EMPLOYMENT TRIBUNALS

Claimant: Mr T Cox

Respondent: Lancashire County Council

Heard at: Manchester Employment Tribunal **On:** 10-14 May 2021 and 28 May 2021 (in chambers)

Before: Employment Judge Dunlop
Mr J Ostrowski
Ms A Berkeley-Hill

Representation

Claimant: In person
Respondent: Mr K Ali (counsel)

RESERVED JUDGMENT

1. The claimant's claim under s.10(4) Employment Rights Act 1999 (right to be accompanied) succeeds in respect of the respondent's failure to postpone the disciplinary hearing scheduled for 6 March 2019 and the respondent's failure to postpone the disciplinary hearing scheduled for 1 April 2019.

2. The claimant's claim under ss. 20-21 Equality Act 2010 (failure to make reasonable adjustments) succeeds in part:

   Specifically, the respondent failed to make reasonable adjustments to its policy regarding employees being accompanied to disciplinary meetings in respect of the meeting scheduled for 6 March 2019 and, up to the 28 March 2019, in respect of the meeting scheduled for 1 April 2019.

   The other allegations of failures to make reasonable adjustments are not well-founded and do not succeed.

3. The matter will proceed to a remedy hearing on **1 October 2021**.

REASONS

Introduction

1. Mr Cox is an IT specialist. He has worked for the respondent council for almost 13 years and continues to work for them. Mr Cox has autistic spectrum disorder ("ASD"). He was (and is) a disabled person for the purposes of the Equality Act 2010.

2. The claims in these proceedings arise out of a disciplinary process commenced against Mr Cox in late 2018/early 2019. This disciplinary process was ultimately discontinued by the respondent and Mr Cox moved to an alternative rule within the organisation.

The Hearing

3. The hearing was conducted over 5 days by CVP. Generally, with the technology worked well, although there were some instances of feedback which was particularly uncomfortable for Mr Cox as he is very sensitive to noise. We are grateful to all participants for their discipline in muting/unmuting which meant these problems were kept to a minimum.

4. Two preliminary hearings were conducted in this matter on 9 October 2019 (Employment Judge Allen) and 11 February 2020 (Employment Judge Ryan). The first hearing discussed the impact that Mr Cox's condition might have on his ability to present his case, and any reasonable adjustments that might be necessary. The matters raised were, firstly, that Mr Cox would seek to be assisted by his wife in presenting his case. That is something which would be available to any litigant in person and was easily accommodated. It was also suggested that Mr Cox might tend to give long answers or to need longer than usual to formulate his questions for the respondent's witnesses, and the five-day listing was designed to accommodate this.

5. During the hearing we took frequent breaks to ensure that Mr Cox (and other participants) had time away from the screen and the pressure of the hearing. We also slightly adjusted our sitting hours to ensure that Mr Cox had time to review his preparation of questions for each witness. We found Mr Cox to be a very able litigant in person and believe that the hearing offered him a full and fair opportunity to put forward his case.

6. We had regard to a 629-page agreed bundle documents. We also had regard to some additional documents supplied during the course of the hearing, including a few contemporaneous documents and a document relied on by Mr Cox, which set out the government's autism strategy for adults in England. We read the documents which were referred to in the witness statements and during the course of the hearing. We also listened to two audio recordings of telephone conversations which had been covertly recorded by Mr Cox. Transcripts of further recordings appeared in the

agreed bundle, but Mr Cox particularly relied on the tone and manner of Mr Percy in the conversations we listened to.

7. Mr Cox gave evidence on his own behalf and his wife, Natalie Cox, also gave evidence. On behalf of the respondent we heard from Mr Marc Percy (Mr Cox's line manager), Mr Alex Turkington (Principal Engineer), Ms Sharon (ICT Services Manager), Mr Andrew Hill (Head of ICT Operations) and Ms Rachael Sykes (HR Business Partner).

8. Both parties produced written chronologies which were of great assistance to the Tribunal. The respondent produced written opening and closing submissions and the claimant produced a written closing submission. We considered all of these submissions carefully.

9. The first day of the hearing involved preliminary matters and reading time for the tribunal. The second day also commenced with preliminary matters. The time was largely taken in dealing with applications to amend, which are discussed further below. We then heard evidence from Mr Cox, followed by Mrs Cox. We heard Mr Percy's evidence on the morning of day 3. We permitted Mr Cox to spend the afternoon of day 3 preparing questions for the remaining witnesses. We heard their evidence on day 4 and the morning of day 5. We heard submissions on the afternoon of day 5. This meant that the case was not completed within the 5 days allocated to it. The Tribunal panel deliberated in chambers on 28 May 2021.

Amendment application and Issues

10. In order to understand the issues in this case, and why they have been put as they have been, it is helpful to have some understanding of the case chronology.

11. By letter dated 23 January 2019 Mr Cox was invited to a disciplinary hearing to face an allegation of gross misconduct. (We will set out the background to that invitation later on in this judgement.)

12. The hearing was scheduled for 7 February 2019, but was postponed (again, in circumstances that will be discussed in more detail) to the 18 February and subsequently to 6 March. Mr Cox had requested to be accompanied at these meetings and, in relation to the 6 March date, made a request for a postponement to enable his chosen companion to attend, citing the provisions of s10 of the Employment Relations Act 1999 ("the 1999 Act").

13. When the respondent indicated that intended for the meeting to go ahead, Mr Cox lodged his first claim (2402124/2019) on 1 March 2019. His claim form indicated that the only claim being brought was a claim for breach of sections 10 of the 1999 Act. It is clear from Mr Cox's comments in the claim form that he anticipated that the process may result in a dismissal and that he was seeking compensation in respect of that dismissal, in the event that it occurred. There was mention of the fact that he was disabled, but no claim of discrimination.

14. The 6 March 2019 date was itself postponed to 1 April 2019. Again, a request for a postponement under s.10 was refused but the hearing was nevertheless subsequently postponed to 18 April 2019. Mr Cox submitted a second claim (2404795/2019) on 16 April 2019. Again, a claim under s.10 is the only claim indicated in Box 8. However, the narrative (for example in box 15) refers to Mr Cox's belief that he has been discriminated against.

15. By email of 29 June 2019 Mr Cox subsequently applied to amend his claim to formally add allegations of failures to make reasonable adjustments. These related to the arrangements for the proposed disciplinary hearings. At the preliminary hearing on 9 October 2019 Employment Judge Allen discussed with Mr Cox the claims he wished to bring and identified further proposed claims of failures to make reasonable adjustments and direct disability discrimination. The note of the hearing records that it "took some time" to identify the claims the claimant wished to pursue. The respondent opposed the amendment of the claim to include the additional matters.

16. EJ Allen permitted some amendments to proceed and refused others. In particular, the claimant was refused permission to amend his claim to include a complaint that the respondent should have moved him to another service at an earlier date (thereby, in Mr Cox's view, avoiding the matters giving rise to the disciplinary procedure) and a claim that the disciplinary process should not have been undertaken at all. Full reasoning for this decision was set out in EJ Allen's case management order. The result of this decision is that the focus of this hearing was entirely on the disciplinary process (and particularly on the arrangements for meetings), and not on the decisions which led to that process being instigated. The respondent's evidence was, understandably, focussed on these matters, whereas the Mr Cox's evidence was more wide-ranging.

17. EJ Allen also formulated the claims into a list of issues. In respect of some of the complaints that Mr Cox had put forward as complaints of failures to make reasonable adjustments, there was no "provision, criterion or practice" identified, which is required by s20 Equality Act ("EA") in most reasonable adjustment claims. (This was not a claim involving a physical feature of the premises or a failure to provide an auxiliary aid).

