EMPLOYMENT TRIBUNALS

Claimant: Mr D Wilkinson

Respondent: Liverpool University Hospitals NHS Foundation Trust

Heard at: Liverpool **On:** 7 – 11 September 2020 (Combination of remote and in person hearing)

Before: Employment Judge Buzzard
Ms H D Price
Mr W K Partington

REPRESENTATION:

Claimant: Mr Mensah, Counsel (days 1-4)
In person (day 5)

Respondent: Mr Williams, Counsel

JUDGMENT having been sent to the parties on 25 September 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. **The Claims Presented**

1.1. In this claim the claimant pursued four claims. All claims were related to the claimant's status as a disabled person as a result of his ADHD. This status is not disputed. The claims pursued were as follows:

1.1.1. direct disability discrimination;

1.1.2. indirect disability discrimination;

1.1.3. discrimination by failure to make reasonable adjustments; and

1.1.4. harassment related to the claimant's disability.

1.2. The claimant's representative confirmed that no claim of discrimination contrary to s15 of the Equality Act 2010 ("EqA") was pursued in relation to these matters. Accordingly, no form of discrimination is alleged that does not require a comparative analysis against other non-disabled employees was claimed.

2. **Strike Out Applications Made During the Hearing by the Claimant**

2.1. The claimant made two applications to strike out all or part of the respondent's defence to his claims during the course of the hearing. Both applications were refused for the reasons set out below.

2.2. *Claimant's First Strike Out Application.*

2.2.1. At the outset of the hearing the claimant made an application that the respondents defence to his claims should be struck out.

2.2.2. The application was made in reliance on Rule 37(1)(b) and Rule 37(1)(e) of the Employment Tribunals Rules of Procedure. The claimant asserted that the manner in which the proceedings had been conducted by the respondent to that point had been unreasonable contrary to rule 37(1)(b). The claimant also asserted that it was no longer possible to have a fair hearing in respect of the claim under rule 39(1)(e).

2.2.3. The claimant and respondent did not present any evidence in relation this application. The Tribunal had sight of documentary evidence. The basis for the application arises from a number of emails which were only disclosed to the claimant in redacted form.

2.2.4. The claimant made a data protection subject access request on or around 10 June 2019. The respondent replied to that subject access request. The response sent to the claimant a number of documents that had been redacted. This was done in accordance with the subject access request rules regarding information pertaining to third parties. The Tribunal did not have a definite date when this response was sent to the claimant, although it appeared to have been sent to the claimant by, at the latest, the beginning of August 2019.

2.2.5. The claimant was sent the redacted emails on a computer disc. No information was given to the Tribunal regarding any of the file properties of any of the relevant files on that computer disc. Accordingly, there was no available digital evidence regarding when they were created and/or amended by any person.

2.2.6. The claimant presented his claim to the Employment Tribunal on 11 July 2019. The respondent asserts this was later forwarded to them such that they received it on 15 July 2019. This was roughly two weeks before the latest date by which the claimant had been sent the redacted emails in response to his subject access request.

2.2.7. As part of disclosure for these proceedings, the parties entered into discussion regarding the redactions. The claimant wanted to see unredacted versions of the emails. The respondent was not able to locate them.

2.2.8. The discussions culminated in an application being made to the Tribunal. In July 2020 the respondent was ordered to further investigate and search for the un-redacted emails. In response to that order the respondent conducted a further search for the emails and produced a detailed explanation of the result of that search. This report was sent to the claimant and the Tribunal on 20 August 2020.

2.2.9. The respondent's explanation stated that the redactions were done by a Data Subject Access Response Officer, a Mr Paul Coppull. Mr Coppull did not present evidence, he had however produced a signed statement regarding the redactions. The claimant's representative, after taking brief instructions, confirmed that the claimant has no basis to suspect Mr Coppull of having any prejudice against him. Mr Coppull, apparently in error, after redacting the emails saved them overwriting the original versions, rather than saving them alongside a redacted version. Mr Coppull is apparently unable to confirm whether the redactions were done before or after the date when the respondent received the claimant's ET1. Mr Coppull's position is that he was not aware that the claimant was making a Tribunal claim when the redactions were made. There was no evidence to suggest this was not correct.

2.2.10. The claimant says that the respondent deliberately, in an attempt to cover up or prevent the claimant from pursuing his claim fairly, deleted the unredacted emails to hide evidence.

2.2.11. The respondent's submissions were that there was absolutely no evidence before the Tribunal of any deliberate act, and that an assertion or a deliberate act had not been raised before this application was made before this hearing commenced. Further, the respondent stated that there is no basis for believing anything other than Mr Coppull's account that the emails were in error overwritten with the redacted versions. The respondent stated that the persons who they believe to be the relevant email senders and recipients of the emails are giving evidence in the claim, and so can testify as to what the emails contained insofar as it is necessary and relevant.

2.2.12. The Tribunal accept that there is a genuine concern from the claimant that without these emails in unredacted form the claimant may be unable to prove his case.

2.2.13. There does not appear to be any realistic prospect that the unredacted emails can be located. It is practical reality that Tribunals have to consider cases based on the available evidence, which is often less than complete. The Tribunal has not seen any evidence that would support a submission that the unredacted emails were deliberately destroyed in an attempt to undermine the claimant's claims.

2.2.14. It is accepted, in part because there is no credible evidence suggesting the contrary, nothing deliberate was done by Mr Coppull. The fact is that Mr

Coppull when dealing with the subject access request made a genuine mistake. A genuine mistake made by someone not involved in litigation and not as part of the handling of that litigation cannot be unreasonable conduct of that litigation. Noting that there is evidence regarding the content of the emails, both from the redacted versions and from those who sent and/or received them, it is not found that because of the loss of the unredacted emails means that there cannot be a fair hearing.

2.2.15. The claimant's first application to strike out the defence to his claims was, accordingly, refused

2.3. *Claimant's Second Strike Out Application*

2.3.1. The claimant's second application was pursued at 12 o'clock on day four of the hearing. This was at the conclusion of all evidence and before submissions were heard.

2.3.2. The claimant's application was that the respondent's defence to his claims, in so far as that defence asserted that the claims were presented out of time, should be struck out.

2.3.3. This application was made on the ground that questions had been put to the claimant on the basis of a flawed premise. Specifically, a line of questioning during the cross examination of the claimant was put to him on the back of an assertion that it related to documents which the claimant had asked to be inserted into the bundle. The documents in question were printouts of websites. The purpose of the questions was to support a submission that the claimant had access to or access to general information from publicly available internet sites about his rights to make a claim.

