EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100354/2017

Held in Glasgow on 1st, 2nd, 3rd, 4th and 9th May 2018.

Employment Judge M Whitcombe
Mr G Doherty
Mr J Burnett

Mr X — **Claimant**
In person

The Home Office (Border Force) — **Respondent**
Represented by:
Dr A Gibson (Solicitor)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows.

1. The claims for disability discrimination succeed in the following respects and the Employment Tribunal makes a declaration accordingly.

   a. The Respondent discriminated against the Claimant by failing to make a reasonable adjustment on or about 1st March 2016 when it terminated a period of detached duty at Glasgow Airport. The Respondent is ordered to pay compensation to the Claimant of £6,500 in respect of injury to feelings plus interest of £1,158 making a total of £7,658.

   b. The Respondent discriminated against the Claimant by failing to make a reasonable adjustment in that it failed to provide him with a suitably

designed and adjusted chair while on detached duties at Glasgow Airport. The Respondent is ordered to pay compensation to the Claimant of £850 plus interest of £146 making a total of £996.

2. The remaining claims for disability discrimination fail and are dismissed.

3. The Tribunal does not make a recommendation because it would not be appropriate to do so.

REASONS

Introduction

1. This is the reserved judgment of the Tribunal following a hearing to determine liability and remedy. In some respects the Tribunal reached a majority decision. We will indicate where that was the case. The majority, whose reasoning therefore represents the judgment of the Tribunal, were Mr Burnett and Employment Judge Whitcombe. Mr Doherty was in the minority. Our findings and reasoning were otherwise unanimous.

2. References in square brackets e.g. [56] are to pages of the agreed joint bundle of documents.

The parties

3. At all relevant times the Claimant was employed by the Respondent as a Border Force officer. He continues to be employed by the Respondent in that capacity at the time of writing. The Claimant's continuous employment with the Respondent and its predecessor organisations began on 1st January 2003.

4. Border Force was formerly the responsibility of HMRC. It was also at one time part of the now defunct UK Border Agency. It is currently an operational command of the Home Office. The title of the Respondent has been amended to that shown above in order to reflect those changes. Border Force is responsible for immigration and customs control at the UK border. The estimate of Mr Summers, the most senior witness from whom we heard, was that about 60% of the activities of Border Force in his area concern immigration, about 30% concern customs and about 10% concern other matters such as counter-terrorism, the detection of human trafficking, the detection of strategic exports and counter-espionage. Border Force has about 7,500 employees across the UK.

Claim and Response

5. By a claim form received by the Tribunal on 3rd March 2017 the Claimant brings a claim for disability discrimination comprising several alleged failures to make reasonable adjustments for his disabilities.

6. The Respondent denies all of those claims. A very brief holding response was filed on 10th April 2017. Fuller amended grounds of resistance were filed on 8th May 2017. Re-amended grounds of resistance followed on 21st September 2017. The issues arising are set out in more detail below under the heading "Issues to be Determined".

Representation

7. The Claimant represented himself at the hearing, although he had been represented by solicitors until 12th April 2018. Most of the preparation had therefore been done with the assistance of specialist solicitors. Mindful of the requirements of the overriding objective, we took various steps during the hearing to ensure that the Claimant was not unduly disadvantaged by his lack of legal experience or representation. We allowed him more latitude when questioning witnesses than we would have allowed an experienced

representative. We nevertheless intervened from time to time to avoid repetition, to ensure that the focus remained on the issues we had to decide and to ensure that the hearing concluded within its agreed allocation of time. We sometimes assisted the Claimant to formulate questions during examination in chief and cross-examination. When we did so we were careful to avoid straying over the line into acting as the Claimant's advocate. The themes and the broad nature of the questions were determined by the Claimant. We helped to put those questions into an appropriate form. Similarly, we frequently assisted the Claimant to elicit evidence in chief from the witnesses called by him without asking leading questions. We are grateful to Dr Gibson for obtaining certain documents during the course of the hearing. More than once we asked the Claimant and Dr Gibson to refrain from interrupting each other (or the Tribunal) in order to ensure that we could properly note what each of them was saying, and to ensure that the tone remained constructive and respectful.

Adjustments to the hearing

8. We also made adjustments to the hearing process in an attempt to alleviate disadvantages faced by the Claimant having regard to his disability.

   a. The Claimant found the tribunal chairs uncomfortable, so he was given a wider and more adjustable chair from the Employment Judge's room. The Claimant used that chair during the hearing.
   b. Witness statements had not been directed, but we allowed the Claimant to use notes amounting to a witness statement as a basis for his evidence in chief, having regard to difficulties he reported with memory and concentration. The Claimant also reported that the effects of medication had made him very tired on the day that he gave his own evidence.
   c. For the same reasons we encouraged the Claimant to make his own notes during the hearing and we gave regular explanations (repeated where necessary) of the procedure to be followed at the hearing and

of the reasons for our rulings on procedural matters. We made it clear that the Claimant had only to ask if he required us to recap any ruling made or explanation given.

d. We asked the Respondent to make its closing submissions before the Claimant made his, having regard both to the Claimant's difficulties with memory and concentration as a result of depression, and also to his lack of legal experience or representation. Those disadvantages compounded each other. Dr Gibson described our ruling as "very irregular" and asked us to provide written reasons for it. For the reasons already set out, we gave that direction in order to further the overriding objective and to make adjustments for the Claimant's disability of depression. If the Claimant were able to observe, hear and digest the Respondent's submissions before making his own, that would remind him of the points made against him and might also give him a helpful structure to adopt in his own submissions. As we observed when giving oral reasons at the time, conventions about the running order of evidence or submissions are only conventions. They are not rules of law or procedure and the basic principle, enshrined in rule 29 of the ET Rules of Procedure 2013, is that the Tribunal is able to manage its own procedure through general powers of case management in order to further the interests of justice. The weakness of any conventions about the order of evidence and submissions is demonstrated by the frequency with which they are departed from, and by the fact that Employment Tribunals adjudicating on equivalent disputes in England and Wales typically apply the opposite conventions about running order, while being prepared to depart from those weak conventions where appropriate. We gave Dr Gibson several days' notice of our direction that he should make his closing submissions prior to the Claimant making his, so there was no question of the Respondent being prejudiced by innocent reliance on assumptions about the "usual" order. We would have expected Dr Gibson to be able to accommodate our direction without disadvantage anyway, given his considerable experience.

Anonymity

9. For reasons entirely unrelated to the subject matter of these claims the Claimant was referred to during the hearing simply as "Mr X". He will not be identified further in these written reasons, in which it is also convenient to refer to him as "the Claimant", for obvious reasons. The relevant order was made on 5th January 2018 by EJ Garvie acting under rule 50(3)(b) of the ET Rules of Procedure. The reasons for it were discussed at a Telephone Preliminary Hearing on 21st December 2017.

10. No members of the press or public attended the final hearing, with the obvious exception of those called as witnesses. There were no applications to vary or discharge EJ Garvie's Order at any stage and it remains in force.

Issues to be determined

Disability

11. Although initially denied in the original response, there is now no dispute that the Claimant is a disabled person for the purposes of section 6 of the Equality Act 2010. He has Type 2 diabetes, consequential diabetic neuropathy, severe gout, knee and ankle swelling, leg pains, difficulties walking, medicated high blood pressure, sleep apnoea, back pain and severe anxiety and depression.

Allegations of discrimination

12. The claim form lacked the detail necessary to explain exactly what the Claimant complained of. The parties were ordered to agree a list of issues by EJ Kearns on 8th September 2017. Unfortunately, the list of issues agreed and included in the bundle of documents at [73-74] did little more than reflect the statutory language in relation to the duty to make reasonable adjustments.

While that was helpful as far as it went, it did not identify the dates and details of the alleged failures to make reasonable adjustments.

13. We were therefore careful to discuss, agree and record the scope of the factual allegations before hearing any evidence. That took some time. Having done so we read them back to the parties. The hearing commenced on that basis without any objections or consequential applications.

14. We should record one important respect in which the claim had narrowed. At one stage during the history of the case it had appeared that the Claimant intended to bring claims of direct disability discrimination under section 13 of the Equality Act 2010, and of discrimination arising from disability under section 15 of the Act (see the Claimant's completed case management agenda at [37-41], the Respondent's comments at [43] and the original amended grounds of resistance dated 8th May 2017 at [49-53]). However, neither type of discrimination allegation was pursued to the final hearing, which was solely concerned with alleged failures to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010.

15. The key allegations of failures to make reasonable adjustments were as follows.

a. An *alleged failure on two separate occasions to make reasonable adjustments in relation to the Claimant's place of work.*

i. The Claimant's "home port" was Birmingham Airport. He was twice posted to the staff of Glasgow Airport on "detached duty".

//. It was common ground between the parties that an employee's place of work is a "provision, criterion or practice" ("PCP") for the purposes of section 20 of the Equality Act 2010.

