EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Z Connolly	**v**	Secretary of State for Justice

Heard: at Bury St Edmunds by Cloud Video Platform

On: 26 to 30 April and 10 June 2021

Before: Employment Judge Finlay
Mr A Chinn-Shaw
Mr B McSweeney

Appearances
For the Claimant: Ms S Ismail of Counsel
For the Respondent: Mr G Powell of Counsel

RESERVED JUDGMENT AND REASONS

The unanimous Judgment of the Tribunal is as follows:

1. The claimant's complaints of direct discrimination (section 13 Equality Act 2010), discrimination arising from disability (section 15 Equality Act 2010) and victimisation (section 27 Equality Act 2010) fail and are dismissed.

2. The claimant's complaint of failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010) succeeds.

There will now be a Remedy Hearing as provisionally arranged on 12 August 2021.

REASONS

Introduction

1. By claim forms presented by the claimant on 18 October 2018 and 19 May 2019 the claimant brought complaints of direct discrimination contrary to section 13 of the Equality Act 2010 ("EqA"), discrimination arising from disability contrary to section 15 EqA, failure to make reasonable adjustments contrary to sections 20 and 21 EqA and victimisation contrary to section 27 EqA.

2. The claims followed periods of Early Conciliation between 1 October and 16 October 2018 and 12 to 27 February 2019 respectively.

3. A case management preliminary hearing took place on 30 April 2020 at which the issues to be determined by the Tribunal were discussed and identified. We considered that there were some ambiguities within that list and following a discussion with the parties on the first day of the final hearing, Ms Ismail for the claimant produced a document entitled 'agreed clarification to list of issues'. We have determined the issues as set out in those two documents.

4. The final hearing was a remote hearing by Cloud Video Platform as agreed with the parties. We heard evidence on 26 to 29 April 2021 and submissions on 30 April. The remaining time on 30 April was utilised for deliberations by the Tribunal and there was a further deliberation day, in private, on 10 June 2021.

5. The claimant gave evidence and we heard from the following witnesses for the respondent:

    a. Mr Brian Tennant, who is a Delivery Manager at Cambridge Crown Court but who at the material time was employed as a Court Usher at Northampton Combined Court Centre and was the claimant's line manager.
    b. Ms J Harper who is now partially retired but who at the material time was employed as a Crown Court Clerk at Northampton Combined Court Centre.
    c. Ms Lindsey Wearne who is and was employed as a Crown Court Clerk.
    d. Ms Michelle Monk who is and was employed as Cluster Manager for Lincolnshire, Leicestershire and Rutland, and Northamptonshire.
    e. Mr Mike Parker, who at the time was employed as Delivery Manager for Northampton Combined Court Centre.
    f. Ms Angela Knights, who at the time was employed as Delivery Manager for Northampton County Court, which operates within the Northampton Combined Court Centre.
    g. Mr Adrian Palmer, Operations Manager for HM Courts and Tribunals Service, Northamptonshire.

    We also had a witness statement from Ms Cheryl Martin, a team leader for HMCTS, but did not hear evidence from her following the withdrawal by the claimant of the allegation with which her witness statement dealt, as described in paragraph 31 below.

6. We were provided with an agreed bundle comprising over 660 pages and both representatives produced helpful written submissions which they amplified in their oral submissions.

Facts

7. The claimant, who was aged 32 at the start of the hearing, suffers from three significant disabilities, namely Cerebral Palsy Hemi-Plegia (CPH), Cervical

Spondylosis (CS) and a Generalized Anxiety Disorder (GAD). There is no dispute that all three are disabilities within the terms of the Equality Act 2010 (EqA) and each on its own would render the claimant a disabled person as defined by section 6 EqA.

8. The claimant had submitted a disability impact statement which set out the effect of each of his disabilities on his ability to carry out day to day activities. We are conscious that any attempt to summarise that statement and those effects will not adequately reflect the extent of the symptoms as set out in that statement, but in brief:

    a. The claimant is unable to use his right hand or arm properly. He cannot use his right hand to cut fruit or hold drinks. He cannot dress his young children or take them to the park on his own. He cannot use his right hand to operate a computer.
    b. The claimant's right leg is smaller and significantly weaker than his left. He is unable to run or jog and becomes uncomfortable after standing for more than one minute. Walking long distances makes him exhausted.
    c. He gets regular muscle spasms in his back at which time he needs assistance with activities such as washing or dressing.
    d. The claimant has to stretch every hour and move every few minutes.
    e. The claimant's CS causes him neck pain, such that if he sits down and stays in one position for more than ten minutes, his neck becomes stiff and uncomfortable. His neck will 'spasm' if he lifts heavy shopping bags. The claimant used to do boxing training, an activity which helped his overall fitness and was beneficial in managing his disabilities. He is no longer able to do so.
    f. As a consequence of his GAD, the claimant suffers from panic attacks about his health and other issues. His anxiety has caused him to attend the doctors or hospital hundreds of times and also to isolate himself in his house. He struggles with his health anxiety every day. By way of example, he said that if he has chest pains, he automatically thinks that he is having a heart attack and becomes fixated on the pain.

9. The claimant has tried a variety of treatments, including physiotherapy, painkillers, CBT treatment, TENS treatment and injections, hypnotherapy, counselling and anti-depressants.

10. The claimant left school with no GCSEs. He says that he learned to read and write by playing online games. After years of further study, he was able to undertake a law degree at the University of Northampton, achieving a 2:1. He told us that his academic performance at university improved markedly after a specialist disability assessment. He was given equipment to help him study, including a £900 desk chair with lumbar, neck and arm support, a 1-1 tutor, funding for counselling, extended exam times and exercise breaks. He was allowed to leave classes and work from home.

11. From what we saw and read, we have no doubt that the claimant is extremely strong willed and has fought throughout his life to achieve goals despite his disabilities. He has the ambition to become a qualified lawyer and we have little doubt that he will continue to fight hard to achieve that ambition in the future.

12. In 2018 the claimant successfully applied for a job with the respondent as an usher at Northampton Crown Court. This was a fixed term contract of one year and the claimant hoped that this would be extended to at least two years, as part of the journey towards a potential career at the bar. He was delighted to be accepted, stating that he felt it was as if he had won the lottery.

13. In his application form, the claimant referred to his CPH and confirmed that he considered himself to be disabled. In the 'Equality and Diversity' section of the form there are other questions regarding disability and other protected characteristics, but the version of the form which we saw did not include any details to the answers to these questions, referring to each as 'restricted data'. We accept that this was the version of the form which was available to the respondent's witnesses, particularly Mr Tennant, Mr Palmer and Mr Parker, and whilst the respondent as an organisation clearly had additional information regarding the claimant, this was not made available to those witnesses. We do not know whether it would have been provided to them had they asked.

14. Mr Tennant was the only one of the respondent's witnesses who was on the panel which interviewed him. Mr Tennant knew that the claimant had a disability, but not the full extent. He recalled that the claimant did not wish to make a big deal out of his disability and we have no reason to dispute this. It is consistent with our sense of the claimant and we have little doubt that at the interview he would be focussing on trying to make a good impression on the panel. Mr Tennant also recalled that the claimant had said that he had previously run a gym and held a boxing licence. Mr Tennant described the claimant as "clearly very physically fit", although he noted that the claimant had a condition which affected his use of one arm. He confirmed that at the interview, he did not raise the issue of disability directly but did say that if the claimant were successful any need for adjustments would be considered.

15. On 15 April 2018, the claimant underwent a telephone assessment by the respondent's external occupational health providers, which provided a fitness for work certificate. This was a one page document. This standard form gives the medical practitioner five alternatives, including 'fit for work', 'unfit for work' and 'fit for work with a recommendation for routine (DSE) workstation assessment'. The last of these was ticked and the additional notes stated: "*To the best of my knowledge and in my opinion this employee is medically suitable for post of usher. Employee has conditions which are likely to come within the terms of the Equality Act 2010. Restrictions or adjustments are indicated at this time. Avoid prolonged static positions such as standing or sitting. Avoid heavier manual lifting, lifting or carrying or manual handling of heavier items/equipment of a repetitive nature over a prolonged period. Support to stretch and exercise as required to maintain comfort at work. When required to work at a standing position such as at reception desk over longer periods would benefit from being able to sit for short periods.*"

16. Although this report was provided to the respondent, Mr Tennant did not read it. On 17 May there was email correspondence between Mr Parker and Mr Palmer, into which Mr Tennant was copied, which was headed "Official. OH Report (reasonable adjustments) – Zac Connolly". Mr Parker expressed doubts about the claimant's suitability for work in the crown court, on the basis that there would be a lot of static sitting or standing and carrying files. Mr Parker was intimating that another jurisdiction would be more suitable for the claimant, but Mr Palmer was more sanguine, believing that the claimant would not be subject to prolonged standing or sitting and that he would have the use of a trolley if required. Mr Palmer also thought the environment would be similar in any jurisdiction. Mr Tennant does not refer to the report or this correspondence in his witness statement.