2.3.4. The claimant disputed that he had produced the printouts in response to the questions. It later became apparent, and is now agreed between the parties, that the document was inserted into the bundle at the respondent's request.

2.3.5. In the claimant's submission, his representative argued that putting questions to the claimant based on this flawed premise was vexatious. Accordingly, it was submitted that the part of the response those questions related to should be struck out under Rule 37(1)(b) of the Employment Tribunal rules.

2.3.6. The respondent's position was that that application had absolutely no merit. The respondent accepted that questions were put on a flawed premise based on a misunderstanding by the respondent's representative. The position was corrected. The respondent says nothing of substance turns on that difference and the Tribunal can address their minds in due course to the question of whether the claimant had access to publicly available documents that he could have referred to. For this reason, the respondent asserted that it would be wholly disproportionate to strike out any part of the respondent's defence.

2.3.7. The relevant part of the defence the claimant seeks to strike out relates to a jurisdictional issue. Specifically, whether the claimant's claims were

presented in time and thus within the jurisdiction of the Tribunal to hear. Since the Tribunal is now fully aware of this jurisdictional issue it has to be considered, regardless of whether it formally constitutes part of the respondent's defence. For this reason, striking out that part of the defence could make no material difference.

2.3.8. Regardless of this, the Tribunal had to determine the application made by the claimant.

2.3.9. The Tribunal is fully aware of the status of the document in question, and who asked for its inclusion in the bundle of evidence. Accordingly, the Tribunal are fully informed and in a position to reach a decision, after hearing submissions from the parties, regarding whether or not the claimant submitted his claim within time.

2.3.10. It would generally be wholly disproportionate to strike out defences based upon an error being made by a representative during cross examination regarding the provenance of a single document. Such errors are not uncommon. Striking out any part of a claim or defence on the basis of such an error, made midway through a cross examination, would be very unlikely in any circumstances to be proportionate. It is especially disproportionate when it is a minor error, that error has been corrected, and the position has been made abundantly clear, by agreement between the parties, to the Tribunal.

2.3.11. Accordingly, the claimant's second strike out application was refused as being entirely lacking in any merit.

3. **The Jurisdictional Issues Arising in the Claimant's claims**

3.1. *Were the Claimant's claims presented in time?*

3.1.1. The question of whether the claimant's harassment claims and in part to his direct discrimination claims were presented in time fell to be determined by the Tribunal.

3.1.2. The claimant presented his claim to the Tribunal on 2 July 2019. He commenced ACAS early conciliation on 30 May 2019. Based upon these dates, the claimant's claims would be out of time in relation to any allegation which arises from conduct that ended prior to 1 March 2019.

3.1.3. There was no suggestion, or dispute from the respondent, that the alleged acts of indirect disability discrimination and discrimination by failure to make reasonable adjustments were not, as contended by the claimant's representative, continuing acts. On this basis these claims were presented in time and no jurisdictional issue arises. It is noted that both these claims rely on the same alleged acts and omissions.

3.2. *Harassment:*

3.2.1. It is not alleged by the claimant that the harassment he complains of continued beyond 11 January 2019. This is well short of 1 March 2019.

3.2.2. Accordingly, the claimant seeks an extension of time for his harassment claims. This is on the basis that he asserts it would be just and equitable to extend time to bring his harassment claims within the jurisdiction of the Employment Tribunal to consider.

3.3. *Direct Discrimination:*

3.3.1. The claimant makes a direct discrimination claim which in part relates to the fact he was moved or moved from Ward 11 to a Dermatology Outpatients' Clinic role. It is agreed that the move commenced, on the basis that it was a trial basis, from 21 January 2019. There is no dispute that the move became permanent on 1 March 2019.

3.3.2. It was conceded by the claimant's representative in submissions that the decision to make it permanent must have been reached before the date it became permanent. On this basis the claimant would need an extension of time to pursue this claim, albeit that it may be only a very short extension of time is be required.

3.4. *What are the normal time limits in discrimination claims?*

3.4.1. The right to make a claim in an Employment Tribunal in relation to these claims comes from Chapter 3 of Part 8 of the EqA. Specifically, s120 states:

> *"120(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—*
>
> *(a) a contravention of Part 5 (work);……"*

3.4.2. Under this a Tribunal has the jurisdiction to determine if prohibited discrimination and / or harassment has occurred.

3.4.3. Under the EqA the time limits are established by s123 which states:

> *"(1) Proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *….*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*

> *(4) 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 P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

3.4.4. Accordingly, the normal time limit for the claimant's claims under the EqA is three months from the end of the discrimination complained of.

3.5. *When is it Just and Equitable to Extend Time?*

3.5.1. Tribunal has discretion to extend time for a claimant to claim discrimination beyond the normal 3 months if it would be *'just and equitable'* to do so.

3.5.2. There is guidance on the exercise of this discretion, in **Roberston v Bexley Community Centre (trading as Leisure Link)** CA 11 March 2003 the Court of Appeal stated:

> *"It is of also importance to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule."*

3.5.3. The guidance of the EAT in **British Coal v Keeble** [1997] IRLR 336 is also of relevance to the exercise of this discretion. This guidance suggests that the following factors, as relevant to this case, to be considered when considering extending time should include:

3.5.3.1. the length of, and the reasons for, the claimant's delay;

3.5.3.2. the extent to which the cogency of the evidence is likely to have been affected by the delay;

3.5.3.3. the extent to which the respondent had co-operated with any requests for information;

3.5.3.4. the promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action; and

3.5.3.5. the steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking legal action.

4. The Law applicable to the Claimant's substantive claims

4.1. *What makes Discrimination unlawful:*

4.1.1. Part 5 of the Equality Act 2010 applies to employees. This prohibits discrimination and harassment of employees in the workplace In relation to discrimination s39 EqA states:

> *"39 Employees and applicants*
> .....
> *(2) An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a) as to B's terms of employment;*
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
> *(c) by dismissing B;*
> *(d by subjecting B to any other detriment.*
> .....
> *(7) In subsections (2)(c) the reference to dismissing B includes a reference to the termination of B's employment—*
>
> *(c) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."*

4.1.2. This prohibits discrimination in the terms of employment, in the way access to training or other benefits is given, by dismissal or by subjecting an employee to any other detriment.

4.2. *What is Direct Discrimination?*

4.2.1. There is more than one form of discrimination based on disability. The claimant pursues, as one of his discrimination claims, a claim of direct discrimination. This is defined by s13 of the Equality Act as when:

> *"13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

4.2.2. Direct discrimination therefore requires the claimant to identify a comparator. It is clear from the wording of the section, '*or would treat others'* that a hypothetical comparator can be used. The claimant in this case sought to rely on either an actual comparator referred to as "*Sheila*", or in the alternative a hypothetical comparator. The hypothetical comparator constructed was a newly qualified nurse of similar ability to the claimant, but where any relevant performance issues were caused by something other than the claimant's disability.