18. A further case management hearing took place on 11 February 2020 in front of Employment Judge Tom Ryan. EJ Ryan assisted the claimant in identifying proposed PCPs where these were missing. However, EJ Ryan acknowledged that these were not the claimant's PCPs and 'left the door open' for the claimant to seek to alter or add to them if necessary. Mr Cox also sought to make a further amendment application. In circumstances where the respondent was unprepared to respond to this EJ Ryan merely directed that the proposed amendments should be set out in the form of the existing list of issues and they would be determined in due course. Mr Cox made his amendment application by email dated 13 February 2020. The amendment again concerned the respondent's arrangements for the disciplinary hearings on 6 March and 1 April. EJ Ryan subsequently directed that the application would be determined at the final hearing. (At the time,

the final hearing was believed to be imminent, subsequently it was delayed for around a year as a result of the pandemic).

19. In his written opening submissions, Mr Ali had referred to the case of **Ishola v Transport for London [2020] EWCA Civ 112** in support of a submission that certain of the PCPs contended for did not amount to PCPs at all, and that the matters complained of were one-off acts in the course of dealings with one individual. Having had that submission in advance of the hearing, Mr Cox attended on the first morning wishing to advance further amendments. That application, in essence, sought to convert his reasonable adjustment claims into direct discrimination claims under s.13 EA.

20. On the first day of the hearing we determined that the amendment application which had been made by email on 13 February 2020 should be permitted to proceed. The Employment Judge circulated to the parties an updated draft list of issues reflecting those amendments. Essentially, the reason for permitting the amendments was that they concerned matters which were closely related to the issues already in play, and which the respondent's evidence already fully addressed (the respondent having had notice of the proposal for over a year) and there was therefore no prejudice in allowing the amendments. Mr Cox was given time overnight on the first day to consider whether he wanted to pursue any further amendment application arising out of the **Ishola** point.

21. Overnight, Mr Cox produced a written amendment application supplemented by his own proposed amended List of Issues. The effect of this was to assert that all of his reasonable adjustment claims should, in the alternative, be considered as s.13 (direct discrimination) claims. Having heard submissions from both parties the Tribunal declined to allow these amendments. The respondent had contended, and the Tribunal accepted, that to allow the amendments would require a postponement to be granted to enable the respondent to consider its position on them, and may well require new evidence. Although the proposed new claims covered the same factual ground, they would have required a comparison of treatment to be made with a comparator. That would probably have been a hypothetical comparator and the claimant did not indicate in his proposed amendment how he said such a comparator would have been drawn. We accepted that it would take time for the appropriate comparator to have been identified and that the respondent may legitimately have wished to lead evidence on how such a comparator would have been treated, and why.

22. We took account of the fact that this claim has already taken a long time to come to trial (neither of the parties are at fault in that respect) and that it may well be delayed by a further year or longer if it was re-listed. That would have a detrimental effect on the quality of the evidence, and would also mean that these parties (who remain in an employment relationship) would continue to have the matter unresolved between them. Further, we took account of the fact that the claimant has taken the opportunities of both previous case management hearings to present amendment applications and this is, essentially, a fourth attempt to formulate the claim. Finally, on a

summary view, we were not persuaded that amending the claims as proposed would necessarily put the claimant in a stronger position. It is rare for s.13 disability claims to succeed following the decision in **Malcolm v LB Lewisham [2008] IRLR 700**, HL and it therefore seems doubtful that Mr Cox will ultimately be prejudiced in not being permitted to advance his claims in this alternative way.

23. The final list of issues appears as an annex to this judgment. It takes account of the successful amendment application, and was agreed by both parties to properly represent the case that has to be determined.

Findings of Fact

Background

24. As noted in the introduction, Mr Cox is an IT specialist who has worked for the council for around ten years at the time of these events. Over that time there had been various reorganisations of the council's IT function, and he had performed various roles within it. He did not have a formal diagnosis of autism prior to the events described below, nor had he asserted that he had the condition. We find that Mr Cox had significant performance strengths, particularly when tasked with complex self-contained tasks. We heard examples of his successes, for example designing a complicated spreadsheet to manage annual leave allocations for the respondent's employees.

25. We also find that there were some areas of weakness in Mr Cox's performance. In particular, his communication skills could be lacking. His managers were aware of a tendency for low-level complaints to be made about Mr Cox's 'rudeness' when dealing with colleagues, particularly when under pressure. Ms de Vall (possibly other managers) did not always inform Mr Cox when these minor complaints were made. In December 2017 Ms de Vall and Mr Percy had a meeting with Mr Cox where one of these complaints was discussed. This resulted in an email in these terms:

    We also discussed a recent interaction with a customer which fell below Service Centre standards in terms of being polite, courteous and respectful towards customers. You have indicated that at times you struggle to contain your frustration when working with customers in the zone and I reminded you that, on a previous occasion, in similar circumstances, I asked that where you are struggling with a customer interaction and are at risk of inappropriate behaviour, you ask for support from the team leader to take the interaction off you. You have agreed to apply this strategy going forward in the hope that we can avoid a similar situation.

    I have explained to you today Tim that if your conduct relating to these issues doe not improve and recurs, I will have no choice but to invoke the formal disciplinary procedure.

26. Also in 2017, the Cox's eldest son was in the process of being assessed for ASD and a school nurse suggested that Mr Cox may also have ASD. Mr

Cox was initially resistant to the idea that he might have the condition, but the suggestion was validated by family members and he gradually 'came round' to the idea. A referral was made in respect of the son, and there appears to have been some confusion about whether this might also result in a formal diagnosis for Mr Cox.

27. Around the time this was happening, Mr Cox and Mr Percy spoke about it. Mr Percy's account is that the discussion was entirely around the son's referral, in the context of difficulties that Mr Cox was having in managing his work and home life. Mr Cox's account is that in the December meeting about the complaint against him, he had informed Mr Percy and Ms de Vall that he "probably had autism" and explained the circumstances about the school nurse comment and the family referral.

28. Whilst it is not necessary for us to make precise findings about what was said and when, we find that Mr Cox had raised the possibility that he was affected by ASD with his managers in 2017. This is supported by the transcript of a conversation with Mr Percy in 2019, in which Mr Percy says "*Do you feel a little bit better then that you've kind of got this diagnosis now? Is that? We've talked about this for how many years now? Three, four years?*"

29. Although Mr Percy was a little out on his dates (we find the conversations would have happened no earlier than mid-2017) we consider that it is evident that there was an understanding on the part of Mr Cox's managers due to his behavior and these conversations that it was quite possible he was affected by ASD to some degree, albeit that there was no formal diagnosis. Mr Percy attempted to suggest that he was "confused" in this conversation and had meant to refer to Mr Cox's son's diagnosis, but that makes no sense in the context of the conversation recorded in the transcript, and we do not accept that evidence.

30. By 2018, and for some time before, Mr Cox was spending most of his working time in the respondent's IT service centre. That essentially meant working in a call centre environment dealing with day to day IT queries raised by council employees and school employees (the schools contracted their IT support from the council).

31. Mr Cox disliked working in the service centre, he found it pressured and unrewarding. His managers, including Mr Percy and Ms de Vall were aware of this. However, many of the respondent's IT team similarly disliked working in that way. There were opportunities to transfer to other roles, but these would be subject to a competitive application process. Ms de Vall supported Mr Cox to spend some time working in another department on a project secondment. However, she was not prepared to arrange for him to be transferred out of the service centre permanently without a successful application for a substantive post. She considered that to do so would be tantamount to "rewarding failure".

Autumn 2018 – supervision note and OH referral

32. On 10 October 2018 following a meeting with his manager, Mr Percy, Mr Cox was issued with supervision notes which effectively comprised a further informal warning. This had arisen from customer complaint on 12 September 2018 about Mr Cox's attitude on a telephone call and, separately, about timekeeping issues. Mr Cox does not agree that the warning was justified, and we need make no finding on the rights and wrong of it. Importantly, however, within the letter, Mr Percy, informed Mr Cox "*I will be referring you to OHU in relation to your ability to carry out your role*". The supervision notes proposed that if Mr Cox was "*struggling with a customer interaction*" he should signal for the call to be taken over by a manager or co-ordinator, and noted that the aim of the measures outlined in the letter was to avoid formal disciplinary action.