17. The claimant commenced work with the respondent on 18 June. His terms and conditions of employment stated that his appointment was "subject to a four month probationary period to test (his) suitability for the post" and that at the end of this period, his appointment would be confirmed provided that he had shown that he could "meet the normal requirements of (his) grade" and that his attendance and conduct had been satisfactory. The terms went on to say that his manager could extend the probationary period, in wholly exceptional circumstances, if he had been prevented from attaining the required standards of performance, attendance or conduct.

18. The role of a crown court usher involves ensuring the smooth running of court hearings and assisting the judges, barristers, jury and witnesses. The precise nature of tasks to be performed will vary from day to day depending on the court list for that day. The role is not 'office based', although there is some computer work, and most of the duties are performed in and around the courtroom. An usher will generally be able to move around, but there will be occasions when the usher will need to remain seated, for example when a witness is giving evidence. The position also encompasses the role of jury bailiff which requires the usher to remain outside the jury room once the jury has been sworn in. Court hearings can last anything from a few minutes to all day and beyond.

19. The claimant was provided with an induction pack including a weekly training plan, the idea of which was for the new usher to 'shadow' another usher who would be able to demonstrate the various tasks to be undertaken until the new usher was sufficiently competent and confident to carry out the tasks without the need for supervision. The fact that the claimant was working alongside another usher during this initial period made it generally easier for him to take breaks and move around. For the period 18 June to 20 July, the claimant was mainly sitting in on a criminal trial. The respondent will have known that this period was not typical of what his daily working arrangements would be following the end of his training period, when he would not ordinarily be working with another usher.

20. Despite the recommendation for a DSE workstation assessment, Mr Tennant did not immediately arrange one for the claimant. Although he had not actually read the OH report, Mr Tennant was relying on the word 'routine' in the recommendation. He explained that the respondent carries out routine DSE

assessments for all relevant staff as a matter of course on a rolling basis and he did not see any need to carry out an assessment for the claimant at the outset of his employment. There is a marked disagreement in the evidence as to the extent to which the claimant was asking Mr Tennant to carry out the assessment in these early days of the claimant's employment. It is common ground that they spoke together virtually every day, but whereas the claimant says that he asked Mr Tennant to arrange the assessment on his first day and on numerous occasions thereafter, Mr Tennant denies this, stating that in his witness statement that he was not aware of any such request from the claimant until he (Mr Tennant) took annual leave from 20 July.

21. Having heard the evidence of both, we find that during this period, the claimant did not make numerous requests of Mr Tennant to arrange the assessment. We consider it more likely that the claimant was focussed on building a good relationship with his manager and did not want to draw attention to his limitations. Nevertheless, we consider it likely that he did ask on at least one occasion and, in any event, we find as a fact that Mr Tennant knew of the recommendation in the report, even though he had not read it himself.

22. The DSE assessment process for the claimant did commence on 18 July when the person responsible for DSE assessments at the respondent sent him the respondent's DSE questionnaire. This was in accordance with the respondent's rolling programme as referred to above and not because of a specific request from Mr Tennant. We accept the claimant's evidence given in cross examination that he completed the questionnaire and returned it to the sender, but we have not seen the completed version and do not know what became of it. There is no suggestion that Mr Tennant was provided with a copy.

23. At this point we pause to consider the nature of the respondent's DSE assessment. The letters DSE stand for display screen equipment but it is very clear that the assessment covered more than the computer and monitor. The recommendation by OH, in accordance with the standard form utilised, was for a "(DSE) workstation assessment" and the questionnaire provided to the claimant refers to the workstation generally, asking about such matters as the temperature of the working environment. It also asks "*Are there any other health and safety issues you wish to raise concerning use of your workstation or workplace (e.g. excessive workload, lifting and carrying, general health etc)? OR Do you have any special needs that should be considered during the assessment?*" We reject any suggestion that arranging the DSE assessment earlier would only have provided the respondent with very limited information to assist the claimant.

24. During this period between 18 June and 20 July the claimant's CS became aggravated and he experienced severe neck pain and numbness in his hand. He made an emergency appointment with his GP on 4 July complaining of 'flare of neck pain' and the doctor's note refers to it bringing back some of his anxieties. The claimant considered that this aggravation of his symptoms was due to him having to sit on what he described as 'a broken old desk chair' when sitting in on the criminal trial, and not being given time for exercise breaks. We accept that he told Mr Tennant that he saw this as the cause of his pain.

25. The claimant then had a sickness bug which meant that he was off sick on Monday 23 July. He was not then able to return to work until Thursday 26 July, due to severe pain in his neck.

26. The claimant's return to work interview was carried out by Ms Wearne in Mr Tennant's absence on holiday. The claimant advised Ms Wearne that his sickness had brought on the pain in his neck which was related to his disability. During this meeting, Ms Wearne advised the claimant that his three day absence had exceeded the 'trigger points' for an employee on probation in the respondent's absence management procedure. She told the claimant that this would be dealt with by Mr Tennant on Mr Tennant's return from holiday on the following Monday. The claimant alleges that Ms Wearne went much further than this and issued the claimant with a warning. We reject this and we accept Ms Wearne's evidence on this point. Ms Wearne was effectively standing in for Mr Tennant at this point and we do not consider it likely that she would have taken it on herself to issue a warning to someone she did not manage. Furthermore, Ms Wearne was well aware that a return to work interview is not the time to issue a warning for exceeding the trigger points. The policy requires a formal meeting to be convened before any decision is taken.

27. At this point we will make some comments about the claimant's evidence to the tribunal. He was clearly nervous and understandably emotional, having waited almost three years for the chance to put forward his case. He gave his evidence passionately, but unfortunately, and despite numerous entreaties, he tended not to answer the questions put to him, but to regard his questioning as the opportunity to repeatedly highlight aspects of his case that he wanted to put across.

28. In addition, we found that he has a tendency to misinterpret or exaggerate issues or statements made. This allegation against Ms Wearne is a case in point. We are not suggesting that the claimant did not genuinely believe that he had been given a warning, but we are clear that this is not what happened. This trait of the claimant may possibly be a result of his GAD (although we stress that we make no finding to that effect having no medical evidence to support the point), but regardless of the cause, there are other examples in the following paragraphs. We add for the avoidance of any doubt that this tendency of the claimant does not mean that we reject his evidence on every disputed issue and we have looked at each such incident separately and made our findings based on the evidence available to us.

29. We also note here that the respondent's witnesses often made notes of conversations and interactions with the claimant. Those notes, being relatively contemporaneous, were of assistance to us but only up to a point. The claimant was not shown these notes at the time and we accept Ms Ismail's submission that these notes should not be seen as verbatim transcripts but should be viewed critically. To some extent, these notes are, as Ms Ismail put it, 'self-serving', particularly those prepared after the claimant had begun to threaten litigation for discrimination.

30. Returning to the chronology, it is common ground that at the meeting with Ms Wearne, the claimant told her of his concern that no action had been taken about the DSE assessment recommended in his pre-employment OH report and that Ms Wearne agreed to speak to Mr Tennant about it and arrange for the assessment to be completed as soon as possible.

31. Later that day, the claimant spoke with Cheryl Martin, who is a trained DSE assessor. In his claim form, the claimant makes an allegation of direct disability discrimination against Ms Martin, alleging that she asked him personal questions about his disability in front of other members of staff. This allegation is identified in the list of issues formulated at the case management preliminary hearing and is repeated in the claimant's witness statement. However, during the hearing the claimant withdrew this allegation indicating that he accepted that Ms Martin spoke to him for the right reasons and was trying to help the situation. Following this admission, the respondent did not call Ms Martin to give evidence although her witness statement remained before us.

