Neutral Citation Number: [2022] EAT 107

Case No: EA-2019-000865-DA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 July 2022

Before :

HIS HONOUR JUDGE WAYNE BEARD

- -

Between :

MR H AHMED	**Appellant**
- and -	
DEPARTMENT FOR WORK AND PENSIONS	**Respondent**

- -
- -

No appearance or representation by or on behalf of the **Appellant**, relying on written submissions
Changez Khan (instructed by Government Legal Department) for the **Respondent**

Hearing date: 23 June 2022

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

Grounds 1 and 2 are dismissed. In the absence of bad faith, communication between a manager and HR to obtain advice would not in normal circumstances amount to a substantial disadvantage for the purposes a reasonable adjustments claim pursuant to section 20 EqA 2010.

Ground 3. An employment tribunal is required to identify the PCP in a reasonable adjustments claim in order to identify whether it causes a substantial disadvantage to a disabled employee because of that employee's disability. Identifying the PCP by working back from the disadvantage alleged creates the danger of circular reasoning. The liberal approach given to the meaning of PCP (**Nottingham City Transport Ltd v Harvey** UKEAT/0032/12; **Lamb v Business Academy Bexley** UKEAT/0226/15; **Carreras v United First Partners Research** [2018] EWCA Civ 223 applied) shows that the tribunal is seeking to identify an expectation of the employee by the employer where the expectation applies to other employees or is repeated (or would be) with the particular employee. Having identified the PCP the tribunal should ask whether the PCP causes a substantial disadvantage and if so what step would be reasonable for the employer ***to have to take*** to alleviate it.

Ground 4 The tribunal fell into the error described in **Risby v London Borough of Waltham Forest** UKEAT/0318/15/DM. It did not consider whether the Claimant's conduct was a consequence of his disability in the broadest sense. The Tribunal also misidentified the consequence of disability; the unfavourable treatment could not also be a consequence of the disability.

HIS HONOUR JUDGE WAYNE BEARD:

PRELIMINARIES

1. This is an appeal arising out the Judgment of Employment Judge Butler sitting with members Mrs Fox and Mr Greatorex following a five day hearing in January 2019. The grounds of appeal advanced today were reformulated following an order of Mr Justice Choudhury made at a preliminary hearing on 27 October 2021. I shall refer to the parties as they were below; Claimant and Respondent.

2. The Claimant's reasonable adjustment claims were set out in the ET judgment. However, in both his ET1 and in the Preliminary Hearing those requirements of Section 20 Equality Act 2010 (EqA) are recorded somewhat differently.

3. The first provision, criterion or practice (PCP) relied upon:

   a. The first PCP in the Judgment is recorded as "*that he achieve a certain level of attendance at work to avoid being subject to the respondent's absence management procedure*." The substantial disadvantage advanced was that it was more likely to be difficult for him to achieve the Respondent's required attendance levels. The adjustment the claimant sought was 11 sick absences in a rolling 12 month period beginning in December 2016; for the totalling absences to start afresh from that date.

   b. The ET1 records the PCP as "*counting sickness absences in a 12 month rolling period and instigating formal attendance management procedures when sickness trigger point is reached*" the disadvantage was described as the management "*including absences related to disability that had previously been disregarded, making it unrealistic for me to comply"*. His complaint was that attending processes would cause unnecessary stress and worry.

   c. At the Preliminary hearing the following is noted as the PCP "*that he had to achieve*

a certain level of attendance at work to avoid being subject to the attendance management procedure" the disadvantage was that "*he would have more sickness absence because of his disability*".

4. The second provision, criterion or practice relied upon:

   a. This PCP recorded in the Judgment was that "*he was required to be flexible in taking his scheduled morning breaks and/or to work during a scheduled break.*" The substantial disadvantage was of being unfairly criticised and adjustment contended was that he be allowed to take his morning breaks at the allotted time.

   b. In his ET1 the PCP is "*being flexible with break times*" the rest of the entry is in narrative form but points out that there is an adjustment in place as a stress reduction plan (see below), and that the Claimant was alleged to be inflexible and there was a plan to implement warnings for conduct. This clearly relates to the communication between Miss Bi and HR.

   c. In the Preliminary hearing this PCP was recorded as not being allowed to take his morning break causing a disadvantage of increased fatigue and the adjustment was to allow him to take breaks.

