Neutral Citation Number: [2022] EAT 192

Case No: EA-2020-000626-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 January 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

MRS SHAMEEM AKHTAR

MR A D GARETH MORRIS

- -

Between :

MR K PRESTON

Appellant

- v –

E.ON ENERGY SOLUTIONS LIMITED

Respondent

- -
- -

Laura Prince and **Katy Sheridan** (instructed through Advocate**)** for the **Appellant**
Tom Gillie (instructed by Pinsent Masons LLP, Solicitors) for the **Respondent**

Hearing date: 8 December 2022

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 am on 6 January 2023

SUMMARY

Disability Discrimination – sections 6, 15, 20 and 21 and schedule 8 ***Equality Act 2010*** *- date of knowledge of disability and substantial disadvantage – reasonable adjustments – reason for dismissal - justification*

The claimant was disabled by reason of his suffering primary reading epilepsy ("PRE"). The ET found that this gave rise to a substantial disadvantage by reason of an increased risk of suffering tonic-clonic seizures when reading. The ET concluded, however, that the respondent had not known, and could not reasonably have been expected to have known, of this disadvantage until 18 October 2017, when the claimant was already on sick leave due to stress, unrelated to PRE. It held that no duty to make reasonable adjustments arose before that time and that the respondent had put in place all reasonable adjustments thereafter. The ET further found that the claimant was ultimately summarily dismissed because of his conduct in refusing to engage with the measures put in place to secure his return to work. That, the ET concluded, was a justified means of achieving the respondent's legitimate aim of efficient absence management. The claimant appealed.

Held: dismissing the appeal

The ET had not failed to consider issues relevant to imputed knowledge but had permissibly concluded that there was nothing disclosed by the claimant that meant the respondent, its servants or agents, ought reasonably to have known of the substantial disadvantage suffered by the claimant prior to 18 October 2017. Moreover, in reaching its finding as to the nature of the disadvantage in this case, the ET had correctly approached the evidence regarding the impact of the impairment suffered by the claimant and its conclusion could not be said to have been perverse. Similarly, the ET had been entitled to find that the claimant's stress (and, therefore, his sickness absence) was unrelated to PRE. As for the ET's finding that the unfavourable treatment (the claimant's dismissal) was justified, having correctly directed itself as to the relevant legal test, it had been open to the ET to conclude that the claimant's summary dismissal was a proportionate means of achieving the respondent's legitimate aim given his continued refusal to respond to reasonable management requests in circumstances in which occupational health had advised that he was fit to return to work and all

reasonable adjustments had been made to enable him to do so.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This is our unanimous judgment. The appeal before us relates to claims of disability discrimination and asks whether the Employment Tribunal ("ET") erred in its approach to issues of knowledge and substantial disadvantage, in assessing the date on which any duty to make reasonable adjustments arose, and/or in its determination of proportionality.

2. In giving this judgment we refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeal against the reserved judgment of the Leicester ET (Employment Judge R Clark, sitting with Mrs Pattisson and Mr Bogaita, from 17-21 February 2020, with a further day in chambers on 14 April 2020). The claimant was represented by his partner below but now appears by Ms Prince and Ms Sheridan, acting *pro bono*; Mr Gillie has represented the respondent throughout.

3. On the initial, on-paper, consideration of the claimant's appeal, HHJ Barklem took the view that it disclosed no arguable question of law. The claimant exercised his right to an oral hearing under rule 3(10) **Employment Appeal Tribunal Rules 1993** (as amended), when he was assisted by counsel acting under the Employment Law Appeal Advice Scheme, and persuaded HHJ Tayler that this matter should be considered further at a preliminary hearing. The preliminary hearing subsequently took place before HHJ Tucker, when Ms Prince appeared for the claimant, and permission was given for the appeal to proceed on amended grounds.

