EMPLOYMENT TRIBUNAL

Claimant: Mr Alexander Akinjayeju

Respondent: Capita Business Services Ltd

Heard at: London South Employment Tribunal (by CVP)

On: 8, 9 and 10 December 2021

Before: Employment Judge Rahman (sitting with members)
Mr Anderson
Mr Rogers

Appearances
Claimant: Mr Rahman, counsel
Respondent: Mr Heard, counsel

JUDGMENT

Unanimous decision:

(1) The Claimant's claim for discrimination arising out of disability contrary to section 15 of the Equality Act 2010 is not well founded and is dismissed.
(2) The Claimant's claim for a failure to make reasonable adjustments contrary to section 20 of the Equality Act 2010 is not well founded and is dismissed.

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REASONS

Introduction

1. The Claimant claims he was discriminated against on the grounds of disability. He seeks compensation. He also claims the Respondent failed to make reasonable adjustments, contrary to section 20 of the Equality Act 2010.

2. ACAS was notified under the early conciliation procedure on 16 March 2020 and the certificate was issued on 16 April 2020. The claim form was presented on 1 June 2020.

3. At this final hearing the Claimant was represented by Mr Rahman of counsel. The Respondent was represented by Mr Heard of counsel. This was a hearing which was listed and proceeded for 3 days and which was conducted remotely by CVP.

4. The case has had some practical difficulties such as:

    a. Initially reference was made to materials in the preliminary hearing bundle which were not contained in the final hearing bundle.
    b. The Tribunal had no updated schedule of loss and after requests from the Tribunal, this was received at the start of Day 2. This is despite a previous direction made that this should have been lodged by 24 November 2021.
    c. The Tribunal had no final agreed List of Issues. Again this was directed to be provided in advance of this hearing. We only received this at the start of Day 2.

5. Notwithstanding these practical difficulties the Tribunal were clear it was consistent with the overriding objective and in the interests of proportionality to proceed with this hearing this week and we ensured the missing material was considered when received.

6. There was further application made on Day 3 by the Claimant to adduce additional emails that were said to show requests for material from the Respondent. The Respondent objected on the basis it was effectively an 'ambush' and there was not sufficient time to take instructions and consider if there was other material the Respondent would seek to rely on in this context. For reasons provided at the time the Tribunal refused the application, primarily as it was not relevant to the primary facts in this case and given that it was adduced so late (with no explanation as to why it wasn't adduced earlier) that it prejudiced the Respondent.

7. At the outset of this hearing the Tribunal was told by Mr Rahman that at times the Claimant speaks fast when he is anxious and tends to not make sense at those times as he mixes up sentences. The Tribunal ensured we allowed the Claimant considerable latitude when he gave evidence – we asked him a number of times if he needed a break (which he declined each time), we

imposed breaks when we considered he had been giving evidence for a long period, and we allowed him scope to address the Tribunal at length in the context of his answers which were often comprehensive and detailed. Although we adhered to a timetable as to the evidence in order to complete the hearing this week, we ensured we were flexible and generous with respect to the timing of the Claimant's evidence as we wanted him to ensure he addressed us fully on all the points he wished to make.

8. The Tribunal has considered all the papers in the bundles before it and the additional material supplied during the hearing. The final hearing bundle was 284 pages and the preliminary hearing bundle was 113 pages. When there is reference to the bundle below, this is reference to the final hearing bundle. The Tribunal heard evidence from three witnesses on behalf of the Respondent, namely Ms Robins, Mr Kennedy and Ms Miller and also evidence from the Claimant.

9. We also heard oral submissions on behalf of each party and were assisted by outline written submissions from the Respondent. We are grateful to Mr Heard for producing the same in a very short time and to both counsel for their assistance.

10. We will deal now with the findings of facts made by the Tribunal.

Fact-finding

11. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all the evidence given by the witnesses during the hearing, including the documents referred to by them and taking into account the Tribunal's assessment of the witness evidence.

12. Only relevant findings of fact pertaining to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary and neither would it have been proportionate to determine each every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered.

13. Starting with uncontroversial facts, the Claimant is Alexander Akinjayeju. The Respondent is Capita Business Services Ltd.

14. At the relevant time the Claimant was employed by the Respondent company as a Security Operations Director. He worked full time, namely Monday to Friday with normal working hours of 9am to 5.30pm. The Respondent is engaged in the business of outsourcing. It is a wholly owned subsidiary of Capita plc which employs 65,000 employees in the UK and globally.