5. The third provision, criterion or practice relied upon:

   a. This PCP, as recorded in the Judgment, was a requirement "*to undertake an excessive workload*" the disadvantage was being unfairly criticised for refusing to comply with a request and the adjustment advanced was not have been given work on short notice or asked to carry out the work of others.

   b. In his ET1 he related unfair criticism for reasonable adjustments to the communications with HR in respect of taking breaks and refusing particular work and set out the PCP as "*always do whatever management request even when you have good*

cause to decline" again in narrative form he contended that if management had implemented adjustments properly he would not have had to face a warning, the disadvantage was that he was more likely to be criticised and more likely to face a warning. Again this appears to relate to the criticism in communication from Miss Bi to HR.

c. In the Preliminary hearing this is recorded as the Claimant being required to have an excessive workload, with the disadvantage of fatigue and an adjustment of not being given work at short notice/without notice and not being asked to carry out other people's work.

6. In his claim pursuant to section 15 whilst the Claimant does refer to that criticism made in communication to HR he also refers to a letter sent to personally to him on 15 November 2017 by Miss Bi outlining criticism on the blocking of his diary. The ET considered that the claim under section 15 EqA was about unfair criticism for taking scheduled breaks, blocking out his diary and refusing work because of the tiredness and fatigue caused by his disability.

7. There are four grounds of appeal, however they have to some extent been subdivided but also deal with common themes:

a. Grounds 1 and 2 argue that the employment tribunal (ET) misapplied section 20 of the Equality Act 2010 when considering whether the Respondent's criticisms of the Claimant for declining additional work and taking breaks amounted to a substantial disadvantage. The Respondent had received occupational health (OH) advice to make adjustments. That advice also indicated that the Claimant was to play an active role in restricting his workload in line with the recommendations made. The criticism made of the Claimant was, essentially, because he was following the adjustments advised by OH. The criticism placed the Claimant at risk of the matters being considered in any

future disciplinary action.

b. Ground 3 argues that the ET misapplied section 20 of the Equality Act 2010 when considering reasonable adjustments in respect of absence management. A letter had been sent to the Claimant making an adjustment to absence management triggers. It is contended that the ET firstly focused on the interpretation of the letter rather than the broader issues relating to reasonable adjustments and secondly that the construction they placed on the letter was plainly wrong. It is further argued that the ET's interpretation of the letter defies logic and ignores factual matters which point to an alternative logical conclusion. In respect of the broader issues the Claimant relies on, amongst other things, the Respondent's internal finding that the level of absence might have been due to a failure by the Respondent to implement a stress reduction plan earlier.

c. Ground 4 argues that the ET misapplied section 15 of the Equality Act 2010 by adding a requirement that the Claimant's disability needed to have influenced the Respondent's decision makers. The further contention is that the ET took account of the conduct of the Claimant during the ET hearing which had no relevance to the specific conduct that the Claimant was criticised for at work.

THE EMPLOYMENT TRIBUNAL FINDINGS

8. The claimant's employment began in 2007 his job was to interview those claiming benefits. By December 2016 the claimant had accumulated 22 days' sickness absence. He was subject at that time to a regime where an 8 days absence in a rolling 12 months was a trigger point for consideration of action. Mr Hickman, the Claimant's line manager at that time, wrote a letter outlining matters discussed at a meeting held with the Claimant about absence (the Hickman letter). The Hickman letter set out that there had been four occasions when further steps could have been taken under the absence policy but weren't. The Claimant was recommended to visit his GP and to consult OH. The Hickman

letter also altered the trigger point of 8 days absence to one of 11 days absence, whilst simultaneously warning of the consequences if the trigger point was reached but caveating that with the phrase "*when all adjustments have been made*". In this meeting it was noted the stress reduction plan for the Claimant had not been implemented. The ET appears to criticise the Claimant for not following aspects of that plan which gave him a level of responsibility for controlling his levels of work. The ET concluded that there was nothing in the letter to support an inference that 22 days' absence already accumulated was to be ignored. The ET reached that conclusion relying on two elements. Firstly, the Respondent's HR gave advice to Mr Hickman which coincided with the interpretation he gave in evidence. Secondly, the Claimant had not, in cross-examination, put to Mr Hickman that he had said that earlier absence would be written off. I should indicate at this point that within the bundle before me are notes taken by a representative of the Respondent at the ET hearing. The notes demonstrate that whilst the Claimant did address that issue broadly with the witness, suggesting that the maintenance of the existing 22 days absence would not have alleviated the disadvantage, he did not specifically suggest to the witness that he was told that the rolling period would start afresh after that alteration.