The Facts

Disability and Impact

4. It was common ground before the ET that the claimant was disabled for the purposes of the **Equality Act 2010** ("the EqA") by reason of his suffering primary reading epilepsy ("PRE"); PRE is a rare form of epilepsy stimulated by reading. The claimant was

diagnosed as suffering from PRE in 2009, after suffering two tonic-clonic seizures (previously known as *grand-mal* seizures) at ages 15 and 22. As a result of his condition, the claimant also experiences myoclonic seizures (previously known as *petit-mal* seizures), which he can suffer on a daily basis, and which the ET described as follows:

> "6.4 … This is described as an involuntary jaw jerk or muscle spasm. [The claimant] interchangeably referred to the myoclonic seizure as an "absence" seizure. He used this term because, for a split second, he may experience a moment of apparent unconsciousness and sometimes this may manifest in momentary confusion, alexia and dysphasia. In the moment of such a seizure, words he would ordinarily be able to read and understand become difficult to comprehend. We find the duration of these events to be that of a split second, … taken from his consultant's description. They require him to gather his thoughts before being able to continue with the task in hand. To put the scale of the seizure into context, [the claimant] said he would be surprised if anyone would notice, including a person with whom he was holding a conversation.
>
> 6.5 [The claimant] confirmed there was no inherent disadvantage arising from a myoclonic seizure beyond the momentary forgetfulness … and that in themselves they do not interfere with his ability to work. The significance of myoclonic seizures is that they are an indicator of how his brain is responding to the reading stimuli. The more frequent and intense the myoclonic seizures become, the greater the risk that he may be moving towards a tonic-clonic seizure which is to be avoided. Faced with that situation, the clinical advice is to remove the stimuli by simply stopping reading which might require little more than looking away from the words or sometimes taking a break. These measures allow the effects of the stimuli to subside. In terms of the scale of these control measures, they themselves may occupy an equally short period of time and may coincide with the natural variation in tasks being performed either at his work or in his private life."

5. When addressing the question of disability, the ET made specific observations about the way in which the claimant's case had been put, recording this was:

> "6.6 … not put on the basis of a disability arising from mental health although [the claimant] was absent for many months with stress and depressive symptoms. His neurologist also had previously recorded a longstanding history of anxiety and depression unconnected with PRE. On the evidence we have seen in this case we find that PRE is not the cause of [the claimant's] stress, anxiety and depression and we find the two are unrelated. We do, however, accept that being stressed may well mean his awareness of myoclonic seizures are heightened and may be intensified. It is important to record that that is the way the claimant puts the relationship between stress and PRE. It is also important to emphasise that we are not asked to decide this case on the basis of a disability arising from stress, anxiety or depression and we have not done so. That is not how it has been put, argued or defended."

6. As for adjustments that might be required in relation to the claimant's experience of PRE, the ET found:

> "6.9 … the best evidence was that which came from [the claimant's] consultant neurologist. …That recommendation was limited to "occasional breaks from reading off a computer screen"."

7. The ET returned to this issue later in its judgment but, using this to put the potential disadvantage suffered by the claimant into context, it concluded:

> "6.10 … the scale of the likely disadvantage in any given situation is therefore low and the adjustments necessary to reasonably address it adequately are likely to be of similar measure."

8. The ET considered its view was further supported by the following: (i) the claimant had taken up a position with the respondent with the support of his partner, who had experience of that workplace (having previously worked there himself) and knew of the claimant's condition; (ii) the claimant had not only coped in that environment but, without seeking any adjustments, had done well over a number of years, leading to an offer of permanent employment which he had accepted; (iii) when raising work-related health issues in 2017, the claimant had not identified PRE as a relevant cause.

The Claimant's Employment

9. The respondent is an energy retailer. The claimant first started working for the respondent as a customer services adviser, engaged on a contract through the agency Manpower. His direct employment with the respondent commenced on 1 October 2016.

