**Case No: 1307338/2019**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Trotman

**Respondent:** Romero Multi-Academy Company

**Heard at:** **Midlands West** **On:** 9 10 11 12 November 2021

and 14 January 2022

**Before: Employment Judge Woffenden**
**Members: Mr N Howard**
**: Ms S Outwin**

**Representation**
Claimant: In Person
Respondent: Mr J Wallace of Counsel

**JUDGMENT** having been sent to the parties on 14 January 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1 The claimant was employed by the respondent as a teacher from 4 June 2018 until he was dismissed with effect on 31 August 2019.He presented his claim of discrimination on grounds of age disability and race on 28 August 2019 following a period of early conciliation from 7 August 2019 to 7 August 2019.

## Claim and Issues

2 The only claim before us was of a failure by the respondent to make reasonable adjustments. The issues for the tribunal to determine were those set out by Employment Judge Johnson at paragraph 12 (i) (ii) and (vi) to xi) of his order sent to the parties on 12 February 2020 and were as follows:
2.1 Were all of the claimant's complaints presented within the time limits set out in section 123 (1) (a) and (b) of Equality Act 2010 ('EqA')?
2.2 Was the claimant a disabled person in accordance with EqA at all relevant times because of the following conditions: nystagmus (which was included

following an amendment application -see below) cataracts pupil focus eye tremors.
2.3 Did the respondent not know and could not reasonably be expected to know the claimant was a disabled person?
2.4 A 'PCP' is a provision ,criterion or practice. Did the respondent have the following PCP: (a) replacing all of the staff's laptops with 'Chromebooks' in September 2018? (During submissions it was conceded by the respondent that it had applied the PCP of replacing all of the staff's laptops with Chromebooks in September 2018).
2.5 Did such a PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time ,in that : caused an increase in the pressure inside his eyes?
2.6 If so ,did the respondent know or could it reasonably be expected to know the claimant was likely to be placed at any such disadvantage?
2.7 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant :however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:
a) permit the claimant to continue to use his existing laptop instead of the Chromebook
2.8 If so ,would it have been reasonable for the respondent to have to take those steps at any relevant time?

**Procedure Documents and Evidence Heard**

3 The claimant confirmed that he did not require any reasonable adjustments to be made for him during the hearing.

4 By consent the unless order of Employment Judge Broughton sent to the parties on 30 November 2020 was set aside.

5 There had been a preliminary hearing before Employment Judge Broughton on 23 November 2020 to determine (among other matters) whether the claimant was disabled .Employment Judge Broughton said in his written reasons that he was '*reluctant to declare him as disabled*' but also that the claimant had answered three times that the information he had given on a health questionnaire that he had no past or present disability or impairment and had no need for adjustments was correct at the time and when it was put to him that his symptoms must therefore have been resolved he gave a different answer saying he had not wanted to disclose his disability . When asked to explain the discrepancy he recorded the claimant had said his earlier responses had been incorrect and this was due to nerves. Employment Judge Broughton recorded that it seemed to him that the claimant's nerves were due to trying to give the answers he thought he needed to hear which cast serious doubts on his credibility. He also recorded that it had been the claimant's evidence that he was unable to regularly use a laptop without adjustments ,often needed to wear sunglasses and had never been able to drive. He decided that the question of disability would remain '*live* ' at the final hearing ,if the respondent continued to dispute it .

6 The claimant confirmed to us that the alleged failure to make reasonable adjustments began in September 2018 and ended in May 2019.He applied to amend his claim to include nystagmus as a physical impairment on which he

relied for the purpose of disability in addition to cataracts pupil focus and eye tremors. That application was opposed by the respondent but granted for the reasons given orally at the time.

7 We heard from the claimant and on behalf of the respondent we heard from Sarah Shirley ( former head of HR at the respondent).The claimant also put in evidence witness statements of three former pupils but did not call them to attend and little weight was able to be given to their contents .There were two folders containing documents (pages 1 to 680 and A1a to A189 and B1 to B536 and C1 to C261). We have considered only those documents to which we were referred by the parties in witness statements or cross examination.