Hi. The Respondent disputes that it is also a "physical feature of premises" for the purposes of the same section, but given the

concession that it is a PCP it is not necessary to resolve that dispute.

iv. The Claimant's first period of detached duty in Glasgow was terminated on or about 1st March 2016 and he was required to return to his home port, Birmingham Airport.

v. A further period of detached duty at Glasgow Airport came to an end on or about 1st February 2017 when the Claimant was suspended pending the investigation of allegations of gross misconduct.

vi. The Claimant alleges a failure to make reasonable adjustments on both of the above occasions.

vii. The Respondent concedes that both decisions could in principle be part of a single act extending over a period for the purposes of the jurisdictional time limit in section 123 of the Equality Act 2010.

b. ***A failure to provide a car parking space within reasonable walking distance of the Claimant's place of work during January 2017 when he was on his second period of detached duty at Glasgow Airport.***

There is no equivalent allegation in relation to the first period of detached duty at Glasgow Airport in early 2016. The Respondent concedes that the duty to make reasonable adjustments arose in relation to parking arrangements, so the sole issue is whether that duty was breached.

c. ***A failure to provide a suitably adapted seat.***

In relation to the first period of detached duty at Glasgow Airport the Claimant alleges that no suitably adapted seat was provided at all, whereas he had previously been provided with one while working at Birmingham Airport. In relation to the second period of detached duty

at Glasgow Airport the Claimant accepts that an adapted seat was provided but alleges that it was broken and dirty and therefore unsuitable for use. Further, he alleges that the seat in question was unsuitable for use when working on immigration duties, such that he was without a suitably adapted seat whenever carrying out those duties. By the time of closing submissions the Respondent had abandoned its original argument that the duty to make adjustments in relation to seating did not arise in relation to duties in Glasgow, and the sole issue was therefore breach.

d. ***A failure to adapt the Claimant's duties.***

This arises from the preceding allegation. The Claimant argues that he should not have been required to carry out immigration duties unless and until a suitably adapted chair was provided for him to use when carrying out those duties.

16. The Respondent does not rely on the defence of lack of knowledge set out in paragraph 20(1), Schedule 8 of the Equality Act 2010.

Remedy

17. The Schedule of Loss claimed only compensation for injury to feelings. At the hearing, and apparently for the first time, the Claimant alleged that he had also lost earnings in the region of £18,000 as a result of disability discrimination. That was a significant development in the case and it was unclear to us how the Claimant's losses could have been that great even if it was assumed for the purposes of argument that all subsequent sickness absence was caused by unlawful discrimination. We emphasised the need for the Claimant to explain how that sum was calculated and to support the claim with evidence. We gave him time to do that and reminded him of the need to do so on subsequent days of the hearing. Eventually, the Claimant reached a considered decision to abandon that aspect of the claim. The

compensation sought was therefore once again limited to compensation for injury to feelings.

18. The Claimant also sought recommendations, although none were formulated in the claim form which seeks at [15] "a recommendation from the Employment Tribunal in line with the duties that the employer is presently failing to comply with".

Evidence

19. We were provided with an agreed joint bundle of documents running to just under 500 pages. Further documents were handed to us during the hearing.

20. All of the witnesses who gave oral evidence did so on oath or affirmation and were cross-examined. Witness statements had not been ordered in this case, although the Claimant had produced lengthy and detailed typed notes for his own use when giving evidence. In those circumstances, and with Dr Gibson's agreement, we treated that document as a witness statement in order to assist the Claimant to give his evidence. We regarded that as a reasonable adjustment given the Claimant's problems with memory and concentration as a result of his disability, combined with his lack of representation.

21. The Claimant called the following witnesses in addition to himself: Andrew Ewing (who began but did not conclude an investigation into the Claimant's grievance in 2016), Greig Chisholm (formerly a Senior Officer at Glasgow Airport) and William ("Billy") Johnston (a highly experienced Border Force officer based at Glasgow Airport and with whom the Claimant worked). All were present under witness orders and the first two gave evidence on the first day of the hearing to accommodate their personal circumstances. The Claimant had also obtained witness orders in respect of Paul Jones, Paul Soutar and Simon Williams but ultimately they did not give evidence.

22. We cautioned the Claimant at the outset regarding the risks of calling a witness who was likely to give evidence adverse to his own case. We explained that such a witness cannot normally be cross-examined by the party calling them, the limited basis on which a witness might be declared "hostile" in the strict sense, and the reality that Dr Gibson would have the considerable advantage of being able to cross-examine a witness arguably more closely identified with the Respondent's case than the Claimant's, so as to minimise the helpful effect of their evidence from the Claimant's point of view. We gave the Claimant a copy of some relevant extracts from the IDS Handbook on the issue. We allowed the Claimant some latitude on the first day of the hearing, but explained that we could not continue to allow him to call witnesses just to dispute their evidence and to contradict them, or to ask a series of leading questions. The Claimant also observed the effect of Dr Gibson's cross-examination of those witnesses. After some reflection overnight, the Claimant decided not to call Paul Jones, Paul Soutar or Simon Williams.

23. The Respondent called evidence from Emma Porter and Gordon Summers. At this point we will briefly explain the scope of their evidence.

a. Emma Porter was at the relevant time a Deputy Director in Border Force (North), which includes Glasgow Airport. She has since become an Acting Director for Border Force (South). She investigated and determined a grievance lodged by the Claimant in relation to his failure to secure a permanent position in Edinburgh. While that is not itself one of the allegations in the case, Emma Porter's investigation touched on some relevant matters as part of the background to her decision. Her proposal on 6th December 2016 was that the Claimant should have a second period of detached duty in Glasgow to run from 9th January 2017 to 9th April 2017. The Claimant undertook that detached duty between 9th January 2017 and 1st February 2017.

b. Gordon Summers is, and was at all relevant times, an Assistant Director for Border Force (North) based at Glasgow Airport. He gave evidence regarding the circumstances in which the Claimant's two detached duties at Glasgow Airport ended.

Findings of Fact

24. Having heard the evidence and the parties' submissions we made the following relevant findings of fact on the balance of probabilities. We have only made the findings of fact necessary to support our conclusions, and it was not necessary for us to resolve all of the factual disputes between the parties. We also wish to avoid any risk that the Claimant's identity might be revealed by extraneous background information. Some details have been left vague.

25. We have already set out above the details of the Claimant's admitted disabilities.

26. As noted above, the Claimant's continuous service with the Respondent and predecessor organisations began in 2003. By 2010, the Claimant was based at Birmingham Airport where he trained as a "cash specialist".

27. The Claimant originates from Scotland. He retained a house in the Glasgow area for the whole of the time during which he worked in other parts of the UK and further afield. The Claimant bought property in the West Midlands in 2009.

28. The Claimant has lived with depression since about 2004, but it was managed well with medication until 2012. Unfortunately, there was a significant setback in the Claimant's personal life in 2011-2012 when his marriage broke down shortly after his parents had both passed away. The Claimant's depression steadily worsened. The Claimant felt socially isolated and when each shift

finished his mood would deteriorate because he felt alone. Eventually he suffered what he called "a complete mental breakdown".

29. After the breakdown of his marriage the Claimant found himself homeless for several nights and slept in his car. He secured local authority housing in the West Midlands from 2012 to 2016.

30. The issue in this hearing was not so much the accommodation available to the Claimant in Scotland or when working in the West Midlands, but rather the place the Claimant made his main base and which represented the centre of his life. At some point in 2015 the centre of the Claimant's life moved from the West Midlands to the Glasgow area. After that, and although the Claimant still lived in the West Midlands when working, it was largely a base for work purposes only. Periods of leave or sickness absence were spent in the Glasgow area. For a while the Claimant attempted to commute between Glasgow and Birmingham on rest days, and sometimes even between shifts.

31. Some potentially important evidence emerges from a subsequent Occupational Health report dated 18th September 2015, which we will refer to slightly out of chronological order because of its relevance to the reason for the Claimant's relocation to Glasgow. The report states that the move back to Scotland had been at least partly on medical advice. The Claimant's own evidence was to the same effect, and the majority of the Tribunal accept that uncontradicted evidence on the balance of probabilities. The minority observes that the report merely records what the Claimant told the Occupational Health doctor and regards it as unreliable evidence. On that basis, the minority regards the Claimant's decision to move back to Scotland as a matter of free personal choice, and not as something done even partly on medical advice.

32. Having relocated to Scotland, the Claimant felt less socially isolated. He was supported by friends and other family members, although his ex-wife and child remained in the West Midlands.

33. The Claimant also benefitted from a good deal of specialist medical support from the local community mental health team near his home in Glasgow. The Claimant saw his GP fortnightly, a Consultant Psychiatrist every few months and a Clinical Psychologist every two weeks. On the basis of the views expressed in the Occupational Health report dated 18th September 2015 [124-126] we find that the medical support provided to the Claimant in the Glasgow area assisted a partial recovery from depression. Therapeutic relationships were formed to the Claimant's benefit.

