Case Number: 2501322/2018

THE EMPLOYMENT TRIBUNALS

Claimant: Mr J Shield

Respondent: BPDTS Limited

Heard at: Newcastle Hearing Centre **On:** 28, 29 and 30 September and 1, 2, 5 and 6 October 2020 with deliberations on 8 October 2020

Before: Employment Judge Morris

Members: Ms L Jackson
Mr S Carter

Representation:

Claimant: Mrs C Shield, the claimant's mother
Respondent: Mr M Brien of Counsel

RESERVED JUDGMENT ON LIABILITY ONLY

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's complaint under section 111 of the Employment Rights Act 1996 that his dismissal by the respondent was unfair, being contrary to Section 94 of by reference to Section 98 of that Act, is well-founded.

2. The claimant's complaint that the respondent unlawfully discriminated against him by treating him unfavourably because of something arising in consequence of his disability contrary to sections 15 and 39 of the Equality Act 2010 is not well-founded and is dismissed.

3. The claimant's complaint that, contrary to section 21 of the Equality Act 2010, the respondent failed to comply with its duty under section 20 of that Act to make adjustments is not well-founded and is dismissed.

4. The claimant's complaint that the respondent harassed him contrary to section 26 of the Equality Act 2010 is not well-founded and is dismissed.

5. The claimant's complaint that the respondent victimised him contrary to section 27 of the Equality Act 2010 is not well-founded and is dismissed.

6. This case will now be listed for a one-day remedy hearing, in person, in respect of the claimant's successful complaint of unfair dismissal.

REASONS

Representation and evidence

1. The claimant was represented by his mother, Mrs C Shield, who called the claimant to give evidence. The respondent was represented by Mr M Brien, of Counsel, who called three employees of the respondent to give evidence on its behalf: namely, Mr N Moorhouse, Digital Services Practice Manager; Mr D Smith, Digital Services Practice Lead; Mr A Bolton Head of Data as a Service for DWP Digital.

2. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. The Tribunal also had before it a bundle of agreed documents comprising some 1330 pages, which was added to during the course of the Hearing. The numbers shown in parenthesis below refer to page numbers (or the first page number of a large document) in that bundle.

3. The claimant is a disabled person as that term is defined in section 6 of the Equality Act 2010 ("the 2010 Act"). As an adjustment to ameliorate the effects of one of his impairments, namely autism/Asperger's syndrome, the Tribunal agreed (having considered Mr Brien's objection but also relevant provisions of the Equal Treatment Benchbook) to adopt the method of asking the claimant questions that was proposed by Mrs Shield, which she said she and the claimant were confident would overcome two of the effects of that impairment: namely, the claimant's inabilities, first, to understand information on paper and, secondly, to absorb oral questions and respond orally to them. In short, the hearing proceeded with any question to the claimant being asked orally, Mrs Shield typing it onto her iPad for the claimant to read, he typing his answer on his laptop and she reading out the answer.

4. In the circumstances of the current pandemic Mr Bolton was unable to attend the Tribunal hearing to give evidence in the usual way. In accordance with rule 46 of the Employment Tribunal's Rules of Procedure 2013, by consent, Mr Bolton's oral evidence (the parties and the Tribunal having read his witness statement) was given over a speaker-telephone.

The claimant's complaints

5. The claimant's complaints were as follows:

   5.1 Discrimination arising from disability as described in section 15 of the 2010 Act, by subjecting him to detriment and dismissing him contrary to sections 39(2)(c) and (d) respectively of the 2010 Act.

5.2 A failure on the part of the respondent, contrary to section 21 of the 2010 Act, to comply with the duty imposed upon it by section 20 of that Act to make adjustments.

5.3 Harassment contrary to section 26 of the 2010 Act.

5.4 Victimisation contrary to sections 27 and 39(4)(d) of the 2010 Act.

5.5 Unfair dismissal contrary to Section 94 of the Employment Rights Act 1996 ("the 1996 Act") with reference to section 98 of that Act.

The issues

6. The parties had produced a list of issues, all but two of which were agreed. Those in dispute are numbered 9 and 10, being respectively whether the claimant's complaint regarding the reasonable adjustment in respect of the provision of Asperger's syndrome awareness training had been presented in time and, if not, is it just and equitable to extend time? Mrs Shield explained that it had been determined at a Preliminary Hearing held on 5 November 2019 ("the Preliminary Hearing") that "this claim should proceed to a full merits hearing" (88). Having read the record of the Preliminary Hearing, however, Tribunal explained that that decision was only that this particular claim should proceed to a full hearing and did not address the question of whether it had been presented in time. Further, as that was an issue of jurisdiction, the Tribunal would need to consider the points whether or not they were agreed issues. In light of that explanation Mrs Shield withdrew her objection; thus the parties were agreed that all the listed issues were agreed issues.

7. The list of issues being a matter of record, it is not necessary to set them out fully in this part of these Reasons. Instead, they will be addressed in our consideration below by reference to the numbering in the agreed list. Suffice is to say that the issues address the five complaints of the claimant set out above and add two additional elements: first, whether the stress, anxiety and depression the claimant suffered amounted to a disability as defined in section 6 of the 2010 Act; secondly, whether, in accordance with section 123 of the 2010 Act, certain aspects of the claimant's discrimination claims (the reasonable adjustment referred to above and four specified complaints of discrimination arising from disability by way of detriment) had been brought within three months starting with the date of the act to which the complaint relates (allowance being made as necessary in respect of Early Conciliation), whether the alleged conduct extended over a period so as to be treated as having being done at the end of the period and, if not, whether it is just and equitable to extend time and if so for what period.

Consideration and findings of fact

8. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned

below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

8.1 The respondent is a relatively new company providing specialist digital technology services to the Department for Work and Pensions. It is a large employer with significant resources including a dedicated Human Resources Department ("HR").

8.2 The claimant began his employment with the respondent on 27 March 2017 when his employment and that of many of his colleagues was transferred to it in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). The claimant's employment with the transferee business and therefore his period of continuous employment commenced on 20 February 2015.

8.3 As indicated above, the claimant is a disabled person as that term is defined in section 6 of the 2010 Act. The claimant states that his conditions include Neurofibromatosis Type 1, autistic spectrum disorder (ASD/Asperger's syndrome), scoliosis and chronic pain, dyspraxia, irritable bowel syndrome and stress, anxiety and depression. That the claimant is a disabled person is accepted by the respondent only on the basis that he has the impairments of Asperger's syndrome and Neurofibromatosis. The respondent does not accept that the claimant's other conditions, particularly of depression, anxiety and stress, are impairments that meet that definition.

8.4 Before and after the transfer of the claimant's employment to the respondent he worked in a team managed initially by ES, the team leader of which was SB. The claimant presented a grievance against ES and on or about 10 November 2016 asked to be removed from his team whereupon CC became his line manager. The claimant claims that his experiences in this team were far from positive. He says that he faced a lack of understanding from his colleagues of the communication difficulties that arose from his autism, criticism for arriving late to work and monitoring of his movements; for example, the times of his arrival and departure and when he was away from his desk on lunch breaks, toilet breaks or attending appointments. Although the claimant was not aware of it at the time, as a result of having made a subject access request he has become aware that members of his team were advising his team leader of these issues and he, in turn, was advising the team manager (1226 to 1230a). It is right that in certain of the emails involved the team members use critical language (for example, "still no sign of him!" (1226) "Some of the tax I pay is going to his salary!" (1230a)). The Tribunal reminds itself, however, that these individuals were not aware of the claimant's disability and, therefore, were perhaps understandably irritated by the apparently lackadaisical approach of a colleague. Additionally, as the respondent operated what has been described as "a matrix management structure", the Tribunal accepts that it was appropriate for the team members to be making their manager aware of the claimant's timekeeping issues. Finally in this respect, the emails referred to by the claimant date from May 2017, which

was prior to the 2017 Claim and prior to the claimant joining Mr Moorhouse' team.

8.5 The claimant states that it was the above experiences that led to him presenting a complaint against the respondent to an Employment Tribunal (No. 2500647/2017) on 28 June 2017 ("the 2017 Claim"). In a reserved judgment dated 14 August 2018 ("the 2018 Judgment") (104) one the claimant's claims (namely that his previous employer before the TUPE-transfer had failed to make a reasonable adjustment in relation to his access to a disabled parking space at its business premises) was found to be well-founded. The remainder of his claims of disability discrimination, failure to make reasonable adjustments, harassment and victimisation were found to be not well-founded and were dismissed. It is convenient to record at this stage that it is stated in the 2018 Judgment that that the "tribunal considered only acts of discrimination arising in the claimant's employment up to the date of the ET1 namely 28 June 2017".

8.6 Matters raised in the claimant's present claim, which he had raised or which could have been raised in the 2017 Claim are not issues before this Tribunal. Indeed certain of such matters (namely his complaints under sections 15 and 20 of the 2010 Act relating to his claims that the respondent failed to provide safe access to a disabled toilet and required him to park in two parking spaces) were struck out at the Preliminary Hearing under the principle of res judicata (83).

8.7 Just before the transfer of the claimant's employment to the respondent he was referred for an occupational health ("OH") assessment the report arising from is dated 17 March 2017 (153). Matters arising from that report that are of relevance to these proceedings include that it is recorded as follows: first, that the claimant had "an adjustment in place to start at 10am and an agreement for some leeway on this start time (up to 45 minutes afterwards) in case he wakes up feeling worse with his medical problems and unable to get in that time exactly. ….. I would be grateful if this adjustment can be kept in place"; secondly, that the 2010 Act was likely to apply "because of his neurofibromatosis and quite possibly his Asperger's".

8.8 In connection with the transfer of his employment to the respondent, the claimant applied in March 2017 to Access to Work for support. By letter dated 13 April 2017 (156), Access to Work confirmed to the respondent that the claimant could get grant support for a height adjustable desk, a SmartDrive for his wheelchair and "One Half Day Asperger's/autism and dyspraxia Training" (161). Authority to purchase these items was issued by Access to Work on 20 May 2017 (167). The claimant's evidence at paragraph 28 of his witness statement is that, "It was therefore reasonable for me to expect the Access to Work goods and services to be in place by 13 October 2017 at the latest".

8.9 By letter dated 10 August 2017 (229a) the claimant was required to attend a formal disciplinary meeting to consider issues of his timekeeping, failure

to attend team meetings and demonstrating aggressive behaviour. In the event, no further action was taken with regard to these allegations.

8.10 On 11 August 2017 the claimant commenced a period of sickness absence in respect of which he was referred to OH on 23 August 2017 (281). Of relevance to these proceedings it is recorded that the above reasonable adjustment was already in place for the claimant "of allowing an additional 45 minutes onto his start time due to mobility issues".

8.11 During the claimant's absence from work a "keeping in touch" meeting took place on 2 November 2017 (287). It was conducted by RW who was the claimant's absence manager. Amongst other things she enquired whether the claimant "had discussed his health condition with his colleagues" but "he confirmed that he did not want them to know", the claimant stated that "he wanted to be away from his current team because of their comments and behaviours" and that he "does not like face to face communication and would like everything by email as face to face was causing him stress at the moment." RW asked the claimant what he perceived to be the blockers to his returning to work to which he answered that he must have a permanent workstation and, in the context of having fallen in the disabled toilet/shower room on the wet floor, asked whether it would be possible to provide a mop or squeezy so that users could make it safer for him. The Tribunal notes that although the Asperger's training was briefly mentioned at this meeting the claimant did not raise the delay in its provision as a blocker to his return. The claimant's request to be away from his current team was supported in a medical certificate dated 6 December 2017, which certified that the claimant may be fit for work, "as long as away from universal credit team and on phased return over three weeks" (305).

8.12 A further OH report is dated 21 November 2017 (296). Amongst other things this report records the claimant's communication issues due to his autism spectrum disorder and a lack of awareness of his work colleagues towards his condition that had led to him currently suffering from anxiety, depression and work stress, that his GP had prescribed him medication and that he was undertaking counselling. The OH adviser expressed the opinion that the claimant was currently unfit for work due to his symptoms and as the claimant perceived the underlying causation to be work-related issues the adviser strongly recommended that a meeting be arranged to allow the claimant and his manager to discuss the matter, which should enable the claimant to move forward and assist his return to work.

8.13 An outcome of the above meeting of 2 November 2017 was a Back to Work Plan, which was subsequently updated on 8 December (314) following the claimant's return to work on a phased return on 4 December. As he had requested, the claimant was moved to a different team; this being managed by Mr Moorhouse. Amongst other things the Plan records that the equipment to be provided by the Access to Work grant funding had been received.

8.14 The claimant indicated to RW his intention to return to work on Monday, 4 December 2017. She wrote to him on 30 November 2017 (298) amongst other things stating that she had not been able to arrange any EVAC training so she did not think, from a health and safety perspective, that the respondent could take him back on his proposed date. She asked whether that would cause him any problems and undertook to be in touch as soon as she had training organised so that he could be given a firm return to work date. She concluded that she thought that he might need a further fit note for the following week. In the event, to RW's surprise, the claimant did return on 4 December (304). The claimant complains that his return to work was mismanaged in that he had to sit at his old desk and his equipment (monitor, cables, etc) had disappeared. The Tribunal is satisfied, however, that given RW's email of 30 November it was reasonable for the respondent's managers not to expect the claimant's return on 4 December with the result that, understandably, everything was not properly in place for him such as details of the hours of his phased return to work and a new desk and work plan in his new role. Nevertheless, relevant managers were then engaged in putting various matters in place as is apparent from the email from HR during the afternoon of 4 December 2017 (302). One of those managers was Mr Moorhouse who quickly responded to that email indicating steps that he was taking; for example, to identify volunteers to be trained in evacuation, meeting with the claimant the following day to discuss job roles and assess his overall suitability and if suitable to look at what training/mentoring would be required, identifying that seating arrangements would have to be considered as the only free desks that he was aware of were in very close proximity to the claimant's old team and that as he needed a riser desk some desk relocations might also need to be considered (302).

8.15 Mr Moorhouse duly met the claimant on 5 December 2017. They discussed the role and responsibilities for the Environment Support role and the shift pattern (albeit the claimant would initially work on a fixed shift) and agreed that he would spend some time with one of the team the following day to get more of an understanding of what they do (300).

8.16 On 8 December 2017 the claimant wrote to RW setting out some "on-going stressors" including, "On-going lack of awareness and failures to comply with my request to communicate via email where possible rather than verbally – ie unannounced approaches to desk and asking non-work-related questions" (311). RW replied that day (310).

8.17 Mr Moorhouse wrote to the claimant on 8 December 2017 summarising a discussion that they had had that day (319). Amongst other things, he set out what were to be the claimant's working hours during his phased return to work as follows: w/c 4 December, 10:00 - 2:00; w/c 11 December, 10:00 - 16:00; w/c 1 January, full-time. He also set out arrangements that would be put in place in respect of a training plan for the claimant in his new role. On 11 December the claimant replied in relation to his working hours that he "was under the impression that it would not be so much the hours/shifts

but the total weekly hours (20H per week, increasing over 3 to 4 week period back to full-time (40h)" (318). In an email dated 11 December (317), Mr Moorhouse corrected the claimant's stated impression reminding him that in their meeting they had agreed the working hours that he had previously set out. He added, "I understand there is some flex around you start time the means you can arrive up to 45 minutes after 10am. If for whatever reason you are not going to be here for 10am please contact me before 10:15am and let me know of your anticipated start time. Any lateness will need to be made up at the end of the day"; he provided his office and mobile telephone numbers. Mr Moorhouse explained in evidence that this flexibility was to reflect the fact that the claimant's condition will at times affect his sleep resulting in him struggling to get into work on time.

8.18 At this time Mr Moorhouse believed that the claimant would be a good fit for his intended role and his team. He was aware that the claimant had not been happy with his previous team, hence the transfer into his team, and he endeavoured to ensure that the claimant felt welcome and could consider the change positive and a fresh start. The claimant originally moved into the role of Environmental Support Engineer but was not kept fully utilised so sometime later, with his agreement, he moved to a role of Test Engineer. This was new for the claimant and, therefore, two mentors were assigned to him and the appropriate training package was developed.

8.19 Early in their relationship the claimant disclosed to Mr Moorhouse that he had been diagnosed with Asperger's. Mr Moorhouse had not worked with someone with that condition before and was keen to learn more about it in order to accommodate and support the claimant. He therefore completed online training on Civil Service Learning on Mental Awareness and Disability Awareness. The claimant then informed him that those training packages were too generic and, therefore, Mr Moorhouse supplemented that basic knowledge by following up on the links to Neurodiversity and Asperger's that had been provided to him by the claimant (393) and by another colleague who was an Autism Ambassador (449).