**Findings of Fact**

8 The claimant was employed by the respondent ( a multi academy trust ) as a teacher at one of its schools (Cardinal Wiseman Catholic School) from 4 June 2018 until his employment terminated on 31 August 2019 .

9 The claimant was born on 14 June 1967. A letter from his general practitioner to the Eye Clinic at Royal Hallamshire Hospital Sheffield dated 25 February 1998 recorded that the claimant had had problems with his eyes since birth with congenital eccentric pupils and a horizontal nystagmus (which means uncontrolled side to side eye movements ) and had recently been found to have bilateral cataracts.

10 In March 1999 and January 2000 the claimant underwent surgery to remove the cataracts and insert replacement lenses which was followed by laser treatment .He was described in January 2001 as doing very well following his cataract surgery with visual acuity as 6/9-2 ( right eye) and 6/12 (left eye). By July 2001 he was advised to see his optician yearly for intraocular pressure checks but no other follow up was advised.

11 By 2011 the claimant's general practitioner notes record he was playing a lot of contact sport football and tennis and also running. Under cross examination he said he was able to play doubles and cricket (though he found bowling easier than batting -because he could not see the ball coming -and refrained from far out fielding).

12 The claimant has never driven. He says this is because he has really poor eyesight and would not be allowed to drive though his fitness to drive has not been assessed. His general practitioner's letter dated 23 August 2021 (addressed '*To Whom It May Concern*' said that he had been denied a driving licence from birth as it was expected that he would have sufficient problems on going with his eyesight as a result of his congenital problems to exclude him from driving. It also said that he is '*now starting with ocular pressure*' .It went on to say he '*struggles with his vision in reading documents and has to be allowed extra time to become familiar with the script . He needs a large screen to read and the ability to magnify text in order not to strain his eyes. He uses immersor reader technology to help with this. In addition when reading ,his eyes can skip to end of a line of type which makes reading more difficult. These problems have been on going for many years*.' The letter said the general practitioner was unable however to outline how this applied to the claimant's work ' *as this would have needed doing prior to employment during the period*.'

13 The claimant wears prescription sunglasses. Despite his oral evidence to Employment Judge Broughton that he often needed to wear sunglasses, there was no evidence in his witness statements about whether he needed to use sunglasses and, if so, why and the frequency of use.

14 By 2017 the claimant was using a mobile phone on a daily basis and continues to use one, the screen of which is slightly larger than the one he had in 2018 which he had used for some 8 to 10 years .He used it to send texts which he was able to enlarge. Although it has a much smaller screen than a Chromebook (see paragraph 16 below) he does not attribute any eye problems or deterioration in vision to his use of the mobile phone.

15 The claimant would miss small areas (letters groups of letters or whole words of print ) when scanning across a page. The smaller the print size the more likely it was that he would miss it. He would reduce the risk of missing anything by reading more slowly than someone with normal vision and magnifying print size. Going shopping, reading a packet or label would take him longer than someone with normal vision. By the time he worked for the respondent he was continuing to take care when crossing roads and had to use public transport because he did not drive. From 2007 onwards he was able to use a PC with adaptations at work and at home but rarely used laptops. With long screen time his eyes would become irritable sore watery and red so he only used them when he needed to.

16 From September 2018 (the time when the respondent provided him with a Chromebook - a type of laptop) the claimant found it was difficult to use a laptop if it had a small screen because it caused eye strain. Although it is recorded in both of the orders made by Employment Judge Johnson that the adjustment he alleged should have been made was to continue to use his existing laptop, under cross examination he said he could not recall what he had said to Employment Judge Johnson, attributed what was said in the orders to '*some confusion*' and denied that he had had an existing laptop ;he had been provided with a computer in his class room and had no need for a laptop. We do not find it credible that the claimant ( who represented himself at the preliminary hearings conducted by Employment Judge Johnson ) was not the source of the information about the step which he alleged should have been made which Employment Judge Johnson recorded in his orders. He also confirmed under cross examination he no longer alleged that to continue to use his existing laptop would have been a reasonable adjustment. In reply to questions from the tribunal he said the reasonable adjustment which he says should have been taken was a voice activated software package to highlight grammar spelling and punctuation so he could mark work correctly and he had only become aware of the existence of this technology recently which he now used.