15. The Claimant states he understood his role to be strategic and to not contain an operational function. This is denied by the Respondent. The Tribunal notes the detail contained within the Job Information at page 187 of the bundle which

clearly includes reference to being 'Responsible for forecasting of the Operations practice' and we are satisfied on that basis there was an operational function to his role.

16. The Claimant was employed at the Respondent's Kings Hill / West Malling office in Kent. The Claimant worked for them for some 7 weeks, namely between 13 January 2020 until his dismissal on 4 March 2020. He was employed initially for a probation period of 6 months.

17. Victoria Robins was the Claimant's line manager. Neil Kennedy was the manager of Ms Robins. In Mr Kennedy's evidence he describes, and we accept, he had an 'open door' policy and welcomed speaking to all employees even if they were managed by others.

18. Ian Campbell was an operations manager who reported to the Claimant. There was a suggestion Mr Campbell had applied for the role the Claimant had and there was an element of 'sour grapes' when he was not successful. For the purposes of this judgment we do not consider it is necessary to determine whether this was true.

19. On his first day at the West Malling office the Claimant met Ms Robins. As part of his introductions to the Respondent company, the Claimant completed a health declaration form, which is at p.190 of the bundle. This is dated 13 January 2020.

20. On the question setting out 'Are you aware of any medical condition or inherited disorder which may prevent you from fulfilling your contract of employment now or in the foreseeable future' he ticks the ***Yes*** box. Further details are provided thus on the second page -

    - He has high functioning autism spectrum disorder
    - He is on a daily antibiotic
    - He has 8 weekly hospital visits for infusions.

21. In response to questions as to whether he considers he has a disability or whether there are any workplace adjustments or adaptions that may need consideration to assist him in his work, the Claimant ticks the ***No*** box for both.

22. The Claimant states he told Ms Robins he had sensitivity to humming noises from computers and uneven lighting, when there was a suggestion he joined the 'SOC gang' in their room. Ms Robins in her evidence states that she asked the Claimant what adjustments he would need after he disclosed his autism – and she noted the need to avoid bright lights and the fact he said he had regular hospital appointments.

23. We are satisfied on the evidence we have heard and find that the issue of the Claimant requiring a room without bright lighting was discussed between him and Ms Robins at the start of his work and he was placed in a room without bright or uneven lighting as a consequence.

24. The Claimant states he told Ms Robins he had depression that day (his first day) – something she denies. It is our assessment that Ms Robins was a truthful witness who was trying to help the Tribunal even though she had left the employ of the Respondent many months ago. At times she could not recall details, she was straightforward and said so. The Tribunal accepts her evidence there was no mention of depression on the Claimant's first day. The lack of any contemporaneous written documentation referring to this is significant – if the Claimant had wanted to notify his employers of this we find he would have done so in writing.

25. From the evidence of the Claimant and Mr Kennedy and Ms Robins it was clear there was a difficult relationship between the Claimant and Mr Ian Campbell. The Claimant's evidence was Mr Campbell was 'not delivering' and this was raised with Mr Kennedy and Ms Robins on several occasions by the Claimant. The Claimant contended he was advised to bypass Mr Campbell, asking the team of senior analysts to report to him (the Claimant) directly rather than their manager Mr Kennedy. He described the meeting on 16 January 2020 and other occasions when Mr Campbell did not, according to the Claimant, follow through with work asked of him.

26. We are satisfied, on the evidence we have heard, that there was a difficult relationship between Mr Campbell and the Claimant that can be best described as a 'clash of personalities'.

27. We are satisfied that the difficult working relationship was clearly known to the managers and meetings were called between the Claimant and Mr Campbell with a view to 'clearing the air'.

28. There is a factual dispute as to whether the Claimant made a derogatory comment directed to an Indian employee at a conference call on 20 January 2020 attended by Ms Robbins and others. This is strongly denied by the Claimant although not challenged at the meeting (record at page 223 of the bundle). Having heard evidence from Ms Robins and the Claimant on this issue we are satisfied that the Claimant made such a derogatory comment, accepting Ms Robins' account it was directed to the Indian employee. We found Ms Robins to be a truthful and credible witness, accepting the limits of her recollection at times and we note the discrepancy in that the Claimant did not deny making the comment at that meeting (as set out in the record).

29. At around the end of February a number of emails were received from the Claimant's team with complaints about the Claimant. For the Claimant's part he describes '*a constant feature of the team meeting is a constant complain and barraging of senior management and the company, and I was expected to join in the pity party, to which I wasn't going to take part*.'

30. The Tribunal accepts the submission that this was a clear example of the Claimant's management approach.

31. Ms Robins told the Tribunal the Claimant had weekly probation reviews, some of which were not documented. The Claimant did not dispute there were regular reviews.