8.20 Almost from the outset of Mr Moorhouse managing the claimant there were issues with his lateness and on 13 December 2017 Mr Moorhouse invited him to a one-to-one meeting to discuss his timekeeping. The claimant responded that his preferred and main type of communication was to be done via email as he was still not comfortable with verbal communication in the office due to a lack of overall trust (330). This response disappointed Mr Moorhouse as he had wanted to use the meeting as an opportunity to try and understand the issues that had resulted in the claimant being late again that morning and, in light of their previous face-to-face meeting he had felt that they were starting to build up a trusting working relationship. He reiterated that from his point of view the claimant had a fresh start with him being his new manager and that they would work together to ensure that the claimant had a seamless transition back to work and into his new team (329). In this email Mr

Moorhouse noted that since their meeting on 8 December (when they had agreed the phased return to work hours and the process the claimant needed to follow if he was not going to be at work for 10:00) he had twice been late and, on one occasion, he had arrived at 10:50 without having informed Mr Moorhouse that he was going to be late. He concluded the letter that continued lateness could not be tolerated and that although there was an adjustment in place allowing the claimant to arrive at work up to 10:45, as had been agreed, he needed to inform Mr Moorhouse of his intended lateness by no later than 10:15. The claimant replied that day explaining why he preferred meetings via email and the reason for his lateness that day being that he had had very little sleep due to a number of work-related stress factors.

8.21 Mr Moorhouse responded fairly positively the following day, amongst other things pointing to what he and the claimant had achieved since he joined his team but noting that he had arrived at work late again that morning without having previously advised Mr Moorhouse of his anticipated lateness. The claimant replied that he did not consider himself to be late as he had been in the building before 10:00 although not at his desk because he had had to make use of the toilet on the ground floor; also, Mr Moorhouse had only previously stated to send a text if he intended to be in after 10:15.

8.22 Mr Moorhouse recorded certain matters relating to his management of the claimant including these issues of his lateness and not contacting Mr Moorhouse to advise him that he would be late (334), which understandably concerned him.

8.23 The Tribunal is satisfied that at this time Mr Moorhouse was committed to supporting the claimant and was working hard to accommodate him in his team as is evidenced by his email to HR dated 8 January 2018 (333).

8.24 The claimant commenced a further period of sickness absence on 2 January 2018, from which he returned on Monday, 22 January 2018.

8.25 A medical certificate dated 10 January 2018 records that the claimant may be fit for a phased return to work subject to conditions previously documented on fit notes and also “communicate only by email and avoid small talk and does not have to attend face-to-face meetings” (347). The claimant forwarded this fit note to RW under cover of an email dated 11 January (353). Regarding his return to work he said that he would need assurances that the adjustments were fully in place explaining that this related to communication adjustments and being called to four meetings to discuss verbally updates and issues; he did not raise the delay in the provision of Asperger’s training.

8.26 Mr Moorhouse sought HR advice with regard to the recommendations in the above medical certificate (352). CW responded advising that they should await the outcome of the OH referral that day but mentioned the impact of the adjustments on the business, that she was concerned that the claimant should not be isolated from his team and queried whether the

claimant's charitable work might be exacerbating his medical conditions (351). Mr Moorhouse replied explaining that the claimant's work required verbal interaction with colleagues as well as customers as did collaborative working, that there would be times when there were unannounced approaches from people in the development team asking questions about environmental support issues and that there were regular team meeting at which people engaged in verbal discussion. He noted that there was general reference to such matters in the job description for the claimant's role that he had stated looked great and that he would be happy in the team. Mr Moorhouse also highlighted the knowledge transfer that the claimant was about to commence, which would involve him spending time at colleagues' desks and that communicating with them would inevitably involve some small talk. He observed that to ask everyone who may have an interaction with the claimant to avoid small talk was ludicrous. CW advised that Mr Moorhouse should email the claimant to get more information about what he saw as the practical application of the adjustments on the fit note.

8.27 During the hearing the claimant was critical, both in his evidence and the questions he asked, of the amount of communications Mr Moorhouse and other managers had with HR. The Tribunal considers it perfectly reasonable, however, for any line manager to keep HR informed of personnel matters and seek advice where necessary. The above exchange with CW is an example of this.

8.28 In oral evidence and questions at the hearing the claimant took exception to Mr Moorhouse using the word "ludicrous" in the above email, which he construed as being directed at him and his request for this adjustment for colleagues to avoid small talk. The Tribunal notes, however, that in paragraph 158 of the claimant's witness statement he states that "having had the benefit of sight of all of the other documents pertaining to my return to work I am willing to concede that the term ludicrous could be attributed to the full situation that Nick had been given to manage. (Pousson v British Telecom)." In addition to this concession on the part of the claimant, the Tribunal accepts Mr Moorhouse' evidence that in using the word "ludicrous" he meant that asking everyone to avoid small talk with the claimant would be extremely difficult to implement, police or monitor and it would inevitably have fallen down at some point, not least because the claimant's height adjusting desk was positioned in a thoroughfare and could not be moved easily. He had not intended to cause offence and was not directing the comment towards the claimant. Further, telling colleagues not to engage in small talk with the claimant would highlight his condition, draw unnecessary attention to him and potentially isolate him.

8.29 An OH report is dated 12 January 2018 (371). It recorded that the claimant was off work again due to workplace issues and recommended that he be referred for a Workstation and Workplace assessment. It is noted in the report that given the period for which it had lasted the claimant's "multiple medical conditions are likely to be considered a disability". This is not

particularly helpful advice as it does not differentiate between which of the claimant's medical conditions is an impairment for the purposes of section 6 of the 2010 Act and only focuses on the long-term element of that definition and not, therefore, the elements of significant effect or day-to-day activities.

8.30 Mr Moorhouse wrote to the claimant on 16 January 2018 (381) in light of the OH report and the advice from CW referred to above. In an essentially supportive email he asked the claimant how he saw the adjustments recommended in the above fit note being implemented and how he saw the practical application of those adjustments on his ability to carry out certain tasks and responsibilities in his role. As to the earlier fit note suggesting that the claimant should be away from the universal credit team, which was located near to the claimant's new team, Mr Moorhouse identified the inevitability that people would walk past his desk and his concern that the claimant would become isolated if he were to be located off the floor plate. In summary Mr Moorhouse explained that he was trying to understand the claimant's medical needs, the adjustments requested and whether the role could be adjusted without causing a detriment to service delivery. Being aware that the claimant continued his charitable work, Mr Moorhouse enquired how he was managing communications away from work and whether that could be mirrored at work. The claimant engaged with Mr Moorhouse in this respect in what Mrs Shield described as a "very productive" exchange. The claimant responded that day with comprehensive answers, including that he was more comfortable talking to colleagues about technical aspects of his job than about personal issues, slides from meetings should be provided to him rather than him being required to attend, he could attend conference calls but would become stressed and anxious if requested to speak and questions should be instigated by email rather than approaches to his desk. Mr Moorhouse took these and other matters in the claimant's response into account. As to the comparison with his charity work, the claimant explained that he was comfortable speaking with both staff and users of the charity as he had had no prior issues with them. Mr Moorhouse passed this response to HR and received appropriate advice from SC in relation to the issues of small talk, face-to-face discussion and the claimant's attendance at the meetings (378). As with the example above, the Tribunal considers that this exchange between Mr Moorhouse and HR was reasonable and appropriate.

8.31 On 18 January 2018 the claimant wrote to Mr Moorhouse with a number of questions to which he required answers prior to consenting to the workplace assessment recommended by OH. Amongst other things he stated that the Asperger's awareness training that formed part of his Access to Work package would enable colleagues to gain a better understanding of the adjustments that he had requested around communication methods. He explained the main difficulties he had around small talk (although understanding that colleagues were attempting to be friendly and open) and that he was slightly more comfortable if a discussion was about work-related topics although there was still a trust

issue due to the comments previous colleagues had made (458). Mr Moorhouse replied the following day (457) making use of the advice he had received from SC in HR.

8.31.1 With regard to avoiding small talk Mr Moorhouse stated that if the claimant wished the business to support his request that would require his permission for an email to be issued to all of the respondent's staff explaining that as a reasonable adjustment they were being asked to refrain from approaching the claimant with non-work related conversations. Mr Moorhouse expressed concern at the attention this could bring to the claimant as he was aware that it could cause his anxiety/stress levels to rise.

8.31.2 Mr Moorhouse confirmed that he was content to consider no face-to-face discussion between the claimant and managers but only on a short-term basis and subject to review.

8.31.3 Team meetings could be moved into an atria to overcome the claimant's concern about small spaces with lots of people and the claimant would not be put on the spot to answer questions or verbally partake unless he felt comfortable doing so. Failing this they could consider looking at providing bullet points of the meeting but he would miss out on ad hoc work conversations. If the claimant did not attend team meetings Mr Moorhouse would make sure that there was work for him to continue with.

8.31.4 To be successful knowledge transfer had to be done face-to-face but it would be necessary for the claimant to confirm that he was happy with this. Mr Moorhouse noted that the new team the claimant worked alongside was comparable to his charity colleagues as there had been no strain in the working relationships. Also consideration could be given to claimant having additional breaks if he was having an 'off day'.

8.32 Once more the Tribunal considers that this was a positive and supportive email from Mr Moorhouse, which he concluded by repeating that the claimant coming onto his team was "a clean slate. I want this new opportunity to work for you and will do what I can make it work for you but to make it work we need to work together." The claimant did not respond to Mr Moorhouse' point about sending an email to the respondent's employees to avoid small talk with the claimant, which was therefore not sent. In any event, the Tribunal considers that it would have been an impossible task for the respondent to require its employees not to approach the claimant in this way especially as he continually refused to give his permission for them to be made aware of impairments.

8.33 A further OH report is dated 11 April 2018 (565). Adjustments were put forward for management consideration including as follows: a stress risk assessment; an ergonomic workstation assessment; a bespoke workplace assessment; toilet breaks as required due to the claimant's IBS; access to

disabled toilets used solely by disabled people; avoiding verbal communication with colleagues where possible, any business communication being delivered by email where appropriate; consideration of the management training that had been actioned by Access to Work with regard to Asperger's.

8.34 On 24 April 2018 Mr Moorhouse conducted an end of year review with the claimant. In preparation he obtained feedback from two of the claimant's colleagues. JH was positive and considered that the claimant would "successfully fit into the team and be a productive team member" (545). SL also provided constructive feedback (547) regarding such matters as the claimant's willingness to gain an increased awareness and having useful past knowledge on other systems. In the context of maintaining focus (which SL observed included everyone) he commented that the claimant "can sometimes be distracted when being shown a new task". The claimant (disregarding SL's positive comments) has homed in on this remark of which he is highly critical, suggesting that it demonstrates a lack of understanding by SL of his impairments.

8.35 One of the claimant's complaints of discrimination arising from his disability is that his appraiser made negative remarks to the claimant about his learning and communication style. It is apparent from the end of year review document (574a) that Mr Moorhouse, who was the appraiser, did not make any such remarks. The only negative remarks were that the claimant's progress in his new role had been slow and that he needed to spend less time on his phone and start asking for help when he needed it (574h). In the summary section Mr Moorhouse similarly recorded that he spoke to the claimant about using his mobile phone while working and advised him that while occasional use was acceptable persistent use while he had work to do was becoming a distraction and, being aware that the claimant had been spoken to previously about the use of his mobile phone, he was surprised that this issue was continuing. Nevertheless, despite this he recorded that the claimant "is an intelligent individual and has a good technical understanding. If he applies himself I can't see any reason why he can't make a success of the testing role". Additionally, against a box marking of 5 at the mid-year review Mr Moorhouse gave an improved box marking of 4 at the end of year as there had been some progress with the claimant's learning although there was still some way to go. He concluded in a very positive fashion, "I really want Jamie to make a success of the testing role and will do what I can to support him but ultimately the effort needs to come from him and I will do what I can to support his learning and development" (574i).

8.36 In evidence the claimant sought to expand this point about his appraiser having made negative remarks to him about his learning and communication style by explaining that it was the above comment of SL that he could "sometimes be distracted" to which he was referring in this respect and not Mr Moorhouse as his appraiser. That is not consistent with the complaint that the remarks were made "by his appraiser" (52) but, two points are apparent in any event: first, when SL made his comment he

was not aware of the claimant having Asperger's syndrome; secondly, Mr Moorhouse did not take SL's observation forward into the end of year review.

8.37 On 25 April 2018 the claimant emailed Mr Moorhouse asking whether there was any progress with the awareness training that had been approved by Access to Work in April 2017 (668). Mr Moorhouse replied the following day asking the claimant to let him know what disability awareness training he was after, who it was aimed at and how wide. He said that would enable him to try and look into what training was best (667). Given the sensitivities of the claimant the Tribunal considers that it was not inappropriate for Mr Moorhouse to seek this clarification but in an email dated 23 January 2018 to Mr Moorhouse the claimant had already answered this question stating that the training was intended to give colleagues and managers a better understanding of ASD and/or Asperger's and was aimed at giving a better understanding of the difficulties faced within the working environment and in general outside work focused on his exact struggles, of which he gave examples (398).

8.38 Between 30 April and 2 May 2018 the claimant and Mr Moorhouse engaged in email communications relating to what the claimant described as a whole host of ongoing concerns, which he wanted to discuss directly with HR without management involvement. Under cover of his email of 2 May 2018 (659) Mr Moorhouse sent the claimant a copy of the OH report and responded to points raised in an email from the claimant dated 1 May 2018. In his email Mr Moorhouse stated that he could email staff reminding those who did not need to use the disabled toilet facilities to refrain from doing so, asked the claimant to let him know of any difficulties he experienced with his allocated parking spaces and undertook to pursue access problems that the claimant was experiencing when a footpath was closed during window cleaning operations. Mr Moorhouse raised two points in particular.

8.38.1 First, he once more addressed the reasonable adjustment of avoiding small talk. He again said that he had concerns that this could isolate the claimant but offered to email staff if the claimant would like him to do so. He suggested wording similar to, "As a reasonable adjustment to support Jamie in the workplace can I please request that you only approach Jamie with work related conversations/topics." He emboldened and underlined a request that the claimant confirm that he was happy for Mr Moorhouse to email the immediate team with this information. For a second time the claimant did not respond.

8.38.2 Secondly, he informed the claimant that the Asperger's training was being looked into further. They were looking into what DWP might have that could be used and also looking to engage PAM. He noted that the claimant had suggested right2write and asked if there was any reason for that.

8.39 The provision of the Asperger's awareness training had now been outstanding for over a year, which Mr Moorhouse acknowledged in evidence. His explanation was that as the claimant was on sick leave between August and December 2017 and his previous management wanted to consult with him on the process it was shelved until the claimant's return to work in January 2018, which was when Mr Moorhouse picked it up. The Tribunal notes and accepts that Mr Moorhouse did seek to action the training immediately after he appears to have been prompted by the claimant in an email of 23 January 2018 (391); and continued to press for a response (541). Mr Moorhouse contacted one of the claimant's former managers and colleagues in HR and at Access to Work for information in relation to which it was suggested an upcoming OH referral could establish any further inputs that were required from Access to Work and any additional support and possible suppliers. The question would then become who would support this, the current employer, Access to Work or a mix of both (542). Mr Moorhouse' evidence was that delivery had then been slow as he and colleagues in HR had to clarify certain things relating to the procurement, for whom it was intended and the claimant's preferences as to provider. The Tribunal does not accept this explanation, the claimant being off sick was not particularly relevant as the training was not for him and when it was provided he was also absent from work, there was no evidence regarding previous management wanting to consult with the claimant on the process and the Tribunal is satisfied that management could have made necessary decisions such as to whom to provide the training and its content without necessarily seeking the claimant's input; in this regard, as indicated above, the claimant had already indicated the intentions and aims of the training in his email 23 January 2018 (398). As the training had been shelved by management, it was management who ought to have taken the initiative to progress it, which did not happen as quickly as it should. In this connection the Tribunal rejects Mr Brien's submission that the Tribunal's consideration of this aspect should be limited to the time commencing with the OH report of 11 April 2018 as that was the first time there was a recommendation regarding training to the claimant's new team. The Tribunal is satisfied that Access to Work approval of the provision of awareness training in May 2017 was applicable to all managers of the claimant, of whichever team he might be a member.

8.40 On 22 May 2018 HR prompted Mr Moorhouse to push forward the decision on who would deliver this training and requested that he ask the claimant to consider and confirm his preference as to which of two suggested providers would meet his needs (723). Those providers were Right2Write (information on two courses that it could provide being set out in the email) and PAM the respondent's wellbeing partners, which could be quicker. Mr Moorhouse passed this information to the claimant (729) indicating that he was content for the claimant to speak to the course provider prior to the presentation of the course. The claimant responded that he had no real preferences as long as the training was delivered without further delay. If the PAM alternative was quicker he was content

with that. Either way he would like to speak with the trainer first to get a better idea of the intended course content (728).

8.41 The training was provided on 19 June 2018 and appears to have been repeated on 22 June 2018. Relevant managers, HR officers, well-being and employee representatives and staff who were interested in learning more attended. A note of a review of the training in August 2018 is at page 774. The note first records feedback from attendees then goes on to review the management of the claimant in light of the training that had been given. This includes the following:

8.41.1 The reasonable adjustment to the claimant's start times, which had been implemented in response to his pain management and not his neurodiversity condition, would remain in place.