10. The recruitment process with Manpower included disclosure of health issues and the ET found the information provided by the claimant was as follows:

> "7.6 … [the claimant] had said he might need additional time to read through documentation. Shortly after his appointment, [the claimant] sent an email to his Manpower contact letting them know of his condition of PRE but there were no implications or potential disadvantages raised as a result of this. We find no adjustments were discussed, requested nor any disadvantages anticipated by either party."

11. As for what was known by the respondent, however, the ET concluded:

> "7.6 … Significantly, … the information was not passed on to the respondent and there was nothing thereafter that could reasonably have alerted the respondent to the possibility of anything causing disadvantage to [the claimant]. [The claimant] accepted the respondent was not aware of what little communication there was on the issue between him and Manpower."

12. In April 2016, the claimant was moved into a complaints resolution manager role. He performed well and was offered and accepted direct employment. At this stage, when completing the respondent's forms, the claimant ticked the relevant box to state he had a disability. This was picked up when the paperwork was forwarded to Human Resources and a pre-employment health questionnaire was sent to the claimant, but he never completed or returned it; rather, as the ET found, he:

> "7.11 … continued in his role as he had before, working well and without any apparent disadvantage or need for adjustments. …"

This, the ET considered, was indicative of the claimant's view that he did not suffer any substantial disadvantage in the workplace.

13. Although the claimant's move to complaints resolution evinced his good performance, he had had concerns about the additional stress it might entail and the ET found it likely that:

> "7.21 … he did not derive much pleasure from the work itself and … the nature of conflict resolution can be draining, even if one is good at it. …"

14. An additional stress arose from a structural change in early 2017, when the claimant moved to a new team, led by a different manager, and the complaints work was expanded to include new areas of demand; the ET found this was:

> "7.25 … a likely contributor to work related stress for an individual who was, at best, indifferent to this area of work but at least competent in his original demand area. The ... additional demand areas were new to [the claimant] and, although there was thorough training, it must have felt to him like starting the job all over again."

15. Notwithstanding this increased pressure, the claimant's performance continued to be very good and he was still undertaking regular overtime, which provided a means of increasing his earnings and, the ET concluded, demonstrated how well he was coping in his role.

16. During the winter of 2016/2017, the claimant experienced health issues unrelated to PRE, suffering three episodes of winter sickness and then experiencing issues with a pre-existing back complaint. Taking time off triggered the attendance management policy, which led to a formal improvement plan being issued in March 2017. This was an additional pressure for the claimant, particularly as he had to take a day off work sick in April, which meant he did not achieve the plan and, at a hearing on 4 May 2017, was issued with a first formal warning; this, the ET found, was a work-related stressor, unrelated to PRE (see ET, paragraph 7.29).

17. In anticipation of the formal hearing under the attendance management policy, the claimant had sought the support of his Unison representative, Ms Kaur, who suggested he ask his manager to undertake a stress risk assessment. This was also discussed at the 4 May 2017 hearing, when the claimant gave a great deal of detail about his health conditions but, as the ET found, nothing that touched on PRE. Subsequently, stress risk and display screen equipment ("DSE") assessments were undertaken and, during the latter, the claimant made a number of detailed criticisms relating to what he considered to be past failures by the respondent. Again, however, no issues were raised relating to PRE and the claimant did not make any link between PRE and the symptoms he was experiencing.

18. Subsequently, the claimant was referred to occupational health and an assessment took place with a Mr Milligan. Although that referral had related to the claimant's back issues, the consultation included references to PRE, elicited in response to standard questions regarding his medical history; the ET noted as follows:

> "7.44 The report that was sent following this consultation focused on the value of a DSE and stress risk assessment which was already in hand … It made no reference to PRE. We accept the reason was as given by Mr Milligan when

> the following year he was asked to respond to [the claimant's] subsequent grievance. He said how it was not a current problem and he did not regard it as related to the issues being raised by [the claimant]. He stated that the issues raised did not relate to reading but the job role and devising a plan related to addressing those stressors. He said he was asymptomatic at the time and he did not consider any adjustments were necessary. [The claimant] agreed in evidence that it was reasonable for the respondent to accept this as suggesting he was not suffering any issues relating to PRE at the time."