33. The referral resulted in an occupational health report dated 7 November 2918. Under the heading "Current Health Issues" it stated:

Mr Cox was contacted today, as requested regarding his potential medical issues. Unfortunately, the room was booked for another and so we had limited time and privacy, to make the assessment Mr Cox advises he has had no formal assessment for Autism and so any assessment would need to be made by an educational psychologist, with funding by the business, if this suited the business needs. The waiting lists are normally long, in my opinion. His mental health is normal, from his perspective and he would need a GP or other Specialist practitioner assessment, as I was unable to complete the full questionnaire today, due to the time restrictions. His GP may need to consider treatment, which he does not want, If this was confirmed as a medical condition. Otherwise Mr Cox appears to be fit and well, he is not on any medication, or any other treatment plan, at this point, for any underlying medical issue, as advised today."

34. The report concluded that Mr Cox has no underlying medical conduction that was likely to be considered a disability "*based on today's assessment*." In response to the specific question "*Does LCC need medical verifiction to substantiate Tim's claims of his potential disabilities?*" the response given is "*A GP assessment could verify any physical or mental health symptoms, if present, via a report, if needed. The educational psychologist would be the preferred assessor for the diagnosis of Autism"*

35. In addition, a 'stress risk assessment' was carried out between Mr Percy and Mr Cox.

36. Mr Percy and Ms Sykes (who was provided HR support) took the view that the claimant's GP was the first port of call for an autism assessment. They did not, therefore, take up the occupational health suggestion that the respondent might commission a report from an educational psychologist. Mr Cox did go to his GP, although it is not entirely clear when in the chronology this happened. An email from Mr Percy dated 22 January 2019 indicates that it had happened by that point and that, given Mr Cox was

seeking that assessment from his GP "*This now brings the OHU matter to a close*."

37. We pause here to note, on introducing Ms Sykes into the narrative, that the bundle contained no HR case notes, either kept personally by Ms Sykes, or on any sort of computerised system operated by the respondent. Ms Sykes was questioned about this by one of the panel members, and confirmed that it was not her practice to take such notes. The panel were very surprised by that evidence, and consider that it has contributed to a marked difficulty in understanding what decisions were taken in this case, by whom, and for what reasons.

38. Each of the respondent's witnesses, in giving evidence, declined to acknowledge that C was 'disabled' at this stage. As far as they were concerned, until there was an actual diagnosis, there was no disability. This was despite the fact that the occupational health report had expressly flagged the possibility of an autism diagnosis (subject to assessment) and the continued history of problems concerning, broadly, Mr Cox's communication style and his being perceived as 'rude' by those he had to deal with.

November 2018 complaints

39. On 22 November 2018 two further complaints were made about the claimant's interactions with other LCC employees. In each case, he had made a call out to pursue a request for IT support, but the extension number he had received was not the up-to-date number of the individual seeking support. The first complaint was from an employee called Claire Durrans. It was submitted via a feedback form and read as follows:

> **This morning I picked up a colleague's telephone and spoke to a Mr Tim Cox. When I advised him that he had the wrong number he became very rude. When I asked for his name he ignored me. I had to ask for his name approx 4 times and each time he ignored me. Eventually he only gave me his name because I explained I was trying to help him and would need his contact details to get back to him once I had looked into the problem for him. I have actually encountered Mr Cox before and had a similar experience; I really think he would benefit from some customer service training.**

40. The second complaint was submitted by email directly to Denise Carr. This references the call above and says that the writer, Alice Cleary, had advised Ms Durrans to submit feedback after she had complained about Mr Cox's rudeness. The email goes on to make a separate complaint:

> **Whilst it is fresh in my mind too, Tim came through to me and asked for Jane McNeice and I explained he had come through to the wrong extension and he said, quite abruptly 'well this is the extension she has given (or I have got) so she needs to change it if it's wrong, so I said she covered for me whilst on**

> **maternity so I can only presume that is why it is still my number and he agreed, (at this point I still had no idea who I was talking to and genuinely thought it was some random external guy) so I asked who was calling and what it was regarding and he said he was from ICT, again just a bit hostile with his tone, I then said I would transfer him, but it went to her voicemail so I said she must be on leave but I said I could give him her contact details at which point he abruptly said no. At that point I asked his name because I just felt the way he was speaking to me was inappropriate when I was trying to help. He changed his tone pretty much straight away and said he'd update the portal and email her direct explaining she can't ask for permissions to a folder herself.**
>
> **It's not word for word perfect but hopefully you'll get the gist. It was more his tone and attitude which didn't come across professional.**

41. It is not clear, given the context, whether this second call is also said to have happened on 22 November, or whether Ms Cleary is recollecting an earlier incident.

42. In view of these complaints, Mr Cox was invited to an investigation meeting under the disciplinary process to take place on 6 December. He was due to be accompanied to that meeting by Steve Davis, his former manager. On 4 December Mr Davies emailed with some concerns about the process and asked that it be dealt with more informally. The meeting went ahead but Mr Davies did not accompany Mr Cox, citing mental health concerns of his own. He was instead accompanied by a colleague called Tom Clark. The meeting was conducted by Lynn Webster.

43. Ms Webster produced an investigation report. Although parts of this were included in the bundle, the full report was produced during the hearing and designated as document 'R1'. The investigation report itself contains no mention of autism. In the appendices, the notes of Ms Webster's interview with Mr Cox show that he raised the issue and showed her a GP referral letter. They also record the fact the OH recommendation for an autism assessment was discussed. Ms Webster concluded that there was evidence to support both the complaints against Mr Cox. Both complaints related to Mr Cox's manner on phone calls. Both (certainly through the lens of hindsight) potentially arise from autism, although this is not explicitly acknowledged by Ms Webster. The recommendation was that "*Management consider the findings and conclusions contained in this report and take any action deemed to be appropriate*".

44. Around the time of this meeting the 'Commissioning Officer' under the respondent's disciplinary procedure was changed. It had been Ms de Vall but (it appears) she was considered too close to the matter and so Alex Turkington was asked to step in instead. We find that Mr Turkington had very limited confidence or experience in disciplinary matters and he therefore leant heavily on R's HR department, specifically Ms Sykes.

Disciplinary process

45. On 23 January 2019 a letter went out in Mr Turkington's name inviting Mr Cox to a disciplinary hearing on 7 February 2019. The allegations were:

    Allegation 1 Unacceptable conduct over the telephone
    Allegation 2 Failed to follow a reasonable management instruction

46. Although it is not obvious from the letter itself what the allegations related to, a full copy of the investigation report was provided and the substance of the allegations is clear from that report. The allegation of failure to follow a reasonable management instructions relates to the claimant's failure to utilise the system of having difficult calls transferred to another member of staff. Both allegations, therefore, arise entirely out of the 22 November complaints.

47. The letter contains the following paragraph:

    I must advise you that, if substantiated, the allegation made against you would amount to Gross Misconduct and it is therefore open to the Senior Designated Officer hearing the case to consider dismissing you from your employment as an appropriate sanction. As a result. you should be prepared to put forward any reasons why you may feel that dismissal would not be appropriate in this case.

48. All the members of the Tribunal panel considered it very surprising that these allegations were progressed as a case of potential gross misconduct, particularly by a large respondent with well-developed HR processes. Indeed, Mr Ali's outline submissions stated "*the respondent was dealing with a relatively minor disciplinary matter which was not going to result in dismissal*". The members of the panel concur with Mr Ali's apparent assessment of how such an allegation would be viewed by a reasonable employer. From their own experience, the non-legal members both consider that this is the sort of case which would normally lead to a first written warning at most. But Mr Cox is not an employment lawyer or HR specialist. He took the letter at face value – if the allegations were proven they would most likely result in his dismissal. He was entirely justified in reading the letter in this way. It would be surprising and cavalier if he read it in any other way. As far as he was concerned, he was now fighting for his job, if not his entire career.