17 The claimant had begun working for the respondent as a supply teacher for health and social care at Cardinal Wiseman Catholic School in Coventry on 29 January 2018.

18 In a pre-employment questionnaire dated 19 March 2018 ('the questionnaire') the claimant confirmed that he had no physical or mental health problems lasting 3 weeks or longer and no reasonable adjustments needed to be considered .He confirmed he required no aids to carry out day to day activities and required no adjustments in relation to disability. He was asked in the questionnaire to read

the job description for his role and then asked if he had any health problems that could be affected or made worse by the activities identified ( which included '*significant use of computers*' and '*high mental stress content'*) and confirmed he did not. It was put to the claimant under cross examination that what he had said three times to Employment Broughton was the truth and the subsequent explanation he had given for the contents of the questionnaire (that he had not wanted to disclose his disability) was a lie .The claimant became irritated at being asked about this and said he had already given his answer. We find that at the time the claimant completed the questionnaire he did so believing the information he provided to be true and he was not truthful in his evidence to Employment Judge Broughton when he told him that the information he had given on the questionnaire had been incorrect because he had not wanted to disclose his disability. He had had to change his evidence before Employment Judge Broughton and then ( to his discomfort ) found he had to stick to that version in front of us too.

19 On 11 May 2018 it was recorded in the claimant's general practitioner notes that he had '*ocular hypertension ( minor*)' and this was a '*new episode'*. The claimant confirmed under cross -examination that (increased ) eye pressure was the same as ocular hypertension .There was also a reference to '*pseudophakia*' which refers to the artificial lenses the claimant had received as treatment for cataracts.

20 On 21 May 2018 it was recorded in in the claimant's general practitioner notes that he had '*started with eye drops with glaucoma*' and '*has annual check*.' He was prescribed eye drops on a monthly basis from May 2018 onwards.

21 There was an increase in the amount of eye drops prescribed in July 2018 to' *double last time ordered*.' There was a change in the type of eye drops prescribed in November 2018.

22 On 4 October 2019 the unredacted general practitioner notes record that the claimant told his general practitioner that '*the small computer screen contributed to eye problems but also had genetic pre-disposition -has high eye pressure - agree with the solicitor advice that would find this hard to prove'*. The redacted general practitioner notes originally disclosed by the claimant removed this comment. Under cross-examination the claimant said that he might have redacted more than he should have done because of his sight problems and attributed this to 'human error.' The specificity of the redaction in question makes this an implausible explanation and we reject his evidence on this point.

23 On 4 June 2018 Mr Leverage (the respondent's principal ) offered the claimant the post of unqualified teacher in humanities. He was given a full timetable teaching Geography sociology and child development.

24 In September 2018 all staff at the respondent were provided with a Chromebook for use at work.

25 On 3 September 2018 the claimant requested by telephone an additional monitor to connect to Chromebook .The note made of that request by the respondent's IT department (called 'a ticket') says it is to '*improve visibility*.' A 22 inch screen was provided to the claimant .The ticket for the provision of the

additional monitor to connect to the Chromebook was noted as closed on 10 September 2018.

26 On 24 September 2018 the claimant raised a concern about the monitor which had been provided and ,with his agreement, a static Neverware Personal Computer was put in his teaching room ( 'Luke 12').

27 On 7 December 2018 the claimant emailed the respondent's HR team to ask for some help about the issue of writing UCAS references and some email exchanges he had had with his manager Ms Duffy. He had previously asked Ms Duffy for help about such references because he was not sure how to write them and asked her for a template. She had responded by email that she had given some advice about this , thought he did not listen to advice and had the mistaken impression that there were easy shortcuts to writing such references when they took time and attention.HR arranged for the claimant to meet with Bridget Morris (the respondent's then vice principal) on 17 December 2018 to discuss the UCAS references issue.