4.2.3. The claimant must show that he has been treated less favourably than the comparator he uses. Less favourable treatment is not defined in the statute. There is guidance from senior courts. From this it can be seen that the question of whether treatment is capable of amounting to less favourable treatment is a question for a Tribunal to decide, not the claimant. The EAT

in **Burrett v West Birmingham Health Authority** [1994] IRLR 7 made it clear that the mere fact that a claimant thinks they are being treated less favourably does not mean that they are. However the House of Lords in **R v Birmingham City Council ex parte Equal Opportunities Commission**[1989] IRLR 173, gave guidance that the test for less favourable treatment must not be onerous. Whilst not determined by the claimant a Tribunal must not disregard the perception of the claimant. Ultimately the decision of whether treatment is less favourable is for the Tribunal to make, accounting for the perceptions of the claimant.

4.2.4. Establishing less favourable treatment is not however sufficient: for the claim of direct discrimination to be made out, the conduct complained of must be also be '*because of*' the claimant's disability. This means that if the alleged direct discrimination was a result of the impacts the claimant's ADHD had on his performance, rather than his ADHD itself, it would not amount to an act of direct discrimiation.

4.2.5. The Court of Appeal established in **Owen and Briggs v James** [1982] IRLR 502, that the protected characteristic, in this case disability, does not have to be the only reason for the less favourable treatment. The question is whether it was an effective cause of the treatment.

4.3. *What is discrimiation by failing to make Reasonable Adjustments?*

4.3.1. If an employer has a duty to make reasonable adjustments for a disabled employee and fails to do so, that is an act of discrimiation. In this case the claimant sought to argue that the respondent had failed to make an adjustment to a provision, criterion or practice ("PCP").

4.3.2. The relevant provision relating to the duty to make reasonable adjustments is to be found in section 20 of the Act which sets out that where:

> *"a provision, criterion or practice applied by or on behalf of an employee places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled it is the duty of the employer to take such steps as is reasonable in all the circumstances of the case, for him to have to take in order to prevent the provision, criteria or practice, or feature, having that effect."*

4.3.3. Following this, the claimant must establish that a PCP was applied to him, and that it put him at a substantial disadvantage compared to non-disabled persons. Substantial means more than minor or trivial in this context.

4.3.4. The duty to make adjustments will only by breached if there is a failure to make a reasonable adjustment. In determining whether an adjustment is reasonable Tribunals are given guidance by paragraph 6.28 of the EHRC Employment Code which lists examples of matters that a Tribunal might take into account. This includes, of particular relevance to this case:

> *"the extent in which taking the step would prevent the effect in relation to which the duty is imposed."*

4.4. *What is Indirect Discrimination?*

4.4.1. Indirect discrimination is defined in s19 EqA. This states:

"19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

4.4.2. No specific submission or argument supporting this claim was made, beyond a submission from the claimant's representative that the claim must stand or fall with the claimant's reasonable adjustments claim.

4.5. *What makes Harassment unlawful?*

4.5.1. In relation to harassment s40 states:

"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;"

4.5.2. This makes harassment in the workplace unlawful.

4.6. *What is Harassment?*

4.6.1. Harassment is defined by s26 of the Equality Act as:

"(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.

(3) 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."

4.7. It is a matter for the Tribunal to determine whether the conduct complained of occurred. If it is found to have occurred, the Tribunal must determine whether it was unwanted, and if it was if it had the purpose or effect set out in s26(1)(b). In determining this the subjective perception of the claimant is relevant, however it must also be reasonable for the conduct to have had the effects the claimant alleges. Therefore, there is an objective element to this test.

4.8. *The Burden of Proof in Equality Act claims*

4.8.1. Considering the claimant's claims for discrimination and harassment the burden of proof is determined by s136 of the Equality Act. The relevant parts of this section state:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(4) But subsection (2) does not apply if A shows that A did not contravene the provision."

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

4.8.3. This is commonly referred to as the reversed burden of proof, and has two stages.

4.8.3.1. Firstly, has the claimant proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination? This is more

than simply showing the respondent could have committed an act of discrimination.

4.8.3.2. If the claimant passes the first stage then the respondent has to show that they have not discriminated against the claimant. This is often by explanation of the reason for the conduct alleged to be discriminatory, and showing that the reason is not connected to the relevant protected characteristic. If the respondent fails to establish this then the Tribunal must find in favour of the claimant. With reference to the respondent's explanation, the Tribunal can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case.

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

5. **What are the Specific Issues Raised by the claimant in each claim?**

5.1. *What are the Allegations of Direct Discrimination made?*

5.2. The claimant relies on two alleged acts of less favourable treatment in his direct discrimiation claims as follows:

5.2.1. moving him to the Dermatology Outpatients' Clinic from Ward 11 – either on a trial basis 21 January 2019 or making the move permanent with effect from 1 March 2019; and

5.2.2. denying him access to training opportunities between January and March whilst working in the Dermatology Outpatients' Clinic.

5.3. The respondent did not seek to suggest that these could not be less favourable treatment in principle. The respondent did argue that a valid comparator without ADHD would have been treated in the same way, in effect that the treatment was not '*because of*' the claimant's disability.

5.4. *What are the allegations of Harassment made?*

5.4.1. The claimant claims that he was subjected to a number of acts of unwanted harassing conduct up to 20 December 2018 that had the effects described in s26(1)(b). In relation to conduct after that date, up to 11 January 2019, the claimant claims that the conduct had both the purpose and effect described by s26(1)(b).

5.4.2. This position was arrived at during submissions, in the light of the evidence. During evidence it had been articulated that the acts complained of prior to 20 December 2018 had the effect of creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for the claimant.