19. Subsequently, on 5 September 2017, there was a review of the stress risk assessment, when it was recorded that the claimant had:

> "no concerns, no additions to add either. [The claimant] is happy with everything that was previously discussed and will let me know if anything changes." (cited by the ET at paragraph 7.45)

20. On 18 September 2017, the claimant was signed off work for two weeks. He told the respondent this was due to anxiety and depression but also disclosed difficulties arising from PRE. A further stress risk assessment was undertaken and a fresh referral made to occupational health in which PRE was explicitly raised, although, as the ET found, at this stage the respondent did not understand there was any interaction between stress and PRE.

21. The claimant continued to be signed off work by his GP; his fit notes referencing "*depressive symptoms – work related stress*". On 23 November 2017, a hand-written addendum was added, stating "*and primary inherited reading epilepsy*". In later fit notes, that reference was clarified to state that "*PRE symptoms were worsened by stress*". The ET concluded that PRE was not itself the reason for the claimant's absence, reasoning:

> "7.51 ... We find it hard to understand why, if PRE was a feature of the initial causes of the absence as alleged, it was not reported as such on the fit notes. It can only be that this did not feature in any discussion between [the claimant] and his GP or, at least, that the GP did not regard it as causative. We note that when the GP was invited to contribute to the occupational health advisers reaching a final clinical assessment explicitly in the context of what was then known about his PRE, the GP still described the reason for absence as being "depressive episode secondary to work stress" and that he had been seen several times since to renew his sick note due to stress which he reports is caused by difficulties with occupational health". The highest that it can be put is that being stressed can intensify his PRE symptoms which we entirely accept. We do not accept that PRE is a cause of his stress and depressive

> symptoms. We find, therefore, that PRE was not the reason for the absence. We find the reason for his absence was depressive symptoms arising from other causes."

22. Meanwhile, a further occupational health assessment was undertaken on 18 October 2017, this time with a Ms Cook, who considered there were underlying management issues that needed to be addressed before the claimant could return to work. The claimant continued to be supported by his trade union and it was around this time that Ms Kaur first became aware of the claimant's PRE. Notwithstanding this awareness of the claimant's condition, the ET found that PRE was only indirectly raised at this stage, as a criticism of the stress risk assessment process:

> "7.61 … neither Occupational Health nor the trade union representative raised PRE as a specific reason for [the claimant's] continued absence. We are unable to reach a finding that the relationship between stress and PRE was stated in the manner that is alleged. We do accept, however, that it was raised and was expressed as a potential symptom secondary to the work-related stress in that being stressed can aggravate the symptoms of PRE. We do not accept that [the claimant] put it the other way around, that is, that lack of adjustments for PRE was the cause of his mental health problems or reason for his absence."

23. A plan was put in place for a series of adjustments designed to address the claimant's workplace issues and help him back to work. The claimant did not, however, return but contacted management to say that, while he appreciated the support he had been given, he felt trust had broken down and, notwithstanding the occupational health advice, he disputed that he was fit for work. In a meeting with management on 31 October 2017, the claimant explained that he was suffering from jaw jerking, migraines, memory loss, lack of concentration, and low mood. It was agreed that he could take regular breaks and that the activities in his return to work plan could be adjusted to support him.

24. On 16 November 2017, the claimant's consultant neurologist reported to his GP the results of a consultation he had had with the claimant on 26 October 2017; as the ET observed:

> "7.72 … He recorded the headaches which he felt were related to the work situation. In respect of his epilepsy, he reported:

> [The claimant] has not had any major seizures for many years and indeed has only ever had two in his life. He still gets the jaw jerks when reading and talking, perhaps associated with a very brief second interruption of awareness. He can actually read much better on screen than on paper as this seems to cause fewer jerks. He finds that taking a break from using the screen is a good way of settling this down, …"

25. The claimant was expected to commence a phased return to work on 20 November 2017 but 'phoned in sick with "*'flu like symptoms*", returning on Thursday 23 November 2017. At a return to work meeting on 24 November 2017, the claimant said he wanted to raise a grievance. On Monday 27 November 2017, he again 'phoned in sick, saying he felt overwhelmed and that this had heightened his PRE.