28 On 17 December 2018 the claimant met with Ms Morris and Richard Kingshott (the respondent's head of 6th Form ). Ms Morris noted in an email that the claimant told them that the use of the Chromebook '*may well be damaging* ' his sight due to the screen size. Ms Morris told him that he needed to be seen by Occupational Health ('OH') but asked if a short term fix could be a larger screen and he agreed . She asked Hitesh Vara of the respondent's IT department to 'sort out a Chromebook with a larger screen' and HR to arrange an appointment with OH. We accept the discussion which took place is accurately summarised in that email ,a contemporaneous document which is preferred to any later account given by the claimant . He had not raised any problem about the suitability of any equipment supplied to him from 24 September to 17 December 2018 nor did he pursue any OH assessment. It is common ground that no OH assessment was carried out until April 2019 by which time the claimant was no longer at work.

29 On 18 December 2018 Hitesh Vara emailed the claimant to confirm that he had a Neverware PC with a large screen monitor in his teaching room and had an additional large screen monitor (22') for him to use at home to connect his Chromebook. He confirmed this to Ms Morris. Mr Kingshott spoke to the claimant who confirmed he wanted the additional screen to use at home.

30 On 19 December 2018 the claimant collected the screen to connect to his Chromebook for use at home and confirmed to Hitesh Vara that he was happy with this solution . Mr Vara recorded in his email to Ms Morris dated19 December 2018 that the claimant had said this was '*perfect for his visibility'*. Thereafter the claimant raised no concern about the suitability of the equipment with which he had been provided nor did he pursue the OH assessment. However, his relationship with his manager deteriorated and his teaching became the subject of scrutiny .He began a period of absence from work due to work related stress on 1 April 2019 and provided a sick note which expired on 2 May 2019.

31 The general practitioner's notes on 1 April 2019 record the claimant saying he was suffering with stress at work again but hoping to go back after Easter break. It was the claimant's evidence under cross examination that at this appointment he had also told his general practitioner about his use of Chromebook and damage to his eyes as well as work related stress and that all his issues in the

workplace were discussed . His evidence about this was vague and unconvincing. Details of discussions about the claimant's work situation are to be found in the general practitioner's notes after that date but the only time that issues with computer noted is on 4 October 2019(see paragraph 22 above) .We find there was no discussion between the claimant and his general practitioner about either the Chromebook or damage to his eyes on 1 April 2019.

32 In reply to tribunal questions about when the claimant found out that use of Chromebook caused an increase in pressure inside his eyes the claimant's evidence was that he had attended a hospital check-up appointment at the ophthalmology department at the Royal Hatton Hospital in January 2019 ( though he later said he could not recall the month) when he was told the pressure in his eyes had increased slightly and he was prescribed different eye drops and told that if the pressure continued to go up high he would get glaucoma .A discussion had ensued about things at work and the ophthalmologist had said the increase could be caused by the Chromebook but she could not be sure without assessing it and he had not brought with him and he did not get subsequently get the Chromebook assessed because his mental health had deteriorated as things got bad at work .He said his own research linked an increase in pressure to the size of the screen. He recalled the pressure in his eyes as being 30 to 35 and that it was not usually that high. We did not find his oral evidence credible and reject it. Even though the substantial disadvantage to which the claimant says he was put by the Chromebook has always been identified in the list of issues as an increase in pressure inside the eyes evidence about this was not contained in his witness statements and there was no corroborative documentary evidence in his medical notes nor has he disclosed any documents about his own researches about any link between screen size and increased eye pressure. Had he been told by the ophthalmologist that the increase in pressure inside his eyes could be attributed to Chromebook he would have taken steps to have it assessed .