34. On 2nd April 2015 the Respondent referred the Claimant to Occupational Health. By the time a report was written on 14th May 2015 [96-98] the Claimant had been back at work for about four weeks but was "a considerable way from being fully recovered". It appears that the Claimant had been absent from work mainly as a result of depression. In response to a specific question regarding adjustments, the report stated:

> *77 organisationally feasible, it would be beneficial if [Mr X] could be posted to the staff of Glasgow Airport. Since he lives near, this would enable him to take the medication that he has currently been given. Unfortunately, the requirement for him to drive or travel to Birmingham means that he has to cease taking two of the potentially most effective medicines for the treatment of his condition and is thus not deriving the full benefit from them."*

35. Another passage indicates that the Claimant felt he would be a risk to other road users if he drove after having taken his medication, and that he would miss his station if he took public transport. The report went on to suggest that the resolution of an ongoing disciplinary process would also assist. That

disciplinary process was concerned with an alleged failure to comply with attendance management processes.

36. On 27th May 2015 Jason Moore-Read (Senior Officer at Birmingham Airport) emailed Anne-Marie Symes (based at Glasgow Airport) to request a "short term posting" for the Claimant at Glasgow Airport. It would be funded by Border Force at Birmingham from 12th June 2015. The purpose, according to Mr Moore-Read, was to aid the Claimant's recovery and it would need to be "regularly reviewed to ensure the arrangement is working for all parties" [101].

37. In email correspondence on 12th June 2015 Craig Haynes (Higher Officer at Birmingham Airport) confirmed to Jason Moore-Read an agreement reached with Anne-Marie Symes in Glasgow [103]. The Claimant would begin detached duty in Glasgow on Monday 22nd June 2015 on a full-time basis, working the full roster of shifts. Mr Haynes would have weekly review meetings with the Claimant and monthly review meetings with Anne-Marie Symes in order to monitor the Claimant's progress and well-being. The placement was to be a three month temporary placement as part of "reasonable adjustments" to assist the Claimant with his health and recovery.

38. The understanding of Mr Summers, Assistant Director for Border Force based at Glasgow airport, was similarly that the Claimant was transferring to Glasgow as a "reasonable adjustment". He understood the arrangement to be temporary, but that there might be a possibility of a permanent transfer if a suitable opportunity arose. In his view, it was "dependent on good conduct". He had some concerns about the Claimant's conduct given that the detached duty was arranged at a time when the Claimant faced a disciplinary investigation in Birmingham.

39. Mr Summers told us that there were a number of especially difficult and time-consuming human resources issues within Border Force at Glasgow Airport at that time. Some officers had been in the Clutha Vaults bar at the time of the well-known fatal helicopter tragedy in November 2013. Two officers were

absent on long-term sickness and management also had to deal with issues of mental health, alcoholism, domestic abuse and capability. Morale was not good, performance was poor, the section was inefficient and some people did not want to be there. There had been a marked turnover of managers at Mr Summers' level: he was the fourth or fifth manager in that post in three or four years. There were similar issues at lower levels of management. Against that background, time was precious and management simply did not have the capacity to deal with "disruptive behaviour".

40. The Claimant started work in Glasgow in early June 2015. It was decided that his talents were best deployed in detection work so he was paired up with Mr Johnston. Results were impressive, especially in respect of cash detection and the detection of cigarettes.

41. Mr Moore-Read observed in an email dated 15th June 2015 [104] that Glasgow did not then have a vacancy for which the Claimant could apply, but that a temporary move was agreed in the light of Occupational Health reports. The Home Office Departmental Disability Adviser Sue Saunders MBE and Jane Bevan (HR Case Manager) had advised that the circumstances appeared to meet the criteria for a "reasonable adjustments move" (see [104, [107] and [109]). The email concludes by comparing the situation with that of other employees who had undertaken similar placements for similar reasons in the past.

42. Border Force at Birmingham Airport continued to operate with less than their full headcount while also paying for the Claimant's detached duty in Glasgow. It is normal that detached duties are funded by the home port. For that reason, Mr Moore-Read was initially of the view that the Claimant would have to return to Birmingham at the end of the three month placement if there were no vacancies in Glasgow for which he could apply. In early August 2015 no vacancies were expected in Glasgow for the foreseeable future.

43. We have already referred above to certain time-consuming HR issues that were occupying management in Glasgow. We heard no evidence regarding the position in Birmingham. We are therefore unable to make any findings as to the relative pressures on management in Birmingham, or the ease with which management in Birmingham could have dealt with issues of conduct or reasonable adjustments arising in the Claimant's case. In those circumstances we are not prepared simply to infer that pressures on management time must have been more acute in Glasgow than in Birmingham. There is no evidence from which we could properly draw such an inference and it would in truth be speculation. The Respondent could have led evidence to that effect but it did not. Our finding is therefore that it has not been established on the balance of probabilities that other pressures on management time made it easier to manage the issues arising in the Claimant's case in Birmingham than in Glasgow. That finding is consistent with the fact that management in Border Force North had the capacity to take over the investigation and resolution of the Claimant's subsequent grievance from an officer based in the Midlands (see below).

44. Towards the end of the initial three month period of detached duty, a further report was obtained from Occupational Health dated 18th September 2015 [124-126] "regarding the requirement for [the Claimant's] existing adjustments to continue". This report has already been referred to above.

45. The report notes, without adverse comment or scepticism, that the Claimant had said that he moved back to Glasgow on the advice of his treating clinicians so that he could be supported by friends and family. The Claimant continued to have regular input from the local community mental health team including seeing a psychiatrist every few months and a clinical psychologist every two weeks. Other health conditions were well-controlled and were not then impacting upon fitness to work. The report continued in the following terms:

> *"In summary, [Mr X] is continuing to recover from depression, the move to Glasgow appears to have been beneficial to him in regard to aiding this recovery and allowing him to access treatment locally. I would have concerns about returning him to his contractual role in Birmingham as this is likely to have a negative impact on his mental health for a number of reasons, including the fact that all his treatment is currently well established and is in Glasgow and transferring this treatment to local services in the Birmingham area is likely to be a stressor in itself. If he were to move back to Birmingham, he would be socially isolated. This is in itself a risk factor for deterioration for worsening mental health. [Mr X] also indicates that following the disciplinary he has lost trust and feels relationships have broken down that would make it difficult for him to return. This perceived work stressor is also a risk factor for deterioration of mental health. I would therefore recommend that you explore the operational feasibility of [Mr X] remaining at Glasgow airport on a longer term basis. Mr X is aware whether any recommendation can be implemented or not depends on his employer's operational circumstances. "*

46. In response to specific questions raised in the referral, the report stated that the Claimant appeared to be on a trajectory of recovery with regard to his symptoms of depressive illness and that the recommended adjustment was for the Respondent to consider the operational feasibility of the Claimant remaining at Glasgow airport for the longer term. The report concluded by stating that it was "highly likely" that the Claimant's depressive illness would be considered a disability under the Equality Act 2010. Against that background the Respondent was asked to consider the reasonableness of the Claimant remaining at the Glasgow airport site for the reasons outlined in the report.

47. Jason Moore-Read wrote to the Claimant on 19th October 2015 [134] in the light of the Occupational Health report dated 18th September 2015. The Claimant's period of detached duty was extended until 22nd December 2015,

amounting in effect to a six month temporary placement at Glasgow airport. It was stated to be a "reasonable adjustment" to assist the Claimant's return to work. The same letter recorded that the Respondent had tried but failed to identify a full-time position for the Claimant in the Glasgow area. Border Force North was not at that time recruiting for officer posts in Glasgow, nor did they anticipate any vacancies arising within the foreseeable future. For that reason the Claimant was formally notified that he would need to return to his substantive post at Birmingham airport with effect from 29th December 2015. The Claimant was also advised that if he still wished to live and work in the Glasgow area he should register on the civil service jobs website for all government department vacancies and actively apply for any jobs that arose. The Claimant was also asked to use the next few months to take steps to minimise his daily travelling.

48. However, and despite the terms of the above letter, on 18th November 2015 [135] Anne-Marie Symes asked Jason Moore-Read whether it would be possible to extend the Claimant's detached duty in Glasgow by one further month, until 22nd of January 2016. During January 2016 the Respondent was considering its workforce and business planning. In an email sent on 11th January 2016 [142] Jason Moore-Read considered that there was no sense in requesting that the Claimant should return to Birmingham while that planning work was ongoing. He requested that, in the absence of any firm vacancy numbers, the Claimant's secondment in Glasgow could continue until the end of February 2016. In a further email sent later the same day [141] Jason Moore-Read thanked his colleagues in Glasgow for working hard to make the secondment work. He said that if there were any concerns regarding the Claimant's conduct then the Claimant should be advised that the secondment would cease with immediate effect. Anne-Marie Symes replied confirming that she had explained to the Claimant that he had to ensure that every conversation he had was in line with the Respondent's standards.