32. Following their discussion, Ms Martin emailed the claimant to say that she had placed a trolley behind the chair where she sat. She explained that the trolley had the claimant's name on it, but he was free to remove the label should he wish to.

33. When the claimant arrived at work on the following day (27 July), he was handed by security a 'post-it note' on which was written his name and date of birth and which had apparently been found in the public gallery. This made the claimant feel embarrassed and upset, believing that everyone at the court knew about him. He was already upset and emotional when he went into the office. He then had an altercation with Ms Harper, who had noticed the plastic folding trolley with wheels, with the claimant's name on it, when she arrived for work that day and had moved it to where the claimant sat (so that he would not have to go and fetch it). Ms Harper showed the claimant the trolley.

34. There is a significant dispute as to what happened next. The claimant alleges that Ms Harper grabbed the trolley, held it up, and said: "This is to help with your disability, Zac". Ms Harper denied even picking the trolley up and strongly denied saying those words.

35. Having heard the evidence of both, we accept Ms Harper's version of events. We note that the claimant was already emotional and aggrieved and consider that he has misinterpreted or exaggerated what Ms Harper said and did.

36. By this point the claimant was angry as well as upset and he and Ms Harper had a loud disagreement. This led to the next in time of the claimant's allegations, which is that Ms Harper was aggressive and told him to shut up at least six times, despite him asking her to stop. Ms Harper's version was that she was simply trying to calm the claimant down and that if she raised her voice, it was only so that she could be heard over the claimant's shouting. The commotion was such that Mr Parker intervened and took them both into a private room.

37. We have heard evidence from the claimant and both Mr Parker and Ms Harper in relation to this incident. We have also considered the file notes prepared by Mr Parker and Ms Harper after the incident. We find that both the claimant and Ms Harper raised their voices and that Ms Harper was attempting to calm the claimant down. In doing so, she may well have told him to 'shut up'.

38. As Mr Parker also attempted to calm the claimant, the claimant complained about the incidents over the previous 24 hours including what he said was the warning given to him by Ms Wearne the previous day. This led into another of the claimant's allegations of direct discrimination. The claimant alleges that Mr Parker stated aggressively and in anger: "Let's be honest, Zac, you don't really have a disability. That's not why you were off". Mr Parker acknowledges in his witness statement that he said to the claimant that his sickness absence had been due to a sickness bug and not related to his disability, but that when the claimant showed him a text explaining about his neck injury, Mr Parker agreed with the claimant that the absence was related to his disability.

39. We heard no evidence from Ms Harper about this discussion, but having heard the evidence of both the claimant and Mr Parker, we find Mr Parker's version to be more plausible. Although no doubt frustrated by the claimant's angry behaviour, Mr Parker had no reason to suggest that the claimant did not really have a disability – he knew full well about it having been involved in the pre-employment email correspondence referred to above. We find it much more likely that Mr Parker was mistakenly suggesting that the claimant's three day absence was not related to his disability. We also noted that in Mr Tennant's note of his subsequent meeting on 30 July, Mr Tennant records that the claimant told him that Mr Parker had suggested that the claimant's absence was disability related and that he felt that Mr Parker was undermining his disability. This appears more in line with Mr Parker's version of events and we think it unlikely that Mr Parker would have influenced Mr Tennant's note in this way.

40. Having left the meeting, the claimant remained angry and upset and approached Ms Knights who was at that time the most senior person on site. The claimant makes no specific allegation against Ms Knights. The claimant explained about his CPH and CS (although Ms Knights did not catch the name of that condition) and spoke about the events since his return to work. Ms Knights asked the claimant what the respondent could do to make the job work for him and the claimant asked for a suitable chair, a room to exercise in, a wrist support for use when typing, a screen extender (to raise his screen) and to keep him in one court if all the above could not be provided. The claimant threatened litigation for discrimination but was calmer when he left. Ms Knights informed Mr Parker that she had spoken to the claimant and suggested a meeting be arranged between the claimant and Mr Tennant on Mr Tennant's return from holiday on the following Monday.

41. The other point of dispute in the meeting between Mr Parker and the claimant is that Mr Parker alleges that the claimant made untrue and somewhat irrational allegations about Mr Parker having previously been a police officer who had been involved in a case some years earlier involving the claimant's family. The claimant denied making any such allegations about Mr Parker, but we find that

he did make those allegations, preferring his evidence to that of the claimant. Whilst Ms Harper was again silent on the issue, Ms Knights refers to the claimant repeating the statements about Mr Parker's past and says that she corrected him. Her evidence on this point was not challenged by the claimant. In addition, Mr Tennant records in his note of 30 July that the claimant repeated the allegation about Mr Parker's past to him. We find it extremely unlikely that Ms Knights, Mr Tennant and Mr Parker would have conspired together to fabricate what are somewhat bizarre allegations.

42. The claimant did meet with Mr Tennant on 30 July. He explained his version of the events the previous week. He also complained to Mr Tennant that he had still not had his DSE assessment and that he felt that this had had an adverse effect on him, because he had been seated in one position in court and felt unable to move. He was concerned about the effect on his 'good' arm. The claimant was visibly angry and upset and Mr Tennant agreed to investigate to ascertain the full facts. The claimant had handed Mr Tennant a doctor's note signing him off work for the week, the note recording that the claimant was unfit for work due to "acute chronic neck pain, secondary to cervical spondylosis, known disability secondary to cerebral palsy, stress related problem due to all of the above." In addition to his continuing problems with his neck, the claimant had a painful lump on his upper back. It was agreed that the claimant and Mr Tennant would speak again on the claimant's return the following week.

43. The claimant met with Mr Tennant and also Mr Palmer on 6 August. He reiterated his complaints regarding what he felt had happened on his return to work the previous month and explained his disabilities and some of the effects and his fears for his future health. He was animated and emotional and, certainly in Mr Palmer's view, not always rational. It was agreed that a full workplace assessment was required – a more detailed assessment by an external provider. Mr Palmer's note records that the respondent should have had much more information than is in the initial OH report. In the meantime, the claimant would be able to use one of the adjustable office chairs in the building (until the precise specification of chair could be identified and acquired), and could use any available room to do his exercises. A DSE assessment would also be completed.

44. Mr Palmer and the claimant spoke again on 8 August. The claimant had no recollection of this discussion and at one point said that it had not happened. We are satisfied that a discussion did take place between them.

45. The claimant had attended work on 7 August. The meeting on 8 August appears to have been positive and constructive, the claimant expressing a wish to put the recent issues behind him and to move on and Mr Palmer stating that the claimant had demonstrated great potential and that the respondent remained keen to work with him. On the face of it, both the claimant and Mr Parker (to whom Mr Palmer had spoken) seemed prepared to set aside their differences.

46. On 9 August the claimant was rostered to be jury bailiff. The chair which was in the area outside the jury deliberation room where the claimant would be stationed was totally unsuitable for him, being a fixed chair with a low back, such as one might find in a doctors' waiting room. At 12:11 pm the claimant took a picture of

the chair and sent it to Mr Tennant stating: *"Mate, I have migraine now, my neck and back and arm is killing. This really needs to be sorted out. Look at what I'm sitting on today. I've tried my best, I really can't cope. I would like to go home*." Mr Tennant went to see the claimant, explaining that the chair could be changed, but the claimant was in pain and Mr Tennant agreed that he should go home.

47. In a lengthy email dated 10 September, Mr Palmer referred to what had happened on 9 August. He stated: "With regards to the chair on the jury corridor, you may recall that, when we met, we advised you not to use chairs like that, but to have a chair relocated from the office for you to use whilst we sought the professional advice about which type of chair was most suitable to you. With this in mind, I was surprised to learn that you have used this chair, and not sought to have an adjustable operator's chair brought to you from the office, as we had discussed". [We have underlined the words which are relied on by the claimant to found one of his allegations of direct discrimination.]

48. The claimant returned to work on 13 August and again met with Mr Tennant and Mr Palmer, who explained that they had decided to place him on a period of disability leave (on full pay), whilst the required assessments were carried out. The claimant was surprised but did not object. Mr Tennant reassured the claimant that the respondent was keen to find a way for the claimant to continue in his role without the difficulties he had experienced. His note records that the pre-employment report had 'not been communicated in its full detail'. Mr Tenant said that if it had been, the referral would have been done earlier.