33 On 4 April 2019 the claimant was invited to attend a disciplinary interview on 12 April 2019 for allegedly grading a student's work without sight of the work. That was postponed until 8 May 2019 because he had been referred to OH to ascertain if he was well enough to attend meetings.

34 The resulting OH report dated 29 April 2019 said in reply to the question whether there were any underlying medical problems in relation to intermittent short absence from work that the claimant had blocked sinuses and raised ocular pressure in both eyes diagnosed by '*the specialist*' within the last 6 months .He had underlying genetic eye problems for which he attended follow ups with the eye specialist every 9 months .In reply to the question '*Is there anything that can be done to improve attendance'* it was noted that the claimant had '*raised concerns with his vision when working on small computer screens*' .Lastly when OH was asked if there were any reasonable adjustments that needed to be made it was stated that there were none at this time .It was said to be '*likely*' that the eye health issues and sinus problems would come within the definition of a disability under EqA. No rationale or explanation was provided for this opinion.

35 On 16 May 2019 the claimant was suspended .

36 On 24 May 2019 the claimant resigned from the respondent and commenced a period of 'garden leave' which lasted until 31 August 2019 when his employment terminated.

37 On 7 August 2019 the claimant contacted ACAS following advice given to him by a friend and early conciliation ended that same day. He accepted under cross examination that he knew from December 2018 that there was an entitlement to reasonable adjustments though he did not know then what exactly he was entitled to and accepted he could have looked on line to see what his rights were. He said he had taken advice from his union but was not clear about when or from whom or what it was, only that he had been 'steered in the wrong direction' .His evidence was that he knew he had to get an ACAS certificate before putting in a claim but it was not till the summer 2021 that he took legal advice. The latter evidence is inconsistent with the contemporaneous note of his general practitioner dated 4 October 2019 which indicates that he had already sought legal advice concerning proving a small screen contributed to his eye problems.

38 The claimant presented his claim to the tribunal on 28 August 2019.

## Submissions

39 We thank both parties for their oral submissions which we have carefully considered.

## Law

40 A person has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities (section 6 (1) (a) and (b) Equality Act 2010 ('EqA')). The burden of proof is on the claimant to show that he was a disabled person in accordance with section 6 and with reference to Schedule 1 EqA at all relevant times. The issue of disability is a question of fact for the tribunal.

41 In **Goodwin v Patent Office 1999 ICR 302** the EAT said that the words used to define disability in section 1 (1) Disability Discrimination Act 1995 (now section 6 (1) EqA) required a tribunal to look at the evidence by reference to 4 different questions:

(1) Did the claimant have a mental and/or physical impairment? (the 'impairment condition').
(2) Did the impairment affect the claimant's ability to carry out normal day-to-day activities (the 'adverse effect condition').
(3) Was the adverse condition substantial (the 'substantial condition'); and
(4) Was the adverse condition long-term (the 'long-term condition').

42 Substantial means more than trivial or minor. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if a) measures are being taken to treat or correct it, and b) but for that, it would be likely to have that effect. 'Measures' includes, in particular, medical treatment.

43 Tribunals must take account of the Guidance on Matters to be Taken into Account in Determining Questions relating to the Definition of Disability (the Guidance').

44 The Appendix to the Guidance provides an illustrative and non-exhaustive list of factors which if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day to day activities. The examples are indicators not tests .A person may have more than one impairment ,any one of which alone would not have a substantial effect .In such a case ,account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day to day activities (paragraph B6 of the Guidance).Normal day to day activities include general work related and study and education related activities such as using a computer and driving (paragraph D3 of the Guidance). The Appendix to the Guidance says the following effect would be reasonable to regard as having a substantial adverse effect of the impairment on normal day to day activities '*Difficulty in operating a computer ,for example because physical restrictions in using a keyboard ,a visual impairment or a learning disability'* and that the following effect would **not** be reasonable to regard as having a substantial adverse effect of the impairment on normal day to day activities:' *Inability to read very small or indistinct print without the aid of a magnifying glass*.' and '*minor problems with writing or spelling*.'