49. At around the same time the Claimant became aware that certain individuals were being interviewed for officer roles in Glasgow. However, the Respondent's explanation, which we accept, is that at that stage there was still no formal approval for recruitment. That was the gist of Mr Summers' evidence and it is supported by the email dated 15th February 2016 which he wrote at the time [169]. We find that the purpose of those interviews was to populate a list of candidates suitable for appointment, should approval to recruit and the necessary funding be forthcoming. We accept that no candidates were appointed to posts in Glasgow, whether in January 2016, or at any other time prior to the end of the Claimant's first period of detached duty in Glasgow on or about 1st March 2016. We regard the email dated 1st February 2016 [300] as a reliable summary of the true position.

50. On 24th February 2016 [174-175] Mr Summers wrote to Mr Moore-Read saying that Anne-Marie Symes had spoken to the Claimant on a number of occasions about his behaviour following complaints from members of the public and Border Force partners at Glasgow airport. At the time of writing, Mr Summers had recently received two more complaints, one from a member of the public and another from a partner organisation. He said, *"given the persistent level of similar complaints and the fact that these appear to have continued despite informal action being taken by local managers I will know [sic] have to consider whether to instigate a misconduct investigation. "* He envisaged that it might be necessary to curtail the Claimant's detached duty before the end of the agreed period.

51. In response, Mr Moore-Read wrote saying that he was very sorry that the Claimant's behaviour had not been of the high standard expected, that Anne-Marie Symes had been extremely accommodating, that he was very grateful for the support provided, and that it had been made clear to the Claimant that if any misconduct issues arose, the detached duty placement would be curtailed [174],

52. On 2nd March 2016 Greig Chisholm emailed Mr Moore-Read in a similar vein [176]. He referred to two recent complaints arising from incidents on 4th February 2016 and 11th February 2016 respectively, and to a "recurring theme" of standards of behaviour falling below that expected of staff. Consequently, Mr Chisholm had met with the Claimant that day and informed him that the detached duty placement at Glasgow Airport would be curtailed such that the Claimant would report back to Mr Moore-Read at Birmingham airport on 9th March 2016.

53. At this point it is appropriate to summarise the complaints made about the Claimant to managers at Glasgow Airport during the relevant period. They are set out at [255-256].

a. On 8th October 2015 a complaint was received from the Emirates Airport Services Manager for Glasgow Airport regarding aggressive questioning by a Border Force officer, subsequently identified (allegedly) as being the Claimant.

b. On 13th October 2015 a formal written complaint was received from a passenger concerning the Claimant's behaviour towards her on 16th September 2016. However, when a Higher Officer investigated she found no evidence that the Claimant had acted unprofessionally. No further action was taken.

c. On 2nd November 2015 a written complaint was received from Detective Inspector Bob Smith of Police Scotland after a passenger complained about the manner in which she had been spoken to. That passenger had complained about someone who had been using Police Scotland podiums and had therefore assumed that the person concerned was a police officer. However, DI Smith identified the Claimant as having been the relevant person, and therefore asked that the Claimant should not use Police Scotland podiums in the future.

The Claimant was spoken to about that incident by Anne-Marie Symes and no further action was taken.

d. On an unspecified date in November 2015 the Claimant was alleged to have used uncouth language during a debrief for an operation in Holyhead. Once again, Anne-Marie Symes spoke to the Claimant about that incident and no further action was taken.

e. On 22nd of February 2016 a complaint was received from a passenger (Mr Mullen) about the way in which he and his wife had been treated when returning from Lanzarote. The complaint was passed to Greig Chisholm who maintained that he had investigated it before concluding that an apology should be offered to the passengers. However, Mr Chisholm did not inspect the Claimant's notebook, which suggests to us that any investigation carried out was far from thorough. Further, and although Mr Chisholm maintained that he had spoken to the other officer present, we find that he did not. We make that finding because the other officer concerned was William Johnston who gave entirely credible evidence at this hearing. He firmly denied having been spoken to by Mr Chisholm as part of any investigation, and said that in fact he, Mr Johnston, had been the officer who dealt with the couple who had made the complaint. We therefore conclude that Mr Chisholm cannot have spoken to the other officer on duty or else he would have been aware of that key aspect of Mr Johnston's evidence. The omission to speak to Mr Johnston is also consistent with the failure to examine the Claimant's notebook.

f. On 24th February 201 6 a complaint was received from Sean Kelly, the Ryanair Base Captain at Glasgow Airport. The complaint was passed to Greig Chisholm for investigation on 7th March 2016. Once again, Greig Chisholm did not review the Claimant's notebook nor did he speak to any officers who might have witnessed the incident. We make those findings for the same reasons as set out above in relation to the

preceding complaint. This was the final incident prior to the termination of the Claimant's first period of detached duty in Glasgow. Mr Summers described this complaint as "the straw which broke the camel's back" given that two complaints had been received within a day or two of each other.

g. On 10th March 2016 a complaint was received from a passenger (Mr Thompson) about the fact that he was stopped and asked questions by certain Border Force officers. That complaint was investigated but no evidence was found that the officers involved (one of whom was the Claimant) had acted inappropriately in any way. No further action was taken. It is important to note that although this allegation related to an incident prior to the termination of the Claimant's first period of detached duty in Glasgow, it did not come to light until 10th of March 2016, by which time the Claimant's detached duty had ended.

54. Mr Summers' summary of the position was that the complaints received on 22nd February and 24th February 2016 were for management in Birmingham to deal with. All earlier complaints had already been "resolved informally" by managers in Glasgow and were not ongoing as far as he was concerned.

55. On 9th May 2016 the Claimant submitted a formal grievance regarding the refusal of a Workplace Reasonable Adjustment Move from Birmingham airport to Edinburgh Airport. Andrew Ewing of Border Force Central was given the job of investigating that grievance.

56. Mr Ewing received advice from Paul Jones, HR case manager, dated 3rd August 2016 [220]. The advice received can be summarised as follows. There appeared to be some serious and consistent issues in relation to the Claimant's behaviour. He had been the subject of a series of complaints from partners and members of the public. There were outstanding matters of conduct which required further investigation. There were issues of conduct and behaviour that needed to be addressed effectively by the Claimant's

managers before he would be deemed suitable for transfer to Edinburgh. The Claimant considered that he had not been given a chance to defend himself against the allegations and that they were only being raised in order to prevent his move. Occupational Health advice dated 18th September 2015 indicated that the Claimant was likely to be considered disabled on account of his depressive illness. It also advised that a move to Glasgow would be beneficial, and that the doctor would have concerns for the Claimant's mental health if he returned to Birmingham. The Claimant was likely to be considered disabled and Border Force had a legal duty to consider and to attempt to implement reasonable adjustments where possible. "Robust reasons" would be needed not to implement them, which would be difficult to advance at any employment tribunal on the basis of the information then available. Mr Jones understood that an investigation was never held into the complaints about the Claimant. On that basis he thought it would be difficult for the Respondent to argue that it was reasonable to reject the Claimant's transfer based on misconduct given that it was never substantiated at a hearing. Rejecting the move was described as "high risk". Mr Jones was concerned that there could be an employment tribunal claim, with no cap on compensation, which would be "difficult to defend given the OH advice and that no disciplinary hearing has established guilt". Mr Jones thought that it could be argued that the issues of conduct and disability should have been treated separately by the business, and a move considered on the merits of Occupational Health advice alone.

57. Mr Ewing met with the Claimant on 10th August 2016. Notes of the meeting are at [224-226].

58. Mr Ewing wanted to resolve the grievance as quickly as possible. Mr Ewing's preliminary conclusion was that the principles of natural justice had been breached. Issues of conduct and discipline had, in his view, been conflated with issues of reasonable adjustments for disability. It was also his provisional view that misconduct enquiries had not been carried out properly. He applied what he called the "grievance consideration test". In essence, that test was

whether the allegation was serious enough to involve potential employment tribunal proceedings. He felt that test was satisfied. Consequently, a formal decision maker and investigation manager would be appointed [235].

59. On 2nd September 2016 Mr Ewing wrote to Adam Scarcliffe who had refused the Claimant's desired move to Edinburgh Airport [236-237]. That letter informed Mr Scarcliffe that a formal investigation would be conducted by Jodie Mason who might wish to take a statement from Mr Scarcliffe in order to establish the facts of the case.