49. None of the respondent's witnesses were able to adequately explain how the decision to progress this as a gross misconduct case had come about. Mr Turkington's evidence was curious. He said that the matter had to proceed as a potential summary dismissal case in order for it to be heard by a Senior Designated Officer. The view was taken (he was hazy as to whom) that it would be to Mr Cox's benefit for the matter to be dealt with by Mr Hill, who would have the experience and gravitas to deal fairly with a

complex matter. However, the policy meant that for Mr Hill (who was a Senior Designated Officer) to be allocated to the hearing, it had to be labelled as gross misconduct. This account is lent some support by the wording of the respondent's template letter (appearing at page 598) which provides alternative paragraphs to be used depending on whether the matter is to be heard by a Senior Designated Officer (gross misconduct cases) or a Designated Officer (sanctions below dismissal). If this was an accurate account of how the gross misconduct charge came about, then it was an entirely wrong-headed way of going about things. It was, as the saying goes, putting the cart before the horse.

50. However, neither Mr Hill nor Ms Sykes supported this account, both said that the view was indeed taken that this was, potentially, gross misconduct, and the decision as to what level of officer should hear the case followed from that. However, none of the respondent's witnesses actually admitted to having taken the decision that this was a gross misconduct case themselves, nor could they explain how that decision had been reached.

51. In view of the issues in this case, it is not necessary for us to make an explicit finding as to who decided that this should proceed as a gross misconduct case and why. It is, however, relevant background that it did proceed and that it did so in circumstances that cannot be properly explained by the respondent. That had a significant effect on the claimant's perception of the disciplinary process. We accept his evidence that he felt under intense pressure during the subsequent weeks, that he believed the disciplinary hearing was likely to result in the loss of his job, and that this prospect hung over him as a threat that assumed immense proportions.

52. Mr Turkington went on in his oral evidence to say that he had reassured Mr Cox during a casual conversation held outside the lift that the reference to gross misconduct was just a necessary formality to secure the involvement of Mr Hill, and that the matter wasn't really going to result in dismissal. Mr Cox had no recollection of any such conversation and we reject Mr Turkington's evidence on this point. Whilst we are prepared to accept that he might have made some attempt to reassure Mr Cox, we have found that he was out of his depth in relation to the whole process and far from authoritative. Any vague attempt he might have made at reassurance was entirely ineffective in the face of the clear wording of the letter.

53. As well as finding the decision to label this a gross misconduct allegation concerning, we find the respondent's decision to embark on the disciplinary process without revisiting the outstanding autism assessment equally concerning. Again, we must emphasise that this is background to our decision given the way the case has been presented, but it is relevant background. It might be understandable that the respondent would allow an assessment to progress via an employee's GP rather than commissioning one at its own expense at a point where there is no crisis. However, when an employer has an occupational health report which recommends an

employee is assessed for autism, coupled with complaints about perceived rudeness in that employee's telephone interaction, we consider it is a matter of common sense that the autism assessment is very likely to be relevant in determining how those complaints should be addressed and, if they are addressed as a disciplinary matter, what the appropriate outcome is.

54. Sadly, that point seemed to entirely elude Ms Sykes, who could only say that she considered the respondent didn't need to do anything else as the assessment was being progressed by Mr Cox's GP. At no point did the respondent take any steps to enquire about the progress of the GP assessment, far less to arrange its own.

55. On 30 January 2019 Mr Cox commenced a certified sickness absence, initially for two weeks. He informed Mr Turkington, noting that this "*may affect the timings*". He also indicated that he intended to raise a grievance and referred to the fat that he had been referred for an autism diagnosis which would have to await the NHS process unless the business were prepared to fund it privately at a cost of around £1,500.00.

56. Mr Percy made a further referral to occupational health in the context of the up-coming disciplinary hearing. He said "*My main concern is that the disciplinary hearing is a large contributor to the stress and that this process at some point needs to come to a close*." That is a familiar sentiment from employers faced with employees involved in protracted disciplinary or grievance processes, but this was not a process was had become protracted – it had only just begun. Further, although he highlighted that the disciplinary hearing was contributing to Mr Cox suffering from stress, he made no reference of the possibility of an autism diagnosis, nor did he seek any advice as to whether that condition would have a bearing on either the disciplinary allegations themselves or the process which should be followed.

57. On 4 February Mr Turkington emailed Mr Cox noting that an occupational health review was planned for Wednesday (i.e. the 6th) and that the respondent would wait to hear from occupational health as to whether the hearing (planned for the 7th) could go ahead.

58. Mr Cox had a telephone assessment with occupational health on the morning of the 6th, and was told that a face-to-face appointment was necessary in view of the matters he had raised. At 13.30 he spoke on the phone to Mr Percy (the call was recorded and a transcript provided) and informed Mr Percy of this development. Mr Percy asked Mr Cox whether he would be attending the disciplinary hearing. Mr Cox queried whether it would be going ahead in the circumstances and Mr Percy said "*there was nothing to suggest that we wouldn't*." He goes on to explain that he anticipates the hearing will go ahead "*because we don't have [a report] that states that you are not fit*."

59. However, in another call around 25 minutes later, Mr Percy confirmed that he has spoken to Mr Hill and the decision had now been taken to postpone the hearing. The following day, Mr Cox was given a new date of 18 February 2019. A short occupational health report was later produced, confirming that a face to face appointment was to be arranged and this was arranged for 11 February 2019.

60. Mr Cox called Mr Percy after the appointment, informing him that the occupational health practitioner had diagnosed medium to severe depression and severe anxiety and wanted him to see a doctor, that the OH report was likely to take longer than was normally the case, and would include a recommendation that the respondent paid for an autism assessment. An interim report followed, but it said little other than that a face to face assessment with an occupational health physician was necessary.

61. In a voicemail left on 12 February 2019, Mr Cox informed Mr Percy that he had received an appointment for the 26 February 2019. Of course, this date was after the re-arranged hearing date.

62. In the meantime, Mr Cox was aware that his NHS autism assessment was unlikely to be progressed for months (if not years) due to waiting times. He was increasingly desperate about the disciplinary process and decided to travel to Birmingham and pay for a private assessment. This took place on 12 February 2019 and a short letter confirming a diagnosis of ASD, signed by a Consultant Psychiatrist, was produced on 13 February 2019. The letter stated that a report would follow.

63. Mr Cox and Mr Percy spoke again by telephone on 13 February 2019 when Mr Cox explained that he had had the assessment and received a diagnosis. After explaining this, Mr Cox suggested that the upcoming disciplinary should be moved or postponed. Mr Percy asked why, and Mr Cox replied "*because it's a protected characteristic under the Equality Act 2010*." Mr Percy's response to this was "*Yeah, but we're not discipling you under the Equality Act 2010."* That response illustrates a level of misunderstanding of employment protections which we consider staggering for a manager in a large, public sector employer.

64. During his evidence Mr Percy explained that he suffers from dyslexia and can get confused. He appeared to find the process of giving evidence very stressful, and the Tribunal is fully aware that the respondent witnesses, as well as claimants, can find the litigation process very onerous. However, despite the panel's real sympathy for Mr Percy it was apparent that he was, like Mr Turkington, out of his depth in his involvement with this process. None of the respondent's witnesses appeared to have had any meaningful training on disability in general or autism specifically, and it is deeply concerning, in a public sector organisation of this size, to see a line manager

demonstrate such a profound failure to grasp the valid points being raised by an employee about a disciplinary process.

65. On Friday 15 February Mr Percy emailed Mr Cox to say that the hearing would be postponed. Again, this was one working day before it was due to take place. The postponement was said to be for "one final time". By email on 26 February a new date was set of 6 March 2019.

66. By email dated 26 February 2019 at 16.26 Mr Cox wrote to Mr Turkington informing him that he wished to be accompanied to the hearing by Tom Clark, who had accompanied him to the investigation meeting. Mr Cox explained that Mr Clark was unavailable on the 6th and proposed an alternative date of the 12th, expressing citing ACAS guidance which is itself based on the terms of s.10 of the 1999 Act. In the same email, Mr Cox stated he would also like to be accompanied by his wife, who was acquainted with his disability.