9. The Claimant's consultation with OH was followed by a report dated 17 August 2017. The recommendations in the report were: "*Monitor the workload to avoid uneven, unexpected or excessive demands, and to ensure that it is commensurate with current capabilities*". "*A continuing supportive and empathetic approach would be advised as likely to help him remain in work*". "*It is important to recognise stressors arising and to take prompt empathetic action; therefore, you may consider that supportive mentoring may help provide an opportunity to express any workplace needs and concerns*". A further stress reduction plan was also put in place on 24 August 2017. It set out that the Claimant should take his breaks on time.

10. Miss Bi, a new manager, held a back to work interview with the Claimant on 4 October 2017.

The Claimant had taken 5 spells of absence since 19 September 2017 passing the trigger point on the Respondent's interpretation of the Hickman letter. After various confrontational discussions disputing the effect of the Hickman letter on periods of absence, and attempts to invite the Claimant to an absence management meeting, a letter inviting the Claimant to an absence management meeting was left on his desk. The Claimant refused to attend the meeting, and a decision was arrived at in his absence. No warning was issued but the Claimant was required to engage further with OH.

11. Two further confrontations took place between the Claimant and Miss Bi. On 5 October 2017 the Claimant was approached during his break and asked if he could see a customer after it, he refused on the basis he should not be interrupted during his break. On 30 October 2017, the Claimant on return from break found papers for 5 customers placed on his desk. These had not been booked in to see him; he told the customers to give their papers back to Miss Bi. The Claimant was requesting a change of manager Miss Bi took advice from HR and was told to continue with the absence management process and the Claimant's mid-year review; the Claimant refused to attend meetings with Miss Bi. The ET accepted that Miss Bi was genuinely trying to do her best to understand the claimant's disability and to support him. It was in this email that the criticism relied upon for the reasonable adjustments claims was set out.

12. Miss Bi saw that the Claimant was blocking out periods in his diary preventing appointments being made with him; this was acceptable practice with managerial clearance which the Claimant had not asked for or received. The ET appear to accept that the Claimant did this because of the effects of his disability, but considered that he should have obtained managerial clearance first as encouraged in the stress reduction plan. The ET held Miss Bi's criticism about this was justified.

13. The ET was critical of the Claimant and took account of his approach in the tribunal hearing in support of findings of fact as to his conduct. The Claimant's character was accepted by the tribunal

to be "*difficult and prickly*" and found to be "*excitable and rude*" and "t*ruculent*". However, despite the Preliminary Hearing referring to the Claimant's social anxiety, the ET had no evidence that these characteristics were a consequence of his disability. The ET considered that the Claimant was a "*very difficult employee to manage*" citing his refusal to engage with the Respondent over the matters which led to his Claim. They described his verbal and written communications with the Respondent on these matters as amounting to insubordination. It is recorded that the Claimant left the hearing after the conclusion of the evidence and made no submissions despite being given the opportunity to do so.

14. Dealing with the s.15 EqA claim the ET indicated it was necessary to consider what was in the minds of those who treated the Claimant in the manner he argued was unfavourable and that there must be a connection between whatever led to the unfavourable treatment and the disability. The ET examined the complaint of "unfair criticism" and then posed the following question for itself to answer *"(w)e have to consider whether the unfair criticism as alleged by the claimant arose in consequence of his disability"*. The tribunal accepted that Miss Bi sought advice from HR in good faith detailing her account of what had happened. Then in answer to its own question concluded "*we do not consider that she had the claimant's disability in mind when (Miss Bi) criticised him*". The tribunal accepted that the Claimant became stressed as a result of his disability, but concluded he was argumentative and not willing to engage and found Miss Bi's criticism of him was neither consciously or subconsciously as a result of his disability, but because of "*behaviour and the refusal to help out by seeing additional appointments*". In a final aspect they concluded "*if the claimant's disability had any bearing at all in relation to s.15 ----- it was no more than trivial*" and any treatment arose as a result of behaviour.