5.4.3. The alleged acts of harassment were thus argued in submissions to be as follows:

5.4.3.1. on 30 November 2018 Noeleen Ryan is alleged to have asked the claimant "*are you a visual learner?*";

5.4.3.2. on 30 November 2018 Karla Bramhill asked is alleged to have asked the claimant "*do you have any learning needs?*";

5.4.3.3. on 30 November 2018 Karla Bramhill is alleged to have said to the claimant "*yes I knew you had something*";

5.4.3.4. on 30 November 2018 Noeleen Ryan and/or Karla Bramhill is alleged to have said to the claimant "*well the first time I met you, you seemed a little different and a bit all over the place*" and /or "*that is what I noticed too, you were a bit all over the place*";

5.4.3.5. on 30 November 2018 Karla Bramhill is alleged to have said to the claimant "*Me and Noeleen called up Edge Hill University before this meeting to see if they had anything on you, but they said they had no record of you having anything*";

5.4.3.6. On 20 December 2018 Karla Bramhill is alleged to have said to the claimant "*I am just being open and honest, when I read your psychologist report from university about your condition I thought 'How did he ever become a nurse? How did he mask it during his training?'*";

5.4.3.7. On 4 January 2019 Karla Bramhill is alleged to have said to the claimant "*look Danny, OCD heaven*", "*have you ever been to Farmfoods*", and/or "*have you seen the tins on the shelves there?*", or alternatively Karla Bramhill is alleged to have an informal conversation about Obsessive Compulsive Disorder (OCD) in the presence of the claimant;

5.4.3.8. On 11 January 2019 Karla Bramhill is alleged to have said to the claimant "*what did you get up to on your days off*" and/or "*you're not as stupid as you look the*n".

5.4.4. The allegations on 30 November 2018 were submitted to have had the purpose, but not the effect, of harassing the claimant. The later allegations were argued to have had both the purpose and effect of harassing the claimant.

5.5. *What are the Reasonable Adjustments Discrimination claims made?*

5.5.1. The claimant argues that the respondent failed to meet its obligation to make reasonable adjustments in two ways:

5.5.1.1. Not providing autocorrect software; and

5.5.1.2. Not providing a purple overlay screen.

5.5.2. In relation to both these, the claim was predicated on an assertion that in doing this the respondent had failed to make an adjustment to a PCP. It was not argued to be a failure to provide an auxiliary aid. The claimant argued that the PCPs in question were:

5.5.2.1. the requirement to use a PC without an overlay; and

5.5.2.2. the requirement to use a PC without autocorrect software.

5.5.3. Whilst these appear to be claims that relate to the failure to make an adjustment by the provision of an auxiliary aid, they were not argued in that context. Regardless, as the PCPs were framed the outcome would be the same.

5.5.4. The respondent did not dispute that prior to the claimant's move from to the Dermatology Outpatients' Clinic this PCP applied. However, the respondent argued that the claimant suffered no substantial disadvantage. The respondent further argued that it had sought to make adjustments, but without co-operation from the claimant it had not completed the process before the claimant moved to the Dermatology Outpatients' Clinic on 21 January 2019.

5.5.5. The respondent did not accept that the PCP was applied in the same way in the Dermatology Outpatients' Clinic. This was based on an assertion that there was minimal need for the claimant to use a computer whilst in the Dermatology Outpatients' Clinic.

5.6. *What are the allegations of Indirect Discrimination made?*

5.6.1. The claimant sought to rely on the same PCPs for his indirect discrimiation claims as in his reasonable adjustment claims.

5.6.2. No evidence was presented or submission made by the claimant regarding the comparative exercise that would be needed to meet the requirements of the comparative test set out in s19(2)(b) EqA.

5.6.3. This appeared to be because it was agreed by the parties that the claim was fully aligned with the claimant's reasonable adjustments claims. If the claimant's reasonable adjustments claims failed then his claims of indirect discrimination must inevitably also fail.

6. What evidence did the Tribunal hear?

6.1. The Tribunal heard extensively from the claimant. We also heard from a number of witnesses for the respondent, as follows:

6.1.1. from Karla Bramhill, the claimant's initial preceptor whilst he was on Ward 11 where she was the Ward Manager;

6.1.2. from Anita Nasser, the lead nurse on the site where the claimant worked;

6.1.3. from Noleen Ryan, who is an Interim Practice Education Facilitator Lead; and

6.1.4. from Kerry Price, a Dermatology Outpatients' Clinic Manager and the person who became the claimant's preceptor when he was on the Dermatology Outpatients' Clinic permanently.

6.2. All witnesses produced written witness statements. There were some minor amendments made in chief to a number of the respondents' witness statement. Following these amendments all the statements were confirmed, whilst under oath, by the individual witnesses, to be accurate.

6.3. The Tribunal was also presented with a substantial bundle of documents. The Tribunal was referred to this bundle at length, and notes that within the written witness statements many documents were specifically reference by page number, albeit some of these documents were not then specifically referred to during cross examination. All documents referenced in the written witness statements or referred to in cross examination were considered by the Tribunal when reaching this decision.

7. **What is our basic understanding of the chronology of events based on the evidence?**

7.1. In March 2018 the claimant applied for a role with the respondent. He was interviewed by Anita Nasser.

7.2. The claimant completed a new employee health enquiry form An Occupational Health document from that time confirmed he had a condition. This document did not name that condition. It did, however, confirm that the claimant, at that point, was not viewed as needing any adjustments.

7.3. The claimant started his induction 1 October 2018. The claimant started on Ward 11 on 15 October 2018. Karla Bramhill was appointed as the claimant's preceptor. There was some suggestion in the documentation that, initially, another individual had been his preceptor.

7.4. There was a meeting on 30 November 2018 between the claimant, Karla Bramhill and Noleen Ryan. It is at this meeting at which the claimant first notified the respondent that he had ADHD.

7.5. Following that meeting, pursuant to a request made, the claimant sent the respondent a report regarding his ADHD. That was sent to someone at the respondent's Education Centre, who then forwarded it on to Noleen Ryan. Noleen Ryan then emailed a summary of that report to Karla Bramhill and Anita Nasser. The claimant was copied in to some emails at that time relating to that summary. This included emails to and from Thomasina Afful, an Equality and Diversity Manager for the respondent.

7.6. A further meeting occurred on 20 December 2018 between the claimant, Anita Nasser, Karla Bramhill and Vanessa Loftus. Vanessa Loftus was the respondent's Practice Education Facilitator. Sometime in December 2018, the claimant was contacted, by email, by Mandy Warley. This contact related to the need for him to engage with seeking Access to Work funding.

7.7. On 17 January 2019 the claimant emailed Anita Nasser seeking to expedite his move to the Dermatology Outpatients' Clinic. It is unclear from the evidence presented at what point it was decided the claimant was going to move. The email shows the claimant was seeking to expedite the move, suggesting the move must have been contemplated before 17 January 2019. The claimant's statement asserts that his move out of Ward 11 had been decided on a month prior to 17 January 2019.

7.8. The claimant's trial at the Dermatology Outpatients' Clinic started on 21 January 2019. On 1 March 2019 the claimant was formally redeployed to the Dermatology Outpatients' Clinic on a permanent basis. At this time Kerry Price became his preceptor.

7.9. The claimant presented a grievance, via his union representative, on or around 4 February 2019.

7.10. Kerry Price gave evidence that on 13 March 2019 she became aware that the claimant had requested an employment reference. This related to a potential move by the claimant to a different Health Trust.