60. What happened next is not entirely clear but Mr Ewing's role rapidly came to an end, as did that of his appointed investigator Jodie Mason. By 12th September 2016 the investigation and resolution of the grievance had been handed over to Emma Porter, then a Deputy Director with Border Force (North). Clearly Border Force (North) preferred to conduct the investigation themselves, a position somewhat at odds with their argument before us that they had insufficient resources to expend management time on the Claimant, and that his home port (or region) were best placed to carry out any investigations into misconduct.

61. Emma Porter took nearly 3 months to reach her decision on 6th December 2016 before finally signing it off on 14th December 2016. Notes of her findings and reasoning are at [244-248]. She did not uphold the grievance, although she did propose a resolution which the Claimant welcomed.

62. Emma Porter's view was that the Claimant's application for a move to Edinburgh had properly been refused given information received regarding a number of formal and informal complaints while the Claimant had been working at Glasgow Airport. However, Emma Porter noted that the complaints had not been raised formally with the Claimant and that no further action had been taken once he returned to Birmingham. The Claimant disputed that managers had spoken to him when formal and informal complaints were

received, and although there was evidence of at least one of the informal complaints being discussed with the Claimant there was limited evidence in relation to the others. There was no evidence of formal management notes being kept. That was attributed to the informal nature of the detached duty arrangement and a lack of clear parameters as to the division of management responsibility between Birmingham and Glasgow. Given the time that had passed between receipt of the complaints and the resolution of the grievance it was not considered appropriate to revisit the complaints at that time. Emma Porter therefore proposed another period of detached duty at Glasgow Airport running from 9th January 2017 to 9th April 2017. Once again, that detached duty would be funded by Birmingham. Clear parameters would be set regarding responsibility for day-to-day management, the behaviours and standards of conduct expected while on duty, and regular documented discussions about performance.

63. In cross-examination Emma Porter agreed with the Claimants suggestion that "leaving [him] in Birmingham placed [him] at a substantial disadvantage when [his] treatment was in Glasgow", and said that was why she arranged for a further period of detached duty in Glasgow. She did not wish to reopen the complaints given the passage of time since the alleged incidents.

64. Mr Summers told us that he was “not best pleased” with Emma Porter’s conclusion. Nevertheless, he accepted it. Arrangements were made for the Claimant to return to Glasgow for a second period of detached duty.

65. As a result of that grievance outcome the Claimant began a second period of detached duty at Glasgow Airport on 9th January 2017. For all practical purposes it came to an end on 1st February 2017 when Mr Summers was informed by management in Birmingham that they were initiating an investigation into an allegation against the Claimant. In broad summary, the core allegation was that the Claimant had used a false identity to obtain social housing in the West Midlands. The detached duty in Glasgow was not formally terminated on 1st February 2017, it merely came to an end for all

practical purposes precisely because the Claimant was suspended from work. The second period of detached duty eventually expired without review or extension on 9th April 2017, at which point the Claimant remained suspended pending the conclusion of a disciplinary process.

66. The outcome of the disciplinary process was that two of the allegations against the Claimant were upheld. A final written warning was issued in June 2017, initially for a period of two years, but reduced to one year following an appeal.

67. We do not find it necessary to make any findings on the issue of security clearance, which both parties ventilated at some length during the evidence. The Respondent accepted that it could only be relevant to remedy and appeared to deploy the argument in order to forestall any possibility of a recommendation if the Claimant were to be successful.

68. The Claimant was adamant that his security clearance had been extended and that he retains security clearance at the present time. The Respondent's case was that the Claimant had lost his security clearance such that it was difficult to employ him in any operational role at all whether in Glasgow, Birmingham, or elsewhere.

69. The Claimant showed us a letter which seem to support his case on this point. The Respondent did not support its case with any documentary evidence although such evidence ought to have been readily available. Mr Summers said that he had seen relevant emails supporting his view that security clearance had been lost but we were not shown those emails.

70. If it were necessary to make any findings on the point then given the Respondent's failure to produce the emails to which Mr Summers referred we would prefer the Claimant's evidence on the balance of probabilities. However, it is not necessary to make findings on this matter in order for us to

reach our conclusions and we therefore prefer to make no finding of fact on what has proved to be a controversial but ultimately irrelevant matter.

71. Within a couple of days of the Claimant's suspension further Occupational Health evidence became available from Dr Christopher Ide dated 3rd February 2017 [430]. Once again, the doctor considered that it was likely that the Claimant was disabled for the purposes of the Equality Act 2010. He went on to state,

> *"the most pertinent adjustment would be that he be permanently stationed in the Glasgow area, since all the clinics that he attends, his main home and other sources of social support, are located in the area. I realise that it is for the employer to decide to what extent this is feasible, but if it were possible for this to happen, then I think it likely that [Mr X's] mood would improve and this would in consequence lead to him taking a greater interest in getting control of his multiple pathologies, thus improving his general quality of life and his ability to discharge the duties required of him"*

72. Later the report states, "*I believe that if Mr X was required to work at Birmingham, then this would be detrimental to his mental health and would likely lead to a continuing deterioration in his general well-being"*

73. Although further Occupational Health evidence dated 29th November 2017 has been obtained since then [460], we do not find it necessary to summarise it since it post-dates the allegations of discrimination in this case by a considerable period.

74. We will set out some additional findings of fact relevant to the issues of parking and seating in the course of our reasoning and conclusions.

Relevant law

75. An ET shall take into account the EHRC Code of Practice on Employment (201 1) where it appears to the ET to be relevant (section 15(4) of the Equality Act 2006). We will make some references to that Code below.

76. The duty to make reasonable adjustments arises in the circumstances set out in section 20 of the Equality Act 2010. The following principles can be found in section 20(3), (4) and (5).

77. Where a provision, criterion or practice of the employer (or a physical feature of premises, or the lack of an auxiliary aid) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the duty is to take such steps as it is reasonable to have to take to avoid the disadvantage, or to provide an auxiliary aid.

78. In ***Secretary of State for Work and Pensions (DWP) v Higgins*** [201 4] ICR 341 and ***Environment Agency v Rowan*** [2008] ICR 218 the EAT reminded employment tribunals that it is necessary to make specific findings identifying the following matters:

a. the relevant provision, criterion or practice ("PCP") or the physical feature of premises occupied by the employer;
b. the persons who are not disabled with whom comparison is made;
c. the nature and extent of any substantial disadvantage suffered by the employee;
d. any steps it would have been reasonable for the employer to take.

79. The concept of a "PCP" is not defined in the Equality Act 2010 but it is well established that is of broad scope. Paragraph 6.10 of the Code of Practice says that the term should be construed widely and that it would include any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.

80. A "substantial disadvantage" is one which is more than minor or trivial (see section 21 2(1) of the Equality Act 201 0 ("General Interpretation"). It has often been said that the threshold is therefore set deliberately low. Whether such disadvantage exists in a particular case is a question of fact, to be assessed on an objective basis (paragraph 6.15 of the Code).

81. So far as comparators are concerned, it should be remembered that the approach is not the same as that in claims of direct discrimination, and that it is therefore unnecessary to identify or to construct a comparator or a comparator group whose circumstances are the same or nearly the same as those of the disabled person. The purpose of the comparison is to establish whether it is because of the disability that a particular PCP, physical feature of premises or lack of an auxiliary aid disadvantages the disabled person in question (paragraph 6.16 of the Code).

82. ***Griffiths v Secretary of State for Work and Pensions*** [201 7] ICR 160 (CA) confirmed beyond doubt that the "like for like" comparison considered in ***Lewisham LBC*** v ***Malcolm*** [2008] AC 1399 (HL) is inappropriate in reasonable adjustments cases. The question is simply whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage in certain circumstances "does not eliminate the disadvantage if the PCP bites harder on the disabled [person]" or a category of disabled people than it does on non-disabled people.

83. It is therefore no answer to say that there is no disadvantage because all people are treated alike, or that the same rules apply to all. The whole premise of the duty is that the disabled employee may be disadvantaged by the application of common rules. Unlike other forms of discrimination, the employer may be obliged to take positive steps which involve treating the disabled employee more favourable than others are treated to remove or

alleviate the consequences of the disability (see for example ***O'Hanlon v Revenue and Customs Commissioners*** [2007] ICR 1359 (CA), the judgement of Elias P in the EAT in the same case at [2006] ICR 1579 para 56 and also ***Griffiths*** (above)).

84. Paragraph 6.28 of the Code of Practice lists some of the factors which might be taken into account when considering reasonableness, although there is no duty on a Tribunal to consider every factor listed in the Code (see ***Secretary of State for Work and Pensions (DWP) v Higgins,*** above). Ultimately it is an objective test depending on all the circumstances of the case (paragraph 6.29 of the Code and ***Morse v Wiltshire County Council*** [1998] IRLR 352).

85. The duty to make adjustments is confined to those which are "job related" and not every failure to make an arrangement which deprives an employee of a chance to be employed is unlawful ***(Kenny v Hampshire Constabulary*** [1999] IRLR 76). It would almost certainly not extend to the provision of a carer to assist with personal toilet needs while at work, or to the provision of transport to get to work from home. Such adjustments would certainly address personal needs, but they would not be job-related.