8.41.2 The decision not to agree with the claimant's request for a reasonable adjustment to ask colleagues not to interact with him was maintained on the basis that the training had indicated that to isolate him from colleagues would not be appropriate.

8.41.3 Management of the claimant's poor performance was considered to have been appropriate given that support and training for his new role had been put in place but had not been completed in the expected timescales and his output of work had been poor: the fact that he had been spoken to on several occasions for excess use of his mobile phone and Facebook while at work was noted.

8.41.4 Discussion had been undertaken with the claimant regarding his reasonable adjustments request a number of which had been implemented such as actively seeking changes to the toilets and car parking to help alleviate the stressful effects of his condition.

8.42 In conclusion the training had been informative (but much had been covered at previous learning and Mr Moorhouse in particular had had previous similar learning and experiences) and the management decisions that had been taken appeared to be fair and reasonable in light of that training. The evidence of Mr Moorhouse was that overall he did not think that the training being delivered sooner would have manifestly changed how colleagues interacted with the claimant or that it would have facilitated his return to work. The Tribunal agrees with that analysis for two principal reasons.

8.42.1 First, the claimant's focus was primarily on how his colleagues behaved towards him if, for example, he did not come across as being a team player or appeared to be aggressive due to his flat tone of voice. He was asked by one of the Tribunal members how that would have been helped if it was his managers who had the training and his colleagues were not aware of his condition. He answered that his colleagues did not need to know, it was simply that if they raised such matters with Mr Moorhouse as concerns he

would be able to handle them in a different way, for example by sending an email to the claimant rather than proceeding by way of disciplinary action, and would not need to inform his colleagues. The Tribunal does not consider that to be a satisfactory explanation: the claimant's concern was directed at the behaviour of his colleagues. That was unlikely to be changed if they were denied knowledge of the claimant's impairments and, not being managers, had not participated in the training that had been provided. That said, the Tribunal observes that Mr Moorhouse handling the concerns of colleagues in a different way was what he did when he did not factor into the end of year review the observation that SL had made about the claimant sometimes being distracted to which the claimant takes exception as set out above.

8.42.2 Secondly, in answer to a question why he had not returned to work following the provision of the awareness training the claimant explained that it was due to what he referred to as "historical failures from day one – TUPE day". He continued that after agreeing to return to work on 4 December 2017 RW had been surprised to see him and he found that his kit was missing etc. Against that background he "was anxious to go through this a third time knowing that the failures would be repeated and I would again be set up to fail". The Tribunal considers this evidence to be telling. Quite simply, the claimant's own evidence was that having returned to work twice he was unwilling to return to work a third time, which the Tribunal considers applied immediately after the provision of the training or thereafter.

8.43 It is appropriate that the Tribunal should have concluded its findings in relation to this aspect of the awareness training. It is, however, necessary to backtrack slightly to return to the chronology. Mr Moorhouse had concerns about the claimant's attention to his work. He had observed, for example, that the claimant would meet with his PCS trade union representative to discuss the 2017 Claim despite having been told that there was a proper process through which he should have gone (437 and 665) and was absent from his desk with such frequency that it was impossible not to take note and comment on it, including informing HR, which was the correct procedure. Mr Moorhouse was particularly concerned about the claimant's timekeeping. On Friday, 11 May 2018 he discussed this with the claimant. Such a discussion would normally have involved a face-to-face meeting but the claimant requested a reasonable adjustment of not attending with the result that Mr Moorhouse sent written questions to him to which he provided responses (689). The context for this meeting was the reasonable adjustment referred to above that had been put in place by the claimant's employer prior to the transfer of his employment to the respondent, which the respondent had maintained. That adjustment provided a late start time for the claimant of 10.00am coupled with flexibility for him to arrive at work any time before 10.45am. When the claimant moved into the team managed by Mr Moorhouse it was agreed that he would contact Mr Moorhouse if he anticipated being late to

work: i.e. after the agreed start time of 10.00am. Despite this, the claimant was either late or failed to notify Mr Moorhouse as had been agreed. The issues to be discussed were therefore essentially that even with the flexibility afforded to the claimant he often arrived late to work and/or failed to make Mr Moorhouse aware of the fact that he would not be in work at 10.00am.

8.44 The outcome of the meeting was that, against a background of informal discussions regarding such matters, Mr Moorhouse gave the claimant a written warning for failure to arrive at work at his designated time and failure to follow the agreed procedure for reporting lateness (687). The claimant was offered a right of appeal, which he did not exercise. This written warning is not, however, directly related to absence management and the respondent's policy in that regard which led, ultimately, to the dismissal of the claimant.

8.45 That policy of the respondent is its Sickness and Long Term Absence Policy ("the Policy") (1094) the purpose of which is said to be to manage sickness in the workplace. The Policy contains two points at which unsatisfactory absence will trigger a formal review:

8.45.1 Frequent short-term absences (defined as 8 working days in a 12 month period or 4 spells of absence)

8.45.2 Long term absence.

8.46 These points are triggered automatically when an employee's absence is entered into the respondent's MyView System. The claimant had had a significant amount of absence from work (964) and when his absence for 10 May 2018 was entered into the system Mr Moorhouse was able to see that the first of the above triggers had been reached in that he had been absent for four spells between 12 June 2017 and 10 May 2018 requiring him to undertake an investigation. He therefore invited the claimant to attend a formal meeting with him to discuss his attendance (711). The claimant requested not to attend an actual meeting and, as an adjustment, Mr Moorhouse provided him with a list of questions to which he responded (714). Mr Moorhouse reviewed the claimant's answers in the context of the following: his absence had totalled 103 days in the 12 month period; not all the absence had been disability-related; adjustments had been put in place to accommodate the claimant's disability as far as possible; he had failed to follow the absence reporting procedure on more than one occasion; he had declined to provide information about new medication, which could have allowed the respondent to look at how allowances might have been made while he adjusted to it. In these circumstances Mr Moorhouse decided that it was appropriate to issue a First Written Improvement Warning, which he did by letter of 29 May 2018 (731). He explained that he would monitor the claimant's absence over the next six months to 28 November 2019 (which he described as being "called the Improvement Period") and if his attendance was unsatisfactory (which he explained it would be if the claimant was absent on six more occasions

during that period) he would consider his case again and “may give you a Final Written Improvement Warning”. It is noted that the giving of a Final Written Improvement Warning (or not) was the only action referred to as the possible next stage of the process: there was no indication that further unsatisfactory attendance might lead to the claimant’s situation being referred for a decision as to whether or not his employment should be terminated.

8.47 On 4 June 2018 the claimant commenced a further period of sickness absence from which he did not return to work (766). Mr Moorhouse then received an OH report dated 13 July 2018 (782). The Management Advice section of that report is as follows, “In my opinion, Jamie is unlikely to return to work for the foreseeable future due to long-term, ongoing, work-related issues that have had a significant impact on his mental health and subsequently his overall health and wellbeing. I am unable to accurately predict a timescale for his recovery and I am unable to identify any modifications which could expedite his return to work. It is likely that whilst Jamie perceives the work-related stress to be ongoing, the symptoms of anxiety and depression will persist.”

8.48 On 28 September 2018 Mr Moorhouse conducted an attendance review meeting (by email) with the claimant (948 to 943). The exchange was not productive. When the claimant referred to “ongoing work stressors” Mr Moorhouse pointed to the fact that all the issues that the respondent was currently aware of had been resolved: car parking space for the claimant, the completion of the awareness training, the removal of the shower facility from disabled toilet and communications with the claimant only being by email. He asked what additional stressors were preventing the claimant from returning to work. The claimant replied that he understood that those things had now been resolved but that that demonstrated that they could have been done much earlier. He raised what he has referred to elsewhere as “historical issues” and that he would like to know that responsibility for his illness was acknowledged. He stated that he would love to be back at work but he was extremely fearful of more of the same occurring again and continued denial did not help him. He needed to clear his name. Mr Moorhouse responded (942a) that the claimant’s perception of events was a shame and that his focus was to work with the claimant to help him return to work, “I’d like to look forward rather than back”. He assured the claimant that there had not been and would not be any covert monitoring and that under the respondent’s code of conduct any inappropriate behaviour would be swiftly dealt with. He set out the various steps that the respondent could continue and offer in order to support the claimant’s return to work as follows:

- “An agreed phased return to work
- A dedicated mentor/coach to allow to be fully trained in test engineer role
- Allocated riser desk
- Management awareness training now completed

- Assurance that any issues highlighted will be thoroughly investigated and dealt with
- Access to the BPDTS mental health support resources as well as details of the BPDTS mental health first aiders
- Continuation of your RA (to start work at 10:00 with the a 45 buffer if you've had a bad night)
- Continuation of the vehicle checks RA (no checking in the car)
- Dedicated designated marked up disabled parking space
- Communication by email only
- No face to face meetings (unless of a technical nature)
- Shower facility now removed from the shared toilet facility in BP 9251 and all unnecessary furniture now removed".

Mr Moorhouse concluded his email by asking, "Is there anything additional you would like us to consider to help you to return to work?" He added, however, that the respondent would need to consider whether it could continue to support the claimant's ongoing absence and that if he could not see a return to work within a reasonable timeframe or offer any further suggestions for support and help for him return to work, "we may need to consider referring your case to a decision-maker which could ultimately result in your dismissal." Mrs Shield described this email from Mr Moorhouse as being "very helpful": the Tribunal agrees with that assessment.

8.49 In these circumstances a further OH report was produced on 31 October 2018 (959). It confirmed that the claimant was not fit for work, his return to work date could not be predicted and unless the employment issues were resolved the prospects for a successful and sustained return to work were poor, and there were no particular adjustments that could be recommended at that stage. As the main sustaining factor for the claimant's mental health issue seemed to be the poor relationship he had with the respondent the adviser suggested that a neutral third-party mediation might be a way forward. She also stated that the claimant was "likely to benefit from having a fresh start in a new team again if this is operationally feasible".

8.50 Mr Moorhouse conducted a further attendance review meeting with the claimant (again by email) on 23 November 2018 (986 to 970). Matters discussed included the possibility of mediation (which the claimant considered to be an excellent idea) and giving the claimant a further fresh start by moving teams again. Mr Moorhouse made the referral to the Mediation Service within DWP and although both he and the claimant had indicated a willingness to participate, after speaking with both of them the mediator formed the view that "a referral for mediation in this case would not be appropriate"; she indicated that she was not at liberty to disclose any further information (993). As to the other issue, the claimant subsequently confirmed that he did not want to consider a move of team (994).

8.51 Given the claimant's continuing absence and there being no indication of when he would return to work, Mr Moorhouse wrote to him on 14 January 2019 to inform him that he had decided to refer his case to Mr Smith who would decide whether he should be dismissed, moved to another job role or whether his sickness absence level could continue to be supported (994). At Mr Smith's request Mr Moorhouse sent him an email on 10 February 2019 explaining the impact of the claimant's absence on the respondent's business (999). In short, he explained that due to the claimant's level of absence his training had never been completed. If it had been completed he could have been moved to a team where Mr Moorhouse currently had two contractors and an employee who would be retiring at the end of April into whose role the claimant could have been placed; thus there were cost implications.

8.52 In evidence Mr Smith described his role as being to consider the circumstances of the claimant's sickness absence to determine, first, whether there was anything that had been missed that was barring the claimant from returning to work such as any reasonable adjustments that had not yet been made that would allow him to return and, if not, secondly, whether it was sustainable for the respondent to continue to support his absence or he should be dismissed in accordance with the respondent's Policy (1094). At the time the matter was referred to Mr Smith the claimant had been absent from work continuously from 4 June 2018 and, therefore, the second of the above trigger points had come into play.

8.53 On 7 February 2019, Mr Smith wrote to the claimant to invite him to attend a meeting on 18 February 2019 to discuss his sickness absence. He offered to conduct the meeting remotely or via email (996). At this time the claimant was in hospital as a result of having kidney stones and the meeting was therefore delayed to 4 March. Mr Smith sent the claimant four questions in advance (1006) to which the claimant replied on 1 March 2019 (1003). He informed Mr Smith that he was keen to return to work although he was anxious and would appreciate an assurance that he would not face an immediate onslaught of disciplinary action due to his absence or any onslaught for that matter.

8.54 The email exchange that comprised this meeting lasted 1¾ hours (1023-1012). A key consideration for Mr Smith, which reflected the first of the questions that he had previously sent to the claimant, was whether he could provide a date upon which he intended to return to work. The claimant replied that he did not have a date because he had not been given any assurances as to what he would be returning to or what he would be doing. He referred to facing hostility on a previous return and stated that if he was to return he would like the previously requested reasonable adjustments to be in place. Mr Smith reassured him that all reasonable adjustments that had been put in place would remain and again asked if the claimant could provide a return to work date. The claimant did not respond to that specific question but enquired whether any of his absence had been considered as disability-related. Mr Smith assured him that all absence had been considered against the

respondent's policy and asked again whether the claimant was in a position to provide a return to work date. He responded, "If we agreed a return to work on 1st April 2019 to enable me to be seen by my doctor and Occ Health, what role would I be coming back to?" Mr Smith responded that the claimant would return to his previous role and asked, "So are you committing to a 1st April return?" Once more the claimant did not respond to that specific question but restated that he was "extremely anxious about returning to work without an agreed step by step plan working alongside any occupational health and my GP's recommendation." Mr Smith explained that his role was to confirm that all reasonable adjustments had been made in order for the claimant to return to work and then make a decision regarding his continued absence. He explained that a return to work plan would be created by the claimant's line manager on indication of a committed return to work date. The claimant did not respond and, therefore, some 10 minutes later Mr Smith wrote again referring to the passage of time and stating, "can we agree a return to work date during this meeting?" If not he said that he needed to move to the next question of whether the claimant had any additional new facts of which he had not made responded aware. The claimant responded referring to having cried out to the respondent for two years but his evidence had been denied or ignored and unless Mr Smith was able to look at what had gone on he did not know of any other facts he could raise. Mr Smith replied that his role was only to discuss the claimant's current absence and not previous issues. He continued that if the claimant could not give a return to work date he would like him to provide answers to the other three questions that had been supplied. He was prepared to close off the conversation then and the claimant could provide the other answers by the close of business that day or he could answer them then if he had the answers prepared. The claimant replied that his current absence was directly related to how he had been treated in the past so it was impossible for him to separate the two. As to the four questions that Mr Smith had previously sent, the claimant 'copied and pasted' the response that he had given to Mr Smith on 1 March 2019 (1003). Mr Smith then closed the meeting although indicating that he might contact the claimant again if needed to clarify any information. If not, he would communicate his decision by no later than 11 March 2018.

8.55 At about noon on the following day, 5 March 2019, the claimant wrote to Mr Smith again (1011). This is a fairly lengthy email but it is important and relevant excerpts bear setting out in full:

> "*further to your reassurances I now accept that the zero tolerance policy of bullying and harassment has been reinforced and there should be no repetition of the type of behaviour which had caused me so much distress in the past.*
>
> *In addition to this the reasonable adjustments which I needed in place to enable me to maintain my attendance and fulfil the requirements of the BPDTS attendance management policy are*

now in place and autism awareness training has also been delivered and understood.

At this present moment in time I am currently unfit to work as a result of the hospital admission for a condition other than those which I have declared as disabilities. I have been discharged but have a hospital review scheduled for 26th March 2019.

If I am discharged from hospital treatment at that review I wish to attempt a return to work after that date.

It would be advisable for a referral to OH to be undertaken to inform my return to work plan so I would be grateful if an OH referral could be arranged. This should be followed by the agreement of a phased return plan to agree the hours and recuperative duties to be undertaken on my return to the workplace.

I will contact you immediately after the hospital referral to confirm whether I have been considered as fit to return to work and dependent on OH referral would predict that I should be in a position to return to work around 1st April 2019. However, full well-being, stress risk assessment and OH would need to be completed prior to me committing to a return.

Without correct assurances in place and correct structure to the agreed return to work plan I would not be able to give a concrete confirmed date.

I tried to send this last night, but I had trouble with the internet at home."

8.56 Mr Smith replied that day restating his role and that he needed to consider the "lack of certainty on a return date and the ability for the company to continue to sustain its support of your absence". He stated that he would review all of the information that he had been provided and would notify the claimant of his decision by 11 March.

8.57 The above email from the claimant begins in a positive style indicating that outstanding matters had been addressed and a return to work was a possibility. The email then becomes much more conditional and never actually confirms an intended return to work date of 1 April 2019. The Tribunal is satisfied that, overall, that conditionality and lack of a commitment to a return to work date could have enabled Mr Smith to maintain his position when giving evidence that he had not received from the claimant the commitment that he was seeking for a return to work date.