67. Mr Turkington replied on the same day, stating that the respondent's intention was to keep the date of the hearing, although this would be reviewed if the occupational health report was not received. The email went on to set out the respondent's position (mirroring the statutory position) that employees were entitled to be accompanied by a colleague or a trade union representative and that Mrs Cox would therefore not be eligible.

68. It was following this, on 1 March 2019, that Mr Cox submitted his first claim. On the same day, Mr Clark also confirmed that he would, in fact, be available for the hearing on the 6th.

69. On 2 March or thereabouts Mr Cox received the full report from the occupational health appointment. It was a detailed report which drew extensively on the report from the consultant psychiatrist which Mr Cox had provided to the occupational health physician. It was very supportive of his case and expressly noted that the diagnosis "*may explain some of the issues Mr Cox has in interacting with colleagues on the phone*".

70. Mr Cox did not (as most other employees might have done in his situation) immediately consent to the release of this report to his managers. He had amendments that he wished to make before it was released. Many of these appear to have been utterly insignificant matters of grammar, spelling and syntax (the Tribunal recognises that a preoccupation with getting these right may well also be something that is connected to Mr Cox's condition).

71. It is clear that in seeking these amendments Mr Cox acted promptly. He was not procrastinating or delaying matters. He provided suggested amendments to Occupational Health on 5 March, and provided his managers with a redacted report (redacting the paragraphs where he had outstanding requests for revisions) around the same time. The redactions were not self-serving – Mr Cox actually took out the key paragraph that was

supportive to his own case. Of course, the respondent was not to know what material had been redacted. Ms Sykes and the managers involved in the case took the view that if they could not see the full report they should not have regard to any of it. Whilst this may vary on a case by case vary, in broad terms we are sympathetic to that standpoint.

72. On 5 March 2019 the hearing for the 6 March was postponed (once again, one working day before the hearing) as the full version of the occupational health report had not been received.

73. On 12 March 2019 a phone call took place between Mr Cox and Ms de Vall. Out of concern for Mr Percy's well-being, Ms de Vall had taken over line management responsibility from Mr Percy. In this context, that meant keeping in touch with Mr Cox and managing his continuing absence. In this conversation, Mr Cox talks in graphic terms about the stress that the disciplinary procedure is causing him. In particular, he expressly makes the point that he is being disciplined over his conduct disciplined of two 6 minute phone calls, where his manner on those calls was due to his ASD. Although Ms de Vall listened to Mr Cox, even with the matter put this bluntly, she did not take it upon herself to speak to Ms Sykes or Mr Hill and consider whether, in light of what had happened since December, it was appropriate to take the pressure of Mr Cox by formally pausing the disciplinary proceedings until proper medical evidence was obtained.

74. On 22 March 2019 a date was set for the 1 April 2019 and the invitation letter strongly implies that if the full report is not received by that time, the hearing will go ahead in any event.

75. The invitation email was copied to Mr Clark. Six minutes later, Mr Clark replied to say he could not attend due to pre-booked leave. (We note this to emphasise that there was no suggestion of his non-availability being in any way contrived.)

76. Around an hour later, Mr Cox, in express reliance on the provisions of s.10 of the 1999 Act, emailed to propose an alternative date of 8th April (later changed to the 4th). He also noted that he was 'chasing' for release of the occupational health report, so that should be available. The response from Mr Turkington was "*As the date has already been rearranged a number of time HR have advised me to continue it.*" The Tribunal notes that the rearranged hearings had always been at the behest of the respondent recognising that it needed to see an occupational health report (which the claimant had cooperated in obtaining). There is an implication in the tone of the letters that this was an employee who was unreasonably employing delaying tactics. That implication is, in the view of the Tribunal, unwarranted.

77. On 26 March 2019 Mr Cox provided Mr Turkington with an unredacted version of the occupational health report, although it was not a finalised version as he was still waiting to confirm suggested corrections with

occupational health. The respondent's position remained that they could not have regard to the report in that form. There was further correspondence around the issue of who would accompany the claimant. On 28th March 2019, after further pressing, the concession was made that the claimant could bring his wife to the hearing, but that was instead of a colleague, not in addition to a colleague.

78. The finalised report was provided directly from occupational health either late on 26 March or early on 27 March 2019.

79. By email dated 29 March 2019 (yet again, one working day before the hearing) Mr Turkington informed Mr Cox that the hearing was to be postponed to a date after the Easter holidays. By email of the same date, Ms Sykes confirmed the postponement and confirmed that Mrs Cox would able to accompany as a reasonable adjustment. She also discussed other potential adjustments and invited Mr Cox to suggest if there were any others to be considered.

80. By email dated 18 April 2019, Ms Sykes informed Mr Cox that, "*given your recent disclosure of a disability and the effect this has had on your conduct, management have made a decision not to pursue the matter to a disciplinary hearing in this instance."* A 'next steps' meeting was proposed, and duly took place.

81. The Tribunal heard briefly that following that meeting and subsequent meetings Mr Cox remained employed and is now performing alternative work. He has, however, reduced his hours and is spending much of his working time working for another employer.

Relevant Legal Principles – Right to be accompanied claims

Employment Relations Act 1999

82. So far as is material, the relevant statutory sections provide:

10 Right to be accompanied.

(1) This section applies where a worker –
(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and
(b) reasonably requests to be accompanied at the hearing.

(2A) Where this section applies the employer must permit the worker to be accompanied at the hearing by a single companion who –
(a) is chosen by the worker; and
(b) is within subsection (3)

(2B)…
(2C)…

(3) A person is within this subsection if he is –

(a) employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992,
(b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or
(c) another of the employer's workers.

(4) If –
(a) a worker has a right under this section to be accompanied at a hearing,
(b) his chosen companion will not be available at the time proposed for the hearing by the employer, and
(c) the worker proposes an alternative time which satisfied subsection (5),
the employer must postpone the hearing to the time proposed by the worker.
(5) An alternative time must –
(a) be reasonable, and
(b) fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer.

(6)…
(7)…

11 Complaint to employment tribunal.

(1) A worker may present a complaint to an employment tribunal that his employer has failed, or threatened to fail, to comply with section 10(2A), (2B) or (4).

(2)…
(2A)…
(2B)…

(3) Where a tribunal finds that a complaint under this section is well-founded it shall order the employer to pay compensation to the worker of an amount not exceeding two weeks' pay.

83. The leading authority in this area is **Toal v Hughes GB Oils Ltd [2013] IRLR 696.** This addresses the situation where a claimant was not permitted to be accompanied by his choice of representative, and the meeting went ahead with an alternative representative. We had regard to the entirety of that short decision and, in particular, to the comments at paragraph 21 regarding reasonableness and at 28 and 28. Mr Ali was unable to find any authority, and nor was the Tribunal, dealing with a situation where a employee's request made in accordance with s.10(4)-(5) was refused, but the meeting did not, in fact, go ahead.

Submissions, discussion and conclusions – Right to be accompanied claims

84. Italicised text below is taken from the List of Issues.

Did the respondent fail to postpone the hearing arranged for 6 March 2019, when the claimant requested that he be accompanied by Tom Clark who was not available and provided an alternative date (for example, in an email of 26 February 2019 at 16:26)?

Did the respondent fail to postpone the hearing arranged for 1 April 2019, when the claimant requested that he be accompanied by Tom Clark who was

not available and provided alternative dates (for example in an email of 22 March of 16:06)?

If so, did the respondent breach section 10(4) of the Employment Relations Act 1999?