15. The ET went on to consider section 20/21 EqA issues. They recognised that in **Griffiths v SoS for Work & Pensions** [2015] EWCA Civ 1265 (below) application of a PCP requiring attendance at a particular level which creates a risk of disciplinary action for an employee could put

a disabled employee at a substantial disadvantage. The ET concluded that this was addressed by the Respondent increasing trigger days from 8 to 11. The ET addressed the reasonable adjustment suggested by the Claimant, concluding that would have meant a potential total 33 days of sickness absence before trigger as of the date of the Hickman letter. They set out their factual finding as to the meeting with Mr Hickman and the meaning of the Hickman letter. The ET stated that they considered that increasing the Claimant's trigger point from 8 to 11 days was a reasonable adjustment stating *"(i)t would not be reasonable for the respondent to allow the claimant to take more than 11 days' absence without the absence management procedure being invoked*".

16. In dealing with the issue of breaks the ET stated that the adjustment sought was that the Claimant should not be asked to be flexible. The ET found he was asked but refused, but that no actual disciplinary action was taken as a result. The ET asked if the PCP requiring flexibility put the Claimant at a substantial disadvantage because of resulting criticism. The finding is a little curious in that it appears to be a finding that a flexibility requirement could not cause substantial disadvantage and did not in the Claimant's case. The tribunal stated the Claimant did not address whether, in being flexible, he would suffer increased fatigue. In dealing with excessive workload the ET found he was asked to see additional customers but refused and the claim was not of additional fatigue but unfair criticism because of the refusal. The ET found that the criticism of him by Miss Bi and others did put the Claimant at a substantial disadvantage because it was appropriate for them to note difficulties faced in exchanges with the Claimant. The tribunal stated that had the Claimant been disciplined it might have led to a different conclusion. They concluded the criticism of the claimant was justified and not a substantial disadvantage

THE LAW

17. The Equality Act 2010 (EqA) at section 15 provides:

> *(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.*

The EqA provides at section 20, insofar as is relevant:

> *(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
> *(2)The duty comprises the following three requirements.*
> *(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
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18. I have been referred to the decision in **Risby v London Borough of Waltham Forest** UKEAT/0318/15/DM. In that case the Claimant was disabled by reason of paraplegia but also had a short temper unrelated to his disability. His employer made a decision to use a venue to which he could not gain access for a workshop. The Claimant lost his temper and was dismissed on account of his conduct towards colleagues and of using offensive and racist language on two separate occasions. The ET dismissed his claims of unfair dismissal and disability discrimination. The ET concluded that his short temper was a personality trait and there was no logical connection between his behaviour and his disability. The Claimant appealed. The EAT allowed the appeal Mitting J finding that if the Claimant had not been disabled, he would not have been outraged by the decision to use a venue without suitable access. His misconduct arose from indignation caused by that decision and disability was one effective cause of that indignation and so of his conduct. Another effective cause was the characteristic of a short of temper unconnected to disability. There were, therefore, two causes of conduct that gave rise to his dismissal, one of which arose out of his disability. For the purposes of section 15 Mitting J held that all that had to be established was that disability was an effective cause of his conduct even if there were other causes.

19. **City of York Council v Grosset** [2018] EWCA Civ 1105 was also cited. The Claimant was a teacher disabled with cystic fibrosis whose case was that he was given an increased workload beyond his ability to cope. He suffered a high level of stress and whilst subject to the stress the Claimant showed an 18 rated horror film to a class of 15- year-olds without approval from the school or consent from parents. Disciplinary charges followed which resulted in his summary dismissal for gross misconduct. Accepting that showing the film was inappropriate the Claimant argued that it was an error of judgment caused by stress, a consequence of his disability and workload. The ET was satisfied that the error of judgment for which the Claimant was dismissed arose in consequence of his disability. Accordingly, the ET concluded that the dismissal was an act of disability-related discrimination contrary to section 15 EqA. The EAT upheld that Decision and the Respondent appealed to the Court of Appeal. The Court of Appeal dismissed the appeal rejecting an argument that the Respondent must, when subjecting the Claimant to unfavourable treatment, be aware that the "something" (i.e. the showing of the film) arose in consequence of the Claimant's disability. Section 15(1)(a) EqA 2010 did not provide for that as a further requirement. In this aspect they considered that there was support for that interpretation in paragraph 5.9 of the Code of Practice. Justification was also dealt with and the court also held that there was no inconsistency between a rejection of an unfair dismissal claim but finding in favour on his claim under section 15 EqA in respect of his dismissal, because the test under section 15(1)(b) EqA is an objective one, according to which the ET must make its own assessment.