8.58 In this regard, however, Mr Smith's answers to questions from the Tribunal are important. He first confirmed that if the claimant had given him a definitive date for his return to work his decision would have been

different. He continued that in making his decision he would take into account all the documents that he had up to the end of the meeting on 4 March 2019, “there has to be a line drawn.” He was asked, however, whether if he had received the email of 5 March from the claimant prior to that line being drawn that would have made a difference to his decision. He answered, “Yes” because the claimant had predicted a return. He explained that he “would then go away and do the art of the possible – could I get everything in place.” To ensure that that answer had been understood, Mr Smith was asked to confirm that he would put the plan in place then inform the claimant that it was in place and ask him whether he could commit to the return date. He responded, “I wanted that commitment in place at the meeting the day before”; in effect restating his earlier answer that a line had to be drawn and was drawn at the end of that meeting.

8.59 In re-examination Mr Smith was taken to his decision letter (1029) in which it is stated that he had carefully considered information including correspondence from the claimant “prior to, during & after” the meeting on 4 March. He confirmed that the only correspondence that he had received after that meeting had been the exchange of emails on 5 March. He was asked whether, in coming to his decision, he had taken into account only the information at the meeting on 4 March or also the exchange of emails on 5 March. His answer was unequivocal; he had made his decision, “up to the closure of the meeting on the 4th; things were said on the 5th but that was outside the deadline. I have to consider whether I had commitment to return to work on the 4th – I didn’t. There was a hint on the 5th but at the meeting, despite binary questions, I had no commitment. The 5th email was acknowledged but not considered”. Mr Brien persisted that when Mr Smith had said in his decision letter that he considered all the information “after” their meeting, the only correspondence was the emails on 5 March. He put to Mr Smith that now saying that the claimant’s email of 5 March had been acknowledged rather than considered was a difference of evidence. Mr Smith acknowledged that and apologised but remained firm in his oral evidence that the claimant’s email of 5 March had been, “acknowledged not considered. I reviewed all the evidence up to the end of the meeting. I acknowledged the email but did not consider its content.”

8.60 Clearly, that oral evidence cannot be ignored despite Mr Smith’s reference in the letter of dismissal to having taken into consideration correspondence after the meeting. Importantly, in that oral evidence, Mr Smith confirmed that if he had received the email of 5 March from the claimant prior to him drawing the line on 4 March, that would have made a difference to his decision because the claimant had predicted a return. On this basis, the Tribunal is satisfied that if the claimant’s email of 5 March had been taken into consideration by Mr Smith, rather than simply being acknowledged by him (as was his evidence), he would have made a different decision.

8.61 The Tribunal is satisfied that given the claimant’s disabilities, Mr Smith’s indication that he could provide answers to the outstanding questions by

the close of business on 4 March (although he did not write until approximately noon the following day albeit explaining that he had tried to send his email of the previous night) and the short time between the end of the meeting and the receipt of claimant's email, it was outside the range of reasonable responses of a reasonable employer for Mr Smith not to have considered the email but merely to have acknowledged it.

8.62 As intimated above, Mr Smith's evidence was that if he had received the email on 4 March he would have taken it into account and would have made a different decision. The Tribunal obviously cannot say what that decision might have been but it is clear that the claimant would not have been dismissed on 11 March. Instead, it is repeated that as Mr Smith said in oral evidence, he would have gone away and done the art of the possible to see whether he could get everything in place.

8.63 In respect of the above, Mr Brian submitted that the contemporaneous documents are to be preferred as to Mr Smith's state of mind at the time of the dismissal. The Tribunal rejects that submission given the clarity of Mr Smith's oral evidence and his repeated insistence, even when it was drawn to his attention in re-examination that his oral evidence conflicted with that in his witness statement and the letter of dismissal, that when coming to his decision he had not taken into account the content of the claimant's email of 5 March but had only acknowledged it.

8.64 A further aspect of the dismissal process arises from the point made during oral evidence that the respondent's Policy had not been followed in that Mr Moorhouse moved directly from a First Written Improvement Warning through three attendance review meetings to referring matters to Mr Smith as decision maker without the intervening stage of a final written warning. As noted above, the Final Written Improvement Warning Letter does not warn that further unsatisfactory attendance might lead to the claimant's situation being referred for a decision as to whether or not his employment should be terminated.

8.65 The narrative in the respondent's Policy is considerably less than that with which the Tribunal is familiar, particularly in the public and quasi-public sectors. Indeed, there is no mention at all in the relevant pages, 1104 or 1105, of any formal warning stages, the Improvement Period, the length of that Improvement Period or the definition of unsatisfactory attendance all of which are referred to by Mr Moorhouse in his letter of 29 May 2018 (731). From the explanations given at the hearing and an email from HR to Mr Bolton dated 9 April 2019 (1045) it would appear that HR and, therefore, those involved in this process, acting on HR advice, were drawing on the principles contained in the equivalent DWP policy a copy of which was not before this Tribunal. Despite the inadequacy in the narrative of the Policy, the flowchart contained in it at pages 1101 and 1102 is clear. Key points include that following the issue of the first written warning (box 21) and an attendance review meeting the manager is to consider whether a final written warning is appropriate (box 25). If so, the manager will issue Model Letter 8 (box 28). The Tribunal has not seen that

model letter but assumes that it would be in similar form to the First Written Improvement Warning (731) albeit giving a final written. There will then be a further attendance review meeting (box 30) and if attendance has not been satisfactory box 40 provides, "Following a final written warning attendance has not been acceptable" and, if dismissal is considered to be appropriate, a senior manager conducts a formal meeting and reaches a decision (box 44).

8.66 The evidence on behalf of the respondent was to the effect that the trigger points in the Policy were alternative and that in the case of the second trigger point it could move to consider dismissal without the employee having been given a final written warning. Mr Moorhouse explained that the issuing of a final written warning was optional focusing on the word "may" in the phrase "may give you a Final Written Improvement Warning" in his decision letter (731).

8.67 In light of the flowchart, the Tribunal does not accept that explanation. In that context "may" simply means that a final written warning may be given if attendance is unsatisfactory but may not be given if either attendance is satisfactory or there is some acceptable explanation for the absences. Further, the Tribunal notes (particularly from boxes 26 and 40 of the flowchart) that the final written warning stage of the process applies whichever of the two triggers has led to the formal review of the absences. For these reasons the Tribunal accepts the submission on behalf of the claimant that the respondent's managers did not follow the Policy to the letter in this respect: i.e. by moving directly to dismissal without an intervening final written warning stage. That said, the Tribunal is satisfied that the effect of the email from Mr Moorhouse to the claimant of 28 September 2018 in which he said that it might become necessary to consider referring the claimant's case "to a decision-maker which could ultimately result in your dismissal" (942a) was to give a final warning in writing to the claimant that dismissal was in prospect even though that email was not in the form of Model Letter 8 and did not bear the 'label', "Final Written Warning". In passing, it is apparent to the Tribunal that the respondent's managers took advice from and were guided by the respondent's HR advisers in relation to their management of the claimant and the absence management procedure. In respect of the need for a final written warning, and indeed elsewhere, it appears that that advice was wanting.

8.68 In the above circumstances, Mr Smith concluded his consideration of matters and produced a Record of Investigation Interview on 11 March 2019 (1027). In summary, he concluded as follows: he did not believe that the claimant's sickness absence could be sustained by the respondent; although the claimant had indicated initially that he might return to work on 1 April 2019, there remained no prognosis or indicative return to work date; he believed that the respondent had taken all reasonable efforts to enable the claimant to return to work, including in respect of the following: provision of a dedicated parking bay; decommissioning a shower within a disabled toilet; ensuring that awareness training had been undertaken;

agreeing to reasonable adjustments to communicate by email etc rather than face-to-face, by telephone or by letter; making two fresh start moves to alternative teams; making OH referrals; attempting mediation. Despite these efforts, however, the respondent was no closer to achieving its goal of the claimant returning to work. This was causing a material impact to the business. Given the likelihood of a qualitative and sustained contribution from the claimant given his current attendance record Mr Smith decided to terminate his employment.

8.69 Mr Smith then wrote to the claimant to inform him that he had decided to terminate his employment. The reason given is, “because you have failed to maintain an acceptable level of attendance or been able to return to work within a timescale that I consider reasonable.” He recorded that the claimant had a right of appeal and was entitled to 5 weeks’ notice, which he was not required to work and, therefore, the effective date of his dismissal would “remain 16th April 2019” (1029).

8.70 The above finding regarding Mr Smith making a different decision notwithstanding, the Tribunal accepted his evidence as to the following key points:

8.70.1 He genuinely believed that the respondent had made all reasonable adjustments for the claimant (including provision of a dedicated parking bay, decommissioning a shower within the disabled toilet, Asperger’s awareness training, two fresh start moves to an alternative team and flexibility on his starting time) but he was still not able to provide any assurances about returning to work or provide a date by which he expected to return. Mr Smith acknowledged that the claimant had mentioned a potential return to work date of 1 April 2019 but, when asked, he had not confirmed this.

8.70.2 For the claimant to return to work needed a return to work plan but such plan could only be created following a committed return date after which Mr Smith could have ensured that everything was in place to enable him to have a smooth return to work unlike in December 2017.

8.70.3 Mr Smith rightly took into account the pressures on Mr Moorhouse’ team that were being caused by the claimant being absent from work.

8.70.4 He considered whether a move to an alternative role would be more appropriate than dismissal but the claimant had already had two previous fresh starts and he did not consider it likely that a further move to an alternative role would resolve these issues.

8.70.5 He did not see any benefit in obtaining an updated OH report as nothing had changed since the most recent report of 31 October 2018 (959). In that report it had been stated that the claimant was

not well enough to work, was unlikely to be able to sustain reliable service in light of his psychological presentation, the prospects for a successful sustained return to work were poor, and suggested mediation had ultimately been deemed not to be appropriate.

8.70.6 In summary, his decision was based on the claimant having been absent continuously since 4 June 2018, whether the respondent had made all necessary reasonable adjustments, whether the claimant was likely to return to work and whether his continuing absence was sustainable.

8.71 The claimant exercised his right of appeal by letter of 16 March 2019 (1032) in which he clearly sets out the grounds of his appeal including that insufficient consideration had been given to the reasons for his absence or that in dialogue with Mr Smith he had offered a return to work date of 1 April 2019, which was in a reasonable timescale, and no consideration was given to the extended trigger points he had requested in 2017. He explained that the biggest cause of his depression, which had led to his sickness absence, had been the respondent's delays to set up reasonable adjustments and cited the issues with his car parking, the delay in the provision of the Asperger's awareness training, the safety issues regarding the disabled toilet and the bullying and harassment that he had received at the hands of other employees; many of these issues going back to 2017.

8.72 Mr Bolton was ultimately appointed as the appeal manager, the manager who had originally been appointed having to withdraw due to personal family reasons. Mr Bolton wrote to the claimant on 3 April 2019 proposing a meeting during the week commencing 15 April (1057). The claimant responded that previously reasonable adjustments had been put in place for these meetings to be conducted by email but, at least initially, Mr Bolton did not consider that email would be an appropriate method by which to undertake the meeting. Ultimately, however, he agreed to make such a reasonable adjustments and offered to supply a framework of questions in advance (1051).

8.73 Thus, on 18 April 2019 Mr Bolton sent to the claimant what he referred to in his evidence as an Appeal Meeting Framework Document (1073) containing such questions and what he referred to as the "appeal tests". There is nothing in the Policy reflecting these tests and it may be that they are drawn from the equivalent policy of the DWP. Nevertheless, they are relevant issues relating to the following questions: was there anything materially new in the appeal reasons; had the process been followed correctly; had any reasonable adjustments been identified but not made; was return to work within a reasonable timescale unlikely or uncertain; whether there were grounds and evidence that the absence could not be supported; had OH been engaged; could further reasonable adjustments be made; had the HR process been exhausted; was demotion an option?

8.74 On 23 April 2019 the claimant requested additional time to respond as he had not been in a fit state due to his medication, he offered to get back to Mr Bolton for 29 April, which Mr Bolton agreed. The claimant structured his response by reference to the appeal tests put forward by Mr Bolton (1071a). It is a detailed response including the following points:

8.74.1 He had done his job successfully for several years until the move into ES' team in May 2015 when he did not fit in with the clique in that office and became a target. He had been utterly dejected to see the extent of the hostility levied at him contained in the emails obtained through subject access requests.

8.74.2 The process had been carried out in a biased and hostile manner to drive him out of his job whereas attendance management triggers should not have been used when his absence was due to work-related stress.

8.74.3 The autism/Asperger's awareness training recommended by Access to Work was unnecessarily delayed for a period of 14 months.

8.74.4 He had given a return to work date of 1 April, which would have given the respondent sufficient time to engage OH to obtain an updated report and was within a reasonable timescale.

8.74.5 OH had been obstructive with the claimant and refused to give a true report of his state of mind and phrases including the word "perception" had been used many times to explain away bad behaviours of colleagues.

8.74.6 The awareness training was manipulated and used against him and was more a generic overview of autism and Asperger's whereas the training suggested by Access to Work was to be bespoke to his individual needs. He had been bullied into accepting any awareness training and had reluctantly agreed.

8.74.7 The HR process had been an all one-sided campaign against him. Emails demonstrated that HR had been a major cause of the delays to the awareness training.

8.75 Having considered the claimant's responses, Mr Bolton wrote to him on 3 May 2019 giving his "decision to not uphold your appeal and the original decision taken by the decision manager to dismiss you stands" (1079). Given the information before Mr Bolton, the Tribunal is satisfied that that was an understandable and reasonable decision for him to make.

Submissions

9. After the evidence had been concluded the parties' representatives made submissions, both oral and written, which painstakingly addressed in some detail

the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from our findings and conclusions below. Suffice it to say that we fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to our decision.

10. That said, the key points made by Mr Brien on behalf of the respondent, which followed the order of the list of agreed issues, included as follows:

Disability

10.1 The respondent accepted that the claimant suffered from stress, anxiety and depression but they were caused by workplace issues and when the claimant was away from work they fell below being a substantial impairment. Thus the claimant is not disabled in relation to those conditions.

Asperger's awareness training

10.2 This claim was brought as a failure to make reasonable adjustments, the approach to which is set out in Environment Agency v Rowan [2008] IRLR 20. The claimant's case is that this training should have been delivered in August 2017. As such, his claim is statute barred. Secondly, in relation to the training provided to the claimant's new team in June 2018 there was no unreasonable delay. The time it took to provide the training could only run from the OH report of 11 April 2018 as that is the first time there is a recommendation for such training and the delivery of the training in June 2018 was within a reasonable period. Finally, the training would not (and in fact did not) remove the substantial disadvantage the claimant was suffering, rather the outcome was to confirm that the management decisions appeared to be fair and reasonable.

10.3 This is not a case where there was a possibility that the adjustment could have ameliorated the disadvantage as those the claimant had referred to had already been addressed, including communication by email for meetings. The delay in providing the training was not conduct extending over a period because the claimant had been introduced to new management under Mr Moorhouse and the training was specifically said to be "management training"; it cannot be said that the new managers should have undergone training as a matter of course as no one knew what training and approaches the new team might have required.

Unfair dismissal

10.4 The claimant was dismissed due to his absence record and the respondent's belief that he would not return. The test in a capability case such as this is set out in Spencer v Paragon Wallpapers Ltd [1976] IRLR 373. The test of what is reasonable is objective (Smith v Churchill's

Stairlifts [2005] EWCA Civ 1220) the focus being on the practical result of the measures that can be taken: see Griffiths v DWP.

10.5 A fundamental issue in this respect is the claimant's perception and inability to remove historical wrongdoings from his mind. In his witness statement and oral evidence he said a number of times that he required an apology for the historical wrongdoings and an acceptance that they had occurred. The OH report had confirmed this. This is why from going on sick on 4 June the claimant had never been in a position to return to work. He had attempted to row back from this at the decision meeting on 4 March. He said that he had confirmed to Mr Smith that he was prepared to move on from these issues but that is not reflected in the notes or in the claimant's email at 12:06 on 5 March, "Without correct assurances in place and correct structure to the agreed return to work plan I would not be able to give a concrete confirmed date." Until the claimant received some form of apology or acknowledgement that the perceived actions of his old team had been wrong he could not return to work for a sustained time. Therefore the respondent reasonably concluded that he was not capable of doing his job and the decision to dismiss was fair.

10.6 A reasonable process had been followed including the attendance management meeting on 11 May giving rise to a written warning for attendance after which the claimant did not return to work, his fit note citing anxiety with depression. Thereafter there were two further attendance review meetings in September and November and an OH assessment in October at none of which was a prospect for the claimant's return to work identified. Similarly, at the meeting with Mr Smith there was no prospect of the claimant returning or any adjustment being identified. The contemporaneous documents all show that in coming to his decision Mr Smith took account of the entirety of the meeting including the claimant's email of 5 March, and those documents are to be preferred as to Mr Smith's state of mind of time at the time of dismissal. If a final written warning was to be issued it would have been due in November 2018 when the improvement period expired but it would have made no difference to the claimant's attendance or the dismissal process. A final written warning is more appropriate if an employee has persistent short term absence whereas this is long-term. In any event the respondent has a discretion whether to impose a final written warning. If the Tribunal disagreed regarding the fairness of the procedure, given the claimant's evidence he would have been dismissed in any event because there was no prospect of a return to work. Nothing had changed between the beginning of his absence on 4 June 2018 and the conclusion of the meeting on 5 March 2019.