49. There is reference to disability leave in the respondent's lengthy absence management procedure. It is described, at paragraph 125, as: "*a form of paid special leave that may be offered as a reasonable adjustment under the Equality Act 2010.*" Paragraph 127 states: "*There may be some cases where an employee with a disability is fit to work but is not able to work safely or effectively until workplace adjustments are put in place. The manager should discuss with the employee whether any temporary changes would enable them to continue to work while the adjustments are implemented. Where temporary changes have been considered but not deemed sufficiently effective, disability leave may be applied until the adjustments are implemented……*"

50. At the end of August, what is described as an independent medical appointment was arranged for the claimant for 19 September and on 10 September, he was asked by a different OH services provider to give his availability for a workplace assessment over the following two weeks. The claimant reacted negatively, questioning the purpose of the medical assessment and telling Mr Palmer that the booking agent appeared to believe it was to determine whether he was fit to work, rather than to determine what support he might need. There followed email correspondence in which the claimant expressed himself in increasingly aggressive and threatening terms.

51. The claimant was then signed off from work from 17 September to 14 October. The doctor's note advised that he was unfit for work due to CPH (waiting for an appointment at the pain clinic), CS and anxiety. In the meantime, the claimant contacted ACAS on 1 October, presenting his first claim on 18 October. In it, he

stated that he would not be returning to the respondent, that too much had happened and that he would be handing in his notice "in due course". The claimant also made a subject access request on 28 October.

52. There were two additional matters cited in the claimant's claim. Firstly, he was advised by Ms Monk and Mr Palmer that his disability leave had effectively been suspended whilst he was covered by his doctor's note, and that he would receive half pay (sick pay) not full pay for that period, and indeed no pay at all for the last few days having exhausted his sick pay entitlement. The respondent's absence management procedure suggests that disability leave and sick leave are mutually exclusive and that: "*The manager should not apply disability leave if the employee is absent because they are not fit for work. Disability leave does not cover period of sickness absence, whether or not the ill health is directly related to the employee's disability.*"

53. The second matter was that Ms Monk in her correspondence with the claimant told him (accurately) that his absence was now considerable, stating that it would "*need to be considered as part of his probationary period*". Again, the claimant reacted angrily, believing that his absence was due to the respondent's own failings.

54. The claimant's sickness had delayed the workplace assessment which eventually took place in December, the report being received by Mr Palmer on 12 December. It made a number of recommendations, including a new chair as specified in the report, a means to enable the claimant to lift his computer monitor, an automatic pencil sharpener and a space where he could bring in some basic gym equipment so that he could perform his normal stretching routine. All of these recommendations could be accommodated by the respondent without undue difficulty.

55. Mr Tennant wrote to the claimant on 28 December advising him that the new chair was being ordered and that a fitting would be arranged in the New Year. In that email, Mr Tennant chose to raise three other matters.

56. The first was to tell the claimant that his probationary period was to be extended to incorporate his period of disability leave, because his training was not complete. Mr Tennant's email suggests that the extension had been discussed with the claimant on 13 August, although it is not mentioned in either his note or Mr Palmer's note of than meeting, or their respective witness statements.

57. Secondly, Mr Tennant refers in his email to concerns about the claimant's conduct in and around the courtroom which had been raised by judges. This was the first that the claimant knew of any such concerns. Mr Tennant's email went on to say: "*These have been independently reviewed in line with the HMCTS complaint handling process, and the reviewing officer has recommended that the findings become part of your probation performance plan*" and that the concerns would need to be discussed with the claimant on his return.

58. This issue stems from an email from a judge to Mr Palmer following a judges' meeting on 7 August. The email states that the judges were all nervous about

the Claimant working in the building and that he was 'fixated' with criminal justice 'because of past events in his life' and apparently fixated with one judge in particular.

59. Mr Palmer then spoke with one of the judges who referred to the claimant having made 'strong and unwanted sexual advances' to another judge. When Mr Palmer spoke to that judge, that allegation turned out to be unfounded, but she said that she had been fearful when speaking with the claimant about the trial he was involved in, because he was very passionate and in some mental distress. It felt to this judge that the claimant was putting himself in harm's way by working in a court. It is at least implicit from this note that this judge wanted the claimant to be dismissed, but Mr Palmer advised that he could not just remove him.

60. Mr Palmer then took HR advice and agreed with the HR suggestion that the claimant be placed on disability leave, which would not be to the claimant's disadvantage as his probation would be extended. Mr Palmer took this advice. It is clear from Mr Palmer's own note of this incident that although Mr Palmer explained in his evidence to us that he decided to put the claimant on disability leave because he was concerned that the claimant had used an unsuitable chair on 9 August when he had no need to do so and that the period of disability leave was to ensure that the claimant did not come to harm before the assessment had been completed, at least part of the reason was to ensure he was absent whilst the he and his colleagues dealt with the judges' allegations. The claimant's absence also allowed Mr Palmer not to speak to the claimant about the allegations.

61. Mr Palmer then had a further conversation with one of the judges on 5 October, which the judge followed up with an email. The judge referred to the claimant having a vendetta and a short fuse and holding delusional views. The judge stated that: "*If your decision is to continue to offer employment to (the claimant), I shall challenge that decision and take the matter to a higher level*."

62. Faced with this pressure, Mr Palmer asked an independent manager to undertake an investigation, which was received on 19 November. The investigator did not speak to the claimant during her investigation. Nevertheless, her report made findings that it was probable that the claimant's conversations with one judge and his behaviours 'as perceived by others' were inappropriate and unprofessional. Her recommendation was that the claimant's line managers progress the case through HR guidance and performance discussions (and not, for example, any disciplinary action).

63. It was with a view to this further action that Mr Tennant raised the issue in his email of 28 December, stating that he would have to meet with claimant to explore how they could work together to restore judicial confidence and also which was the most appropriate setting for the claimant to return to.

64. Thirdly, Mr Tennant referred to the respondent's probation policy requiring a Probation Interview Meeting where there are concerns with absence, conduct or performance. He advised the claimant that relevant attendance trigger points were four days in the probationary period and that as the claimant had exceeded

this number, Mr Tennant would be convening a formal meeting where one of the outcomes could be that first and final warning be issued. Mr Tennant commented that the claimant's occupational health report has made no recommendations for any revised trigger points.

65. In response, the claimant alleged victimisation following the presentation of his claim to the tribunal. In particular, he questioned why the concerns of the judges were not revealed in response to the subject access request he had made.

66. Mr Tennant responded on 10 January. In his email, he told the claimant that he would discuss whether revised trigger points would be an appropriate adjustment when they met to discuss the claimant's attendance, stating that a typical adjustment might be to double the number of days absence before the trigger point were met, which in the claimant's case would be to eight days. The claimant had of course already had more than eight days absence. As for the judges' concerns, he confirmed that the claimant was not in a disciplinary process.

67. Further email correspondence ensued. The fitting for the claimant's new chair was arranged for Friday 25 January and on 23 January Mr Tennant suggested that they might also start to talk about the period of probation and 'possibly discuss the concerns of the judiciary'. Whilst stating again that this would not be a formal meeting, Mr Tennant told the claimant that he could be accompanied by a trade union representative. Despite requests by the claimant, Mr Tennant declined to elaborate on the concerns raised by the judges until they met face to face.

68. In the event, the chair fitting did not take place on 25 January because the claimant's wife went into hospital to have their baby who was born the following day. On 6 February, the claimant emailed his resignation to Mr Tennant stating that the past months had been a 'living hell'. His email stated: "*After much thought and consideration, I have decided that I no longer wish to work for the MOJ. Your department has discriminated (against me) on multiple occasions, it is all documented in black and white. I have been directly discriminated and victimised, alongside your failure to make reasonable adjustments. This has impacted my mental and physical health negatively. In your most recent emails, you have decided to raise issues that didn't exist prior to my claim. I know this because of the SAR documents. You also want to punish me for the absence that you contributed to. I do not have the energy to deal with this anymore. However, everybody involved will be made accountable for their actions. It is disgraceful that a government department has behaved this way, publicly this will not look good*." Having heard the claimant's evidence, we find that this email accurately records his reasons for resigning.