20. In **Griffiths v SoS for Work & Pensions** [2015] EWCA Civ 1265 the Claimant had substantial periods off sick with a post-viral fatigue syndrome and fibromyalgia. The employer acted in accordance with its Attendance Policy, her level of absence triggering a warning. The Claimant asked for two adjustments: firstly, for the employer to disregard a certain period of absence so that the warning would be withdrawn; secondly, that the trigger point of absence for the Attendance Policy be increased. The request was refused and the Claimant took her claims to the ET which found no

breach of the duty to make reasonable adjustments. The EAT upheld the ET decision. The Claimant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal but also indicated that "*both the majority in the ET and the EAT were wrong to hold that the section 20 duty was not engaged simply because the Policy applied equally to everyone because the duty arises once there is evidence that the arrangements placed the disabled person at a substantial disadvantage because of her disability*". The court dismissed the appeal on the ground that the ET was entitled to hold that the proposed adjustments were not steps which the employer could reasonably be expected to take.

21. In the Supreme Court decision in **Williams v The Trustees of Swansea University Pension & Assurance Scheme & Anr.** [2018] UKSC 65 considering the meaning of treats unfavourably in section 15 EqA. The Supreme Court held that in most cases there is little to be gained from seeking to distinguish between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. The case involved an employee who had the benefit of an adjustment in respect of his disability reducing his working hours. However his disability progressed and he was required to take early retirement. However, under the pension scheme his retirement pension was based on the reduced hours. The Claimant's argument was that as there was an adjustment on the basis of his disability it should be ignored for the purpose of pension calculation and not to do so was unfavourable treatment. The case shows that the necessary first step to identify the relevant "treatment"; once this is done then it may well be "obvious" if that treatment is disadvantageous, and what the disadvantage is. In this case the treatment was the award of a pension. There was nothing intrinsically "unfavourable" or disadvantageous about being given a pension early as the basis of his entitlement to any award was by reason of his disability. The judgment confirms that demonstrating "unfavourable treatment" is a relatively low hurdle for claimants.

SUBMISSIONS

22. The Claimant has decided not to attend and relies on written representations.

a. In respect of ground 1 he contended that he would refuse additional work in accordance with the adjustments put in place. In those circumstances the Claimant was being unfairly criticised for refusing to comply with reasonable requests in front of others. The refusal was also treated as disciplinary so it was not a trivial disadvantage. He refers to **Griffiths** (above) and argues that the Respondent was already aware of the disadvantage and made agreed adjustments to mitigate it, it was the ignoring of these adjustments that led to the unfair criticism, he should have been allowed to refuse without criticism.

b. In respect of Ground 2 he advances the same argument save in reference to taking his breaks. He has argued that there is an indication that this was regarded as him being inflexible with his break timings (p.106).

c. His arguments on Ground 3 begin with the ET's apparent focus on the Hickman letter in deciding what was a reasonable adjustment. The ET made no analysis of the requirements in section 20, particularly as there was an indication in evidence that the Claimant's absence level might have, at least in part, arisen because of the Respondent's failure to implement stress reduction. The ET did not consider whether an additional 3 days before trigger was reasonable in these circumstances. A proper analysis would have revealed that the additional three days did nothing to alleviate the disadvantage i.e. the Claimant was as much at risk of an absence procedure being invoked before and after the increase in the amount of days before trigger, because of the absence record in the previous twelve months.

d. His second argument on ground 3 relates to the construction of the letter. It is argued it is both implicit in the content of the letter itself and the circumstances surrounding the absence meeting that the letter was intended to disregard previously accumulated

days. This in part was obvious from the admission in the letter that some absence might have been due to the Respondent's failures.

e. On Ground 4 the Claimant argues that having, apparently, found the treatment of the Claimant was unfavourable, the ET made the fatal mistake of considering that the disability had to be the motivation for the treatment. The Claimant was criticised for blocking out periods in his diary, being inflexible on break timings and refusing additional work. These arose, unarguably, from the Claimant's approach to implementing adjustments and therefore his disability. Therefore these were the "something" arising from his disability and the treatment was inconsequence of that something.