10.7 The decision to dismiss was reasonable. The claimant had been off for a nine-month period and prior to that for 103 days. Throughout the meeting he was asked a number of times for a commitment to return and failed to provide one.

Detriment arising from disability

10.8 Section 15 of the 2010 Act requires two steps be taken as described in Basildon & Thurrock NHS Trust v Weerasinghe [2016] ICR 305. In the present case there is simply no material on which the Tribunal can make a causal link between the "something" (i.e. the claimant's behaviour towards his colleagues in his team) and his relevant disability of Asperger's. Thus the reason for the claimant's treatment was not something arising in consequence of his disability but rather his lateness, failure to work his contracted hours and excessive use of his mobile telephone for his personal use.

10.9 As to the claimant's four specific complaints:

10.9.1 The complaint that the claimant's colleagues were told to avoid verbal communication with him is directly contradicted by the minutes of the Welcome Back meeting on 2 November 2017 where it is the claimant's request. That being so, Mr Moorhouse had sought the claimant permission to do so in January and again in May 2018 but the claimant did not reply and the request was never implemented. Even if such a request was made it was not as a consequence of the claimant's disability but arose from the claimant's own request.

10.9.2 The claimant had complained about negative comments made in his end of year review in April 2018, which he asserts were as a result of character traits caused by Asperger's. He had confirmed in evidence that his complaint was about the comment made by SL regarding his "focus" yet nowhere in the record of the review does SL's comment appear. Any negative comments were in respect of timekeeping and the use of the mobile phone none of which were something arising in consequence of the claimant's disability.

10.9.3 There is no suggestion that the claimant's managers disclosed his condition to his colleagues or that the claimant felt forced to do so. The only reference is in the Welcome Back meeting where RW asked if he had discussed his health conditions with colleagues.

10.9.4 The substance of the complaint that the claimant's movements and actions were communicated to HR was addressed in the previous Tribunal claim where it was found that the claimant being late for work and leaving before completing a full day's work were not related to his disability. It is not unfavourable treatment for managers to seek advice from HR regarding attendance, timekeeping or reasonable adjustments. That is the job of a good manager and as the claimant was not copied into the correspondence it cannot be unfavourable treatment. In any event it would be a legitimate aim to manage employees in line with sickness and disciplinary policies and ensure that they maintain regular and sustained attendance at work

Harassment

10.10 There is no conduct which is related to the claimant's disabilities and the submissions outlined above in relation to the section 15 claims are repeated.

Victimisation

10.11 The claimant relies upon four protected acts but the first, his grievance in August 2017, was dealt with at the previous Tribunal hearing. In any event, the claimant's complaint that he was subject to the detriments of being subject to disciplinary proceedings and various warnings about his conduct is misconceived. The evidence demonstrates that he was frequently late, frequently failed to meet his contractual hours, was on unauthorised absence and failed to follow the agreed protocol with Mr Moorhouse in respect of informing him if he was late. That is what he was disciplined and warned about and there is no evidence that any of these were because of his protected disclosures.

Limitation

10.12 The claim was presented on 2 July 2018. The early conciliation certificate was issued on 3 June 2018. The limitation cut-off date is therefore 2 March 2018 and any act alleged to have occurred before that date is out of time. The claimant has not advanced any explanation why claims relating to acts or omissions before that date were not presented within the primary limitation period: Ramakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278.

10.13 The claim in respect of the Asperger's training is for a failure to implement it in a reasonable time. The failure to implement the training would be the expiry of the period in which the respondent might reasonably have been expected to do it. The claimant had said that by August 2017 the training had been fully procured but not delivered and that three months was a reasonable time for it to be implemented from the claim form being provided to CC in May 2017. Thus this claim is out of time.

11. The key points made by Mrs Shield on behalf of the claimant included as follows:

Disability

11.1 The claimant suffered from stress, anxiety and depression at the relevant time. This is apparent from the documentation before the Tribunal including the report from North Tyneside Talking Therapies (884), numerous OH reports and a referral from one of the respondent's managers dated 9 August 2017 (228) all of which referred to the claimant's anxiety, stress and depression related to work (see Archibald v Fife Council), and there is reference in an email from CH of HR dated 26 July 2018 to the claimant's "recent suicidal thoughts" (850). There had

been no adverse life events that had contributed to the claimant's anxiety, stress and depression. He has excellent family support.

Asperger's awareness training

11.2 The claimant rarely engaged in small talk in the workplace. This symptom of Asperger's only became a problem when he joined ES' team and 'the boys' turned against him as he was not a 'team player'.

11.3 The claimant's inability to make or maintain eye contact was misunderstood as meaning that he was not paying attention.

11.4 Due to difficulties with handwriting the claimant would make notes on his phone while sitting next to a mentor. This was misconstrued as him being on social media and not paying attention. A person writing on a notepad would not be accused of not paying attention.

11.5 The claimant's trust having been destroyed by the behaviours of his colleagues, management and HR was such that close contact in small rooms left his mind whirring. His sensory overload was greater in smaller/confined spaces.

11.6 The claimant's mind was distracted during meetings and prior sight of materials etc in a calm environment would have been beneficial.

11.7 The above two points apply equally to the claimant's ability to respond to unprepared questions asked verbally during meetings.

11.8 Others do not have the problem of sensory overload. The claimant had no problem with technical related tasks being given verbally because of Asperger's but his stress, depression and anxiety stripped him of all of his confidence and impaired his thinking.

11.9 Providing Asperger's training is the provision of an auxiliary aid. This is apparent from the BUPA referral, all other OH reports and the information from North Tyneside Talking Therapies.

11.10 If managers in particular had received this training earlier they would be better equipped to minimise actions and practices such as peer feedback and issues with communication, and would have prevented misunderstandings which led to the build-up of hatred and hostility from colleagues.

11.11 The Access to Work funding offer was in place from 15 May to 14 November 2017 but it did not happen. Over 35 people had been involved in this matter.

11.12 This complaint had been presented in time as the respondent's failure to provide the training was a continuing course of conduct and the last act of detriment was 22 June 2018.

11.13 If not, it is just and equitable for the Tribunal to extend time.

Unfair dismissal

11.14 The dismissal the claimant was not for a potentially fair reason. It was not for capability/attendance, neither was it because Mr Moorhouse stated that he was not prepared to manage the claimant. Rather there had been systemic organisational weaknesses in the management of all aspects of the claimant's attendance management, no one had a full overview of this case, Mr Moorhouse admitted to abject ignorance of the claimant's medical condition and there was no organisational memory transferred on TUPE. In Polkey v AE Dayton it was held that a fair procedure must be followed. The respondent acted unreasonably, unfair process, no proper investigation, biased HR input and gave no consideration to adjusting the trigger points or considering disability-related absences as the claimant had requested. Consideration had not been given to the respondent's involvement in the onset and progression of the claimant's mental health disability, which caused the absences. Taylor v OCS Group looks at the procedure as a whole being fair but the internal appeal process was not carried out with an open mind due to biased input from non-impartial HR, and the dismissal investigation had not been thorough.

11.15 The respondent had not looked at alternatives to dismissal but moved directly to dismissal following the first written warning in May 2018. It could reasonably be expected to wait longer as the claimant gave reasonable practical and sustainable suggestions for return to work plans for 1 April 2019. The decision to dismiss was outwith the band of reasonable responses as the correct procedure for long-term sickness absence was not followed. As to equity and substantial merits of the case the respondent had acted unreasonably: see Turner v East Midlands Trains Ltd, BHS v Burchell and Iceland Frozen Foods v Jones.

11.16 There was no chance that the claimant would have been fairly dismissed if a fair capability dismissal procedure had been followed.

Detriment arising from disability

11.17 The respondent had given no consideration to adjusting the trigger points or disability-related absence and had not followed its own sickness absence policy.

11.18 The dismissal of the claimant was not a means of achieving any of the aims put forward by the respondent and there were less unfavourable steps open to it by facilitating a reasonable, practical and sustainable return to work for 1 April or at least commence working towards a return to work plan.

11.19 Each of the claimant's four specific complaints had been presented in time or, if not, it is just and equitable that time be extended. As to those four complaints:

11.19.1 The respondent had notified colleagues in the claimant's department to avoid verbal communication with the claimant. This had been suggested several times and was unfavourable treatment due to Mr Moorhouse' stubborn refusal to accept that the claimant had already raised issues with him and the respondent had not put adjustments in place. The unfavourable treatment arose in consequence of something arising from the claimant's Asperger's, which affected his communication skills and confidence in respect of verbal communication skills.

11.19.2 The respondent suggested several times that he should disclose and explain his condition to all colleagues including at the return to work meetings in January and May 2018. The claimant did not request this. It arose because of something arising from the claimant's Asperger's as HR and Management misunderstood his disability.

11.19.3 During the claimant's year-end appraisal the appraiser had made negative remarks to the claimant about his learning and communication style.

11.19.4 An appendix attached to the written submissions listing numerous documents and email chains bore out the complaint relating to communications sent to the respondent's HR Department, which constituted unfavourable treatment in respect of which the respondent did not have any legitimate aim or, if it did, the communications were not a means of achieving one or more of those aims.

Harassment

11.20 The respondent's conduct in respect of the four particular complaints set out above related to the claimant's disabilities and had the purpose or effect of violating his dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Victimisation

11.21 The claimant had done six protected acts: his grievances in August 2017 and July 2018, his presentation of the 2017 Claim and his communications with the respondent's CEO in April 2018, Mary Glyndon MP, Richard McHugh and J Moore on 1 and 4 May 2018. Mr Moorhouse and the respondent's HR had made the claimant the subject of disciplinary proceedings and given him warnings about his conduct because he had done one or more of those protected acts. Mr Moorhouse and HR refused to take away the need for calling him if the claimant was using the 45 minute leeway. No other employee had to call in advance. Mr Moorhouse and HR were hostile and closed off to any true consideration of the claimant's difficulties and presented a warped and misinformed account of his actions.

Caselaw

11.22 The Tribunal took into account the 17 case precedents listed by Mrs Shield at the end of her written submissions.

The Law

12. The principal statutory provisions that are relevant to the issues in this case are as follows:

12.1 Unfair dismissal - Employment Rights Act 1996

"94 The right.
(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.
(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it -
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
....
(3) In subsection (2)(a) -
(a) "capability", in relation to an employee means his capacity as set by reference to skill, aptitude, health or any other physical or mental quality
……
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

12.2 Discrimination arising from disability - section 15 Equality Act 2010

"15 Discrimination arising from disability
(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and

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

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

12.3 Failure to make adjustments - sections 20 and 21 Equality Act 2010

"20 Duty to make adjustments
(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."

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

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

"39 Employees and applicants
(4) A duty to make reasonable adjustments applies to an employer."

12.4 Harassment - section 26 Equality Act 2010

"26 Harassment
(1) A person (A) harasses another (B) if -
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of –
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are -

…..
disability;"

12.5 Victimisation - Section 27 Equality Act 2010

"27 (1) A person (A) victimises another person (B) if A subjects B to a detriment because -

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act -

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

12.6 Section 39 - Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)-

…….

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(4) An employer (A) must not victimise an employee of A's (B)-

…….

(e) by dismissing B;

(f) by subjecting B to any other detriment.

12.7 Section 40 - Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)-

(a) who is an employee of A's

12.8 Section 136 - Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

Application of the facts and the law to determine the issues

13. The above are the salient facts relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the

relevant law and the case precedents in this area of law. While not wishing to limit that general statement, the Tribunal records that in considering the claimant's complaints under the 2010 Act it paid particular attention to 'the reverse burden of proof'. The effect of that is that, initially, it is for the claimant to demonstrate evidence from which the Tribunal could reasonably conclude that he had been discriminated against in relation to his disabilities. If the claimant satisfies that initial burden of proof it then shifts to the respondent to show that, in no way whatsoever, was the reason for the particular treatment of the claimant to do with his disabilities.

14. It is appropriate that in setting out its consideration and decisions in respect of these claims the Tribunal should follow the order of the agreed list of issues and, in that connection, we have adopted the paragraph numbering in that list in the following section of these Reasons.

Disability

1. The respondent accepts that the claimant was disabled at all relevant times because of Neurofibromatosis and Asperger's. Thus, the claimant is a disabled person as defined in section 6 of the 2010 Act.

2. There is no dispute that the claimant suffered from stress, anxiety and depression at the relevant time, which the Tribunal has identified as being at least from August 2017 (217 and 230) until the effective date of the termination of the claimant's employment. That much is apparent from the documentation before the Tribunal referred to above including the several medical certificates and OH reports.

3. In issue, however, is whether these conditions of stress, anxiety and depression constituted a mental impairment having a substantial, long-term adverse effect on the claimant's ability to carry out normal day-to-day activities or were symptoms derived from adverse life events being stress at work caused by workplace issues and the previous Employment Tribunal proceedings.

    3.1 In this respect, the Tribunal had regard to the definition of disability contained in section 6 of the 2010 Act along with Part 1 of Schedule 1 to that Act and the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011).

    3.2 The Tribunal also had regard to the judgement of the EAT in Herry v Dudley Metropolitan Council UKEAT/0100/16 (in which the decision in J v DLA Piper UK [2010] ICR 1052 was applied). The guidance the Tribunal draws from those judgements is significant, which justifies the following excerpt from Herry being set out at some length:

    "53. The Employment Judge quoted at some length from J v DLA Piper UK [2010] ICR 1052. In one important passage his conclusions are framed by reference to it. It is therefore convenient to quote from it and discuss it now. In that case the EAT was concerned with the

question whether conditions described as "depression" will amount to impairments.

54. *Underhill P said:*

"42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or -if the jargon may be forgiven - "adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians - it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived."

55. *This passage has, we believe, stood the test of time and proved of great assistance to Employment Tribunals. We would add one comment to it, directed in particular to diagnoses of "stress". In adding this comment we do not underestimate the extent to which work related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression.*

56. *Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can*

become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess."

3.3 The Tribunal notes the recommendation referred to above that a tribunal should start by considering the adverse effect issue to determine whether the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more because that would in most cases be likely to lead to a conclusion that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances. In this case, however, that recommendation is difficult to follow given that although the Tribunal has evidence before it as to the length of time during which the claimant has had these conditions of stress, anxiety and depression it has heard little evidence of the effect of such conditions on the claimant's ability to carry out normal day-to-day activities. The evidence that the Tribunal does have of the claimant's day-to-day activities is limited to his work. Although limited in that way it nevertheless is important. As was said in Herry above, "we do not underestimate the extent to which work related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression". Similarly, in Law Hospital NHS Trust v Rush [2001] IRLR 611 CS, it was said that evidence of the nature of the claimant's duties at work and the way in which they are performed, particularly if they include "normal day-to-day activities", can be relevant to the assessment that a Tribunal has to make of the claimant's case. The Tribunal has these points in mind but it is repeated that there is little additional evidence in this regard. Indeed, Mrs Shield stated that the claimant enjoys a good and supportive family life and there is also evidence before the Tribunal that these conditions do not impact upon him undertaking the day-to-day activities connected with his charitable work. A further factor in this regard is that the claimant did not rely upon these conditions of stress, anxiety or depression when he made the 2017 Claim; that despite the fact that in his Further and Better Particulars (produced at a time when he had legal representation) it is

stated at paragraph 60 (54), "The Claimant has suffered from Depression since 2015."

3.4 In the above circumstances, and reminding ourselves that "substantial" is defined in section 212(1) of the 2010 Act as meaning "more than minor or trivial", the claimant had not established to the satisfaction of the Tribunal that these conditions of stress, anxiety and depression have had a substantial effect on his ability to carry out normal day-to-day activities.

3.5 The Tribunal's consideration of this issue could therefore rest there but the question of whether these conditions are impairments for the purposes of section 6 of the 2010 is also obviously important and it is right, therefore, that we should address that question too.