86. The Respondent relied heavily on an unreported first instance decision of an employment tribunal in ***Todd v HM Prison Service*** (1500052/2007 and 1500667/2007), which was described as being "on all fours" with this one. The judgment and written reasons of the employment tribunal in that case were not available to us, and the Respondent relied on the summary in the IDS Handbooks (see for example para 4.21, page 152 of the 2010 Disability Discrimination Handbook). Because Dr Gibson relied so heavily on ***Todd,*** and because we have reached a majority decision, we will give rather fuller reasons than might normally be sufficient to deal with the decision of another ET.

87. According to the summary in the IDS Handbooks, Mr Todd suffered from clinical depression. He got a job at Whitemoor prison in Cambridgeshire but did not move from his home in West Yorkshire. The prison service paid his lodging and travelling costs. Eventually, Mr Todd applied for a transfer to a prison nearer his home because he believed that being closer to family and friends who offered support would aid his recovery. No suitable vacancy was found and he was ultimately dismissed. Before the ET, one of his arguments was that it would have been a reasonable adjustment to transfer him without competitive interview to a role at a prison in Yorkshire. The ET held that the duty to make adjustments did not arise because it was Mr Todd's personal choice not to move near Whitemoor. The employer was not under a duty to make adjustments for the (laudable) purpose of helping to improve an employee's medical condition. None of the job-related requirements at Whitemoor placed the Claimant at a substantial disadvantage. The disadvantages arose from personal choices as to his living arrangements, medical practitioners and, from time to time, partners.

88. The minority essentially agrees with Dr Gibson that ***Todd*** is on all fours with this one, while acknowledging that the Tribunal is not bound to follow it.

89. The majority take a different view and make the following observations.

a. ***Todd v HM Prison Service*** is a decision of another employment tribunal, and therefore it is not binding on us. It might be persuasive in some circumstances but it is not a precedent.

b. The persuasive weight is difficult to ascertain. It is difficult to be certain that we have correctly understood the full reasoning of the employment tribunal in ***Todd*** in the absence of a copy of its reasons. If any principles of general application emerge, it is not necessarily clear what they are. We are uncomfortable relying on a summary in the IDS Handbook as an alternative to the full judgment and reasons.

c. The IDS Handbook does not indicate that Mr Todd appealed the decision. Curiously, and despite its longstanding presence in the IDS Handbooks, it appears that the case has never been considered or commented upon by the EAT in subsequent cases. Neither this Tribunal nor Dr Gibson could find any appellate case which had referred to ***Todd*** at all. The reasoning therefore lacks the endorsement of the EAT.

d. The majority consider that the essential question is always whether the relevant PCP put the disabled person at a disadvantage which was more than minor or trivial. It is not clear that the tribunal in ***Todd*** maintained a focus on that question, unless it was effectively saying that the effect of personal choices was such that the PCP caused no disadvantage at all, or one which was only minor or trivial.

e. If the tribunal in ***Todd*** reasoned that all of the disadvantage experienced by the disabled person must be attributable to the PCP and nothing else, then we regard that as a legally erroneous approach which we decline to follow. There is nothing in the statute to support that approach, which simply requires a focus on the extent of the disadvantage caused by the PCP. There is no requirement that it should be the sole or main cause of disadvantage.

f. ***Todd*** is also distinguishable on its facts. In Mr Todd's case he had always lived in the same home location and had never moved from it. That can be contrasted with the present case in which the Claimant formerly worked in one location but was moved to another workplace as part of a reasonable adjustment (or so those acting at the time believed). A further difference is that, on the findings of the majority, the Claimant moved the centre of his life to the Glasgow area partly on medical advice, and it was not a free choice.

g. Respectfully, the majority think that the tribunal in ***Todd*** was wrong in at least one important respect, when it said that none of the job-related requirements in Cambridgeshire placed Mr Todd at a substantial disadvantage. One of those "job-related" requirements was, very obviously, the requirement to attend work at a location in Cambridgeshire. That plainly put Mr Todd at a disadvantage which was more than minor or trivial, in that it meant that he had to lodge a great distance from the sources of support which would aid his recovery. It is not obvious to us from the case summary how that disadvantage could instead be ascribed entirely to personal choices, or to such an extent that the role of the PCP was no more than minor or trivial. That does not necessarily mean that in our view Mr Todd had a strong claim. Whether it was reasonable for the employer to make the adjustment sought by Mr Todd is an entirely different matter and it is easy to see why it might not have been reasonable on those facts, but the majority of this Tribunal think the tribunal in ***Todd*** was wrong to find that no duty to make adjustments arose at all.

Submissions

90. The parties made written submissions. The Respondent produced written submissions first, and the Claimant then inserted his comments in capitals in another version of the same document.

91. Dr Gibson said that he had little to add orally but that he wished to add emphasis. An hour of emphasis was added orally, but no new points were made and the Respondent's written submissions are a sufficient summary of its argument. The Claimant made brief oral submissions.

92. Rather than add to the length of these reasons by setting out the submissions of each party in full, we will instead deal with them as appropriate in the course of our own reasoning below.

Reasoning and Conclusions

(1) Termination of the first period of detached duty in Glasgow

(a) Whether the duty to make adjustments arose

93. On behalf of the Respondent, Dr Gibson argued that the duty to make adjustments in respect of the Claimant's place of work did not arise at all. That argument is entirely open to him, even though the Respondent's managers thought that they were under such a duty at the time and received advice to that effect. The duty to make reasonable adjustments does not arise merely because managers think or assume that it arises, or act as if it did out of an abundance of caution.

94. Applying the ***Higgins/Rowan*** approach (see above), we find as follows.

a. The relevant PCP was the requirement that the Claimant should work in Birmingham rather than in Glasgow. For present purposes, it applied to the Claimant on or about 1st March 2016.

b. On the issue of substantial disadvantage, we reached a split decision.

i. By a majority, the disadvantage to which the Claimant was put by that PCP was separation from important networks of social support and medical support. On the occupational health evidence, such separation was likely to cause an adverse effect on health and well-being. It disrupted therapeutic relationships and exposed the Claimant to particular stressors, which constituted "risk factors" for deteriorating mental health. Someone who was not disabled would not face the same risk of a deterioration in mental health if required to work a long distance from networks of social and medical support. The majority therefore found that the PCP of place of work put the

Claimant at a disadvantage which easily reached the threshold of "more than minor or trivial", and that it was therefore "substantial" for the purposes of section 20 of the Equality Act 2010.

ii. The minority view is that the PCP did not put the Claimant at any disadvantage at all, or at any rate no more than a minor or trivial disadvantage, if any. The minority view, essentially mirroring the reasoning of the employment tribunal in ***Todd,*** is that the disadvantages faced by the Claimant were caused not by the PCP, but rather by a free personal choice by the Claimant to base the centre of his life in the Glasgow area.

95. The majority therefore find that the duty to make adjustments did arise from the PCP that the Claimant should work in Birmingham rather than Glasgow. The minority find that no duty to make adjustments arose on the facts of this case.

96. We add that we unanimously reject the Respondent's submission that the adjustment sought by the Claimant in this case is equivalent to that in ***Kenny v Hampshire Constabulary*** [1999] IRLR 76 (above), and that no duty to make adjustments arises for that reason. In ***Kenny*** the adjustment in issue was the provision of someone to help with personal care needs. Here the Claimant argues for an adjustment to his place of work. In our judgment there is a world of difference. An adjustment to the place of work is plainly a work-related adjustment. It is not a matter of personal care.

(b) Whether reasonable steps were taken

97. The next issue is therefore whether the Respondent took such steps as it was reasonable to have to take to avoid the disadvantage, so as to discharge the duty arising under section 20 of the Equality Act 2010. That is a multi-faceted

assessment of the facts, but by way of guidance we bear in mind the factors listed in para 6.28 of the EHRC Code of Practice on Employment (201 1).

98. First, we consider the benefits of the adjustment so far as the Claimant was concerned. We are entirely satisfied that a detached duty in Glasgow was and would continue to have been effective in alleviating the disadvantage faced by the Claimant. It would mean that therapeutic relationships were not disrupted, it would mean that social support networks were close at hand, it would avoid the Claimant being exposed to additional stressors and it would maintain conditions which had led to improvements in his mental health. The benefits to him were significant and valuable. The proposed adjustment would remove some of the disadvantages faced by the Claimant having regard to his disability and the location of his "home port" in Birmingham.

99. Next, some background considerations. The Respondent is a large employer with considerable resources. It operates over many sites and has a presence at Glasgow Airport. It has a clear management hierarchy and managers are supported by HR advisors. The Respondent also benefits from occupational health support. The Respondent is therefore better placed to make an adjustment in an employee's place of work than a small employer, or one operating at just one site.