45 The Equality and Human Rights Commission has prepared a Code of Practice on Employment (2011) ('the Code'). Tribunals and courts must take into account any part of the Code that appears relevant to any questions arising in proceedings. The respondent's Counsel made no reference to the Code in submissions.

46 The Code states at paragraphs 5.14 and 6.19:

*" It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not have reasonably been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.*

*An employer must ,however ,do all they can reasonably be expected to do to find out [whether this is the case].What is reasonable will depend on the circumstances .This is an objective assessment .When making enquiries about disability ,employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."*

47 Section 39(5) EqA imposes a duty to make reasonable adjustments upon an employer. Where such a duty is imposed sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that duty comprises three requirements. Insofar as is relevant for us, the first of those requirements is that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, that the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

48 Section 21(1) EqA states that the failure to comply with one of the three requirements is a failure to comply with a duty to make reasonable adjustments. Section 21(2) EqA provides that a failure to comply with a duty to make reasonable adjustments in relation to the disabled person constitutes discrimination by the employer.

49 In **Environment Agency v Rowan [2008] IRLR 20** *(*a case concerning the provisions of the Disability Discrimination Act 1995 ('DDA')) the Employment Appeal Tribunal, His Honour Judge Serota QC, presiding stated as follows:-

> *'27 …..In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:*
>
> *(a) the provision, criterion or practice applied by or on behalf of an employer, or*
>
> *(b) the physical feature of premises occupied by the employer,*
>
> *(c) the identity of non-disabled comparators (where appropriate) and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the Claimant.*
>
> *It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.' "*

It was held that an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters at a) to d) above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person at a substantial disadvantage.

50 Paragraph 6.10 of the Code suggests that *'provision, criterion or practice'* should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications and in line with authorities pre dating the EqA this includes one-off decisions and actions.

51 The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.

52 The EqA states that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact and is assessed on an objective basis.

53 Once the duty is engaged employers are required to take such adjustments as it is reasonable to have to take, in all the circumstances of the case. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

54 Paragraph 6.28 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

whether taking any particular steps would be effective in preventing the substantial disadvantage;
the practicability of the step;
the financial and other costs of making the adjustment and the extent of any disruption caused;
the extent of the employer's financial or other resources;
the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
the type and size of the employer.

55 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

56 As far as knowledge for the purpose of the claimant's claim of a failure to comply with the duty to make reasonable adjustments is concerned in **Secretary of State for the Department of Work and Pensions v Alam [2010]IRLR 283** (EAT) (again a case that preceded EqA ) it was held that two questions needed to be determined:
Did the employer know both that the employee was disabled and that his/her disability was liable to affect him/her in the manner set out in section 4A (1) DDA?
Only if that answer to that question is no then ought the employer to have known both that the employee was disabled and that his /her disability was liable to affect him/her in the manner set out in section 4 A(1)?
If the answer to both questions was also negative, then there was no duty to make reasonable adjustments (see also the comments of Underhill P at [37] in **Wilcox v Birmingham CAB Services Ltd [2011]EQLR 810 EAT).**

57 Schedule 8, para 20(1) EqA states that a respondent is not under a duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to .It would seem therefore that the analysis in **Alam** remains good law.

58 His Honour Judge Richardson made it clear in **Newcastle City Council v Spires 2011 UKEAT 0334 10 2202** in the context of a reasonable adjustments claim that a tribunal should consider only complaints that were defined at the commencement of the hearing ,following **Sainsbury's Supermarkets Ltd v Tarbuck** and **Chapman v Simon**.