7.11. On 29 March 2019 the claimant emailed Kerry Price, resigning on notice.

7.12. Sometime in late May 2019 the claimant attended a grievance meeting. Also in late May 2019 the claimant's employment ended.

7.13. The claimant then contacted ACAS on 30 May 2019. A conciliation certificate was issued on 30 June 2019. The claimant presented his ET1 on 2 July 2019.

7.14. The claimant was sent a grievance outcome letter on 19 July 2019. He subsequently appealed against the grievance outcome, or at least against parts of the grievance outcome.

8. **What are the Tribunal's Findings?**

8.1. The relevant findings of the Tribunal are set out below in relation to each claim pursued. The claims where there was a jurisdictional question about whether the claims were presented in time are considered first.

9. ***Harassment***

9.1. The claimant's allegations of harassment were found to have been presented out of time in circumstances where it would not be just or equitable to extend time.

9.2. *Impact of delay on the evidence*

9.2.1. It is agreed that the claimant's allegations of harassment ended on 11 January 2019.

9.2.2. The claimant alleged that he had a very clear recollection of all the harassing comments he complains about. He explained that because these comments had had a particular impact on him at the time, they had stuck in his memory. In effect he had remembered the bad things.

9.2.3. In his statement, the claimant makes it very clear that it was after the meeting of 20 December 2018 with Karla Bramhill that his perception of her attitude towards him changed. His evidence was that during this conversation his views shifted from a perception that she was "*looking out for me*" to a perception that she was "*not trying to help me*". It is difficult to see how the claimant can assert that the three allegations against Karla Bramhill in November 2018 can be argued to have been memorable because of their impact at the time, in the light of his evidence that until 20 December 2018 he perceived Karla Bramhill was looking out for him. During submissions the claimant's representative, after a short adjournment to take instructions, clarified that the claimant's claim is not that the incidents on 30 November 2018 had the effect of harassing him. If the events on 30 November 2018 did not have the effect of harassing the claimant at the time, his assertions that effect was what made them memorable to him cannot be credibly maintained.

9.2.4. The claimant's recollection of events did not appear to be as clear and accurate as he asserted. His recollection of events changed during the his cross examination.

9.2.5. The claimant was asked to recall what Karla Bramhill had allegedly said to him on 20 December 2018. The claimant stated that she had commented that she did not understand how, with his ADHD, the claimant had "*slipped through the net*". The claimant was very clear under cross examination that he believed his memory about this was precise and accurate. When, however, it was pointed out to him that his account of this alleged incident, both in his written witness statement and in his claim form, does not mention "*slipping through the net*", and in fact alleges that Karla Bramhill talked about him "*masking his condition*", the claimant sought to suggest that he had merely '*explained*' himself *'poorly'*. This was not viewed by the Tribunal as a credible response to the change in the evidence. The differences in the recollection of the words used are not minor. The recollection of what was said was asserted to be a very clear and exact recollection. It was not described as '*an explanation*' which could in some way have been poorly expressed.

9.2.6. Considering this, despite the claimant's clear belief that he has a very clear and accurate memory of the comments made, the Tribunal finds he does not. It is found that the claimant's recollections are not as accurate or reliable as he believes.

9.2.7. When being cross examined the claimant set out clearly, and forcefully, that he believed that Karla Bramhill had been involved with, and engaged in, an active conspiracy of prejudice against him. The alleged harassment was asserted to be part of this conspiracy. He alleged that the conspiracy was motivated by a desire to get rid of him. The claimant alleged, under cross examination, that this prejudice had begun from at least the date Karla Bramhill had been told he had ADHD, which was 30 November 2018, if not some time before when the claimant believes she began to suspect he had a disability.

9.2.8. In his statement the claimant states that he found comments made by Karla Bramhill on 30 November 2018 had the effect of "*violating his dignity and*

creating a hostile, degrading, humiliating or otherwise offensive environment for me". This is despite the fact that, as noted above, the claimant's later oral evidence was that until 20 December 2018 he believed Karla Bramhill was '*looking out for me*'. It was conceded by the claimant's representative in submissions that the alleged comments on 30 November 2018 did not have that effect. This amounted to concession that the claimant in evidence had not provided a reliable account of the harassment he alleges, in particular regarding the impact that is alleged to have had.

9.2.9. The respondent's witnesses were all found to be clear and materially consistent. They denied all the harassing comments had been made, with the exception of a different account of the alleged 4 January 2019 comments, which are discussed below. Those denials had to be qualified in cross examination by conceding that they could go no further than assert they had no recollection of the alleged comments being made.

9.2.10. There was nothing in any of the evidence before the Tribunal to support the claimant's bald assertion that there was a deliberate campaign of harassment against him. The claimant was referred to the notes of the meeting on 20 December 2018, where he is recorded as describing Karla Bramhill as "*very supportive*" and that he "*thanked her for her support"*. The accuracy of the notes was not disputed by the claimant on this point. The claimant's evidence in cross examination was that he had said this because he was "*intimidated"* and "*trying to please Karla Bramhill*". This does not appear to credibly explain what appears to be a particularly, and unnecessarily, positively expressed view of Karla Bramhill, or to be consistent with the claimant's evidence that up to this point he had considered Karla Bramhill was '*looking out for me'.* On balance, the Tribunal does not find the claimant's explanation for these comments to be persuasive.

9.2.11. The allegations the claimant makes, setting aside the comments alleged to have occurred on 4 January 2018, even at their highest, do not appear to amount to comments which would not have been of significance to those alleged to have been involved.

9.2.12. The claimant's allegations are not found to have had the purpose of harassing the claimant. There was simply no credible evidence presented to support this assertion.

9.2.13. Noeleen Ryan, as an Interim Practice Education Facilitator Lead was expected to support newly qualified nurses. For her to ask the claimant if his was a "*visual learner*" appears to be an entirely appropriate and benign question.

9.2.14. Karla Bramhill, the Ward Manager for the claimant's ward, was expected to mentor the claimant, in a system the respondent calls '*preceptorship*'. In this context, asking the claimant if he "*had any learning needs*" would be an entirely appropriate question.

9.2.15. Noting that the claimant asserts that the claimant responded to explain that he had ADHD, a further response from Karla Bramhill (which is not recalled) that she "*knew you had something*" is again not something that the Tribunal

find is likely to have been memorable. The claimant has conceded that it did not have the effect of harassing him at the time (nor did he even perceive she was not looking out for him at the time). Given this it is likely that there would have been no reaction from the claimant to the alleged comment, even if it was made. A reaction would be likely to have made the comment more memorable to the person alleged to said it, and thus reduced any prejudice caused by allegations having been raised months later and the impact that delay has on memory.