100. We have considered the financial cost of making the proposed adjustment. We note that Border Force in Birmingham were willing and able to fund the detached duty in Glasgow beyond the date on which it terminated on or about 1st March 2016. No doubt the continuation of funding might have become a concern for the Respondent at some point, but it was not a limiting factor around 1st March 2016. We also note that a further period of detached duty was funded in early 2017. Funds were clearly available. Further, it is important to consider the Respondent as a single organisation rather than as a grouping of separate employers. The Claimant's salary costs were the same whether they came from the budget of his "home port", or from that of the detached duty location, or from some other budget. The financial cost of

employing the Claimant is therefore a neutral factor in the reasonableness assessment. Unlike a case in which employment is terminated, here the salary costs were the same whether the adjustment was made or not. No other financial implications were identified in evidence or submissions.

101. We accept that salary costs are not the only consideration. We must consider other demands on the Respondent's resources too. We have given careful consideration to the point made by Mr Summers about pressures on management time in Glasgow. Two distinct issues arise. First, whether there would be fewer pressures on management time if the Claimant were to work in Birmingham because there would be fewer incidents requiring management attention if he worked in Birmingham. Second, whether it would simply be easier to for management in Birmingham to put in the necessary time than it was for management in Glasgow to do the same.

102. As for the second issue, we refer back to our findings of fact, above. It has not been established on the balance of probabilities that the Claimant was more difficult to manage in Glasgow than in Birmingham by reason of the greater pressures on management time in the former location. We heard no evidence of the relative pressures on management in Birmingham. Therefore, we do not regard the background of pressures on management time in Glasgow as a cogent argument against making the adjustment sought by the Claimant. Even if it had been established on the evidence, then there would have been an answer. Management in Birmingham and elsewhere within Border force could have assisted. Jason Moore-Reid made offers of that sort in correspondence: for example, on 24th February 2016 [174] he contacted Mr Summers to offer to be a "decision manager" if conduct allegations originating in Glasgow were "taken forward". We also note that the Claimant's grievance was initially investigated in the Midlands before the process was taken over by Border Force (North). Those facts show that other parts of Border Force were prepared to become involved in the management of the Claimant and the resolution of difficulties if required to do so. The resource was available.

103. While the Respondent made the continuation of the detached duty conditional on "good conduct" we do not think the mere fact that it was a stated *condition* adds anything to the broader question of reasonableness. An otherwise reasonable adjustment cannot lawfully be made subject to conditions, unless that is in effect just a way of emphasising matters relevant to reasonableness in advance of their occurrence. Putting it another way, if an employer imposes conditions on the grant or continuation of an adjustment that do not accurately reflect matters going to the reasonableness of that adjustment, then they do not acquire any relevance merely because they are conditions. We therefore give no weight to the mere fact that conditions were imposed. It is much more important to examine the substance of those conditions.

104. We readily accept the principle that issues of poor performance or poor conduct might have a bearing on the reasonableness of the continuation of detached duty at a particular location. The same is true of harm to customer relationships or other reputational damage. However, termination of the detached duty was only a local solution to those problems. It would simply move the Claimant (allegedly the cause of those problems) to another location, assuming the Claimant remained at work (in practice he was absent for much of the time that he was notionally back in Birmingham).

105. There was no evidence before us sufficient to show that the Claimant's conduct would for some reason be problematic in Glasgow but not in Birmingham. Therefore the termination of the detached duty in Glasgow was not a matter likely to resolve issues of poor conduct or the causation of reputational damage if those problems existed. If the Respondent is considered as a whole, then it would still have to manage and deal with precisely the same issues, just in another location. We therefore regard the allegations of poor conduct and reputational damage as factors having no real bearing on the reasonableness of declining to allow the Claimant to work in Glasgow.

106. Even if we had done so, there is an alternative basis for our reasoning. In our judgment the allegations of poor conduct would have to have a sufficiently proven basis in order for them to weigh in the reasonableness assessment. While we have been careful not to confuse issues arising in misconduct dismissal cases and ***BHS v Burchell*** principles with those arising in the context of reasonable adjustments, some similar considerations apply on the particular facts of this case.

107. If an employer wishes to terminate or withdraw an adjustment on the basis of complaints or allegations of poor conduct, then reasonableness will normally require an investigation and an assessment of those complaints or allegations. That is so because it is necessary to determine not only whether those complaints or allegations are well-founded but also whether the extent of the established poor conduct was such as to mean that it was not (or no longer) reasonable to adjust the employee's place of work. It would not normally be sufficient for an employer simply to base its approach on principles such as "the customer is always right", or that "there is no smoke without fire", or that the complaints were of a similar nature.

108. We find that the Respondent's handling of the complaints and allegations in this case was insufficient to support the conclusion that it was not reasonable for the Claimant to continue to work in Glasgow. The only complaints to have been investigated thoroughly resulted in the Claimant's exoneration. We have not accepted Mr Chisholm's evidence that he properly investigated two more complaints. We find that his investigation was seriously deficient and that his conclusions were unreliable. The Claimant led evidence at this hearing that he was a victim of mistaken identity in respect of two of the complaints, but even if he had not done so the point would be the same. On the information available to the Respondent and to us, the *complaints* of poor conduct did not, without more, diminish the reasonableness of the proposed adjustment. By "without more", we mean without soundly based findings of fault on the

Claimant's part. Had there been any, we might well have taken a different view.

109. In this case the Respondent could and should have separated the issue of reasonable adjustments from that of conduct and dealt with them separately. The Respondent could have commenced a formal conduct investigation if it had wished. At the point when the Respondent required the Claimant to return to Birmingham it remained a reasonable adjustment for him to work in Glasgow.

110. The conclusion of the majority is therefore that the Respondent failed to make a reasonable adjustment when it terminated the Claimant's detached duty in Glasgow on or about 1st March 2016. By doing so the Respondent failed to take such steps as it was reasonable to have to take to avoid the PCP of place of work from putting the Claimant at a substantial disadvantage. It was a reasonable step to continue the detached duty.

(2) Termination of the second period of detached duty in Glasgow

111. We can set out our reasoning in relation to the second period of detached duty much more concisely.

a. By a majority, the duty to make reasonable adjustments arose for the same reasons as are set out above in relation to the termination of the first period of detached duty. The minority considers that no duty arose, and his reasoning is also as set out above.

b. However, we unanimously find that there was in any event no breach of that duty on or around 1st February 2017. The Respondent did not at that stage alter the Claimant's place of work, which remained Glasgow until the review date on 9th April 2017. The adjustment was not withdrawn. The only reason the Claimant was not *attending* work in Glasgow after 1st February 2017 was that he was suspended

pending a disciplinary investigation. He was not required to attend work, whether in Birmingham or anywhere else, after 1st February 2017 until the suspension was lifted. The Respondent had nevertheless taken all reasonable steps to alleviate the disadvantage caused by the PCP of place of work since the Claimant remained on detached, albeit suspended, duty in Glasgow.

c. The suspension effectively removed the disadvantage caused by the PCP of place of work anyway, since the Claimant could live wherever he liked while suspended. That consequence of suspension was also sufficient to remove the relevant disadvantage.

Jurisdictional time point

112. This leads to a jurisdictional time point, on which we were not addressed during the hearing. The Respondent did not take the point and did not make submissions dealing with it on a contingent basis. Since it is jurisdictional, we must deal with it anyway.

113. Although the Respondent conceded that the two allegations of termination of detached duty were *capable* of being an act extending over a period for the purposes of section 123(3)(a) of the Equality Act 2010, we have not upheld the second allegation. It follows that there is no act extending over a period, just a single finding of discrimination of that nature on or about 1st March 2016, with the consequence that it was significantly out of time when ACAS were contacted on 12th December 2016 and when the ET1 was presented on 3rd March 2017.

114. However, we find that it would be just and equitable to hear the complaint in relation to the first period of detached duty, and that we therefore have jurisdiction to hear it under section 123(1)(b) of the Equality Act 2010.

115. Having considered the factors in ***British Coal Corporation v Keeble*** [1997] IRLR 336, we are prepared to exercise our discretion in the Claimant's favour. The complaint in respect of the first period of detached duty is around 9 months out of time. The Respondent did not allege any prejudice during the hearing, and we find that the cogency of the evidence has not been affected. All of the relevant witnesses had a clear recollection of events in early 2016 and none of them said that the lapse of time had caused them to forget important details. The events were also well documented in the joint bundle of documents. A fair trial on the merits was entirely possible. As for the reasons for delay in presenting the complaint, the Claimant gave no direct evidence but we infer that he, like the Respondent, thought that his ongoing dissatisfaction regarding his place of work related to an act extending over a period. While that was not, as it turned out, the correct legal analysis, it does in our view go to the reasonableness of presenting the complaint late. The parties were under a shared misapprehension. Finally, the fact that we upheld the claim means that its substantive merits also weigh in favour of allowing an extension of time. For those reasons we are satisfied that it would be just and equitable to hear the complaint in respect of the first period of detached duty in Glasgow even though it is about 9 months out of time.