85. Our findings of fact are set out above. The respondent did not demur that the claimant's postponement requests were made in accordance with the timescale set out in s10(5) and were refused. The respondent's primary argument was about the effect of the subsequent postponement, which took place for other reasons. As Mr Ali put it: "*Does a breach of section 10(4) only occur if a meeting in fact takes place, or does a cause of action arise at the point of any refusal to postpone a meeting? Was there only a potential breach in this case rather than an actual breach?*"

86. We find that the breach occurred at the time the respondent refused to accede to the claimant's re-scheduling request. We note that the language of s.11 enables an employee to complain when an employer has "threatened" to fail to comply, as well as when it has actually failed to comply. We consider it clear that Mr Cox had a cause of action when his s10(4) request was refused. Indeed, in related to the meeting scheduled for 6 March, the ET1 was actually presented (on 1 March) before the respondent postponed the hearing (on 5 March). That was the very situation envisaged in paragraph 27 of **Toal.** In our judgment, the cause of action that has come into being is not extinguished because the disciplinary hearing is subsequently postponed for another reason. The fact that a hearing was re-arranged for other reasons might, in some cases, have a bearing on the appropriate level of compensation, but it does not erase non-compliance with the terms of the Act.

87. In respect of the first hearing, the respondent notes that Mr Clark subsequently became available. Again, that does not, in the view of this Tribunal, make any difference to the claim as the cause of action crystallised at the point of refusal.

88. The respondent has a subsidiary point that the alternative time must be "reasonable" (s.10(5)) and in this case it was not. The submission is that no alternative time was "reasonable" given the history of this case – it simply was not reasonable to postpone at all. The Tribunal's view is that accepting this submission would undercut the protection offered by the statute in an analogous way to the respondent's submissions which were rejected in **Toal**. Our view is that the additional qualification of "reasonable" in 10(5) is designed to prevent an employee suggesting a meeting and an unreasonable time of day, for example, proposing a midnight meeting in circumstances where all of the participants work standard office hours.

89. We do accept that in modern workplaces, with complex disciplinary procedures, it may be difficult for an employer to re-arrange a meeting for an alternative date proposed by the claimant within the strictures of s.10. However, that is what the clear wording of the statute requires. In that context, we also note that the penalties for non-compliance are very limited.

Relevant Legal Principles - Disability claims

90. Ss. 20-21 of the Equality Act 2010 provide (as relevant) as follows:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) - (13) […]

21 Failure to comply with duty

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

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

(3) […]

91. Schedule 8 of the Equality Act 2010 deals with reasonable adjustments in the workplace and provides, materially, as follows:

20 Lack of knowledge of disability, etc

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) […]

(b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

92. Turning to case law, the starting point is the well-known decision in **Environment Agency v Rowan [2008] ICR 218** which identifies that the tribunal must begin by identifying the PCP before considering the nature and degree of disadvantage to the claimant (with reference to a hypothetical comparator if appropriate) and finally analysing the appropriate steps to avoid or ameliorate the disadvantage.

93. On the question of identifying the PCP we have had regard to the cases cited by Mr Ali: **Ishola** (discussed above), **Nottingham City Transport Ltd**

v Harvey [2013] UKEAT/0032/12 and **Carphone Warehouse Ltd v Martin UKEAT/0371/12**.

94. At paragraphs 34-43 of **Ishola** Simler LJ provides thorough guidance on how Tribunals should approach the question of whether a particular one-off act can properly be regarded as a PCP. We do not consider that the earlier cases add much in terms of principal, but they are cited by Mr Ali as illustrations of cases where procedural failures did not give rise to successful reasonable adjustment claims.

95. Mr Cox suggested at the outset of the hearing that we should not have regard to **Ishola** as the judgment post-dated the events in this case. Whilst it is true that statutory changes tend not to have retrospective effect, legal doctrine assumes that developments in case law merely explain or clarify the existing law, and so it is appropriate for this Tribunal to have regard to **Ishola**. Indeed, it would be in error for us not to do so.

96. Mr Cox put forward several case reports alongside his own closing submissions. Several of these were decisions at ET level. These are examples of other cases with which various comparisons and distinctions with this case may be drawn. However, they are not decisions which set out legal principles, and therefore, although we have looked at them, we do not say any more about them in this decision.

97. Mr Cox also supplied a copy of the EAT decision in **Lancashire County Council v McGregor UKEAT/0005/19** a case involving this respondent and a finding that they had failed to make reasonable adjustments in respect of another employee. Although decisions of the EAT which set out relevant principles of law are binding on this Tribunal, we did not consider that there was any such principle set out in the **McGregor** case which related to the matters we have to determine today. Similarly, Mr Cox referred us to the unfair dismissal case of **Stoker v Lancashire County Council [1992] IRLR 75**. Whilst Mr Cox's endeavours in legal research are to be commended, we again did not find this authority helpful in assisting us to determine the points at issue in this case.

Submissions, discussion and conclusions – disability claims

Knowledge of disability

98. At the outset of the hearing the respondent conceded that it had knowledge of Mr Cox's disability from 13 February 2019 (when it received the letter of diagnosis from the consultant psychiatrist). As all the acts complained of post-dated this date, it did not fall to us to determine whether the respondent had actual or constructive knowledge of the claimant's disability before that date.

99. The list of issues as drafted omitted to reflect the 'knowledge defence' available to an employer in relation to reasonable adjustment claims. Namely, under paragraph 20 of Schedule 8 to the Equality Act 2010, an employer will not be liable for a failure to make reasonable adjustments

when it does not know, and could not reasonably be expected to know, that a PCP will place the claimant at a disadvantage. The respondent has been clear from the outset that, whilst it accepted knowledge of disability, it did not accept knowledge of any disadvantage, and so we have also had regard to this issue. Our conclusions in respect of knowledge of disadvantage are set out under the relevant issues below.

Withdrawing the disciplinary allegation on 13 February 2019

Did the respondent apply the PCP of not withdrawing a disciplinary allegation as soon as the employee provides information/a diagnosis from a registered medical practitioner which tends to show that he was a disabled person at the time of the event giving rise to the allegation?

100. We accept the respondent's submission that this was not, and cannot be, a provision, criterion or practice. We accept that the decision on whether a disciplinary allegation was withdrawn is a one-off decision which would depend on a number of factors, including the severity of the allegation, the level of detail contained in the medical diagnosis and the apparent relationship between the medical information and the allegation. The respondent did not withdraw the disciplinary following receipt of the 13 February information but did withdraw it (perhaps rather belatedly) following receipt of the full occupational health report. That of itself tells against anything that can properly be described as a PCP. Further, we have no evidence at all of how such decisions were made in respect of other employees, and can only conclude (as a matter of common sense as well as having regard to the respondent's witnesses evidence) that they would be dealt with on a case by case basis. We find that this was, within the terms of **Ishola**, a "one-off act in the course of dealings with one individual" which did not amount to a PCP.

Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

Did the respondent take such steps as were reasonable to avoid the disadvantage? The reasonable adjustment which the claimant contends should have been made was withdrawing the disciplinary allegation on 13 February 2019 when the claimant's full diagnosis was available.

101. Strictly speaking, it is not necessary for us make findings on these issues given the finding above. We found it difficult to analyse the question of disadvantage in these circumstances, but we consider that that difficulty simply reflects the fact that there is no properly-drawn PCP and that this complaint is not apt to be addressed as a reasonable adjustment complaint.

102. Having said that, we are able to conclude that if disadvantage were made out, it would nevertheless not be a reasonable adjustment to require the respondent to withdraw the disciplinary proceedings in their entirety on the basis of a bare letter of diagnosis which gave no information as to how Mr Cox's condition may have affected the behavior giving rise to the disciplinary proceedings. We therefore consider that this complaint of failure

to make reasonable adjustments would inevitably have failed on this ground too.

Delaying the hearing arranged for 18 February 2019

Did the respondent apply the PCP of maintaining the date for a disciplinary hearing after an employee has provided information/a diagnosis from a registered medical practitioner which tends to show that he was a disabled person at the time of the event giving rise to the allegation?