59 Section 123 EqA provides that:

*"(1) Subject to sections…140B, proceedings on a complaint within section 120 ( which relates to a contravention of Part 5 (Work) of EqA )may not be brought after the end of –*

*(a) The period of three months starting with the date of the act to which the complaint relates ,or*

*(b) such other period as the employment tribunal thinks just and equitable .*

*…..*

*(3) For the purposes of this section –*

*(a) conduct extending over a period is to be treated as done at the end of the period:*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*

*(a) when P does an act inconsistent with doing it, or*

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

60 In **Matuszowic v Kingston –upon Hull City Council [2009] EWCA Civ 22** the Court of Appeal found that a failure to make a reasonable adjustment is an '*omission*' rather than a '*continuing act*' so that the time limit for presentation of a claim starts from the expiry of the period within which the employer might reasonably have been expected to make the adjustment. In the case of **Secretary of State for Work and Pensions (Jobcentre Plus ) v Jamil and others UKEAT /0097/13BA** the then President of the EAT Langstaff P held that where an employer refused to make a particular adjustment but agreed to keep it under review rather than making a 'once and for all' refusal ,the failure to make that reasonable adjustment was capable of amounting to a continuing act ,although the refusal to make the reasonable adjustment had occurred more than three months prior to the presentation of the claim. In **Viridor Waste v Edge UKEAT 0393/14/DM** the EAT distinguished **Jamil** and held each case was to be decided on its facts. In that instance it was a refusal and that it might be reconsidered was irrelevant. It was not a case of a policy to review as in **Jamil**.

61 If a claim under EqA is out of time the burden is on the claimant to persuade a tribunal that it is just and equitable to extend time **(Robertson v Bexley Community Centre [2003] IRLR 434.**

62 In the case of **British Coal Corporation v Keeble [1997] IRLR 336 EAT** it was suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980 .Those factors are consideration of the prejudice which each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case ,in particular the length of and reasons for the delay ;the extent to which the cogency of the evidence is likely to be affected by the delay ;whether the party sued had cooperated with any requests for information ;the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action ;and the steps taken to obtain appropriate advice once he or she knew of the possibility of taking action. However a tribunal is not required to go through the matters listed in section 33 (3) of the Limitation Act, provided that no significant factor is omitted **(London Borough of Southwark v Afolabi [2003] IRLR 220).**

## Conclusions

63 It is convenient first to address the issue of disability.Was the claimant a disabled person because of cataracts pupil focus eye tremors and nystagmus? We conclude that C had the physical impairments of a congenital nystagmus pupil focus issues and eye tremors. He had had cataracts but they had been successfully treated by surgery. The nystagmus and pupil focus issues and eye tremors were present from birth.

64 Driving is a normal day to day activity. The claimant cannot drive .The reason he cannot drive is because he believes that his eyesight is so poor he would not be allowed to drive but (contrary to the implication in his General practitioner' letter of 23 August 2021) he has never put this to the test. On the evidence before us we are unable to conclude that the claimant's visual impairments have a substantial and adverse effect on his ability to drive. It is a normal day to day activity at work and at home to be able to use a computer, be it PC or lap top. The effect of the claimant's impairments was that it was difficult for the claimant to operate PCs and lap tops (without adaptations) because of his problems reading text ( missing print and the length of time needed to read ) and the physical discomfort (eyes would become irritable sore watery and red) which he developed after prolonged use. This dates from 2007. We conclude that this effect was both substantial and adverse and long term. He was therefore a disabled person at the material time ie from September 2018 to May 2019.

65 Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person? By 3 September 2018 the respondent was aware (via Hitesh Vara) that the claimant was asking for a change to his computer equipment to improve visibility .In our judgment his request was enough to prompt the question why. Had this been done the claimant ( who had not hitherto revealed his impairments to the respondent ) would have explained the issues with his eyes which would have then prompted an OH assessment .That OH assessment ( if carried out promptly and in a reasoned way as far as the issue of disability was concerned unlike the OH report obtained in April 2019) would have revealed the impairments and their long-term effect on the claimant's ability to carry out normal day to day activities as far as his difficulties in operating a computer was concerned. It seems to have taken the respondent a period of about 3 weeks to get an OH report done on the claimant. We conclude that the respondent did not know but could reasonably have been expected to know the claimant was a disabled person by around early October 2018.