26. On 4 December 2017, the respondent emailed the claimant, setting out the extent of the support that was being offered. The ET accepted that the claimant confirmed he was:

> "7.80 … comfortable with all of the actions that had been agreed and appreciated the support."

27. Also on 4 December 2017, the respondent responded to the points raised by the claimant in his grievance, largely rejecting his complaints.

28. On 6 December 2017, the claimant attended a further occupational health consultation with Ms Cook. This resulted in a new report, advising that the claimant was disabled for the purposes of the **EqA** and that a workplace risk assessment should be undertaken to assess his role in terms of the amount and sources of the reading involved. The ET recorded that it was around this time that the claimant's objection to the phased return to work plan crystallized into a requirement that the adjustments offered should be made permanent. The respondent agreed, but explained this did not mean there would never be any future review. The ET considered the claimant's position as follows:

> "7.87 … He saw no value in any future review of the adjustments. We found that to be an unreasonably inflexible position particularly in circumstances where he was not even prepared to try the adjustments during the initial phased return."

29. On 9 January 2018, the claimant had a further consultation with occupational health, this time with a senior advisor, Ms Howe, who reported:

> "[The claimant] has been reviewed by his specialist and provided reassurance that his symptoms should settle when his stress levels improve. In my opinion, [the claimant] is fit to return to work at the end of his current fit note which expires on the 02.02.18. Considering the presentation of his condition I have suggested that he seek some external support in the next couple of weeks prior to his return to work, he may require some support with managing this process. His union representative, Manjit Kaur, has kindly offered to support him in contacting Be Supported for psychological support and also Access to work for a workplace assessment and understanding of what additional equipment may support him and managing his role, which may include reading software and assistive technologies" (see the citation by the ET at paragraph 7.89)

30. As the ET found, it was understood that Access to Work would undertake a workplace assessment once the claimant had returned to work, when his work and working environment could be assessed. At no time, however, did the claimant make contact with either Be Supported or Access to Work.

31. Ms Howe's report also introduced for the first time the concept of a "*readiness to work plan*", known as "*work conditioning*"; the ET described this as follows:

> "7.92 … We find this to be a highly supportive scheme allowing an additional period of time during which [the claimant] would simply be "acclimatised" to the normal expectations of working life. We cannot over state just how basic these expectations were. This was a gradual plan to get [the claimant] used to nothing more than getting out of the house and to work; turning up on time; engaging with his colleagues; socialising; catching up on developments in the business and matters of that nature. It was a plan which would take place over four weeks before he then embarked on the original four-week return to work plan. It was a period during which it was understood the workplace assessments by access to work and others could take place. There was, therefore, a period of around eight weeks planned before any review would take place of the effectiveness, either way, of all the permanent adjustments that had by then been planned to be put in place."

32. The ET concluded that an extensive package of support had thus been provided for the claimant, explicitly based on an understanding of how PRE affected him. The immediate feedback from the claimant and Ms Kaur was positive and the claimant agreed to return to work on 17 January 2018. Subsequently, however, the claimant wrote to Ms Howe raising a number of concerns and, on 16 January 2018, Ms Kaur informed the respondent

that the claimant was unlikely to return to work the next day. The ET concluded that by this stage there was nothing that the respondent could have put in place that would have enabled the claimant to return to work. At the end of January 2018, the claimant was again signed off work by his GP until 2 March 2018. As the ET recorded, however, his health had not worsened since the last occupational health assessment and Ms Howe continued to advise that the claimant was fit for work.