23. The Respondent's contentions:

a. On ground 1 the Respondent argues the PCP advanced by the Claimant at the ET was to "always do what management request even when you have good cause to decline". It is argued that the ET conclusion can be upheld on two bases (1) because there was no excessive workload because the Claimant refused to do what he had been asked (2) because no disadvantage was caused (a fact to be found by the ET) the conversation was private with HR, a potential course of action was outlined but not acted upon, Miss Bi was outlining a problem to receive advice from HR and was entitled to outline her perception it should not be considered an disadvantage where no steps were taken.

b. On ground 2 it is argued that on the facts the PCP alleged by the Claimant was never applied to him because he refused and that no disadvantage arose from his refusal to comply. No sanction arose from his actions whatever the Respondent had planned.

c. In respect of Ground 3 the Respondent states that the tribunal were entitled to interpret the letter as they did and to conclude that to wipe the slate clean would not have been reasonable. The ET interpretation cannot be described as perverse, particularly as the

letter does not describe wiping the slate clean. The view taken by the tribunal was a common sense view and was supported by contemporaneous HR advice given to Mr Hickman. The Claimant is not entitled to criticise the ET because he left early and did not listen to or respond to the Respondent's submissions.

d. Ground 4 is challenged on the basis that the so called criticism was a discussion between HR and Mrs Bi, it was not a substantial disadvantage for the same reasons as advanced in Ground 1. Further the criticism was about the Claimant's "behaviour" and if had any bearing was trivial.

DISCUSSION

24. The Employment Appeal Tribunal on any appeal seeks to understand whether the Employment Tribunal has applied legal principles correctly, reaching permissible conclusions. If the correct legal principles are outlined by the Employment Tribunal and apparently applied it is appropriate to read an Employment Tribunal's Reasons in the round without being pernickety or overcritical. There should not be a dissection of the reasons so that a paragraph here or a sentence there is relied upon to undermine the overall sense of the Judgment.

25. The differences between the descriptions of the PCP's in the ET1, Preliminary Hearing and the ET Judgment, albeit minor in the main, illustrate a recurring problem in reasonable adjustment cases; construction of the PCP often proves elusive. Unfortunately, it is often the case that the PCP constructed is reverse engineered from the disadvantage perceived; particularly when the PCP is being constructed by a litigant in person. It is important that any tribunal considering such a claim begin, as here, by identifying the PCP[1]. A PCP, simply put, is where the employer has an expectation[2] of the employee, and either the same expectation is made of other employees or there is an element

[1] Environment Agency v Rowan [2008] ICR 218
[2] Carreras v United First Partners Research [2018] EWCA Civ 223

of repetition in the expectation with the particular employee[3]. In order to found a claim the PCP must create a disadvantage because of a disability; constructing the PCP from the disadvantage has the danger of circular reasoning. The identification of the PCP should, because of the protective nature of the legislation, follow a liberal approach and a tribunal should widely construe the statutory definition[4].

26. Grounds 1, 2 and 3 all deal with reasonable adjustments. It is common ground that the Respondent was subject to the duty to make adjustments, it is further common ground that some adjustments were intended to be in place. It appears to me, at the heart of the Claimant's complaint as set out in the ET1, is that these adjustments were not being adhered to. The PCP's relied upon, as expressed in the ET1, appear to be usual day to day requirements of work, as they would be, if adjustments were not in place. It is necessary to note the disadvantage that those adjustments were intended to alleviate were levels of stress suffered by the Claimant at work and were intended to reduce the risk of stress as a reaction to work.

27. I have considerable sympathy for the tribunal: it was having to consider complex legal and factual issues with a Claimant whose lack of positive engagement in the process would not have assisted. For example, it was faced with coming to conclusions on these issues without the assistance of submissions from the Claimant. However, I do conclude that there have been some gaps that have arisen in the reasoning of the tribunal.