103. Again, we consider that this is not a PCP, but rather a one off act in a course of dealings with a particular employee. Further, the 18 February hearing date was not maintained, in the sense that it did not go ahead, although the decision to postpone was taken later than it might have been as a matter of good practice, that simply illustrates that the respondent was responding to matters in an *ad hoc* way, as submitted by Mr Ali. The fact that it may have made poor *ad hoc* decisions does not convert those decisions into a PCP.

104. An alternative PCP, along the lines of failing to cancel hearings until the last moment even where there was good reason to believe that the hearing could not fairly go ahead might have been more apt in the circumstances of this case, but that was not how the case had been put following lengthy iterations of case management, and we did not consider that such a suggestion could be introduced without affording the respondent opportunity to address that matter in its evidence.

Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

Did the respondent take such steps as were reasonable to avoid the disadvantage? The reasonable adjustment which the claimant contends should have been made was delaying the hearing arranged for 18 February 2019 more quickly than the respondent in fact did.

105. Again, it is not strictly necessary to determine these issues given the findings above. The Tribunal agrees with the claimant that the hearing should have been postponed more quickly than it was, but this is a matter of good practice, not a reasonable adjustment. Further, we consider that the respondent's habit of maintaining a date until the last possible moment, even when it was clear that this complicated and serious matter was not ready for hearing, would have been highly, and unnecessarily, stressful for any employee regardless of a disability. Even if the PCP had been drawn differently, it is far from clear that Mr Cox would have succeeded in establishing a particular disadvantage related to his disability.

Delaying the hearing arranged for 6 March 2019

Did the respondent apply the PCP of maintaining the date for a disciplinary hearing after an employee has provided information/a diagnosis from a

registered medical practitioner which tends to show that he was a disabled person at the time of the event giving rise to the allegation?

106. We repeat our comments at paragraph 103 above. This was not a PCP.

Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

Did the respondent take such steps as were reasonable to avoid the disadvantage? The reasonable adjustment which the claimant contends should have been made was delaying the hearing arranged for 6 March more quickly than the respondent in fact did or refraining from setting a date for this hearing until more evidence as to the claimant's health was obtained?

107. We repeat our comments at paragraph 105 above.

Delaying the hearing arranged for 1 April 2019

Did the respondent apply the PCP of maintaining the date for a disciplinary hearing after an employee has provided information/a diagnosis from a registered medical practitioner which tends to show that he was a disabled person at the time of the event giving rise to the allegation?

108. We repeat our comments at paragraph 103 above. This was not a PCP.

Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

Did the respondent take such steps as were reasonable to avoid the disadvantage? The reasonable adjustment which the claimant contends should have been made was delaying the hearing arranged for 1 March 2019 more quickly than the respondent in fact did or refraining from setting a date for this hearing until more evidence as to the claimant's health was obtained.

109. We repeat our comments at paragraph 105 above.

Accompaniment for 6 March 2019

Did the respondent apply the provision, criterion or practice ("PCP") of allowing the claimant only to be accompanied by a colleague or trade union official in relation to the meeting arranged for 6 March 2019?

110. The respondent conceded that this is a PCP and that it was applied to the claimant on or around 26 February 2019, when the claimant was informed that he was allowed to be accompanied only by a colleague or trade union representative.

Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

111. Mr Ali submitted that there could not be a disadvantage in Mr Cox having to conduct the hearing without his "preferred companions" because the hearing did not take place. He therefore posits that the disadvantage we are considering is the stress and anxiety that Mr Cox suffered from having to contemplate going to a meeting without his preferred companions. Mr Ali says that such disadvantage was not "substantial" and that there is no evidence that it arose from Mr Ali's autism and that he was therefore at any disadvantage compared to non-disabled people (who may have been similarly stressed and anxious).

112. Leaving aside, initially, the complication that the hearing did not take place, we conclude that the application of the PCP did put Mr Cox at a disadvantage. That disadvantage arises out of his own limitations in being able to communicate fully and appropriately, particularly when under stress, and therefore to conduct the hearing effectively.

113. In making that finding, we have regard to the final occupational health report which included the following comments (set against a broader description of the difficulties Mr Cox's condition may cause him).

> **Mr Cox will need adequate time to prepare for the meeting and be accompanied by somebody appropriately skilled to assist him during the meeting. I would also suggest that there would be support from his wife as he finds this quite supportive and that the meeting could be held in a neutral environment. It may also be of benefit for Mr Cox if any questions are given to him in advance so he can answer them accordingly. As described Mr Cox, due to his autistic spectrum disorder, can find communication in these situations quite difficult and to answer the questions directly.**

114. We recognise a degree of force in the respondent's submission that "*The claimant is competent and articulate in dealing with complex matters and putting his case forward (as his correspondence and handling of the trial illustrates)*". However, the claimant conducted the trial with the assistance of his wife, which was the primary adjustment sought (and refused) in the context of this meeting. A trial in front a of a neutral tribunal is also a different prospect to a hearing conducted by an employer, which the claimant considered, with some justification, had already handled things badly and seemed intent on denying him his rights and (at least as he perceived it) on dismissing him.

115. It is impossible to say, if a hearing had ultimately taken place with the PCP continuing to be imposed, whether the claimant would have felt unable to attend at all, whether he would have attended and acquitted himself well, or whether he would have attended and found himself unable to answer certain questions, or even triggered into a non-verbal state. However, in view of the content of the final occupational health report taken as a whole, and those paragraphs in particular, it is impossible to accept the respondent's submission that the disadvantage caused to the claimant by this PCP would have been minor or trivial.

116. Finding that the substantial disadvantage was present is not enough, we must also find that the respondent knew about it or could reasonably be expected to know about it. We fully accept that, at the relevant time, they were not in possession of the final occupational health report which contained that critical information.

117. However, the Tribunal considers that the respondent did know about the disadvantage. By this point is knew there was an autism diagnosis, it knew in broad terms that communication difficulties were an issue for the claimant and it knew that he had made an express request to be accompanied by a disability support worker and/or by his wife (emails of 26 February 2021). In view of those matters, we consider that comments such as those that would ultimately be made in the report cannot have come as a surprise, certainly not to Ms Sykes as an experienced HR representative. We consider that if she had reflected genuinely on the information in her possession at this point, Ms Sykes would have recognised that there was likely to be a substantial disadvantage to Mr Cox in the respondent sticking rigidly to its policy on who could accompany an employee to a disciplinary hearing, particularly in circumstances where the person Mr Cox would have chosen in compliance with that policy was not available.

118. Further, even if we are wrong that the respondent had ‘actual knowledge’ at this stage, we are firmly of the view that it had ‘constructive knowledge’ – that it could reasonably be expected to know of the disadvantage. This finding arises out of the factual findings we made about Mr Cox’s early disclosures of possible ASD and, in particular, the occupational health recommendation for an ASD assessment that was never actioned by the respondent. This was a respondent that was content to ‘stick its head in the sand’ about a disability that had been clearly flagged to it. Only when, faced with potential dismissal, Mr Cox went to considerable personal expense and effort to secure a private diagnosis, did the respondent begin to pay any attention to the issue, and even then there was still a huge reluctance to take the time to properly assess what the condition meant in respect of the disciplinary allegations and Mr Cox’s participation in the disciplinary process. This respondent could reasonably have been expected to educate itself about Mr Cox’s condition and take that into account in its decision making at a much earlier stage – and certainly by the point in late February where it was refusing to make even the relatively minor adjustment of allowing Mr Cox’s wife to accompany him to a disciplinary hearing.

119. We do not consider that the stress and anxiety which arose from this refusal is properly characterised as being the disadvantage which the statute requires us to identify. Rather, they are the natural consequences of the respondent’s refusal to make the adjustment which the claimant required.

120. We consider further below the fact that the meeting did not take place, and what that means for the complaint of failure to make reasonable adjustments.

Did the respondent take such steps as were reasonable to avoid the disadvantage? The reasonable adjustment which the claimant alleges should have been made was agreeing to and/or allowing the claimant to be accompanied by his wife and/or a disability support worker for the hearing arranged for 6 March 2019.