33. On 20 February 2018, the claimant's GP provided details regarding his PRE diagnosis but was unable to provide any meaningful input in response to questions regarding the need for restrictions in the workplace, deferring to occupational health in this regard. Meanwhile, the claimant had stopped making contact with management and a letter was sent to him on 23 February 2018 raising concerns about this and reminding him that it was expected that he would return to work on 27 February 2018.

34. The claimant did not, however, return to work, saying that his mental health had deteriorated further. Subsequently, on 12 March 2018, the claimant made clear he would not be returning to work. The ET recorded management's response, set out in a letter of 13 March 2018, as follows:

> "7.109 … This letter set out the recent history and the previously agreed return to work plan together with the plan for exploring further support. It recorded the attempt to engage with the GP to inform the occupational health position. It set out in detail the adjustments that had previously been agreed to support both a four-week phased return to work and the initial work conditioning. We record that the letter is the culmination of various points of face to face and written communication within which the respondent had informed [the claimant] that it was prepared to put in place measures of the nature that we are now tasked with assessing as failures to make reasonable adjustments, specifically including issues of additional and flexible breaks, uninterrupted paperwork time, focusing on limited areas of business, ongoing support and reviews to identify additional support. Against that background, [the manager] then set out the crux of the issue which was now a warning about what would happen in the future if he did not return to work. She said:–
>
> > As reasonable attempts have been made to resolve the dispute regarding your fitness to work and no new medical information was presented by your GP in your medical report, you have been deemed fit to return to work with the above adjustments in place. It is therefore my expectation that you return to work on 19 March 2018 on the return

> to work plan previously agreed with you. Failure to return to work on 19 March 2018 would result in your absence being viewed as unauthorised and as a potential disciplinary matter."

35. The claimant did not return to work on 19 March 2018 and he was duly invited to a disciplinary hearing, with the warning that one possible outcome might be his summary dismissal. That hearing took place on 5 April 2018, with the claimant and his union representative in attendance. At the outset, however, the claimant presented an extensive grievance which led to the hearing being adjourned so this could be investigated. A meeting relating to the claimant's grievance took place on 20 April 2018, with the claimant and Ms Kaur in attendance. On being asked what outcome he was seeking, the claimant replied "s*ubstantial compensation*"; the ET found that this response:

> "7.114 … gives an insight into [the claimant's] present intention not to return to work and is consistent with the state of affairs that had existed over the previous five months whereby whenever it appeared that a plan had been agreed for his return to work, rather than test it, a new challenge create *[sic]* a new obstacle to any return to work. It also highlights a separation between [the claimant's] own thoughts and feelings and the complaints being expressed on his behalf through the grievance and other correspondence apparently originating from [the claimant]. It follows we find nothing that the respondent could do would have resulted in [the claimant] returning to work. It is inevitable that this employment relationship would have soon come to an end."

36. On 4 June 2018, a copy of the grievance investigation report was provided to the claimant and he was invited to a reconvened disciplinary hearing on 8 June 2018. At the claimant's request, that hearing took place by telephone conference call. On 15 June 2018, the manager's decision was sent to the claimant; as the ET recorded:

> "7.121 .. It is necessarily a lengthy document running to 22 pages. As to the disciplinary allegations, she found that [the claimant] was fit to return to work and that all the adjustments contended for were there to be implemented on his return and had been made clear to him that they would. She accepted that if there had previously been any doubt about that, it was put beyond doubt in the discussions on 12 March 2018 which had been put in writing on 13 March 2018. She expressed her concern that [the claimant] had not demonstrated a willingness to return to work and was concerned that his accounts of earlier discussions about PRE had not been supported by those he said he had spoken to about it. Her conclusion was that against that background his continued absence amounted to gross misconduct and he was dismissed with effect from

15 June 2018."

37. Although the claimant was advised of his right of appeal, he did not pursue this.

The ET's Decision and Reasoning

38. The claimant brought claims of disability discrimination under section 15 **EqA**; of discrimination by reason of a failure to make reasonable adjustments in breach of sections 20 and 21; of disability related harassment; and of victimisation. For present purposes, we are concerned only with the first two of those claims. More specifically (although the claimant's complaints before the ET covered a far longer list of issues in each case), in relation to the section 15 claim, we are concerned with the dismissal as the act of less favourable treatment; and in relation to the reasonable adjustments claim, the appeal is focused on the provision, criterion or practice ("PCP") put as a "*requirement to read constantly from a computer screen while simultaneously talking to customers on the telephone*".