28. The Claimant's first PCP (relates to ground 3). In its initial form and its reframing on two occasions at the preliminary hearing and by the ET, all versions seem to have missed the virtue of simplicity in identifying the actual first PCP. This PCP was, in actuality, a requirement to achieve a

[3] Nottingham City Transport Ltd v Harvey UKEAT/0032/12 & Lamb v Business Academy Bexley UKEAT/0226/15
[4] Carreras *ibid*

level of absence of no more than 8 days in a rolling 12 month period (albeit that this was, in substance, what the final iteration by the ET closely reflected). That was the policy which the Respondent applied to its employees in respect of absenteeism. On that basis the substantial disadvantage that arose from that PCP was clear and accepted by the Respondent; that the Claimant would have additional absences because of his disability. The questions that would then remain for the ET would be: whether the adjustment the Respondent actually made would alleviate the disadvantage (they did not have to consider reasonableness for that adjustment); if not, whether the adjustment sought by the Claimant would alleviate the disadvantage and, if so, was it an adjustment that it was reasonable for the Respondent to have to make; if not, whether there was any other adjustment which it would be reasonable for the Respondent to have to make to alleviate the disadvantage.

29. The confusion here arose because a form of adjustment had already been agreed to by the Respondent. This confusion led to a further question as to the construction of the Hickman letter. The Claimant was arguing that the adjustment made was insufficient. The contents of the letter, and its meaning, was evidence which might impact on the question of whether an adjustment was reasonable. However, its construction was not key to all of the questions the ET was required to answer that I have set out.

30. I consider that the construction of the Hickman letter to be a matter of fact for the ET to resolve. It is not a contractual document, it simply sets out a record of decisions at a meeting. Unless the factual finding is perverse, which is a significant hurdle[5], the Appeal Tribunal should not interfere with such a finding. If the Claimant is correct that there was an agreement to start from a clean slate, and that was an adjustment made and removed, that will be evidence as the reasonableness of the adjustment[6]. However, its construction does not provide anything beyond that evidential value.

[5] Yeboah v Crofton [2004] ICR 257
[6] Northumberland Tyne & Wear NHS Foundation Trust v Ward UKEAT/0249/18/DA UKEAT/0013/19/DA

31. The ET had to choose between the evidence of the Claimant and Mr Hickman on this issue. In support of the Claimant's contention was the logic argument; that the adjustment made placed the Claimant at the same risk under the attendance policy the day after the adjustment was made as he had been prior to the change; it did not alleviate the disadvantage. In addition to this reliance is placed upon the apparent admission in the letter that some absence may have been caused by the failures of the Respondent. In support of Mr Hickman's evidence was the advice given by HR and the Claimant's failure to cross examine on the point. I consider there is fallacy in the Claimant's logic argument: it considers a static situation after the meeting with Mr Hickman; the situation was, by definition, not static, a rolling period was to be taken into account. Logically, some of the 22 days would begin to fall off as their anniversary was reached and the adjustment was to be long term not just for the period immediately post the meeting. A further consideration is that the decisions as to what followed a trigger point were discretionary, there was no automatic step. In contrast the ET found that there was clear advice given to Mr Hickman which was in accordance with his evidence as to the adjustment he put in place. I consider that, on the evidence before it, the tribunal was entitled to draw this conclusion. This comes nowhere near the circumstances necessary to demonstrate that the ET was perverse in reaching this conclusion.

32. As to the ET's focus on the Hickman letter when considering adjustments, it seems to me that there is some force in the Claimant's argument. The approach of the tribunal as to what adjustment it would be reasonable for the Respondent to have to make appears, even with a benevolent reading, not to descend to the requirements of section 20. There is an indication in evidence that the Claimant's absence level might have, at least in part, arisen because of the Respondent's failure to implement a stress reduction plan. It is logical to conclude that any failure to adhere to the agreed adjustments would include a risk that levels of stress would increase, and sickness absence might follow. That would mean that the disadvantage that the original stress reduction plan was intended to

address, would not have been addressed. In those circumstances the question of whether it would have been reasonable for the Respondent to have to disregard certain occasions of absence would need to be subject to consideration.