3.6 Adverting to the above case law the Tribunal has sought to differentiate between what are classified above as being "clinical depression" and "adverse life effects"; in this case those life effects being the issues, or what the OH reports often refer to as being the claimant's perceived issues, at work. The Tribunal has done so by reference to the following evidence before it. First, the Tribunal notes that the medical certificates issued to the claimant are in fairly general terms referring, for example, to anxiety and depression or stress related problem (230, 231, 257, 305, 347, 766 772 and 1080). Thus, they are not particularly helpful in making the above differentiation as they do not focus on work issues but neither do they address more general issues and do not constitute what is referred to in Herry as being "medical evidence in support of a diagnosis of mental impairment". The letter from North Tyneside Talking Therapies dated 22 December 2017 (1084) is more helpful in this regard. It refers to the claimant's current episode of depression and anxiety being "triggered by a dispute in the workplace" and the claimant acknowledging that his symptoms were being "maintained by the dispute at work". In this connection the claimant's own evidence, at paragraph 140 of his witness statement, refers to him having told a manager "that the workplace was causing me stress" and that the claimant wanted the issues tackled "before my return to work as they would only cause more stress if they were not resolved"; the claimant makes equivalent references to his work environment causing him stress elsewhere in his witness statement. Likewise, the claimant makes similar references during internal meetings and email exchanges at work: for example, in the following: an email exchange with Mr Moorhouse of 16 January 2018 (379); the Welcome Back Discussion following the claimant's return to work on 19 January 2018 (388) in which reference is made to, "Number workplace issues around failures to make adjustments, stress, depression and anxiety" and the claimant refers to the view of Talking Therapies that "my mental state is not likely to change until the environment in which causes the stress/depression changes or I remove myself from the environment"; the attendance review meeting between Mr Moorhouse and the claimant on 23 August 2018 (937) in which he again states, "Talking therapies told me that until my work situation resolves I will not get better". The several OH reports are of particular assistance in relation to this question as follows:

that of 21 November 2017 (296) refers to communication issues and the lack of awareness of the claimant's work colleagues having "led to his current Anxiety and Depression" and expresses the opinion that the claimant "perceives the underlying causation of current ill-health to be work related issue"; that of 12 January 2018 (371) refers to the claimant being "currently off work again due to workplace issues; that of 11 April 2018 (565) refers to the claimant having stated that "his stress/depression and anxiety are work related" and that his "mental health condition is reactive in nature and due to perceived work stress" and that the "work-related stress is likely to resolve the resolution to the perceived stressors"; that of 13 July 2018 (782) refers to the claimant having spoken about "different incidents that have occurred in the workplace that have further impacted on his mental health", that he "does not appear to be accessing clinical care from his GP …. he has tried medication and therapies to support his conditions to no avail", and he "is unlikely to return to work for the foreseeable future due to long-term, ongoing, work-related issues"; that of 31 October 2018 (959) records the claimant having "referred to work-related issues as a reason behind his current sickness absence" and expresses the opinion that, following assessment, there was an indication that the claimant "developed psychological response to his work-related concerns and that he presented with significant degree of dissatisfaction with his work situation".

3.7 The Tribunal has carefully considered all the evidence before it in the context of the statutory and case law and the Guidance referred to above. Having done so, it is satisfied that, paraphrasing from the excerpt from the decision in Herry above, this is a class of case where a reaction to circumstances perceived as adverse has become entrenched; where the claimant will not give way or compromise over issues at work, and refuses to return to work (notwithstanding the efforts made by Mr Moorhouse to achieve that end as exemplified by the list of adjustments set out in his email of 28 September 2018 (942a)), yet in other respects he suffers no or little apparent adverse effect on normal day-to-day activities; rather the evidence before the Tribunal suggests a tendency to nurse grievances (for example, the claimant's continued references to historical wrongdoings and the behaviours of members of his previous team before he joined that of Mr Moorhouse being such that he could not return to work until he had received an apology from the respondent), or a refusal to compromise.

3.8 In these circumstances the Tribunal is not satisfied that these conditions of stress, anxiety or depression are mental impairments.

3.9 That being so, on either of the above bases (these conditions of stress, anxiety and depression, first, not having a substantial effect on the claimant ability to carry out normal day-to-day activities and, secondly, not amounting to mental impairments), the Tribunal is not satisfied that the claimant has established that, in reliance upon these conditions, he has a disability for the purposes of section 6 of the 2010 Act.

Reasonable adjustments – failure to timely provide Asperger's Syndrome Awareness Training

4. Addressing this issue first requires a consideration of the statutory and case law in respect of the duty to make and any failure to make adjustments under, respectively, sections 20 and 21 of the 2010 Act. The Tribunal's consideration of this issue is therefore subdivided as follows:

4.1 The following propositions can be said to emerge from relevant case law in the context of the above statutory framework and the Equality and Human Rights: Code of Practice on Employment (2011) ("the EHRC Code of Practice") to all of which the Tribunal has had regard:

4.1.1 It is for the disabled claimant to identify the PCP of the respondent on which he relies and to demonstrate the substantial disadvantage to which he was put by that PCP.

4.1.2 There must be a causal connection between the PCP and the substantial disadvantage contended for: "It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(i) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP": Nottingham City Transport Ltd v Harvey UKEAT/0032/12.

4.1.3 It is also for the disabled claimant to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; he need not necessarily in every case identify the step(s) in detail but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable. There must be before the tribunal facts from which, in the absence of any innocent explanation, it could be inferred that a particular adjustment could have been made: Project Management Institute v Latif [2007] IRLR 579.

4.1.4 Put another way, it is important to identify precisely what constituted the "step" which could remove the substantial disadvantage complained of: General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43.

4.1.5 "Steps" for the purposes of section 20 of the 2010 Act encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP: Griffiths v Secretary of State for Work and Pensions [2017] ICR 160.

4.1.6 That said, the disabled claimant does not have to show that the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage: Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10.

4.1.7 Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step(s): Latif [2007].

4.1.8 The question of whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include the following:

4.1.8.1 the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

4.1.8.2 the extent to which it is practicable to take the step;

4.1.8.3 the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;

4.1.8.4 the extent of the respondent's financial and other resources;

4.1.8.5 the availability to it of financial or other assistance with respect to taking the step;

4.1.8.6 the nature of its activities and the size of its undertaking.

4.1.9 If a Tribunal finds that there has been a breach of the duty, it should identify clearly the PCP, the disadvantage suffered as a consequence of the PCP and the step(s) that the respondent should have taken.

4.2 In light of the above, the Tribunal reminded itself that it first must identify the PCP that the respondent is said to have applied (Rowan): indeed, as indicated above it is for the claimant to identify that PCP. Notwithstanding an unequivocal order of the Employment Tribunal dated 3 September 2018 that the claimant must detail the PCP he has failed to do so. That said, it is implicit and is not contentious. The claimant can be said to rely upon a single PCP that he should attend at work and carry out the day-to-day contractual duties of his employment, which would ordinarily involve the matters set out at subparagraphs a. to h. inclusive of this issue that are detailed below. The respondent has implicitly accepted that that PCP was in place.

4.3 As indicated above, section 20(3) of the 2010 Act provides that where an employer's PCP "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled" the duty arises for the employer "to take such steps as it is reasonable to have to take to avoid the disadvantage".

4.4 To quote from this agreed issue 4, the Tribunal is satisfied that, subject to one qualification, the claimant was, "because of his Asperger's, at a substantial disadvantage to his workplace colleagues (without Asperger's) in relation to the matters set out below:

a. ability to partake in non-technical verbal discussions;
b. ability to maintain eye contact;
c. ability to focus when listening to prolonged explanations;
d. level of comfort during meetings held in small rooms;
e. ability to review meeting materials/slides provided at meeting, not before;
f. ability to respond to unprepared questions asked verbally during meetings;
g. exposure/susceptibility to "sensory overload";
h. ability to comply with verbal instructions for tasks".

The qualification referred to above is that the Tribunal is not satisfied, with regard to subparagraph h. above, that the claimant was at a substantial disadvantage in relation to his ability to comply with verbal instructions for technical tasks, which was accepted on behalf of the claimant in closing submissions.

4.5 In summary of this issue 4, following the guidance in Rowan, the Tribunal finds that the PCP is that set out in paragraph 4.2 above, the identity of non-disabled comparators is those of the claimant's workplace colleagues without Asperger's and the nature and extent of the substantial disadvantage suffered by the claimant is that set out in paragraph 4.4 above.

5. Having had regard to sections 20(5) and (11) of and Schedule 8 to the 2010 Act and the EHRC Code of Practice, especially at paragraph 6.13, the Tribunal is not satisfied that providing this training constitutes the provision of an "auxiliary aid".

6. Our consideration of this issue 6 is again detailed and it has therefore been subdivided as follows:

6.1 Again as indicated above, it is for the claimant to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage. The claimant asserts that the adjustment or step that the respondent should have taken was the provision of the Asperger's Syndrome Awareness Training.

6.2 In deciding whether this would have been a reasonable step for the respondent to take, the Tribunal took into account the factors listed at paragraph 6.28 of the EHRC Code of Practice; in this case the majority of which tend to tip the balance in favour of a particular step being taken given the type, size and resources of the respondent. The first and possibly the most important factor is whether any particular step would have had some prospect of being effective in preventing the substantial disadvantage. In this respect we note the observation by the Court of

Appeal in Griffiths that "it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness", and the observation in Foster to similar effect that there must be some prospect of the step avoiding the disadvantage. We also reminded ourselves (as set out at paragraph 6.29 of that Code) that the test of the reasonableness of any step "is an objective one and will depend on the circumstances of the case".

6.3 On the evidence before it, however, the Tribunal is not satisfied that providing Asperger's Syndrome Awareness Training to the claimant's workplace colleagues (without Asperger's) would have removed the claimant's substantial disadvantage in relation to the matters set out in subparagraphs a. to h. above. Our reasoning is that the majority of those matters are, on the claimant's own evidence, disadvantages that are characteristics and traits or otherwise connected with his Asperger's and, as such, no amount of training of his workplace colleagues could have affected those characteristics and traits.

6.4 In this connection the Tribunal was informed that the agreed list of issues was intended to reflect the issues set out by the claimant in the Further and Better Particulars of his claim. It notes, however, that this issue 6 does not actually reflect paragraph 29 of those Particulars (47), which states, "The lack of awareness of the Claimant's condition led to his colleagues regularly interacting with the Claimant in a manner which caused him stress and anxiety." It is well-established that a tribunal is not necessarily hidebound by an agreed list of issues and should depart from such a list where necessary to determine a claim properly: see Saha v Capita plc EAT 0080/18 and Mervyn v BW Controls Ltd [2020] EWCA Civ 393. As that complaint is clearly stated in that paragraph of those Particulars the Tribunal considers it appropriate to address it in the context of this issue 6.

6.5 Having done so, the Tribunal is not satisfied that if the training had been provided it would have led to the claimant's workplace colleagues reacting in a different fashion to the claimant's presentation of his characteristics and traits of Asperger's listed in the above subparagraphs a. to h. This is because the claimant repeatedly refused to allow his colleagues to be made aware of his impairment and expressly stated in evidence that he would not have wished them to be involved in the training: "my colleagues do not need to know". Instead, the claimant's intention was that it was the relevant managers within the respondent who would receive the training. He reasoned that that would enable them to deal with issues raised with those managers by the claimant's colleagues in respect of the claimant's behaviours: i.e. as the claimant explained in evidence, the managers would not explain the claimant's disability to his colleagues but would simply not record any complaint or other issue raised by the colleagues or pursue it formally with the claimant. This was echoed in the submissions made on behalf of the claimant in respect to the effect that if managers

had received the Asperger's awareness training earlier "they would have been better equipped to minimise actions and practices such as peer feedback and issues with communication". The Tribunal is not satisfied that that would have addressed the claimant's principal complaint of his colleagues' behaviours and reactions towards him: for example, social interaction by stopping at his desk for a chat.

6.6 Other matters that are relevant to the provision of this training are as follows: first, the claimant was critical of the content of the training yet he had liaised with the training provider about that; secondly, his evidence was that the managers had not understood the training that had been provided to them and lessons had not been learned by them but that is inconsistent with his email to Mr Smith of 5 March 2019 (1011) in which he referred to the training having "been delivered and understood".

6.7 In summary of this issue 6, therefore, in light of the above findings the Tribunal is not satisfied that it was reasonable for the respondent to take the step of providing this Asperger's training (Griffiths) or that there was even some prospect (Foster) that providing such training would have removed the claimant's substantial disadvantage in relation to either the matters set out in subparagraphs a. to h. above or arising from his colleagues' behaviours and reactions towards him.

6.8 In the circumstances, the complaint of the claimant that the respondent failed to comply with its duty under section 20 of the 2010 Act to take this step is not well-founded. That being so, it is not strictly necessary for the Tribunal to continue to consider the remaining issues in relation to this complaint but it does so for completeness given that our above decision could have been to the contrary.

7. The claimant's oral evidence was that he considered a reasonable timeframe for the provision of the training would have been three months from when he had forwarded relevant documentation completed by him to CC on 22 May 2017: i.e. the training ought reasonably have been provided by August 2017. As noted above, however, the claimant's evidence in his witness statement is, "It was therefore reasonable for me to expect the Access to Work goods and services to be in place by 13 October 2017 at the latest". Not a lot turns on this difference in dates. Given that Access to Work confirmed the availability of support on 13 April 2017 (156) and gave authority to purchase on 20 May 2017 (167), the Tribunal adopts the longer of those timescales as being a reasonable timescale. Thus, for the purposes of 123(4) of the 2010 Act, the Tribunal is satisfied that the period in which the respondent might reasonably have been expected to provide this training expired on 13 October 2017.

8. It appears in the notes at page 774 that this training was provided on 19 June 2018 and was repeated on 22 June 2018.

9. The Tribunal's consideration of this issue is also detailed and is therefore again subdivided as follows:

9.1 Section 123 of the 2010 Act provides, as a starting point, that proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates; albeit, where relevant, due allowance must be given for the implications of early conciliation. In this case, the claimant's claim was presented on 2 July 2018 and the early conciliation certificate was issued on 3 June 2018. That being so, by reference to this initial period, proceedings cannot be brought in respect of acts or omissions occurring before 2 March 2018.

9.2 As intimated in paragraph 7 immediately above, the provision of this training is to be categorised for the purposes of section 123 of the 2010 Act as being a "failure to do something". Relevant law in this regard includes that a failure to make a reasonable adjustment is an omission not an act: Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288 (CA). Time runs from when the respondent decided not to make the adjustment or might reasonably have been expected to make the adjustment: (Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24), and section 123(4) applies:

> "*In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*
>
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if he does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*"

9.3 There is no evidence that the respondent made any decision in this regard, rather (as indicated above) its managers simply did not attend to the provision of the training as quickly as they should. As explained above, focusing for present purposes only on section 123(4) of the 2010 Act, the Tribunal is satisfied that the period in which the respondent might reasonably have been expected to provide this training expired on 13 October 2017.

9.4 The Tribunal considers, however, that to focus on section 123(4) of the 2010 alone would be the wrong focus. This is because it is provided in section 123(3)(a) of the 2010 Act that "conduct extending over a period is to be treated as done at the end of the period".

9.5 In this regard, in Barclays Bank plc v Kapur [1991] ICR 208 HL, the House of Lords drew a distinction between a continuing act and an act that has continuing consequences. The focus in that case, however, is upon whether an employer operates a discriminatory regime and, in the decision in Commissioner of the Metropolitan Police v Hendricks [2003] ICR 530, the Court Appeal made it clear that it was inappropriate for a tribunal to take too literal an approach to the question of what amounts to continuing acts by focusing upon whether the concepts of policy, rule, scheme, regime or practice fit the facts of a particular case and that they were just examples of when an act extends over a period. It was held that when considering whether there is conduct extending over a period, the

focus should be on whether there was an ongoing situation or a continuing discriminatory state of affairs. This approach in Hendricks has been approved in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA (where it was held that the correct approach is to look at the substance of the complaints and determine whether they can be said to be part of one continuing act on the part of the employer) and Aziz v FDA [2010] EWCA Civ 304, CA.

9.6 In light of the guidance that the Tribunal draws from this case law it is satisfied that the failure on the part of part of the respondent's managers to provide this training timeously all formed part of one continuing act and was therefore an ongoing situation that constituted a continuing discriminatory state of affairs. Thus, it is satisfied that the repeated failures to make this adjustment of providing this training related to "conduct extending over a period", which, in accordance with section 123(3)(a) on the 2010 Act, would fall "to be treated as done at the end of the period".

9.7 The Tribunal is satisfied that the end of that period was when the training was provided on 19 June and 22 June 2018. As indicated above, the claimant's claim form was presented on 2 July 2018 and proceedings can be brought in respect of acts or omissions occurring after 2 March 2018. That being so, the Tribunal is satisfied that this complaint was presented 'in time'; given our decision in relation to issue 6, however, that is academic.

10. This issue also involves lengthy considerations and is therefore again subdivided as follows:

10.1 If the Tribunal's conclusion that this complaint was 'in time' on the above bases were to have been to the contrary, we would have considered the question of extending the primary three-month time limit. There is no presumption that a tribunal should exercise its discretion to do so, quite the reverse: Robertson v Bexley Community Centre T/a Leisure Link [2003] IRLR 434. The question for the Tribunal is whether, in accordance with section 123(1)(b) of the 2010 Act, a complaint has been presented within "such other period as the employment tribunal thinks just and equitable". The law does not require exceptional circumstances; it requires that an extension of time should be just and equitable: Parthan v South London Islamic Centre EAT 0312/13.