The applicable law

<u>Discrimination</u>

<u>Time Limits</u>

69. By Section 123(1) EqA the proceedings brought by the claimant "may not be brought after the end of:

    (a) a period of three months starting with the date of the act which the compliant relates, or
    (b) such other period as the Employment Tribunal thinks just and equitable."

70. By section 140B(3), in working out when that time limit expires, the period beginning with the day after Day A (as defined in section 140B(2)(a)) and ending with Day B (as defined in section 140B(2)(b)) is not to be counted.

71. Section 140B(4) provides that: "If the time limit…….would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period."

72. By Section 123(3), acts occurring more than three months before the claim is brought may still form the basis of the claim if they are part of "conduct extended over a period" and a claim is brought within three months of the end of that period.

73. The tribunal also has the discretion to extend time where it is "just and equitable" to do so. The tribunal has a wide discretion in determining what, if any, period of extension is just and equitable. However, the burden is on the claimant to show that time should be extended and there is no presumption in favour of extending time. On the contrary, extension is the exception not the rule and the tribunal should not extend time unless the claimant convinces the tribunal that it is just and equitable to do so (see for example Bexley Community Centre v Robertson [2003] EWCA Civ 576).

Burden of Proof

74. Section 136 EqA sets out the burden of proof provisions in relation to a complaint of contravention of the EqA.

75. By subsection (2) and (3):

    "(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 it did not contravene the provision."

76. There is therefore a two-stage approach. Stage 1 is whether the claimant can show what is often described as a prima facie case. If so, the burden of proof shifts to the respondent and the claimant will succeed unless the respondent's explanation is sufficient to show that it did not discriminate.

77. The case law has confirmed that these rules should not be applied in an overly mechanistic or schematic manner and tribunals may often make positive findings about matters without recourse to the "shifting burden of proof".

Direct Discrimination

78. The first of the complaints which we consider below is that of direct discrimination. By section13 EqA:

> "(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."

79. Treatment will be found to be because of a protected characteristic if that characteristic is the substantial or effective reason for the treatment. It is not necessary for the characteristic to be the sole or intended reason for the treatment. In the case of Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, the question to be asked was framed as: "What, consciously or unconsciously, was the [alleged discriminator's] reason?"

80. The fact that a claimant has been treated less favourably than an actual or hypothetical comparator is not sufficient to establish that direct discrimination has occurred unless there is "something more" from which the tribunal can conclude that the difference in treatment was because of the claimant's protected characteristic (Madarassy v Nomura International PLC [2007] IRLR 246.

81. Where there is no actual comparator, the treatment should be compared with that of a hypothetical comparator. In the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, the House of Lords stated that: "The comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class." The EHRC Employment Code provides at paragraph 3.23 that: "What matters is that the circumstances which are relevant to the treatment are the same or nearly the same for the claimant and the comparator".

Discrimination arising from disability

82. The claimant also complains of discrimination arising from disability. Section 15 EqA provides that:

> "(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."

83. The test is of unfavourable rather than less favourable treatment and so no comparator is required.

84. In the case of Sheikholeslami v University of Edinburgh UKEATS/0014/17, it was confirmed that there is a two-stage approach to causation –

(a) Whether A had treated B unfavourably because of an (identified) something; and
(b) Whether that something had arisen in consequence of B's disability.

85. The first question involves an examination of the alleged discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment. The test is whether the identified something arose "in consequence" of the disability rather than being "caused by" that disability. The second question is a matter of objective fact to be determined by the tribunal on the basis of the evidence heard.

Reasonable adjustments

86. The claimant also alleges that the respondent failed to make "reasonable adjustments for him". Section 21 (1) EqA provides that a failure to comply with any of the requirements set out in section 20 will be a failure to make reasonable adjustments.

87. The first and second requirements (set out in and (4)) is that where a "provision, criterion or practice" of an employer (section 20 (3)) or a physical feature (section 20 (4)) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer has an obligation to take such steps as is reasonable to avoid the disadvantage.

88. The third requirement (section 20 (5)) is that where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

89. One potential reasonable adjustment may be for an employer to ignore disability-related absences when applying its absence management policy.

Victimisation

90. By section 27 EqA:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

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

91. Subsection (2) lists a number of protected acts including making an allegation that A or another person has contravened the EqA.

92. There is no requirement for a comparator in a victimisation complaint. A detriment is made out if a reasonable worker would or might take the view that he or she had been disadvantaged in circumstances in which he had to work (Shamoon). The protected acts need not be the whole reason for the treatment and victimisation need not be consciously motivated.

Knowledge in disability discrimination cases

93. If a claim for direct discrimination is to succeed, the tribunal must be satisfied that the alleged perpetrator(s) of the less favourable treatment had actual or constructive knowledge of the claimant's disabilities. The requisite knowledge is of the impairment, rather than knowledge that the specific technical definition of disability applied to that impairment.

94. Similarly, if a claim for discrimination arising from disability is to succeed, the tribunal must be satisfied that the respondent knew or ought reasonably to have known, that the claimant had the disability. The knowledge required is of the disability, rather than knowledge that the "something" leading to the treatment was a consequence of the disability. Subsection 15 (2) provides that there can be no discrimination arising from disability if "A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

95. If a claim for failure to make reasonable adjustments is to succeed, the tribunal must be satisfied that the respondent knew or ought reasonably to have known both that the claimant was disabled and that the claimant was likely to be placed at a substantial disadvantage because of the disability.

Constructive Dismissal

96. The claimant complains that his dismissal by the respondent was an act of direct discrimination, discrimination arising from disability and/or victimisation. To succeed with any of those complaints, he must first show that he was dismissed. Constructive dismissal occurs where the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

97. The case of Western Excavating Limited v Sharp [1978] ICR 221, determined that there are three elements for a claim for constructive dismissal.

    a. A repudiatory or fundamental breach of contract going to the root of the contract;

    b. A resignation by the employee in response to that breach of contract. The case of Nottinghamshire County Council v Meikle [2004] IRLR 703, applied in Abbycars v Ford UK UK EAT/0472/07, confirms that the breach does not need to be the effective cause as long as it "played a part" in the decision to leave; and

    c. That the employee should not have delayed too long or affirmed the contract prior to resigning.

    The test is objective.

98. There is an implied term of trust and confidence incorporated into every contract of employment. It is well established that an employer must not without

reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term of trust and confidence will constitute a repudiatory or fundamental breach of the contract.

Conclusions

Disability

The respondent's knowledge of the claimant's disability/disabilities

99. There is a dispute between the parties regarding the extent to which the respondent has admitted knowledge of disability. The claimant points to a letter from the respondent dated 12 June 2019. Having conceded that the claimant was a disabled person in respect of each of the three specified conditions, the respondent went on to say: "*Notwithstanding the above, the Respondent does not concede that it had knowledge of the Claimant's GAD at the relevant time*." The claimant argued that, at least by implication, the respondent had by this statement conceded knowledge of the other two disabilities. The respondent disputed this.

100. The list of issues discussed at the case management preliminary hearing does not support the claimant's interpretation, in that an issue identified is "Did R know, or could R be expected to have known, that C was disabled at the material time or times?" We note also that the email referred to in the paragraph above was written primarily in relation to GAD. Accordingly we have gone on to consider the extent to which the respondent knew, or ought reasonably to have known, that the claimant was disabled (and, in relation to the direct discrimination complaints, which of the respondent's employees had that knowledge).

101. The claimant's application form for employment with the respondent refers specifically to his CPH. In that application form, he states that he considers himself to have a disability as defined by the Equality Act.

102. Mr Tennant was on the claimant's interview panel. In his witness statement, he comments: "At interview I recall that Zac did not want to make a big deal about his disability. I did not know the full extent of the medical conditions that make him disabled for the purposes of the Equality Act 2010. I could see that he had a condition that affected the use of one arm……."

103. The claimant was then assessed by the respondent's (external) OH provider who also advises that the claimant has conditions which are likely to come within the terms of the Equality Act and sets out adjustments required.