32. The Claimant states that he was informed by Ms Robins, whilst on a train journey back from Birmingham to London, of criticisms of Mr Campbell and that she was full of praise for the Claimant for the progress he was making. Ms Robins denied this in her oral evidence. The Tribunal notes there was no written or formal record of either (a) such criticism of Mr Campbell or (b) praising the Claimant in the terms he suggests, which could have been contained either in an email or in written reviews, and as such the Tribunal is not satisfied that this conversation occurred as the Claimant suggests.

33. On 27 February 2020 the Claimant received an electronic meeting invitation attaching a spreadsheet of his probation objectives from his line manager advising that there would be a review of his probation on 4 March 2020. The Respondent asserts it also sent a letter that is at page 211 of the bundle, which the Claimant denies receiving. Much evidence has turned on whether this was in fact sent and the Tribunal was referred to metadata that showed a 'creation date' that appeared to be after the said meeting on 4 March 2020. In submissions the Claimant's case has been that it is not asserting there was less favourable treatment because the letter was not sent out – but it shows the lack of support from the Respondent generally. The Tribunal does not accept that submission – even taking the case at it's highest. The Claimant was aware of the meeting by virtue of the electronic invitation – the only additional matter of note in the letter was the fact it states the Claimant has a right to be accompanied. That was not referred to by the Claimant in any of his arguments on this issue. The Tribunal having considered all the evidence and submissions on this issue considers it is not necessary to make a finding on whether or not the letter was actually sent.

34. On 4 March 2020 the scheduled review took place. The script of this meeting is at page 219 of the bundle and the notes are at page 222.

35. Two main allegations were put to the Claimant – namely concern about running the team and the complaints from the team.

36. The Claimant says he was shocked. Ms Robins' evidence was he was made aware of gist of the concerns orally before the meeting. The Claimant had not been shown the complaints before (on HR advice, according to the Respondent) but he was shown them at the meeting.

37. Performance issues were discussed, including the Claimant's non-attendance at an important Bank of Ireland meeting, which he accepted he missed as his phone was elsewhere and he was working on something else. The notes of the meeting (page 224) describe that the Claimant's team feels the Claimant has an aggressive management style and the team feels demotivated and not valued and that the Claimant is not a team player.

38. We heard evidence from Mr Kennedy that he had considered an extension of the probation period as an alternative to dismissal but ultimately decided against this.

39. At that meeting the decision was then taken to terminate the Claimant's employment and provide the requisite notice.

Law

40. We are grateful to both counsel for the authorities which they have referred us to which we have considered, even if it is not referred to below.

41. We set out the relevant law below.

42. The Claimant's claims are for a failure to make reasonable adjustments and discrimination arising from disability contrary to sections 20 and 15 of the Equality Act 2010 ('EqA') respectively.

43. S.15 provides:

Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

44. Paragraph 2 of Schedule 1 EqA, provides that:

(1) The effect of an impairment is long-term if:

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months,

(c) it is likely to last for the rest of the life of the person affected.

45. Paragraph 5 of Schedule 1 provides that:

(1)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 correct it, and

(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

46. We were referred to *Guidance on matters to be taken into account in determination questions relating to the definition of disability* (2011) and in particular D3 that provides –
"*In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education- related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.*"

47. Section 20 provides:

Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled,

to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to: (a) removing the physical feature in question, (b) altering it, or (c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to: (a) a feature arising from the design or construction of a building, (b) a feature of an approach to, exit from or access to a building, (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or Case Number: 2301123/2019 20 of 37 (d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

48. Part 3 of Schedule 8, section 20 EqA provides:

Part 3
Limitations on the duty
Lack of knowledge of disability, etc.

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

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

49. Pursuant to S. 212 EqA, '*substantial'* means more than minor or trivial.

50. The general burden of proof is set out in section 136 EqA. This provides:

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

51. Section 136 (3) provides that section 136 (2) does not apply if A shows that A did not contravene the provision.

Knowledge of disability

52. The EqA imposes no duty to enquire about an employee's possible or suspected disability. Rather, in respect of constructive knowledge, the issue is whether employer could not reasonably have been expected to know of the employee's disability.

53. The applicable legal principles have been summarised recently in *A Ltd v Z* [2020] ICR 199, paragraph 23:

"23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2) ; it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long- term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610 , per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, " it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so] ", per Langstaff P in Donelien EAT at paragraph 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code , which (relevantly) provides as follows:
"5.14 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 reasonably have 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'.
5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. 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."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628 ; SoS for Work and Pensions v Alam [2010] ICR 665).

(7) Reasonableness, for the purposes of section 15(2) , must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code ."