10.2 In considering whether a claim has been brought in a period which is just and equitable it was suggested in British Coal v Keeble [1997] IRLR 336 that tribunals would be assisted by the factors mentioned in section 33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases. This requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to the following factors:

10.2.1 the length of and reasons for the delay;

10.2.2 the extent to which the cogency of the evidence is likely to be affected by the delay;

10.2.3 the extent to which the party sued had cooperated with any requests for information;

10.2.4 the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and

10.2.5 the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

10.3 This is reflected in the multi-factorial approach commended in Rathakrishnan v Pizza Express [2016] IRLR 278. In this connection the Tribunal is satisfied as follows:

10.3.1 the length of the delay has not been excessive given that the claimant was ill at this time (his evidence to that effect being supported by his medical certificates and, more importantly, by the several OH reports referred to above) which contributes towards the reasons for the delay;

10.3.2 the cogency of the evidence has not been affected by any delay, to the contrary the respondent has addressed this issue clearly and comprehensively;

10.3.3 the claimant acted promptly after the training had been provided and, as he saw it, lessons had not been learned by the respondent’s managers, and at this time he obtained appropriate professional advice;

10.3.4 there has been no prejudice to the respondent by any delay, and in this connection Mr Moorhouse confirmed in oral evidence that the claimant had not been responsible for the delay;

10.3.5 conversely, the prejudice to the claimant in not granting an extension of time would be significant.

10.4 Applying these findings and others made above in the context of the case law the Tribunal is satisfied that, in accordance with section 123(1)(b) of the 2010 Act, for the claimant to present his complaint in respect of the respondent’s failure to make this reasonable adjustment to the Employment Tribunal on 2 July 2018 was to do so within “such other period as the employment tribunal thinks just and equitable”; as with issue 9, however, given our decision in relation to issue 6 that is academic.

Unfair dismissal

11. This issue 11 relates to the question of what was the reason for the claimant's dismissal and was it a potentially fair reason within sections 98(1) and (2) of the 1996 Act?

    11.1 It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

    11.2 In this case, the facts and beliefs of the respondent, as personified by those persons who took the decision to dismiss the claimant and reject his appeal (Mr Smith and Mr Bolton) are clearly set out in their respective contemporaneous decision letters which have been summarised above. The claimant has submitted that the reason for his dismissal was what were referred to in submissions as being systemic organisational weaknesses in the management of the claimant's attendance management as set out more fully above.

    11.3 On the basis of the evidence before it and the findings set out above, the Tribunal has no hesitation in finding that the respondent has discharged the burden of proof upon it to show that the reason for the claimant's dismissal was related to his capability, which is a potentially fair reason). The reason was not because Mr Moorhouse stated that he was not prepared to manage the claimant; this alternative ground not being pursued by Mrs Shield in submissions.

12. This issue of whether the claimant was fairly or unfairly dismissed on capability grounds requires a further consideration of the statutory and case law in this regard. Once more, therefore, the Tribunal's deliberation on this issue is subdivided as follows:

    12.1 If, as the Tribunal has found, the reason for the claimant's dismissal was a potentially fair reason for dismissal, section 98(4) of the 1996 Act provides that the determination of whether the dismissal was fair or unfair depends upon whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating the reason of capability as a sufficient reason for the dismissal of the claimant; that question being determined in accordance with equity and the substantial merits of the case. In this regard the Tribunal reminded itself of the following important considerations:

        12.1.1 neither party now has a burden of proof in this respect;

        12.1.2 our focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter;

12.1.3 the decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness, which applies equally in cases of ill health dismissal such as this, including as to the procedure an employer has followed regarding such matters as engaging in discussions with the employee and obtaining up-to-date medical advice, both of which elements we address below;

12.1.4 our consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision;

12.1.5 the 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439 and Post Office v Foley [2000] IRLR 827), which will apply to our decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see, in the context of an ill health dismissal, Pinnington v City and County of Swansea EAT 0561/03, applying J Sainsbury plc v Hitt [2003] ICR 111.

12.2 Regarding the general consideration of fairness, the Tribunal records that it brought into consideration all the evidence before it including the following: the procedure followed by the respondent's managers; the significant absence of the claimant throughout his employment with the respondent and, particularly, his long term absence from 4 June 2018; the impact of the claimant's absence on his colleagues and the respondent's business; the terms of the Policy which is applied in circumstances such as this; the significant size and resources of the respondent (that being a specific element in section 98(4)); the length of the claimant's continuous period of employment with the respondent and its transferee predecessor.

12.3 The Tribunal acknowledges that while East Lindsay District Council v Daubney [1977] IRLR 181 is accepted as being a leading authority on medical investigation in the context of a fair capability dismissal, the well-established principles in British Home Stores Limited v Burchell [1978] IRLR 379 (albeit there in the context of a conduct dismissal) that were indorsed in the decision of the Court of Appeal in Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903 apply equally in the case of a dismissal for ill-health: see DB Schenker (UK) Ltd v Doolan [2010] UKEAT/0053/09. At risk of oversimplification, those principles are as follows: first, that the employer must believe that there is the basis for dismissing the employee; secondly, the employer must have in mind reasonable grounds upon which to sustain that belief; thirdly, at the stage at which that belief was formed the employer must have carried out as much investigation into the matter as was reasonable in all the circumstances. The Tribunal has brought each of those principles into account in making our decision.

12.4 Against the above background, addressing the above three well-established principles in turn, the Tribunal is satisfied on the basis of the evidence before it as follows:

12.4.1 At the time the respondent (in the shape of Mr Smith) took the decision to dismiss the claimant and (in the shape of Mr Bolton) upheld that decision on appeal they did genuinely believe that the claimant's capability was such that his employment with the respondent should be terminated. The reality was that he had had substantial absences (including, latterly, a prolonged period of continuous absence) from work, which had not shown any improvement notwithstanding the adjustments that the respondent had made and his returns to work even on a phased basis had often broken down. Moreover, the opinions recently expressed by the various OH advisers were to the effect that the claimant was not fit for work, there were no adjustments that could be made to assist him in doing so and there was no reasonable likelihood of him becoming fit to return to work and sustain attendance at work in the reasonably foreseeable future. In particular, despite being asked what Mr Smith referred to in oral evidence as being binary questions during the course of their meeting on 4 March, the claimant did not commit to a date for his return to work. In this regard the Tribunal accepts that the claimant did mention 1 April 2019, both during that meeting and in his email of 5 March 2019 but in each case his suggestion of that date was couched in conditional terms as set out more fully above.

12.4.2 In the circumstances Mr Smith and Mr Bolton had in in their respective minds reasonable grounds upon which to sustain that belief.

12.4.3 The answer to the question of whether, at the stage at which they each formed that belief on those grounds, the respondent's managers had carried out as much investigation into the matter as was reasonable in all the circumstances of the case is less straightforward.

12.4.3.1 In most respects the Tribunal is satisfied that there had been a sufficient and reasonable investigation including in two important ways. First, having frequently referred the claimant to OH so as to be aware of "the true medical position" (Daubney); and in this respect the Tribunal accepts the evidence of Mr Smith that given the common themes in recent OH reports there was nothing to be gained in obtaining a further report. Secondly, there had been fairly extensive discussions with the claimant with regard to his ill-health and prognosis, particularly by Mr Moorhouse (in the 'meeting' on 18 May 2018 that gave rise to the First Written Improvement Warning and in the three attendance review meetings he conducted with the claimant thereafter on 23 August, 28 September and 23 November 2018) and by the decision makers, Mr Smith and Mr Bolton, in their

respective 'meetings'. In this regard, Mr Moorhouse had specifically made the claimant aware in one of his emails of 28 September 2018 (942a) that if he could not see a return to work within a reasonable timeframe the respondent might "need to consider referring your case to a decision-maker which could ultimately result in your dismissal."

12.4.3.2 The Tribunal is satisfied that those discussions satisfied the guidance in Daubney where it is stated: "Unless there are wholly exceptional circumstances, before an employee is dismissed on grounds of ill-health, it is necessary that he should be consulted and the matter discussed with him …", "If the employee is not consulted and given an opportunity to state his case, an injustice may be done", and in Spencer where it is stated, "Usually what is required is a discussion of the position between the employer and the employee so that the situation can be weighed up, bearing in mind the employer's need for work to be done and the employee's need for time to recover his health".

12.4.3.3 It is right, as we have found, that the respondent moved directly from a First Written Improvement Warning through three attendance review meetings to the decision-making meeting conducted by Mr Smith without the intervening stage of a Final Written Warning and, therefore, did not follow the Policy to the letter but the Tribunal is less concerned with that given that its function is to consider not the detail of whether the respondent followed its internal policy document but the reasonableness of the respondent's decision in accordance with section 98(4) of the 1996 Act.

12.4.3.4 In light of the guidance the Tribunal draws from the above case law and notwithstanding the absence of a Final Written Warning, it is satisfied that as summarised above there had been the necessary discussions between the respondent's managers (particularly Mr Moorhouse) during the course of which those managers and the claimant were equally aware of their respective positions (including as indicated above Mr Moorhouse' email of 28 September 2018 drawing the claimant's attention to the possibility of his dismissal), steps had been taken to obtain and continually update advice from OH as to the medical position, and in relation to those discussions the claimant had been made aware that if he could not return to work or even commit to a specific date for his return, his employment was likely to be terminated.

12.4.3.5 In this connection, the Tribunal also accepts the evidence of the respondent's witnesses that merely going through the formality of issuing a Final Written Warning to the claimant in accordance with the Policy would not have brought about his return to work

12.4.3.6 There is, however, another aspect to the answer to this question of whether the respondent's managers had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. That other aspect arises from the Tribunal's finding above regarding Mr Smith's evidence that had he received the claimant's email of 5 March before he 'drew the line' at the end of their meeting on 4 March, his decision would have been different. For the reasons set out in some detail in our findings above, the Tribunal repeats its conclusion that it was outside the range of reasonable responses of a reasonable employer for Mr Smith not to have considered the email but merely to have acknowledged it.

12.4.3.7 At an early stage in the development of the law of unfair dismissal it was said that a procedural flaw at the dismissal stage could be corrected at the appeal stage. That has developed, however, to the current approach of considering the totality of the process followed by the employer: Taylor v OCS Group Limited [2006] IRLR 613 and in Graham, "An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) …". With that in mind the Tribunal considered whether, looking at the totality of the dismissal and appeal process in this case in the round, it could be said that a fair procedure had been adopted notwithstanding Mr Smith not having considered the claimant's email of 5 March. The Tribunal is not satisfied, however, that that can be said given that Mr Smith not considering that email was a significant factor in the decision to dismiss the claimant on the date when he was dismissed.

12.5 In light of the above findings, the Tribunal's answers to the specific matters contained in this issue 12 are as follows:

a. having regard to the length and effect of the claimant's absence from work, his dismissal was fair;

b. by the point of the decision-making meeting with Mr Smith the respondent had taken reasonable steps to get the claimant back to work before dismissal but, given Mr Smith's evidence, the Tribunal considers that a further reasonable step to get the claimant back to work before dismissal would have been for Mr Smith to engage in what he referred to as being "the art of the possible" to determine whether the claimant could return to work;

c. at the point of that decision-making meeting with Mr Smith the respondent had waited a reasonable time and could have proceeded to make a decision on or soon after that meeting (for example on 11 March 2019 being the date of the decision letter) but, given Mr Smith's evidence, the Tribunal considers it would have been reasonable to wait at least a little while longer while (at the risk of some repetition) Mr Smith engaged in what he referred to

as being “the art of the possible” to determine whether the claimant could return to work;

d. in respect of the above consideration only, the Tribunal finds that the respondent’s decision to dismiss the claimant was outwith the band of reasonable responses open to it at the time;

e. equity and the substantial merits of the case have been brought into account in coming to the above decisions.

12.6 In summary of this aspect of the complaint of unfair dismissal, with reference to the several elements contained section 98(4) of the 1996 Act the Tribunal finds that the dismissal of the claimant was unfair but only on the limited basis described at paragraph 12.4.3.6. As such, the Tribunal is satisfied that the claimant’s complaint that his dismissal by the respondent was unfair is well-founded.

13. This issue 13 relates to the question of remedy in relation to which the Tribunal has not heard evidence or considered submissions from the parties. The Tribunal has, however, received and considered certain evidence that has a bearing on this issue. That includes the following principal areas: first, the several OH reports referred to above, the more recent of which indicating that nothing much had changed with regard to the claimant and the reasons for his absence, and in particular, he remained unfit for work, a date for his return could not be predicted, prospects for a successful and sustained return to work were poor and there were no particular adjustments that could be recommended; secondly, the claimant’s continued focus on what he saw as the historical behaviours of his colleagues and his express statement in evidence that he could not return until he had received from the respondent an apology for past behaviours and reassurances for the future. In light of this evidence, at this juncture but obviously subject to any further evidence at a remedy hearing, the Tribunal considers that after Mr Smith had done everything he said he would have done by way of “the art of the possible” and reverted to the claimant to seek a commitment for a return to work date, the claimant would have remained dissatisfied with the respondent’s response to the conditions he had set for his return and would not have actually given such a date or returned to work. In these circumstances the Tribunal considers that Mr Smith would then have considered the position once more and would have proceeded to dismiss the claimant, which given our above findings is likely to have been a fair dismissal. That would obviously have been some time after the actual dismissal date of 11 March 2019. In the absence of further evidence and submissions on this point it is impossible to say when that dismissal would have occurred but our best estimate at this stage is that that could have been on approximately 31 March 2019. We stress, however, that all of the above is subject to any further evidence in these respects at a remedy hearing.

Discrimination arising from disability - dismissal

14. The Tribunal’s consideration of the claimant’s five complaints of discrimination arising from disability by reference to the of the 2010 Act requires some introduction as follows:

14.1 In connection with this aspect of the claimant's claims, the Tribunal adopted the approach as set out in Pnaiser v NHS England and another [2016] IRLR 170 which, so far as is relevant to this case, is as follows:

"(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, …. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. …..

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. …..

(f) This stage of causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

14.2 In this regard the Tribunal also reminds itself that "unfavourable" does not equate to a detriment or less favourable treatment but to an objective sense of that which is adverse as compared to that which is a benefit: Trustees of Swansea University Pension and Assurance Scheme v Williams [2018] ICR 233. Thus, the 'test' is an objective one requiring the Tribunal to make its own assessment. In addition, the concept of "something arising in consequence of" disability entails a looser connection than strict causation and may involve more than one link in a chain of consequences: Sheikholeslami v University of Edinburgh [2018] UKEATS/014/17.

14.3 Further, that the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. It is for an employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases unfair dismissal: Hardys & Hansons plc v Lax [2005] IRLR 726.

14.4 Moving from the general to the specific, there is no dispute and the Tribunal finds that as recorded in the agreed list of issues, the claimant's dismissal was unfavourable treatment.

15. As to this issue 15, the Tribunal is satisfied, with regard to subparagraph a, that the claimant was dismissed because of his attendance record/absence from work: that was the "something". That leads to the question, however, whether that "something" arose in consequence of the claimant's disabilities. As found above, the claimant's disabilities were Asperger's and Neurofibromatosis. On the evidence available to the Tribunal, the claimant's absences did not arise in consequence of either of those disabilities but, as is certified in the medical certificates and referred to in the OH reports, arose from his stress, anxiety and depression in relation to work-related matters. With regard to subparagraph b, the Tribunal has found in relation to issue 6 above and for the reasons stated there that providing Asperger's Syndrome Awareness Training would not have removed the claimant's substantial disadvantage and would not have led to his colleagues reacting in a different fashion to his presentation of his symptoms, characteristics or traits of Asperger's. For those same reasons, the Tribunal is not satisfied that the claimant's attendance record/absence from work was caused by the respondent's delay in providing this training and, therefore, in this regard the respondent did not treat the claimant unfavourably because of something arising in consequence of his disability. In connection with this complaint, addressing the above points in the approach in Pnaiser and using the notation used in that approach above:

(a) As indicated above, this first point is conceded. In dismissing the claimant there was unfavourable treatment of him by the respondent.

(b) Again as indicated above, the cause of that impugned treatment, or the reason for it, was the claimant's attendance record/absence from work but those absences did not arise in consequence of the claimant's disabilities of either Asperger's or Neurofibromatosis.

(d) As such, the reason/cause was not "something arising in consequence of B's disability".

In summary of this issue 15, whether with regard to subparagraph a. (attendance record/absence from work) or subparagraph b. (attendance record/absence from work being caused by the delay in providing the Asperger's training) the Tribunal

is satisfied that the respondent did not discriminate against the claimant as described in section 15 of the 2010 Act.

16. Given the above decision with regard to issue 15 that the respondent did not discriminate against the claimant as described in section 15 of the 2010 Act, it is not necessary for the Tribunal to address the remaining issues in respect of the complaint that the dismissal of the claimant amounted to discrimination arising from disability. We do so for completeness, however, acknowledging that our decision as set out above could have been to the contrary. As to this issue 16, therefore, the Tribunal is satisfied that each of the aims specified in the subparagraphs of this issue were legitimate as follows:

    a. employing staff who have regular, sustained attendance sufficient to carry out the role they are employed to do;
    b. managing the claimant and other staff fairly in accordance with the Policy;
    c. managing long-term absence of the claimant and the respondent's other staff.