104. These factors convince us that the respondent as an organisation, and Mr Tennant as an individual, had actual knowledge that the claimant was a disabled person from the outset of his employment. Even if we are wrong about this, then there were sufficient indications that they ought to have been aware of it. Whilst Mr Tennant may not have seen the actual OH report, he had interviewed the

claimant and was aware of the recommendations. Whether he knew the 'full extent' of the claimant's medical conditions is not the test we apply.

105. We accept that the respondent and Mr Tennant may not have been aware that the claimant was suffering from the specific medical condition GAD until much later, if at all. However, this does not affect our decisions on the issues we have to determine. Firstly, none of the claimant's complaints rely on GAD alone and secondly, we have taken on board the evidence that both CS and GAD are to some extent 'secondary' disabilities, in that they emanate from the claimant's CPH, and can be seen as 'symptoms' of his CPH as well as separate disabilities.

Direct Disability

106. The claimant relied on a hypothetical comparator, but different formulations have been adopted by the claimant at various times during this claim. At the case management preliminary hearing, it was identified as someone performing the same job but without the claimant's disabilities. In her written submission, Ms Ismail settled on: "a disabled person with other more physically limiting disabilities, e.g. a wheelchair user, or a visually impaired employee".

107. Ultimately it is for the Tribunal to determine the appropriate comparator in a direct discrimination claim. A hypothetical comparator must be in the same position in all material respects as the claimant save only that he, or she, is not disabled. Only those characteristics which the respondent has taken into account in deciding to treat the claimant in a particular way are relevant. Furthermore, the claimant and the comparator must have abilities that are materially the same.

108. We do not accept Ms Ismail's assertion that the comparator should be someone with a different disability. The comparator should be an employee of the respondent who has the same abilities and in the same position in all material respects as the claimant but who is not disabled. Those 'material respects' may well be different, and therefore the comparator may be different, depending on the specific allegation of direct discrimination and the specific treatment relied on.

109. The claimant relies on 13 incidents of alleged less favourable treatment which he says occurred because of his disability. 14 allegations were identified at the case management preliminary hearing but one was subsequently withdrawn. We find that all the allegations of direct discrimination fail, for the reasons set out below. We will deal with each in turn, using the same lettering as in the list of issues:

a. Not carrying out a DSE assessment shortly after the Claimant started working for the Respondent;
b.Ignoring the message from Health Management Ltd that the Claimant needed a DSE assessment;
l. Not carrying out a DSE assessment until December 2018;

It is logical to deal with these three allegations of direct discrimination together, as Ms Ismail did in her submissions. It is not in dispute that the DSE assessment

was not undertaken until late in 2018, despite the instruction in the OH report prior to the commencement of the claimant's employment. Mr Tennant argued that from his perspective, there was no need to carry out the assessment earlier, denying that the claimant was asking him to arrange it and relying on the wording in the report referring to the need for a 'routine' DSE assessment. Mr Tennant interpreted this as meaning that the DSE assessment should be carried out as part of the respondent's rolling programme of DSE assessments, rather than being required in order to identify any specific requirements of the claimant when he started his job.

We disagree with this interpretation, which we find illogical, albeit genuinely held. The box ticked by the OH professional was one of five alternatives, stating that the claimant was fit to begin work with a recommendation for a routine DSE assessment. Had it been intended that the assessment take place sometime during the course of the claimant's employment, this box would not have been ticked.

However, it is the reasoning of Mr Tennant which is important in a complaint of direct discrimination. We accept that whilst his failure to arrange the DSE assessment may lead to a prima facie case, the explanation for his failure is his view that it was not needed. The reason why Mr Tennant did not arrange the DSE assessment for the claimant was not the claimant's disability. He would have done the same for an employee in the same position – with the relevant box ticked in the OH form – who was not disabled.

c. Ignoring the claimant's repeated requests for reasonable adjustments to be made for him;

Similar principles apply in relation to this allegation, which again relates primarily to Mr Tennant. He did put in place some adjustments for the claimant, but where he did not, his reason was that he did not appreciate that they were needed. He would have treated the comparator no differently.

d. Giving the claimant a warning due to him being off work because of his disabilities;

This is an allegation directed at Ms Wearne. We have found as a matter of fact that she did not give the claimant a warning – see paragraph 26 above.

e. Asking the Claimant personal questions about his disabilities in front of other members of staff;

This is the allegation which has been withdrawn.

f. Mocking the Claimant's disabilities with a trolley;

This is the first of two allegations directed against Ms Harper. We deal with it in paragraphs 33 to 35 of our findings of fact, determining that the incident did not occur in the manner in which the claimant relayed it to us. Our finding is that Ms

Harper did not mock the claimant's disabilities, but was simply pointing the trolley out to him as something he could use to carry out his duties.

g. Being aggressive towards the claimant and telling him to shup up;

This is the second allegation against Ms Harper and it follows on immediately from allegation f. We deal with it in paragraphs 36 and 37 of our findings of fact. We have found that both Ms Harper and the claimant raised their voices in what became a heated situation. Ms Harper may well have told the claimant to 'shut up' and her actions could be seen as aggressive, albeit in an effort to calm him down.

There is therefore a prima facie case of discrimination. However, whilst the catalyst for the altercation was the claimant's perception that Ms Harper was mocking him, the reason why Ms Harper acted in the way she did was not the claimant's disability. She was acting to defuse a situation in the workplace which was getting out of hand. We believe that she would have acted in the same way to a person who was not disabled, but who was agitated, shouting and not letting her speak.

h. Suggesting to the Claimant that he was not disabled and that he had deliberately taken time off work;

This allegation is directed at Mr Parker. We deal with it in paragraphs 38 and 39 of our findings of fact. The allegation is that Mr Parker said to the claimant: "*Let's be honest, Zac, you don't really have a disability. That's not why you were off*." We have found, however, that this is not what Mr Parker said and that the claimant has misinterpreted and distorted his words. Mr Parker did not suggest to the claimant that he was not disabled and did not suggest that he had deliberately taken time off work.

i. Suggesting to the claimant that he had deliberately made his condition worse by sitting down on a chair;

This is an allegation against Mr Palmer. It relates to his email of 10 September and specifically to the wording we have underlined in paragraph 47 of our findings of fact. The question for us is whether by those words, Mr Palmer was suggesting that the claimant had deliberately made his condition worse. Having heard his evidence, we accept Mr Palmer's explanation that he was doing no such thing, but simply expressing his surprise that the claimant had not done what Mr Palmer felt had been agreed. Furthermore, whilst Mr Palmer's use of words may not have been very clever, we find that he would have said the same thing to a non-disabled comparator and there was therefore not any less favourable treatment. allegation therefore fails.

j. Not paying the Claimant for four weeks for his disability-related absence from work;

The claimant went on disability leave on 13 September, but then provided a note from his doctor stating that he was not fit for work, due to his three disabilities,

from 17 September to 14 October. As a result, he was paid company sick pay (half pay) for this period. We have set out the relevant wording of the respondent's policy in paragraph 49 above. It is clear that disability leave and sickness absence are mutually exclusive and that the respondent has followed its own policy. Whilst it may have been a reasonable adjustment to have amended the policy in the claimant's circumstances it cannot be direct discrimination for the respondent to abide by its own procedures, unless those policies are inherently discriminatory.

k. Advising the Claimant that his absence from work would be used against him in assessing the Claimant's probationary period;

This is the issue referred to in our findings of fact at paragraph 53. In making the statement relied on by the claimant, Ms Monk was referring to the fact that the respondent's probationary policy requires an employee's level of attendance to be reviewed during probation and that the absence management procedure states that sickness absence of eight working days or more is considered to be unsatisfactory. She told us that she had not intended to suggest to the claimant that formal action would be taken or a warning issued.

The actual wording used by Ms Monk was that the absence would 'need to be considered' as part of the claimant's probationary period and not that it would be 'used against him'. As with the previous allegation, this simply reflects the respondent's policy. We are satisfied that the same situation would have applied to a non-disabled comparator in his probationary period with similar levels of absence.

m. Raising alleged concerns by Judges about the claimant's conduct at work which had not been mentioned to the claimant previously;

We deal with this issue in our findings of fact in paragraphs 57 to 63. It is not entirely clear to us whether the complaint is that the concerns were raised at all or whether it is that Mr Tennant delayed in doing so and we note that Ms Ismail chose not to make any submission on this allegation of direct discrimination. We note also that it appears in a slightly different form as an allegation of discrimination arising from disability and of victimisation.