9.2.16. The same observations would apply to the further comments alleged to have been made by either Noeleen Ryan or Karla Bramhill on 30 November 2018.

9.2.17. In relation to the comments relied on as harassment that were alleged to have been made on 20 December 2018, as explained above the claimant's recollection of these has been found to be unreliable. Karla Bramhill did not recall the comment and denied it is something she believes she would have said.

9.2.18. The respondent's witnesses did not recall all but one of the allegations, and that one was recalled as having been materially different to the way the claimant recalled it. It is not just or equitable to expect respondents' witnesses to be able to recall comments made in passing, which would have been unlikely to have been of any significance to them when made, long after the events in question.

9.2.19. The incident when the comment alleged to have been made on 4 January 2019 occurred was recalled, albeit differently to the way the claimant recalled it. There was a recollection of a similar comment. There was, however, a substantial dispute about exactly what was said, about who was present when it was said, about how the claimant reacted (if at all) when it was said, about whether it was directed to the claimant, about whether the claimant had ever indicated he had OCD (it was conceded he had said he used perfectionism as a coping strategy), and even potentially whether it was on 4 January 2019.

9.2.20. Regarding the date of this incident, Karla Bramhill, was clear that she recalled a particular person being present at the relevant time. That person was shown by the evidence not to have been in work on 4 January 2019. Karla Bramhill was asked, in cross examination, if she was now disputing the date, because no such dispute had been identified at any previous stage of these proceedings. Karla Bramhill responded that she could not recall the date, and because no-one had ever asked her at any point if it was indeed 4 January 2019, or highlighted any particular importance over the specific date, she had seen no reason to consider or dispute the accuracy of that date. This appears to be a credible and honest response.

9.2.21. The claimant does not suggest he drew any particular attention to the 4 January 2019 allegation at the time. There is no suggestion of any reaction from the claimant which could have alerted the alleged harassers to the effect the comments are now alleged to have had. Such a reaction from the claimant would have made the incident more memorable and aided recollection. This allegation is viewed in the light of the finding that

the claimant's recollections in relation to other events are not as accurate or reliable as he asserts.

9.2.22. The alleged harassment on 11 January 2019, by Karla Bramhill asking the claimant what he did on his days off, and in the light of the claimant's response saying, "*you're not as stupid as you look then*" appears to Tribunal to be an entirely normal conversation. There does not appear to be any credible link between this alleged comment and the claimant's disability. There is no suggestion before the Tribunal that the claimant's disability has any impact on his appearance, or any connection with intelligence. There does not appear to be anything about this comment which would cause any reasonable person to have a particular recollection of what was said.

9.2.23. The Tribunal finds that there are significant gaps in the recollections of the respondent witnesses, which given the delay in raising the allegations, coupled with the nature of the allegations, is unsurprising. The claimant's recollections are found to be unreliable. They have not been consistent, and at times have not appeared to be credible. The disputed comments and events appeared to the Tribunal to be matters that would be unlikely to have been memorable events. This is in the context that they are not found to have been things done or said with the purpose of harassing the claimant. This is consistent with the evidence of the respondent's witnesses that they could not recall the alleged events.

9.2.24. Assessing if the alleged acts or harassment meet the requirements of having the *effect* of harassing the claimant is only possible by considering the exact wording used, the surrounding circumstances, the conversation immediately before and immediately after the alleged incidents, and the way the claimant (if at all) reacted. The availability of reliable evidence about these matters is found to have been substantially and materially diminished by the claimant's delay in bringing proceedings.

9.3. *Knowledge of right to claim*

9.3.1. The claimant in his evidence confirmed he had full access to the internet. He did, at one point, suggest his computers were in some way intermittently functional. Regardless of this he confirmed he also had a smartphone with reliable internet access.

9.3.2. The claimant confirmed that he was aware that he wanted to make a complaint about harassment, and had been asking his trade union for legal advice about making a complaint, from February 2018. Considering the last alleged act of harassment on 11 January 2019, the time limit for commencing early conciliation would have been by 11 April 2019.

9.3.3. Prior to this date the claimant accepted that he had resigned from the respondent's employment, having applied for and secured a position at another Trust.

9.3.4. The claimant submitted that he did not contact ACAS because he was seeking to resolve matters internally before taking his employers to a Tribunal. This submission carries far less weight in the context of the fact

that the claimant had resigned from his employment prior to the limitation period expiring. Any potential concern that a claimant would not wish to invoke Tribunal proceedings against their employer is clearly lessened, if indeed it exists at all, once they have resigned that employment having secured employment elsewhere.

9.3.5. The claimant suggested in evidence that he may have been too stressed and under pressure to be able to present his claim. During the limitation period, the claimant drafted and submitted a formal grievance, successfully applied for another job and chased his union representative for assistance before deciding to resign. The Tribunal do not find this to be consistent with being too stressed and under pressure to be able to start the process of making a claim by approaching ACAS.

9.3.6. The Tribunal find that the claimant has not presented a persuasive explanation for his failure to commence his harassment claim earlier than he did. The Tribunal find the claimant had access to information and advice, and was in a position to have presented his claim in time.

9.4. *Other available evidence*

9.4.1. There were a number of emails that were redacted sometime around June 2019. The absence of the un-redacted emails was a matter raised as a preliminary application by the claimant at the outset of the hearing as detailed above. The reasons for the redactions has been found to have been completely unconnected to the actual claim presented. They arose as part of a standard approach to responding to a data subject access request the claimant had made, albeit there it was an error in that process to overwrite the un-redacted emails with the redacted versions.

9.4.2. Had the claimant presented his claim in time the respondent would have been aware of the allegations he made and would have had the opportunity to seek to secure those emails before the data subject access request was processed. It is not clear how helpful those emails would have been in their un-redacted state. The claimant, however, has strongly asserted that he believes that these emails are of material significance.

9.4.3. Had the claimant presented his claim in time there is every reason to believe that these emails would have been available in their un-redacted form, albeit this can never be known with certainty. The claimant's delay in presenting his claims has, at the least, deprived the parties of the potential to secure this evidence.

9.5. *Conclusion*

9.5.1. The evidence in relation to the claimant's harassment allegations is found to have been substantially diminished by the lapse of time and the claimant's delay in presenting his claim. No good reason for not presenting the claim earlier has been provided by the claimant

9.5.2. Considering this, the Tribunal finds that it would *not* be just and equitable to extend time such that the claimant should be allowed to pursue his claims. Such an extension would require the respondent, and those employed by

the respondent who are alleged to have harassed the claimant, to defend themselves in an unfairly prejudicial situation.