    In relation to the above, the claimant has suggested, from time to time, that the Policy should have been relaxed or disapplied to an extent either by adjusting the trigger points or discounting his disability-related absences when assessing whether one of those trigger points had been reached. Many claimants might have advanced such an argument as a complaint of failure to make reasonable adjustments or as an aspect of the employer not having acted reasonably in connection with a dismissal. In this case the claimant has advanced this argument in connection with his complaint of his dismissal amounting to discrimination arising from disability. However this contention might have been advanced, the Tribunal is satisfied that the answers to it are the same. First, and most importantly, as we have found above the claimant's absences that led to the application of the trigger points and ultimately to his dismissal were not related to his disabilities (as we have found them to be) but to his conditions of stress, anxiety or depression. Secondly, it is well-established that it will rarely be a reasonable adjustment to require an employer to disapply the terms of such a policy by discounting sickness-related absence: see, for example, Bray v Camden London Borough Council EAT 1162/01 and O'Hanlon v HM Revenue and Customs Commissioner's [2007] ICR 1359 CA.

17. The Tribunal is also satisfied in light of its findings set out above that the dismissal of the claimant was a means of achieving one or more of those aims.

18. All other things being equal, the Tribunal is satisfied that at that point that the respondent's managers came to consider the claimant's dismissal, given the circumstances and the evidence including the medical evidence available to them at that time, there would not have been less unfavourable steps open to the respondent falling short dismissal, which might still have achieved those aims. For the reasons more fully set out above in relation to the complaint of unfair dismissal, however, the Tribunal is satisfied that as at the precise point at which the claimant was dismissed there were, on Mr Smith's evidence alone, less unfavourable steps open to the respondent falling short of dismissal, which would

still achieve those aims. Namely, delaying the dismissal while Mr Smith looked into “the art of the possible” before reverting to the claimant to seek a return to work date; albeit that as explained above (and again stressing that this is our preliminary thinking and subject to further evidence and argument at a remedy hearing) that delay might have been relatively short and, ultimately, the decision to dismiss might have been the same. Given the Tribunal’s decision in relation to issue 15 above, however, its decision in respect of this issue 18 is academic.

Other complaints of discrimination arising from disability

19. This issue is drawn from paragraph 48 of the Further and Better Particulars submitted on behalf of the claimant (51) in which it is explained that his complaint is that following his request that his colleagues refrain from verbal interaction with him, except in relation to technical queries, “communication was disseminated throughout his department to the effect that colleagues should avoid any and all verbal communication with him. The consequence of this was that the claimant felt ostracised by his colleagues.” There is no evidence that supports that assertion. The only related reference is during the Keeping in Touch meeting on 2 November 2017 as follows, “JS confirmed that he does not like face to face communication and would like everything by email as face to face was causing him stress at the moment” (288). Thereafter, that request of the claimant was respected and complied with including attending meetings such as the attendance review meetings, the dismissal meeting and the appeal meeting by email notwithstanding the misgivings of the respondent’s managers who were involved in those meetings. A connected issue is the claimant’s wish to avoid small talk and his assertion that the respondent had suggested notifying his colleagues not to approach him. This assertion is similarly misplaced. The claimant having raised the difficulties he had in this respect with Mr Moorhouse in January 2018 (459), he responded that small talk was standard practice in British Society and could help staff well-being and overall productivity. He offered, however, that if this was something the claimant wished, it would require his permission for an email to be issued explaining to the respondent’s staff that as part of a reasonable adjustment they were being asked to refrain from approaching the claimant with non-work-related conversations. Despite making that offer Mr Moorhouse expressed his concern at “the attention this may bring to you as I’m aware that this can cause you anxiety/stress levels to rise” (457). As noted above, the claimant did not respond. The matter was raised again in May 2018 and once more Mr Moorhouse expressed his concerns that this could isolate the claimant from the team. He continued, “however if you would like me to email them, the content of the email would be similar to; “as a reasonable adjustment to support Jamie in the workplace can I please request that you only approach Jamie with working related conversations/topics.” Despite a specific request for him to do so, the claimant did not respond. Thus, reverting to the complaint in paragraph 48 of the claimant’s Further and Better Particulars, first, no communication was disseminated to the effect that the claimant’s colleagues should avoid any and all verbal communication with him and, secondly, Mr Moorhouse was very much alert to the concern (held by both him and the relevant HR adviser) that if the claimant’s colleagues were requested to refrain from verbal interaction with him he might become isolated or, to use the claimant’s word in this complaint, “ostracised”. Addressing this specific issue 19,

the respondent did not notify the claimant's workplace colleagues in his department to avoid "any and all verbal communication" with the claimant.

20. Given our finding in respect of issue 19 that the respondent did not notify the claimant's work colleagues to avoid verbal communication with him it follows that the subparagraphs of that issue 19 and issues 20 and 21 fall away and do not need to be determined.

21. See 20 above.

22. The respondent did not suggest to the claimant that he disclose and explain his Asperger's condition to all colleagues. In support of this assertion the claimant relies upon what was said at the Keeping in Touch meeting on 2 November 2017 (288). That assertion is also misplaced. The record of the only part of that meeting that might have any bearing is as follows, "RW enquired as to whether JS had discussed his health conditions with his colleagues. JS confirmed that he did not want them to know." Thereafter, as with the communication point at issue 19 above the claimant's position in that respect was respected and complied with.

23. Given our finding in respect of issue 22 that the respondent did not suggest to the claimant that he disclose and explain his Asperger's condition to all colleagues it follows that the subparagraphs of that issue 22 and issues 23 and 24 fall away and do not need to be determined.

24. See 23 above.

25. During the claimant's year-end appraisal his appraiser, Mr Moorhouse, did not make negative remarks to the claimant about his learning and communication style. Our findings in respect of this allegation are fully detailed above. In short, Mr Moorhouse' remarks were essentially positive (574i): Mr Moorhouse referred to the claimant as being intelligent and having good technical understanding who could make a success of his role, increased his marking from 5 at the mid-year review to 4 at the year-end and recorded his intention to support him. Any negativity on the part of Mr Moorhouse during the year-end appraisal was limited to him noting the claimant's slow progress and excessive use of his mobile phone, neither of which were therefore about his "learning and communication style". In this regard the claimant suggested at the Tribunal hearing that he only used his mobile phone at work during the course of his knowledge transfer sessions when he would access the Notepad facility. He had never raised that explanation previously, however, and having balanced the evidence of him and Mr Moorhouse in this respect (the evidence of Mr Moorhouse being corroborated by documentary evidence) the Tribunal prefers his evidence and rejects this explanation of the claimant. Thus, the Tribunal finds that this reference by Mr Moorhouse to the claimant's excessive use of his mobile phone is a genuine criticism of him using his phone during work time and is not related to his use of the Notepad facility during knowledge transfer. It became apparent during the hearing that the actual negative remark in relation to the year-end appraisal upon which the claimant relies in this respect came not from Mr Moorhouse but from feedback Mr Moorhouse obtained from SL. The Tribunal has recorded above that

that feedback from SL was essentially constructive albeit the comment was made that the claimant, like everyone, could sometimes be distracted. Important points in connection with the assertion in this issue 25, however, are as follows: this remark was not made "by his appraiser"; at the time SL was not aware of the claimant having Asperger's syndrome; the claimant has disregarded the otherwise positive feedback from SL and from JH; Mr Moorhouse did not take SL's observation forward into the end of year review.

26. Both this issue and issue 27 are predicated upon the Tribunal having found in favour of the claimant in relation to issue 25 (as are the sub-paragraphs of that issue 25). As the Tribunal has not found in the claimant's favour in relation to that issue we do not need to address these related issues.

27. See 26 above.

28. This issue is drawn from paragraph 51 of the Further and Better Particulars submitted on behalf of the claimant (52) in which it is explained that the communications were ostensibly due to the claimant's timekeeping and the time spent away from his desk, such that he felt as if his movements were being monitored to a much greater degree than his colleagues. On the last day of the hearing, Mrs Shield particularised this complaint by providing a list of documents and email chains showing communications mainly between Mr Moorhouse and the respondent's HR Department. An example of this is contained in the chain of emails between the claimant and Mr Moorhouse and he with SC of the respondent's HR Department (509 to 501). That email chain relates to the claimant expressing concerns that he was being subject to "monitoring and reporting back and incorrectly raising false concerns" and feeling as if he was "being watched and timed". This email correspondence shows Mr Moorhouse seeking to obtain from the claimant further detail of these concerns and also raising issues relating to the claimant's working hours and his having returned to work on 22 January 2018 from 3 weeks' sick leave without informing Mr Moorhouse, and what the claimant had referred to as being his "ET stressors". In the course of this email exchange Mr Moorhouse sought advice from SC of HR as to the content of draft emails he proposed to send to the claimant. The context for this is referred to in our findings above: namely that despite the adjustment regarding his working hours, the claimant was either late or failed to notify Mr Moorhouse of his anticipated lateness as had been agreed. A second example is an exchange of emails between Mr Moorhouse and LH of HR on 2 March 2018 (524), which begins with Mr Moorhouse asking, "I'm just after some guidance around Jamie's end of year review please". While writing, Mr Moorhouse took the opportunity to inform LH that the claimant was absent from work that day and although he had not heard anything from him he assumed that it was due to the snow which had caused the claimant to be absent the day before when he had contacted Mr Moorhouse.

29. This issue and issue 30 need not be addressed given our findings in relation to issue 31 below.

30. See 29 above.

31. As indicated in our findings above, the Tribunal is satisfied as to the following. First, it was understandable that the claimant's arrival times and other movements within the office were monitored but such monitoring was related to the claimant's failures to comply with the terms of the reasonable adjustment regarding the timing of his arrival at work and notifying Mr Moorhouse that he expected to be late and was not related to the claimant's disabilities. Secondly, it was perfectly reasonable, indeed proper, for Mr Moorhouse to refer personnel issues such as those exemplified in paragraph 28 to HR and seek appropriate advice. It is also noted that although Mr Moorhouse was seeking this advice it was not something of which the claimant was aware at the time. For these reasons, the Tribunal is not satisfied that the communications between primarily Mr Moorhouse and the respondent's HR advisers constituted unfavourable treatment of the claimant.

32. Once more, given our findings in relation to issue 31, this issue and issues 33 to 35 need not be addressed.

33. See 32 above.

34. See 32 above.

35. See 32 above.

    As a final aspect of the Tribunal's consideration of each of the above four other complaints of discrimination arising from disability, the Tribunal again addresses the above points in the approach in <u>Pnaiser</u>. It can do so relatively simply, however, since only subparagraph (a) of that approach is relevant in respect of those four complaints. As explained above, the Tribunal is not satisfied that the substance of the first three complaints occurred at all: the respondent did not notify the claimant's colleagues to avoid verbal communication with him; the respondent did not suggest that he disclose and explain his Asperger's condition to his colleagues; the claimant's appraiser did not make negative remarks to the claimant about his learning and communication style. As such, the Tribunal finds that there was no unfavourable treatment of the claimant by the respondent in respect of those first three complaints. As to the fourth of the complaints we have found that communications were sent to the respondent's HR Department but there was a reasonable and proper basis for those communications and, therefore, once more, there was no unfavourable treatment of the claimant by the respondent in this respect. In light of these findings, it is unnecessary for the Tribunal to consider the remaining points in the approach in <u>Pnaiser</u>. In summary and conclusion of these four complaints, therefore, the Tribunal is satisfied that the respondent did not discriminate against the claimant as described in section 15 of the 2010 Act.

Harassment – section 26 of the 2010 Act.

36. Although this issue relates to a complaint of harassment, the conduct relied upon by the claimant in subparagraphs a. to d. is precisely that upon which he relies in relation to the four complaints of discrimination arising from disability considered in respect of issues 19, 22, 25 and 28 above. This issue 36 is whether the

respondent engaged in that conduct. The Tribunal has already found that it did not.

37. In light of that finding is not necessary for the Tribunal to consider this issue or issue 38.

38. See 37 above.

Victimisation – section 27 of the 2010 Act.

39. For the purposes of section 27(2) of the 2010 Act, four protected acts are relied upon by the claimant in the Further and Better Particulars submitted on his behalf; we repeat at the time when he was legally represented. Those acts are his submissions of grievances in August 2017 and July 2018, his presentation of the 2017 Claim and his communication with the respondent's Chief Executive in April 2018. Two preliminary points arising from this. The first is that the first of those protected acts, the grievance lodged in August 2017, was considered as part of the claimant's 2017 Claim and, therefore, the Tribunal is satisfied that it should not be re-litigated in these proceedings. The second preliminary point is that in the written submissions that Mrs Shield handed in towards the close of the hearing she had added the three further communications set out above upon which she sought to rely as being protected acts. In this regard, the Tribunal accepts the submission made on behalf of the respondent that these additional acts were not raised in the Further and Better Particulars that had been submitted on behalf of the claimant (or at any other time prior to the hearing commencing) and were not raised in the claimant's written or oral evidence at the hearing or in questions asked of the respondent's witnesses. As such, the Tribunal is satisfied that they cannot reasonably be pursued as potentially protected acts at such a late stage in the proceedings.

40. Subparagraph a. of this issue is whether Mr Moorhouse and/or the respondent's HR Business Partners made the claimant the subject of disciplinary proceeding. The short answer to that is that they did. This is borne out by the letter of 10 August 2017 (229a) inviting the claimant to attend a formal disciplinary meeting to consider issues of his timekeeping, failure to attend team meetings and demonstrating aggressive behaviour. Subparagraph b. of this issue is whether Mr Moorhouse and/or the respondent's HR Business Partners gave the claimant warnings about his conduct. The claimant has not particularised in the Further and Better Particulars of his claim, his witness statement, questions he asked of the respondent's witnesses or in submissions made on his behalf precisely to what he refers in the nature of warnings. As indicated in our findings above there have been occasions upon which Mr Moorhouse took the claimant to task about his late arrivals to work and other absences. The Tribunal is satisfied that those discussions and emails probably do not constitute "warnings" in the normal sense in which that word would be used in relation to an employment relationship; they were simply Mr Moorhouse discharging his role as the claimant's line manager. Additionally, on the evidence available to the Tribunal, Mr Moorhouse was justified in the approach that he adopted. The claimant did, however, receive two formal warnings. The first was on 15 May 2018 (687) and was a written warning for misconduct, being the claimant's failure to arrive at work at his designated

time and failing to follow the agreed procedure for reporting anticipated lateness (687). The second was on 29 May 2018, which was a written warning for the claimant's attendance (731). Thus, this warning was not about the claimant's "conduct" in the normally accepted sense in which that word is used in relation to "disciplinary proceedings" referred to in subparagraph a.

41. As to subparagraph a. of issue 40, the Tribunal is satisfied on the evidence available to it that when the invitation to the disciplinary meeting was sent to the claimant the respondent had reasonable grounds for initiating that disciplinary action, and the respondent did not do that because the claimant had done any protected act. As to subparagraph b. of issue 40, the Tribunal is similarly satisfied that the respondent had reasonable grounds for giving the warnings to the claimant (whether that be the informal warnings or the two formal warnings referred to in the immediately preceding paragraph) and did not do so because he had done a protected act. For completeness, the Tribunal notes that the letter of 10 August 2017 inviting the claimant to the disciplinary meeting preceded two of the protected acts relied upon by the claimant (his grievance of July 2018 and his letter to the respondent's Chief Executive in April 2018) and, self-evidently therefore, the disciplinary proceedings could not have been because the claimant had done either of those protected acts; similarly, the two formal warnings referred to above were each issued in May 2018 and the grievance of July 2018 came after those warnings and, therefore, they could not have been given to the claimant, because he had done that protected act.

Conclusion

15. The unanimous judgment of the Employment Tribunal is as follows:

15.1 The claimant's complaint under section 111 of the 1996 Act that his dismissal by the respondent was unfair, being contrary to Section 94 of that Act by reference to Section 98 of that Act, is well-founded but only to the limited extent that it was outside the range of reasonable responses of a reasonable employer for Mr Smith not to have considered the claimant's email of 5 March, which led to him proceeding to dismiss the claimant by letter of 11 March 2019.

15.2 The claimant's complaint that the respondent unlawfully discriminated against him by treating him unfavourably because of something arising in consequence of his disability contrary to sections 15 and 39 of the 2010 Act is not well-founded and is dismissed.

15.3 The claimant's complaint that, contrary to section 21 of the 2010 Act, the respondent failed to comply with its duty under section 20 of that Act to make adjustments is not well-founded and is dismissed.

15.4 The claimant's complaint that the respondent harassed him contrary to section 26 of the 2010 Act is not well-founded and is dismissed.

15.5 The claimant's complaint that the respondent victimised him contrary to section 27 of the 2010 Act is not well-founded and is dismissed.

15.6 This case will now be listed for a one-day remedy hearing, in person, in respect of the claimant's successful complaint of unfair dismissal.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 02 November 2020

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