54. More specifically, in relation to reasonable adjustments, a claimant must establish he is disabled and that there is a provision, criterion or practice which has caused the claimant his substantial disadvantage (in comparison to a non-disabled person) and that there is apparently a reasonable adjustment which could be made. The burden then shifts to the respondent to prove that it did not fail in its duty to make reasonable adjustments: *Project Management Institute v Latif 2007 IRLR 579*. The respondent may advance a defence based on a lack of actual or constructive knowledge of the disability and of the likely substantial disadvantage and the nature and extent of that because of a PCP - S.20, Part 3, Schedule 8 EA and *Newham Sixth Form College v Sanders 2014 EWCA Civ 734*.

55. In relation to discrimination arising from disability, once a claimant has established he is a disabled person, he must show that '*something*' arose in consequence of his disability and that there are facts from which the Tribunal could conclude that this something was the reason for the unfavourable treatment. The burden then shifts to the employer to show it did not discriminate. Under S.15 (2) EqA, lack of knowledge of the disability is a defence but it does not matter whether the employer knew the '*something*' arose in consequence of the disability. Further an employer may show that the reason for the unfavourable treatment was not the 'something' alleged by the claimant. Finally, an employer may show the treatment was a proportionate means of achieving a legitimate aim.

56. In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN* the EAT stated:

"*26. The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" - and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.*

27. In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability."

57. In *Pnaiser v NHS England & Anor UKEAT/0137/15/LA* the EAT stated, in reviewing the authorities:

"*31 (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

31 (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial)

influence on the unfavourable treatment, and so amount to an effective reason for or cause of it".

58. In *Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16/JOJ* the EAT stated:

"*15. In those circumstances, I do not consider that there is any conflict between the approach identified in Hall and that identified by Langstaff J in Weerasinghe. As Langstaff J said in Weerasinghe the ingredients of a claim of discrimination arising from disability are defined by statute. It is therefore to the statute that regard must be had. The statute requires the unfavourable treatment to be "because of something"; nothing less will do. Provided the "something" is an effective cause (though it need not be the sole or the main cause of the unfavourable treatment) the causal test is established.*

16. In this case, the Tribunal recognised that the requirement in section 15 does not involve any comparison between the Claimant's treatment and that of others. It expressly accepted that in considering a section 15 claim it is not necessary for the Claimant's disability to be the cause of the Respondent's action, and that a cause need not be the only or main cause provided it is an effective cause (see paragraph 29.2). Notwithstanding the arguments of Mr McNerney, I can detect no error of law in that self-direction.

17. At paragraph 29.3 the Tribunal applied the facts to that statutory test, adopting the two-stage approach identified in Weerasinghe. In light of my conclusions above, I do not consider that there was any error of law by the Tribunal in taking that approach. The Tribunal was entitled to ask whether the Claimant's absence, which it accepted arose in consequence of his disability, was an effective cause of the decision to dismiss him. To put that question another way, as this Tribunal did, was the Claimant's sick leave one of the effective causes of his dismissal?"

Conclusions and Analysis

59. The Tribunal will turn now to its conclusions and will rely on the list of issues prepared at the outset that both parties have agreed.

60. The following conclusions and analysis are based on the findings which have already been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

61. Turning first to whether the Claimant has a disability within the meaning of EqA – the Claimant asserts 'he is disabled within the definition of the 2010 Act by virtue of suffering from a physical/mental impairment that has substantial and long-term negative effect on his ability to do normal daily activities', (Conclusion, paragraph 3.2 of the Claimant's Particulars of Complaint).

62. The Tribunal has carefully considered all the medical material in the two bundles. The only medical diagnosis for the Claimant contained within the papers is for ADHD, which is referenced in Dr Mashru's report of 7 January 2021 and repeated in the letter from the GP (Dr Shah, 9 April 2021). There is no medical diagnosis of ASD or depression. The Claimant has attached photographs of medication to his 2021 Disability Impact statement – the Tribunal attaches little weight to this as photographs of medication are insufficient to confirm a diagnosis and do not address any impact of any condition he may have and as the Tribunal would have expected a letter from the GP or medical records to corroborate the conditions of depression and/or ASD.

63. The Tribunal has carefully considered the two impact statements that the Claimant has provided in support of his assertions that his condition / conditions affect his daily activities. In particular the recent (8.9.2021) statement refers to effects at paragraph 6, namely an overactive mind, hopping topics, inability to relax or switch off, consequently being over-exhausted and appearing inattentive; also having mood swings and struggling to engage / affecting his motivation. Being easily affected by bright lights and background noise is also referred to. He describes being impulsive and talking fast.