10. ***Direct Discrimination***

10.1. *Extension of time.*

10.1.1. The Tribunal find it is just and equitable to extend time such that the claimant's direct discrimination claims fall within the jurisdiction of the Tribunal to consider.

10.1.2. The claimant's allegation that he was denied access to training whilst in the Dermatology Outpatients' Clinic was, in any event, raised in time.

10.1.3. The claimant's claim that it was direct discrimination to move him to the Dermatology Outpatients' Clinic would have only been out of time by a day if the act was found to continue until it was decided the move would be made permanent. Thus a much shorter extension of time is needed in relation to this claim.

10.1.4. In the view of the Tribunal a more important consideration was the nature of the decision to move the claimant to the Dermatology Outpatients' Clinic. An active decision has been made to move an employee to a different department. Conservations must have occurred regarding this move, steps were taken to put the move into effect as a trial that was then made permanent. The reasons for that are not likely to have been viewed as insignificant matters. They should be recalled, and are likely to have been recorded in some way. Given this the Tribunal do not find that there is the same prejudice to the respondent in relation to being able to produce evidence regarding this claim.

10.1.5. For this reason it is just and equitable to extend time to bring this claim within the jurisdiction of the Tribunal to consider.

10.1.6. For these reasons

10.2. *Comparator*

10.2.1. As set out above, the claimant identified two acts which he alleges were acts of direct discrimination. To establish that they were acts of direct discrimiation they must have been acts of '*less favourable treatment'*. This requires a comparison to be drawn.

10.2.2. The claimant identified initially a comparator, referred to as '*Sheila*'. The Tribunal do not find Sheila to be a valid comparator. It is not clear that the claimant's representative in submissions sought to pursue an argument that Sheila was a valid comparator. The following relevant points were not disputed:

10.2.2.1. Sheila was an experienced nurse whereas the claimant was a newly qualified nurse; and

10.2.2.2. No issues had been raised regarding Sheila's performance.

10.2.3. Accordingly, the Tribunal cannot see any basis upon which we could conclude that Sheila would be a valid comparator. Regardless of this the claimant can rely upon a hypothetical comparator, and in submissions his representative appeared to confirm that a hypothetical comparator was in fact relied upon.

10.2.4. The comparator described was a newly qualified nurse with the same performance issues as the claimant, but where those performance issues are caused by something other than ADHD. The question is if such a nurse would have been treated more favourably in relation to the acts identified by the claimant. These are discussed below.

10.3. *The claimant's move to the Dermatology Outpatients' Clinic*

10.3.1. The respondent's witnesses presented clear evidence stating that moving the claimant was intended to provide a better environment for him, and to provide more support for him.

10.3.2. The respondent's witnesses were clear in their evidence that Ward 11 was a hectic and busy ward that was both understaffed and very demanding. The Tribunal simply do not accept the claimant's repeated assertions that he, as a newly qualified nurse, is in a better position to judge what is or is not a fully staffed ward than the ward managers from the respondent.

10.3.3. The Tribunal note that having looked carefully through the evidence beyond the bare assertion from the claimant that he thinks he was moved because he had ADHD, there was no evidence whatsoever to suggest that it was anything other than to provide a more suitable environment for him. To put him in a less pressured and more structured environment to assist his development.

10.3.4. The claimant does not agree with this but simply could not provide any credible basis to support that disagreement. The witnesses' evidence from the respondent was credible and consistent, both regarding the actions and discussions which were recorded at meetings, and the events and the timings of the claimant's move.

10.3.5. The claimant's case in this regard was based largely on, and connected with, his allegations that there was a wider conspiracy or campaign amongst ward 11 staff to get rid of him because he had disclosed his ADHD diagnosis. The Tribunal do not accept the evidence we have seen shows anything that even remotely suggests the claimant was being subjected to any systematic prejudice or bias by anyone in ward 11 because he had ADHD, or indeed for any other reason.

10.4. The Tribunal conclude that any newly qualified nurse with performance issues like, or similar to, the claimant's, would have been moved from a busy, understaffed, demanding and hectic ward to a more structured, more fully staffed outpatients' clinic. For this reason, the Tribunal do not find the claimant's direct discrimination claim relating his move from the Ward 11 to the Dermatology Outpatients Clinic to be well founded. The claimant has made no other claim or complaint to this Tribunal regarding this move.

11. Discrimination by refusing training opportunities

11.1. As noted above, the Tribunal do not accept that Karla Bramhill had any prejudice against the claimant because he had ADHD. The claimant's case was that Karla Bramhill misled staff after he moved from ward 11, and that resulted in him being treated badly by not letting him go on training as a result of Karla Bramhill's prejudice. The claimant was clear that Kerry Price, the person Karla Bramhill is alleged to have mislead, was not believed to have had any inherent prejudice against the claimant, or any nurse, with ADHD.

11.2. Accordingly, the fundamental premise behind the claimant's belief is not supported by the Tribunal's findings.

11.3. Regardless of this, the allegation less favourable treatment the claimant relies on is not supported by the evidence presented. The claimant appears to have been a permanent member of the Dermatology Outpatients' Clinic for approximately 13 days before the respondent became aware that he was leaving their employment for another Trust. The claimant by the end of the month he started in the Dermatology Outpatients' Clinic had handed in his formal notice of resignation.

11.4. The claimant complains that he was not allowed to go on pregnancy testing training. The Tribunal accepted the clear, logical, sensible and consistent evidence, from Kerry Price and others from the respondent, that this was simply not something that the respondent needed the claimant to do whilst working in the Dermatology Outpatients' Clinic. Even if the claimant had been allowed to go on this training, it would not produce a transferable qualification. This means the training would have to be redone at any other Trust he went to work for. Noting how quickly the respondent became aware that the claimant was moving to another Trust where the training would have to be repeated anyway, coupled with the fact that he did not need to perform pregnancy tests in the Dermatology Outpatients' Clinic, it would have made little sense for the respondent to support that training.

11.5. Accordingly, it is found that the refusal of support for pregnancy testing training was in no sense whatsoever connected to the claimant's ADHD

11.6. The claimant also complains about medication training. The evidence was clear, however: in the Dermatology Outpatients' Clinic medication training was not available. The claimant either had to do this in a different setting or could potentially wait for a rotation to the Dermatology Ward and do the training then. Accordingly, the reason for the claimant not doing this training is again found not to relate to the claimant's ADHD in any way.

11.7. The Tribunal have seen clear evidence that the claimant did not attend any specific training sessions during his brief period working in the Dermatology Outpatients' Clinic. This is not, however, enough. The Tribunal finds that the reason why this was the case had nothing whatsoever to do with the fact the claimant had ADHD, either directly or indirectly. The claimant was in the department only briefly, and the training he identifies was either not available in the clinic in which he worked or not for something the respondent needed

the claimant, as a newly qualified nurse in the Dermatology Outpatients' Clinic, to do.