33. The ET does not explain on what basis it considers the addition of 3 days is an adjustment which is reasonable, beyond the fact that it was the adjustment that was made. The ET does not consider whether that adjustment alleviated the disadvantage or if there is any other adjustment, except that advanced by the Claimant, would be reasonable for the Respondent to have to make to alleviate the disadvantage. The ET does state that the adjustment sought by the Claimant would not be reasonable. It does so by indicating that it did not think it reasonable that the Respondent might have to accept 33 days of absence before triggering an absence procedure. However, it does not address the Respondent's admitted failing in implementing a stress reduction plan when considering this aspect of reasonableness. In addition, the same criticism I raise as to the Claimant's logic, applies here. The tribunal appears to be considering this as a static situation and does not appear to consider the falling off of absences on their anniversary. On that basis I would allow the appeal on ground 3.

34. The identification of the PCP's in respect of grounds 1 and 2 are of lesser importance to my conclusions. This is because of the nature of the disadvantage alleged. The complaint is that Miss Bi communicated negative information about the Claimant to the Respondent's HR. It appears relatively clear from the ET judgment that the Respondent's managers exercise a decision making function. However, it appears those managers are supported in such decision making by the expertise provided by HR. That expertise would cover the detail of the policies and procedures which the Respondent applies, but also would be likely to include information as to the implications of employment law. This support is provided after the particular set of circumstances is described by a manager to HR. However, the decision whether to follow the advice and how to implement a decision based that advice is that of the manager. Without advice from HR any decisions would depend on the particular

knowledge and skills of a manager. There is the obvious risk in a large organisation that this could lead to a lack of consistency in decision making. It could be not be a disadvantage for manager to research policies and procedures and employment law in order to come to an appropriate decision. On that basis it is, in general terms, an advantage and not a disadvantage to employees that managers have access to such advice.

35. Of course it is arguable that there could be a disadvantage to an employee where a manager deliberately gives false or misleading advice to HR. However, here the ET did not consider that there was any indication of malice on the part of the Respondent's managers. The ET was correct to say if there had been a disciplinary process of any sort that could have amounted to a disadvantage; there was no such process. Taking account of those matters it appears to me that in the Claimant's case Miss Bi seeking advice and providing information to HR in order to obtain that advice from the appropriate department cannot be considered a disadvantage.

36. If the disadvantage was fatigue as set out at the preliminary hearing, then the Claimant faces these difficulties. Firstly whilst there were requests for the Claimant to be flexible with his breaks there was never an occasion where the Claimant was actually required to be flexible. In those circumstances the adjustment in place was not disturbed. Similarly, where the PCP was to take additional work, again the Claimant did not do this additional work; the adjustment was kept in operation. On that basis the appeal on Grounds 1 and 2 is dismissed.

37. The Ground 4 appeal relates to the application of section 15 EqA. The treatment of the Claimant relied on here includes the criticism that was made in the email to HR but also included the criticism made directly of the Claimant in a letter. It appears the ET considered this was unfavourable treatment. Even on the most benevolent reading of the ET Judgment Dealing with the s.15 EqA claim the ET indicated it was necessary to consider whether what was in the minds of those who criticised

the Claimant arose as a consequence of his disability. That would not be the correct analysis to adopt. The first step is to identify the something that is a consequence of the Claimant's disability. That would not be, as the ET set out, whether the unfair criticism was a consequence of disability. On any basis the criticism was relied on as the unfavourable treatment.

38. The Claimant relied on not being flexible as the something arising in consequence of his disability. Given the broad approach that needs to be taken to what amounts to a consequence of disability, it appears to me that where adjustments because of disability were made, one of which was that the Claimant should be less flexible, that falls to be considered a consequence. The ET also held that the Claimant's "behaviour" was the cause of the Respondent's criticism. It appears to me that the ET fell into the same trap as that described in **Risby**, they did not consider whether the Claimant's response was because of the attempted removal of the adjustment, and therefore another consequence of the disability in the broad sense.

39. The ET as a fallback conclusion decided that any treatment of the Claimant, even if unfavourable, was "trivial". However, that raises the question as to what was the ET conclusion was as the unfavourable treatment? If the ET, as they appear to have done, have conflated the treatment complained of with the consequence of disability, there is a concern that they have not correctly identified the unfavourable treatment to properly categorise it as trivial.

40. I consider that the appeal on ground 4 should be allowed. However it seems to me that my decisions mean that those matters which have been argued successfully on appeal should be remitted for consideration by the ET. However, on that basis I will need to hear submissions from the parties on whether that should be to the same or a differently constituted ET panel.