121. The respondent did not make this adjustment. To the contrary, by Mr Turkington's email of 28 February 2019, the respondent expressly rejected Mr Cox's request and refused to make an adjustment.

122. Again, we consider that Mr Cox's cause of action in respect of this claim arose at the point of that refusal. We took account of s. 123(3)(b) which provides (albeit for the purposes of the application of time limits in discrimination proceedings) that a failure to do something is to be treated as occurring when the person in question decided upon it.

123. The respondent's breach of its obligation to make reasonable adjustments had negative consequences for the claimant from the moment the decision was made – namely, it gave rise to the stress and anxiety referred to above. Those consequences were undoubtedly ameliorated by the fact that the hearing was later postponed for other reasons. This Tribunal considers that that amelioration is something that falls to be taken account of in assessing the appropriate remedy for this breach, rather than extinguishing the breach altogether.

Accompaniment for 1 April 2019

Did the respondent apply the PCP of allowing the claimant: only to be accompanied by a colleague or trade union official; or to be accompanied by only one of either a colleague/trade union official or the claimant's wife and/or a disability support worker? This is in the relation to the meeting arranged for 1 April 2019.

124. Following the postponement of the hearing scheduled for 6 March, a new date of 1 April was fixed on 22 March 2019. Initially, the PCP described above continued to apply. For example, by email dated 27 March 2019 the respondent confirmed that adjustments would not be made to the policy on right to be accompanied for the new hearing date.

125. Subsequently, on 28 March 2019 the respondent advised Mr Cox that he could be accompanied by his wife or another alternative colleague.

126. We accept the respondent's argument that it is an error to characterise this as an evolving PCP. The PCP always remained the same, what happened from the 28 March 2019 was that the respondent began to make adjustments to it in an *ad hoc* manner. Whether those adjustments were sufficient to discharge the duty which it was under is a separate question.

Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

127. We consider that the application of the PCP did put the claimant at a disadvantage (and that the respondent either know or could reasonably be expected to know of that disadvantage) for the reasons set out in paragraphs 111-120 above.

Did the respondent take steps as were reasonable to avoid the disadvantage? The reasonable adjustments which the claimant contends should have been made were:

(1) Agreeing when it was first requested, to the claimant being accompanied by his wife and/or a disability support worker for the hearing arranged for 1 April 2019; and/or

(2) Agreeing to the claimant being accompanied by his wife and/or a disability support worker, in addition to a colleague or trade union official, for the hearing arranged for 1 April 2019.

128. We will deal with the two proposed adjustments put forward in the List of Issues together. Firstly, we find that the respondent was in breach of the duty when it initially failed to make any adjustment to its policy at all. This followed on from its failure in respect of the meeting scheduled for 6 March and we base our conclusions on the reasoning set out above.

129. The second proposed adjustment arises out of the fact that Mr Turkington's email of 28 March 2019 (the first time there had been any softening of the respondent's stance on accompaniment) proposes that Mr Cox can bring his wife or a colleague, rather than bringing his wife in addition to a colleague. The Tribunal considers that it was the presence of Mrs Cox that was likely to be key. Mr Cox had emphasised in various emails about the value of her support and it was her that he chose to rely on for the purposes of presenting this claim. We find that the duty to make reasonable adjustments was satisfied once this concession had been made, and that the substantial disadvantage created by the PCP Mr Cox would be signifiucantly ameliorated by this step. Whilst a gross misconduct disciplinary hearing would be difficult for every employee, and particularly difficult for Mr Cox due to his ASD, we do not find that any further adjustment to this particular PCP would have done more to alleviate that difficulty.

130. In the circumstances, we find that the respondent's failure to make reasonable adjustments continued, in respect of the 1 April meeting, up to the 28 March, but not beyond that.

Next steps

131. This matter has been listed for a remedy hearing on 1st October 2021. The Tribunal will correspond with the parties separately regarding preparation for that hearing.

Employment Judge Dunlop

Date: 2 July 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: 21 July 2021

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FOR EMPLOYMENT TRIBUNALS

List of Issues

Employment Relations Act 1999

1. Did the respondent fail to postpone the hearing arranged for 6 March 2019, when the claimant requested that he be accompanied by Tom Clark who was not available and provided an alternative date (for example, in an email of 26 February 2019 at 16:26)?

2. Did the respondent fail to postpone the hearing arranged for 1 April 2019, when the claimant requested that he be accompanied by Tom Clark who was not available and provided alternative dates (for example in an email of 22 March of 16:06)?

3. If so, did the respondent breach section 10(4) of the Employment Relations Act 1999?

Equality Act 2010 – section 20 – duty to make adjustments

Withdrawing the disciplinary allegation on 13 February 2019

4. Did the respondent apply the PCP of not withdrawing a disciplinary allegation as soon as the employee provides information/a diagnosis from a registered medical practitioner which tends to show that he was a disabled person at the time of the event giving rise to the allegation?

5. Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

6. Did the respondent take such steps as were reasonable to avoid the disadvantage? The reasonable adjustment which the claimant contends should have been made was withdrawing the disciplinary allegation on 13 February 2019 when the claimant's full diagnosis was available.

Delaying the hearing arranged for 18 February 2019

7. Did the respondent apply the PCP of maintaining the date for a disciplinary hearing after an employee has provided information/a diagnosis from a registered medical practitioner which tends to show that he was a disabled person at the time of the event giving rise to the allegation?

8. Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

9. Did the respondent take such steps as were reasonable to avoid the disadvantage? The reasonable adjustment which the claimant contends should have been made was delaying the hearing arranged for 18 February 2019 more quickly than the respondent in fact did.

Delaying the hearing arranged for 6 March 2019

10. Did the respondent apply the PCP of maintaining the date for a disciplinary hearing after an employee has provided information/a diagnosis from a registered medical practitioner which tends to show that he was a disabled person at the time of the event giving rise to the allegation?

11. Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

12. Did the respondent take such steps as were reasonable to avoid the disadvantage? The reasonable adjustment which the claimant contends should have been made was delaying the hearing arranged for 6 March more quickly than the respondent in fact did or refraining from setting a date for this hearing until more evidence as to the claimant's health was obtained.

Delaying the hearing arranged for 1 April 2019

13. Did the respondent apply the PCP of maintaining the date for a disciplinary hearing after an employee has provided information/a diagnosis from a registered medical practitioner which tends to show that he was a disabled person at the time of the event giving rise to the allegation?

14. Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

15. Did the respondent take such steps as were reasonable to avoid the disadvantage? The reasonable adjustment which the claimant contends should have been made was delaying the hearing arranged for 1 March 2019 more quickly than the respondent in fact did or refraining from setting a date for this hearing until more evidence as to the claimant's health was obtained.

Accompaniment for 6 March 2019

16. Did the respondent apply the provision, criterion or practice ("PCP") of allowing the claimant only to be accompanied by a colleague or trade union official in relation to the meeting arranged for 6 March 2019?

17. Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

18. Did the respondent take such steps as were reasonable to avoid the disadvantage? The reasonable adjustment which the claimant alleges should have been made was agreeing to and/or allowing the claimant to be accompanied by his wife and/or a disability support worker for the hearing arranged for 6 March 2019.

Accompaniment for 1 April 2019

19. Did the respondent apply the PCP of allowing the claimant: only to be accompanied by a colleague or trade union official; or to be accompanied by only one of either a colleague/trade union official or the claimant's wife and/or a disability support worker? This is in the relation to the meeting arranged for 1 April 2019.

20. Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

21. Did the respondent take steps as were reasonable to avoid the disadvantage? The reasonable adjustments which the claimant contends should have been made were:

(1) Agreeing when it was first requested, to the claimant being accompanied by his wife and/or a disability support worker for the hearing arranged for 1 April 2019; and/or

(2) Agreeing to the claimant being accompanied by his wife and/or a disability support worker, in addition to a colleague or trade union official, for the hearing arranged for 1 April 2019.

Remedy

22. If the claimant succeeds, in whole or in part, the Tribunal will be concerned with issues of remedy and, in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.