The claimant first became aware of the Judges' concerns through Mr Tennant's email of 28 December. Whilst Mr Tennant has been criticised by the claimant for not raising these issues earlier, and more particularly for not providing the claimant with details of the allegations when asked, we acknowledge that he had a dilemma. Whilst it is certainly possible that the Judges' concerns may have been misguided due to their ignorance of the claimant's medical situation, there was absolutely no reason to think that they were in any way fabricated or not worthy of investigation or discussion with the claimant. The concerns therefore had to be introduced to the claimant at some point. In the light of the previous threatening and intemperate emails from the claimant, Mr Tennant knew that the claimant would react badly to the concerns and chose to wait until he believed the claimant was ready to come back to work. We are satisfied that this was not less favourable treatment because of the claimant's disability and we consider

that Mr Tennant would have made the same decision in respect of a non-disabled employee who was off work and who was likely to react strongly to the allegations.

n. Causing the Claimant to resign from his job due to the lack of support and failure to make reasonable adjustments for him.

We have interpreted this as an allegation that the respondent constructively dismissed the claimant and that the dismissal was an act of direct discrimination.

We discuss the allegations of failure to make reasonable adjustments below. In summary, our findings are that the respondent failed to carry out the assessment required by the OH report until too late, failed to provide the claimant with proper facilities to undertake his exercises, failed to provide the equipment and furniture which he needed, and failed to ensure that he could take breaks when needed.

We consider that these failures were sufficiently serious to constitute a fundamental breach of the claimant's contract of employment and were likely to, and did, seriously damage the relationship of trust and confidence between the respondent and the claimant. We have also found as a fact (paragraph 68 above) that the failures were part of the reason why the claimant resigned.

However, the breaches we have found took place between June and August 2018 and the claimant did not resign until the end of January 2019. We must therefore consider whether the time elapsed and/or the claimant's actions during that time, lead to the conclusion that the claimant affirmed the contract of employment.

Our conclusion is that there was no affirmation. The claimant was on disability leave or sick leave throughout this period. He was entitled to give the respondent an opportunity to put the adjustments in place before deciding whether to resign, particularly in the light of his positive experience when studying, but in the event he resigned before those adjustments were implemented. Although when issuing his first claim in October 2018, the claimant indicated that he was going to resign, we agree with Ms Ismail's submission that at this point, he remained hopeful. Although we consider that later actions of the respondent did not contribute to the breach of contract and that the legal 'last straw' principle does not come into play, the claimant had not affirmed the contract by the end of January.

We therefore find that the claimant was dismissed by the respondent. However, we do not consider that the dismissal was an act of direct discrimination. It follows from our findings in relation to direct discrimination allegations a, b, c, and l that the respondent would have committed the same breaches in respect of the hypothetical comparator.

Discrimination arising from disability

110. The specific allegations of unfavourable treatment are as follows:

a. That the respondent was compelled to work in conditions which did not make allowances for his disabilities;
b. That the respondent extended the claimant's probationary period;
c. [No longer relied on by the claimant];
d. That the respondent raised alleged concerns about the claimant's conduct at work, which had not previously been raised with him, meaning that he was at risk of disciplinary action; and
e. That the claimant was constructively dismissed.

111. The respondent asserts that these specific allegations are not pleaded by the claimant. This was patently an issue discussed at the case management preliminary hearing, as one of the issues identified (but unfortunately not resolved) was whether the above matters were referred to in the claimant's grounds of complaint.

112. The relevant section of the pleading is paragraph 29 of the particulars of the claimant's second claim, which asserts that "*by failing to implement a suitable work pattern for the claimant which inevitably resulted in the claimant resigning from his job, the respondent subjected the claimant to unfavourable treatment because of something arising in consequence of his disabilities contrary to section 15 (1) of the Equality Act 2010*." Whilst the phrase 'suitable work pattern' is perhaps not helpful, we consider that it is intended as a general 'umbrella' phrase to cover the specific matters complained of and we consider that items a., b., d. and e. are referred to in the particulars of claim in sufficient detail. We therefore reject the respondent's assertion that it should not have to answer the section 15 complaint.

113. Turning to the specific allegations:

a. That the respondent was compelled to work in conditions which did not make allowances for his disabilities;

and

e. *That the claimant was constructively dismissed.*

As in Ms Ismail's submission, we have dealt with these two allegations together.

The first appears to be alternative means of saying that the respondent failed to make reasonable adjustments for the claimant and the second echoes the first in that we have concluded above that it was the respondent's failures to make adjustments which led to the constructive dismissal of the claimant.

The 'somethings' relied upon by the claimant are his inability to stand for long periods, his need for special furniture and equipment and other requirements arising from his disability. It is clear that those things arose from the claimant's disability and so the question we are required to answer is whether the unfavourable treatment identified was "because of" those things.

It goes without saying that the claimant would not have been in this position had he been able to stand for long periods or had he not needed special equipment and furniture, but it does not then automatically follow that the complaint under section 15 must succeed. As stated by Bean LJ in the case of Robinson v Department for Work And Pensions [2020] EWCA Civ 859 at paragraph 56: “I also agree with the observation of Simler P in the EAT in *Dunn* that "just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary" if a s 15 claim is to succeed.”

Neither Mr Tennant nor Mr Palmer failed to make the adjustments for the claimant “because of” his inability to stand for long periods, his need for special furniture and equipment and other requirements arising from his disability. They may have had what might be described as a lackadaisical attitude to the claimant and his disabilities, but the reason why they failed to put in place the adjustments required was because they did not realise, until it was too late, that those adjustments were needed, having not properly addressed their minds to what the claimant needed. Mr Tennant mistakenly thought that he was following OH advice by not arranging the DSE assessment at the outset of the claimant’s employment. He believed that he was doing what was needed to accommodate the claimant’s limitations. Once it became apparent to them at the beginning of August that a more detailed assessment was necessary, Mr Palmer put in place a workaround which they believed would resolve the issues (see paragraph 43 above), but again they failed to appreciate the claimant’s genuine concerns and needs and it only became apparent to them this was inadequate on 9 August when the claimant sent to Mr Tennant the picture of the chair outside the jury room.

This allegation therefore fails.

b. That the respondent extended the claimant’s probationary period;

The ‘something’ relied upon by the claimant is his absence from work due to his disabilities. Whilst the extension of the probationary period resulted from those absences, we do not find that it constituted unfavourable treatment. The claimant had actually been at work for just over one month of what should have been a four month probationary period, which we do not think was sufficient time to assess the claimant’s suitability for the role or to complete his training for the role. The extension was therefore to his advantage as much as to his detriment.

Even if we are wrong about this, we consider that the treatment can be justified. A sufficient probationary period is part of the respondent’s management of its staff and extending that period when the probationer has been absent for almost 75% of the time is a proportionate means of achieving that aim. This allegation therefore fails.

c. Not relied on by the claimant.

d. That the respondent raised alleged concerns about the claimant's conduct at work, which had not previously been raised with him, meaning that he was at risk of disciplinary action;

This is a slightly revised formulation of direct discrimination allegation m., which we cover in paragraphs 57 to 63 above. The 'somethings' relied upon by the claimant are his absence from work due to his disabilities and his requests for DSE and/or workplace assessments. However, the respondent (Mr Tennant) raising these concerns with the claimant was not because of either of those things, but because the report commissioned by the respondent recommended that Mr Tennant "progress the case through HR guidance and performance discussions". The allegation therefore fails, but even if we are wrong about this, the respondent is able to justify raising those concerns with the claimant as a proportionate means of achieving its legitimate aim of managing its staff properly.

Failure to make reasonable adjustments

114. The PCP identified at the case management preliminary hearing is '*a requirement to attend work regularly, work full-time and have the stamina of a person in good health – in other words, to remain standing for periods, without comfort breaks, and with standard equipment and furniture*.' This was re-formulated in the agreed clarification as "*requiring the claimant to work without reasonable adjustments of chair / room to stretch / equipment*". The effect of this second iteration is that it brings into focus section 20 (5) EqA as well as section 20 (3): "*The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid*."