11.8. Accordingly, the claimant's claims of direct discrimiation are both dismissed as not well founded.

12. ***Discrimination by Failing to Make Reasonable Adjustments***

12.1. It is accepted by the respondent that the claimant needed to use a computer on Ward 11.

12.2. The Tribunal took particular note of the respondent's evidence regarding the claimant's need to use a computer whilst in the Dermatology Outpatients' Clinic. It was not set out in the claimant's own statement in any detail that he would need to use a computer in that setting, it was however suggested in his oral evidence. The claimant asserted that he would need to book swabs and check patient information.

12.3. It was put to Kerry Price that the claimant would need to use a computer whilst working in the Dermatology Outpatients' Clinic. Kerry Price was clear and consistent in her evidence on this point. The two things put to her, that the claimant would need to use a computer for booking swabs and/or for checking some patient information, were both denied. Her evidence was that doctors would perform these functions. The doctors would book swabs and the doctors, if they needed information, would look it up themselves. They would not entrust such tasks to a nurse, especially a newly qualified nurse.

12.4. Based upon the evidence before the Tribunal it is found that following the claimant's move to the Dermatology Outpatients' Clinic from 21 January 2019 his need to use a computer for his work became minimal. The Tribunal accept that the claimant, at most, may have had to read occasional emails. The Tribunal do not accept, given the evidence regarding the extent of the computer use, that any disadvantage this caused was substantial.

12.5. We note the respondent accepts that the claimant at no point not given either an overlay for the screen or any global autocorrect software. However, noting that there was minimal need to use a computer in the Dermatology Outpatients Clinic, we do not accept that the PCP of the claimant having to use a computer where necessary without those adaptions put the claimant at a substantial disadvantage, because the need to use a computer was so minimal and any disadvantage (that it might take him slightly longer) was not substantial. Accordingly, from this date the duty to make reasonable adjustments did not apply, the claimant was no longer at a substantial disadvantage because he had to use a computer as part of his role.

12.6. The claimant confirmed in cross examination that he was provided with coloured paper by the respondent. This was an adjustment made because he could read more easily from coloured paper. The claimant's own evidence was that he had access to a printer at work, which he could use, both for work and surprisingly, he stated, for personal purposes. Accordingly, insofar as there may have been an occasional need for the claimant to read an email whilst in the Dermatology Outpatients' Clinic, there was nothing stopping him printing that email onto his coloured paper and reading it from that.

12.7. Considering the above, the Tribunal find that an adjustment was made that would address any disadvantage, substantial or otherwise, that the occasional need to read emails caused the claimant.

12.8. The Tribunal considered the chronology of the alleged failure to make adjustments. The claimant disclosed his ADHD on 30 November 2018. Prior to this, although the respondent as an organisation was aware that the claimant had an unidentified condition, they also had clear Occupational Health advice that no adjustments were needed.

12.9. Following a meeting on 30 November 2018, where the claimant disclosed his ADHD, the claimant provided a psychologist's report to the respondent. This was sent on 7 December 2018. There followed a meeting on 20 December 2018 during which it is agreed a number of potential adjustments were discussed. These included the provision of global autocorrect software and the provision of a screen overlay.

12.10. Following the meeting on 20 December 2018 the claimant was sent an email identifying some potentially useful global autocorrect software that could be installed on a computer for the claimant to use. The claimant was specifically asked to confirm if that was the software he had mentioned at the meeting earlier that day. The claimant never replied to this request for confirmation. He accepts he saw and was aware of the request. Nobody from the respondent chased the claimant. The respondent in no way sought to chase up the claimant or take any action regarding that software. Nothing further occurred in relation to software before the decision to move him to the Dermatology Outpatients' Clinic was made.

12.11. The claimant's statement alleges that this decision was made at a meeting "*an entire month*" before 17 January 2019. If this is correct, then the decision to move was made at or around the time that the software had been discussed.

12.12. In relation to the overlay, apparently pursuant to an instruction which the Tribunal did not have the benefit of seeing, the claimant completed an Access to Work funding application on or around 31 December 2018. Nothing further seems to have happened in relation to this prior to his move to the Dermatology Outpatients' Clinic.

12.13. The Tribunal were taken to a detailed policy from the respondent regarding adjustments for disabled employees and reasonable adjustments generally. That policy suggests that, regardless of an application for funding, adjustments of a value of under £1,000 could be ordered by the claimant's manager. Despite this an overlay was not ordered and further advice was sought by the claimant's manager regarding authority to order aids.

12.14. The Tribunal find that the evidence shows the respondent at worst delayed making the suggested adjustments to software and by providing overlays for 3-4 weeks. This was over the festive period. Based on the claimant's statement, this was mostly in a period when it was known he was moving to from Ward 11. There was minimal need to use a computer in the Dermatology Outpatients' Clinic he moved to.

12.15. The Tribunal finds that, by definition, the phrase "*reasonable adjustments*" must incorporate a reasonable time to make an adjustment. In assessing that time, the fact that the claimant did not chase up the overlays and failed to provide information regarding the correct software that would have facilitated the adjustment is relevant. Whilst it is not the responsibility of the claimant to make the adjustment, the respondent must be permitted to seek, and then wait for, the claimant's input regarding any adjustment. The respondent's request for the claimant's input regarding the software was almost immediate, and the request that the claimant engage with the Access to Work process, although the date is not specifically known, must from the fact it was done by 30 December 2018 have been relatively prompt.

12.16. On the claimant's case it was known he was moving from ward 11 from 20 December 2018. The Tribunal do not find it was reasonable for the respondent (or potentially possible given the processes that are likely to be needed, especially to order and install software, given the nature of the organisation) to have made adjustments to facilitate the claimant's use of a computer when it was unclear which computers if any he would need to use after he moved. From, at the latest 17 January 2018, it was clear that the claimant would not have any substantial need to use a computer, as his move to the Dermatology Outpatients' Clinic had been decided.

12.17. Accordingly, it is not found that a failure to make a reasonable adjustment occurred before the claimant's move to the Dermatology Outpatients' Clinic, given the short time frame involved. Further, it is found that there was no duty to make reasonable adjustments after the claimant's move to the Dermatology Outpatients' Clinic, given the minimal need for the claimant to use a computer in that clinic.

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Employment Judge Buzzard

6 December 2020

REASONS SENT TO THE PARTIES ON

.28 January 2021

FOR THE TRIBUNAL OFFICE