(3) Car Parking

116. We are concerned only with car parking during the Claimant's second period of detached duty in Glasgow. The Respondent accepted that a duty to make adjustments arose in relation to car parking but argued that it took all reasonable steps to provide it and that the duty was discharged. We agree for the following reasons.

117. The Respondent does not own or control any car parking close to the terminal building in Glasgow, so the provision of the necessary adjustment required a liaison with third parties. We find that all reasonable steps were taken to arrange a suitable parking space for the Claimant and that one was provided

just before his last day of work on the second period of detached duty in Glasgow.

118. Emma Porter recommended that the Claimant should have another period of detached duty in Glasgow on 6th December 2016 [246]. That is reflected in correspondence with the Claimant dated 8th December 2016 [416] when plans were being made for his return to Glasgow. The series of emails at [418-426], read in reverse order, amply demonstrates that the Respondent was taking steps to obtain a parking space for the Claimant from 16th December 2016 in advance of his planned arrival on 9th January 2017. The initial efforts to obtain a space in the staff "Admin" car park (controlled by the airport and not by the Respondent) failed through no fault of the Respondent because that car park was full to capacity. The Respondent was notified of that on 4th January 2017. It then acted promptly to secure an alternative space in the main terminal short term NCP car park, while asking that the Claimant should be put on a waiting list for the Admin car park. The Respondent pursued that option further between 5th and 13th January 2017. Within two further weeks or so a space had been found in the NCP car park closest to the terminal, which was funded from Mr Summers' own budget at a cost of £850 per annum, or the *pro rata* equivalent. We accept his evidence that it was available for the Claimant's use a few days before the Claimant's final day of work at Glasgow Airport on or about 1st February 2017. When that chronology is looked at fairly and as a whole, we find that all reasonable steps were taken to provide a suitable car parking space with the result that one was available in the last few days of January 2017. There was no failure to make reasonable adjustments in this respect.

(4) Adjusted seating

119. The Claimant had been provided with two reinforced and adjustable seats for his use when carrying out his duties at his home port of Birmingham Airport. It was accepted on behalf of the Respondent that this constituted a reasonable adjustment at that time.

120. Dr Gibson suggested during cross-examination that the Claimant's duties while on detached duty in Glasgow were different from those carried out in Birmingham, such that an adapted chair was no longer required as a reasonable adjustment once the Claimant began detached duty in Glasgow. By the time of closing submissions the argument was no longer advanced, and it was accepted that the lack of that auxiliary aid put the Claimant at a substantial disadvantage in comparison with persons who were not disabled.

121. We would have rejected the argument anyway because it was inconsistent with the evidence of the witnesses. Not only did the Claimant persuasively reject the notion that there was any material difference between his duties in Birmingham and his duties during the first period of detached duty in Glasgow, but Mr Summers agreed when cross-examined by the Claimant that the Claimant's role in Birmingham was the same as his role during the first period of detached duty in Glasgow. In both locations some of the duties were performed standing, but some were performed from a seat. The Claimant had been assessed as requiring an adapted chair as a reasonable adjustment in Birmingham and so one was required in Glasgow too.

122. It was common ground that the Claimant did not have an adapted chair in Glasgow during his first period of detached duty in that location. The Respondent highlighted the fact that the Claimant failed to ask for it or to lodge complaints about the failure to provide it. In our judgment that makes no difference whatsoever to liability since the duty to make an adjustment is not subject to the disabled person requesting compliance, especially not when the Respondent's own assessment in another location had already concluded that an adjusted chair ought to be provided for precisely the same duties. The Respondent's failure to send the appropriate chairs up to Glasgow, or to obtain replacement chairs of a suitable type, amounted to a failure to make reasonable adjustments.

123. Dr Gibson also argued that a chair had been provided, in that it had been provided in Birmingham. We think that argument has no merit at all. An auxiliary aid or other reasonable adjustment has not been provided if it is only available several hundred miles away at a location which is not the day to day workplace of the disabled person concerned. Such an adjustment is not available for the disabled person's use. In terms of the statutory language, such steps as would be reasonable to avoid the disadvantage have not been taken if suitable equipment is provided at the wrong location.

124. For those reasons the Respondent failed to take such steps as were reasonable to provide an adapted chair and there is a breach of section 20 of the Equality Act 2010 in respect of seating during the first period of detached duty in Glasgow.

125. There was also a breach during the second period of detached duty. On this occasion the Claimant's duties had altered in that he was required to do immigration work for part of the time. That work was done while sitting in a booth. The chair provided was broken and dirty, and for that reason the Respondent failed to take reasonable steps to provide a suitable chair. That chair was in any event unsuitable for immigration work since it did not fit in the booths used by Border Force officers for that sort of work. The Respondent failed to make a reasonable adjustment in that it should either have provided a suitable chair that fitted the booths for use when carrying out immigration duties, or else it should have organised the Claimant's work such that he did not have to carry out immigration duties.

126. We do not accept the Respondent's submission that the Claimant had agreed to use a different chair. That suggestion appeared in an email dated 12th May 2017 at [428]. The author, Paul Soutar, did not give evidence at the hearing. We therefore prefer the Claimant's evidence on this point. He denied any such agreement.

Remedy

Recommendations

127. We do not think that it would be appropriate to make a recommendation under section 124(2)(c) and (3) of the Equality Act 2010. The Respondent is aware of our findings. The declaration that there has been discrimination accompanied by these reasons should go a long way to avoiding similar discrimination in the future, should similar situations arise.

128. It would not be appropriate to make any recommendation regarding detached duty in Glasgow because much has changed since the date on which that act of disability discrimination occurred. Most obviously, the Claimant lodged a grievance which resulted in a second period of detached duty in Glasgow, the termination of which we have not found to be unlawful. The Claimant remains free to apply for vacancies in Glasgow, or for detached duty in Glasgow as a reasonable adjustment. It would not be appropriate for us to interfere in either process without knowing the background facts and having a full picture of the matters affecting the reasonableness of the adjustment.

129. It would not be appropriate for us to make any recommendation regarding seating because at the time of writing the Claimant's workplace is his home port of Birmingham, where suitable seating has been provided in the past. Seating is not currently an issue.

Compensation

130. We do however make an award of compensation under section 124(2)(c) and (6) of the Equality Act 2010. There is no claim for financial losses and we are concerned with compensation for injury to feelings only.

131. When fixing the appropriate figure we have borne in mind that awards of compensation are based on the extent of the injury suffered, taking into account the characteristics of the injured party. Awards should be

compensatory and not penal. We have applied the well-known ***Vento*** [2002] EWCA Civ 1871 guidelines, now updated in Presidential Guidance to take into account both inflation and also developments in case law such as ***De Souza v Vinci Construction (UK) Ltd*** [2017] EWCA Civ 879.

132. The Claimant was clearly very upset by the circumstances in which his first period of detached duty in Glasgow was terminated. The lingering sense of injustice was clear throughout the hearing. We readily accept that he was upset and angry for many months. We also note the Occupational Health evidence that the withdrawal of that adjustment was likely to expose the Claimant to additional stressors. On the balance of probabilities, it did. That said, the Claimant was subsequently given a further period of detached duty in Glasgow which terminated in circumstances which we have not found to be unlawful. The injury to feelings caused by the earlier (discriminatory) termination of detached duty is reduced by the fact that any injustice suffered in March 2016 was recognised and corrected towards the end of that year. While that does not necessarily end the injury to feelings, it goes a long way to righting the wrong that injured the Claimant's feelings. We concluded that the award should be in the lower band and that the just sum would be £6,500. We have calculated interest at 8% from 1st March 2016 making £1,158 (to the nearest pound). The total award is therefore £7,658.

133. We award £850, a sum close to the minimum amount, for the failures to provide a suitable chair. On the first occasion there is no evidence that the Claimant raised or complained about the Respondent's failure, and we therefore infer that the degree of upset was at the very lowest end of the scale. On the second occasion the Claimant was without a suitable chair for only the very short duration of the detached duty, which was less than a month in total. Once again, the injury to feelings can only be very slight. We have calculated interest at 8% running from 1st April 2016. We have picked that date because it represents (roughly) the midpoint of the two periods over which the Respondent failed to provide a suitable chair (i.e. beginning around 1st June 2015 and ending around 1st February 2017). To the nearest pound

that makes £146. The total award of compensation for failure to provide a suitable chair is therefore £996.

134. The Respondent is ordered to pay compensation to the Claimant accordingly.

Employment Judge: M Whitcombe
Date of Judgment: 24 May 2018
Entered in register: 29 May 2018
and copied to parties