66 Did the PCP put the claimant at a substantial disadvantage? We remind ourselves that the claimant does not have to prove that he would be placed at a substantial disadvantage by the PCP because of his disability. However, there is no evidence before us from which we could conclude that it was the replacement of laptops for staff with Chromebooks that put him to the substantial disadvantage of causing an increase in pressure in the claimant's eyes. This is the assertion made by the claimant but an assertion is not evidence. He disingenuously redacted the medical note by the ophthalmologist which highlighted this evidential issue. We must compare him with people who are not disabled but there was no evidence before us about the effect on non-disabled persons of using Chromebooks as far as eye pressure is concerned. Having had annual checks for ocular hypertension since 2001 the claimant has been treated for ocular hypertension since May 2018 which predates his use of Chromebook

and there is no evidence before us from which we could conclude that he suffered an increase in C's eye pressure after September 2018 and that that was a substantial disadvantage in the sense that it was more than minor or trivial. We conclude the claimant was not put to the substantial disadvantage of an increase in pressure in his eyes by the replacement of laptops with Chromebooks.

67 It follows that the respondent did not know and could not reasonably be expected to know that the claimant was likely to be placed at any substantial disadvantage by the PCP. There was therefore no duty on the respondent to make reasonable adjustments.

68 If however we are wrong in our conclusion at paragraph 66 above and the claimant was put at the disadvantage that the replacement of laptops with Chromebooks caused an increase in eye pressure and that disadvantage was substantial there was no evidence from which we could conclude that the continued use of the claimant's existing laptop would have alleviated or reduced that disadvantage. First he did not have such a laptop. After December 2018 and in addition to the large monitor he had been given to use at work he was given an additional large screen monitor (22') for him to use at home to connect to his Chrome book. He is recorded as having told Hitesh Vara that it was '*perfect for his visibility*' and, having brought the concerns he had to the respondent's attention, he raised no further complaint whatsoever about the equipment with which he had been provided by the respondent thereafter nor did he pursue the outstanding OH assessment . In our judgment if there was any substantial disadvantage to which the claimant was put by the replacement of laptops with Chromebooks ,the respondent had taken steps to avoid any substantial disadvantage to which the claimant was thereby put by the provision of larger monitors for use at home and work.

69 During the hearing the claimant resiled from the reasonable adjustment contended for in the list of issues identified by Employment Judge Johnson and relied instead on a voice activated software package (paragraph 16 above) . There was however no evidence before us how or the extent to which this would have alleviated or removed the substantial disadvantage of causing an increase in eye pressure .It was the claimant's evidence that this would have enabled him to mark work correctly. We accept Mr Wallace's submission that, following **Newcastle v Spires** ,we are unable to consider this complaint.

70 Turning finally to the issue of time limits, was the claimant's complaint presented within the time limits set out in section 123 (1) (a) and (b) EqA? The only complaint is of a failure to make a reasonable adjustment. That is an omission .In our judgment section 123(4) (b) EqA applies .The expiry of the period within which the respondent might reasonably have been expected to make any adjustment would be 6 weeks from 3 September 2018.The respondent was on notice the claimant needed to improve visibility. As we have said above it seems to have taken the respondent a period of about 3 weeks to get an OH report done on the claimant which would have provided information about any reasonable adjustments that needed to be made. It would then have taken a few weeks for any such adjustments to have been put in place for the claimant . The claim was not presented until 28 August 2019.The claimant's complaint was not presented in time .No extension of time is afforded by ACAS certificate because more than 3 months had already elapsed since the omission in question. He has not explained the substantial delay in issuing proceedings. He was aware of the

right to reasonable adjustments from December 2018. The claimant is a secondary school teacher. He accepted he could have made his own enquiries on line. He also had access to advice from his union. We conclude that he did not act promptly or take reasonable steps to obtain appropriate advice. It is for the claimant to persuade a tribunal that it is just and equitable for time to be extended. He has not done so in this case.

71 The claimant's claim of a failure to make reasonable adjustments therefore fails and is dismissed.

Employment Judge Woffenden
Date 13 April 2022