64. We find that these descriptions of effects are generic and non-specific. No examples are given of the effect on him, whether in the sphere of work or at home.

65. The Tribunal has to consider whether the Claimant is affected to a more than minor or trivial extent in carrying out day-to-day activities (which may include work activities) as a result of the impairment or impairments. It is the Tribunal's view that the generalised descriptions do not reach the level of affecting the Claimant to more than a minor or trivial extent.

66. We are satisfied that given the diagnosis of ADHD this is a mental impairment but we are not satisfied – on the evidence of the Claimant and the generalised description of the effects as set out above – that this impairment has a substantial and long-term effect on the Claimant's ability to carry our normal day-to-day activities. Looking at the Guidance referred to above, the Tribunal is not satisfied that the effects of the Claimant's ADHD affects what he does on a regular or daily basis – he has provided no specific instances of when this has actually occurred. Even the descriptions of the effect of his ADHD / conditions on his communications with his team and Mr Campbell are not particularised.

67. It is the claimant's burden to prove:
    a. disability, and
    b. that the impairment had an effect but for the measures that are taken to treat or correct the condition.

68. The Tribunal is not satisfied the Claimant has discharged that burden on the evidence that the Claimant has produced that the impairment had an effect that

is substantial and long-term. The evidence was so sparse it could not be reasonably be analysed. There was insufficient evidence of not only the substantial adverse effects but also in respect of whether the effect was long term.

69. Notwithstanding that finding the Tribunal has considered the position even if it had been satisfied that the impairment was substantial and long-term.

Knowledge of disability

70. The EqA imposes no duty to enquire about an employee's possible or suspected disability. Rather, in respect of constructive knowledge, the issue is whether employer could not reasonably have been expected to know of the employee's disability.

71. In this case the Claimant declared his ASD (not ADHD) at the outset. We accept the evidence of Ms Robins that she then asked him what adjustments if any the Claimant would want and the Claimant himself accepts he asked for an adjustment of room lighting. We note the health questionnaire referred to above specifically asks about adjustments.

72. The Respondent is criticised by the Claimant for not making a referral to Occupational Health for a further assessment of the Claimant / his needs or making more enquiry of him. The Tribunal finds this criticism is unfounded. The Tribunal finds the Respondent made reasonable enquiry both through the form and Ms Robins' enquiries (she gave evidence, which we accept, she asked the Claimant a number of times if he needed anything) once they were made aware of his declared Autism Spectrum Disorder.

73. The Tribunal finds that the conditions of ADHD and depression were not disclosed to the Respondent at the time of the Claimant's employment with them.

74. Therefore even if we considered that the Claimant had a disability (which we have not), we are satisfied that the Respondent could not reasonably have been expected to know of their employee's (ie the Claimant's) disability.

75. To the extent the Respondent was aware of the Claimant's self-declared ASD, in the Tribunal's view the Respondent acted reasonably in its enquiries of the Claimant.

76. For the sake of completeness the Tribunal also considered the section 15 claim notwithstanding the determination as to whether the Claimant had a disability for the purposes of EqA.

77. The Claimant asserts the unfavourable treatment is (a) the Claimant was not supported by the Respondent at all material times and (b) being dismissed / disciplined.

78. We are not satisfied there was unfavourable treatment in the first limb (a). The Claimant has not established there was a lack of support. We heard evidence, which we accept, from Mr Kennedy, who struck us as a genuine hands-on manager, that he had an open door policy for all employees and we note that there were attempts made by the managers to alleviate the difficulties between Mr Campbell and the Claimant. The Claimant himself states in his evidence that he considers that he was supported at that time, but not in hindsight. The minutes of the 4 March 2020 meeting shows a detailed exploration of the concerns raised as to the Claimant's performance – which we are satisfied he had the opportunity to respond to.

79. In respect of (b) we do not consider he was disciplined, but we do find the dismissal was unfavourable treatment. The Tribunal however is not satisfied there is a causal link in this case between the dismissal and something arising from the Claimant's disability. The Claimant's case refers in generalised terms to communication difficulties – but there are no specific assertions as to what is the causal link to the dismissal. The Tribunal does not know what communication difficulties are relied on – what exchanges, with whom and when. The Tribunal considers that there were performance issues of the Claimant that were raised and these were explored at the March meeting.

80. In respect of the claim for reasonable adjustments we do not go on to consider this given our finding as to whether the Claimant has a disability, however we do note the Claimant's case on this is characterised by a lack of specificity.

81. For all these reasons the Claimant's claims fail.

EMPLOYMENT JUDGE RAHMAN
31 May 2022