his future role and duties could be. There was no evidence of any undue delay in this process.

81. Accordingly, whilst it is clear that in those two weeks the claimant could have been assisted with his computer based work by the provision of software, and the respondent was aware of this potential, making adjustments within two weeks would not be reasonable. This is particularly the case when the

respondent is seeking to determine if the claimant's role will have to change because the claimant could not manage, even with adjustments, the majority of his role, which was not computer based.

82. Accordingly, it is not found that the respondent failed to make a reasonable adjustment by providing software to assist the claimant in that two week period. After this period, the claimant did not have ongoing computer based duties either current or planned, and accordingly he could not have been at a substantial disadvantage in the following weeks.

83. For reasons the claimant's claim that the respondent breached it duty to make reasonable adjustments by not providing specialist computer software must fail and is dismissed.

84. For the above reasons all the claimant's claims are dismissed.

Employment Judge: N Buzzard

Date of Judgement: 01 July 2019

Entered in Register,

Copied to Parties: 01 July 2019