115. Whichever formulation is used, we are satisfied that the claimant was put at a substantial disadvantage in comparison with persons not disabled. This is apparent from the claimant's own evidence – in particular the impact on his health of the first month of his employment – as well as the initial OH report which details some suggested adjustments.

116. For an employer to be required to make reasonable adjustments, it must have knowledge of substantial disadvantage. We are satisfied that it did have that knowledge, and even if it did not, that it was reasonable to expect it to have had the knowledge. We refer again to the OH report. Even if, as stated by Mr Tennant, the claimant was keen at the outset to 'play down' his limitations, Mr Tennant had sufficient notice of the claimant's medical position to put him on enquiry. We note also that Mr Parker did not consider that the claimant could undertake the role of crown court usher, even with the recommended adjustments.

117. Whilst ultimately this is a matter for the Tribunal, the claimant has put forward five adjustments (or, in some cases, auxiliary aids) which he says the respondent failed to implement. They are:

a. Not carrying out a DSE assessment shortly after the Claimant started working for the Respondent;

b. Not allowing the Claimant to have any regular comfort breaks at work;
c. Not providing the Claimant with a chair with adjustable arms, an adjustable lumbar support, free flow mechanism and a full-length back support including neck rest. Consequently, the Claimant could not vary his posture every 30-60 minutes as he did not have the recommended supportive chair that was later recommended in the DSE assessment;
d. Not providing the Claimant with a suitable screen height, the work station that was assessed was still 3 inches too low even with the stand fully raised;
e. Not providing the Claimant with an automatic pencil sharpener to as the Claimant is not unable to use conventional sharpeners due to his Cerebral Palsy Hemiplegia. Making it impossible for the Claimant to prepare pencils for the jury daily;

118. We are not convinced that the DSE assessment is in itself an adjustment, as the assessment alone would not avoided the claimant's disadvantage. We see it as the gateway to an understanding of what adjustments are required. In any event the respondent should have arranged for the assessment on commencement of employment or soon afterwards. The failure by Mr Tennant to do so led to real disadvantage to and suffering by the claimant, because it meant that the necessary adjustments and aids were not implemented quickly enough or at all.

119. When the assessment was finally carried out, the specific recommendations were for a new chair (as specified in the report), a box file folder or similar to help lift the current monitor stand up 3" and an automatic pencil sharpener. The assessor advised that during his lunch period the claimant would require a space where he could bring in some basic equipment (gym ball, blocks etc.) so that he could perform his normal stretching routine for his CPH.

120. The respondent says that when Mr Tennant and Mr Palmer realised the need for the adjustments and aids, they acted promptly. A new chair was ordered in response to the report and the other recommendations would have been put in place on the claimant's return to work. But in our judgment, this was too little, too late, as the damage had been done. There is no reason why these adjustments could not have been made early in the claimant's employment, if the assessment had been carried out as recommended by the OH advisor before the claimant started his employment. We add that the OH report did not simply refer to a DSE assessment but to a number of other requirements including the need to avoid static positions such as standing or sitting, avoid heavier manual lifting, lifting or carrying or manual handling of heavier items/equipment of a repetitive nature over a prolonged period plus the requirement for support to stretch and exercise as required to maintain comfort at work.

121. We do not suggest that Mr Tennant or Mr Palmer deliberately set out to damage the claimant. However, they both showed a complete misunderstanding of their duties towards the claimant as a disabled employee. The attitude appears to have been that it was for the claimant at all times to make the running and to resolve the issues himself. For example, Mr Tennant was happy that the claimant use an available office to do his exercises, but whilst he seems to have appreciated that the claimant would want to do this in private without prying eyes

of colleagues, he took no steps to facilitate this for the claimant. It would have been very simple, for example, to have provided the claimant with a 'room in use, do not enter' sign for the claimant to have hung on the door of the private room he was using.

122. Whilst there is of course a balance to be struck between putting in place the accommodations required by a disabled employee and focussing simply on the disabilities and restrictions of an employee who does not want to highlight or draw attention to those restrictions, we consider that Mr Tennant and Mr Palmer got that balance wrong. Mr Tennant should have arranged the DSE assessment at the outset, as required by the OH report and then sat down with the claimant to plan how the adjustments and auxiliary aids could be utilised to avoid the disadvantage he suffered in the workplace.

123. The respondent also points to the temporary arrangement put in place when it became clear from the conversations at the beginning of August that a bespoke new chair was required. Whilst the use of an adjustable office chair might have been a sensible temporary workaround to which the claimant was prepared to agree, he was still left to his own devices to make it happen. It was Mr Tennant who rostered the claimant to be jury bailiff on 9 August. He must have known that there would not have been an adjustable office chair in the area, yet left it to the claimant either to source an alternative chair and then transfer it to where he was sitting. We accept that he could have telephoned for assistance, but Mr Tennant does not seem to have appreciated that the claimant would find it embarrassing to do so every time he moved to a different location within the court buildings. It would have been very simple for Mr Tennant to have arranged for an appropriate chair to be placed where the claimant was to spend his time on that day, or perhaps to have provided the claimant with one point of contact when he needed a chair to be moved.

124. The complaint of failure to make reasonable adjustments therefore succeeds. Auxiliary aids could and should have been provided including, and most significantly, a bespoke chair, a means to raise the claimant's computer screen and an automatic pencil sharpener. Proper facilities should have been afforded to the claimant to carry out his exercises in private. There should have been a plan at the outset to enable the claimant to have regular breaks and the facilities and equipment he needed. It was insufficient for the respondent to expect the claimant to manage his own adjustments and Mr Tennant and Mr Palmer failed to understand how humiliating it would be for the claimant to continually draw attention to his disabilities by having to keep asking different colleagues to help him out, when it would not have been difficult to make arrangements which removed the need for this.

125. Mr Powell has, quite reasonably, not sought to argue strongly that any element of the claim is out of time and has merely stated the relevant law, but we are required to consider it as a matter of jurisdiction.

126. In a complaint of failure to make reasonable adjustments, time runs from the date when the respondent ought to have made the adjustments or provided the auxiliary aids. Some of the adjustments and aids could have been provided at

the very start of employment, although others such as the chair would have taken longer. We consider that if the DSE assessment had taken place at the very beginning of the claimant's employment, the other adjustments and aids (including a workaround pending delivery of a new chair), should have been completed by the end of the first week of July. Accordingly the complaint of failure to make reasonable adjustments is within time, early conciliation having been instigated by the claimant on 1 October 2018.

Victimisation

127. It is common ground that the presentation by the claimant of his first claim on 18 October 2018 was a protected act within the meaning of section 27(2)(d) EqA.

128. The claimant relies on two alleged detriments. The first mirrors precisely allegation d. of his section 15 EqA complaint – the raising of the Judges' concerns with him. Even if this is capable of being a detriment, this complaint fails, because the necessary causation between the raising of the concerns and the protected act is not present.

129. We have considered the claimant's assertion that the decision to place the claimant on disability leave was motivated by a desire to have him 'out of the way' whilst the concerns were investigated and we note that there is evidence to support this. Moreover, we find it surprising that the independent manager investigating the concerns did not speak to the claimant about them. In addition, we have no explanation as to why no reference to the Judges' concerns was disclosed by the respondent in its response to the claimant's DSAR. We also note that Mr Palmer appears to have commissioned the report orally and that we do not know the exact date on which he did so.

130. Nevertheless, from the evidence we have heard and read, we are satisfied that Mr Tenant raised the concerns because of the recommendations in the report prepared by an external manager. We are also satisfied that the report was commissioned by Mr Palmer in response to the pressure put on him by a Judge in a telephone call and subsequent email sent to him on 5 October and not because the claimant had made a claim to the Tribunal.

131. The second alleged detriment is the alleged constructive dismissal. This cannot succeed as a complaint of victimisation. The breaches of contract which founded the claimant's dismissal were the failure to make adjustments for him before he was placed on disability leave and these breaches occurred prior to the protected act. In any event, we are satisfied that nothing that the respondent did after 18 October 2018, including the reference to the judges' concerns and the attempts to convene one or more meetings to discuss this and the extension of the claimant's probationary period, was influenced by the fact that he had presented a claim to the tribunal.

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Employment Judge Finlay

Date: 5 July 2021

Sent to the parties on:

12/07/2021

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J Moossavi
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For the Tribunal Office