39. Dealing with the section 15 claim, the ET made the following general findings:

> "8.3 The respondent has relied on an aim of efficient absence management to ensure consistency and quality of service for the respondent's customers. We are satisfied that is a legitimate aim. …
>
> 8.4 The something arising relied on in this case is sickness absence. There is no doubt that [the claimant] was absent from work. We have found the reason for that absence was his stress and depressive symptoms and not his PRE. Whilst [the claimant's] level of stress can have a bearing on how he experiences the symptoms of PRE, we are clear in our findings of fact that the absence did not arise in consequence of the PRE but because of other factors, including the changes to [the claimant's] work following the reorganisation of the business to a complaints centre. That is a fundamental and fatal conclusion to claims of unfavourable treatment. Nevertheless, so far as it is possible to do so we have gone on to consider the remaining elements of each allegation."

40. The ET found that dismissal was clearly unfavourable treatment. Assuming that it was wrong in its primary conclusion (as stated at paragraph 8.4), the ET considered the position as if the claimant's sickness absence had arisen in consequence of his disability. In so doing, it was satisfied that, by the time of the dismissal, the respondent

had the necessary knowledge of the claimant's disability. The ET did not, however, find that the respondent's treatment of the claimant was because of his sickness absence, reasoning:

> "8.8 … The reason for his dismissal was the employer's view of his conduct in his refusal to engage with the measures put in place to assist in his return to work. That was in circumstances where the employer was not only of the view that it had made sufficient steps to set up the necessary adjustments to support him back to work to such an extent that made it reasonable to insist on him returning to work, but those steps had at various times during the absence apparently been agreed by [the claimant]. There were a number of stages during the 10 months' period of sickness absence where it appeared that there was agreement for a package of adjustments to support a return to work which he then felt unable to engage with. There was no sanction in October, or November or any of the other points before the respondent had reasonably satisfied itself that reasonable adjustments were there to be implemented. There is nothing that explains why sickness absence should be the reason at 10 months (or even 7 when the disciplinary process was started) but not 4, 5 or 6 months. Something else was operating on the mind of the employer. In our judgment, it was the refusal to engage in the return to work process."

41. Even if that was not correct, however, the ET considered that the respondent's treatment of the claimant was proportionate:

> "8.9 … we are satisfied that the treatment of dismissal at that time was proportionate. It occurred after approximately 10 months; about 9 months after the meeting to explore barriers to return to work; for around 6 months or more the occupational health advice had been that he was fit to return to work with the package of adjustments; the employer and occupational health were alert to his PRE and took this into account and the decision to dismiss was reached only after a particularly thorough investigation into his grievances. Against that background, the alternative of simply allowing his sickness absence to continue indefinitely was not an adjustment we could say would have been a reasonable one to make, particularly as by then [the claimant] had expressed a negative view of returning to work on more than one occasion and his personal view, unadvised by Mr Parson's drafting or Miss Kaur's trade union advocacy, was that he wanted substantial compensation from the employer. For those reasons, if our primary conclusions are wrong, we are satisfied that the respondent had made available all reasonable alternatives *[sic]* to supporting [the claimant] back to work. We are satisfied that the treatment was therefore the least discriminatory and therefore a proportionate means of achieving the aim of efficient absence management to ensure consistency and quality of service for the respondent's customers."

42. For completeness, we further note that the ET rejected the claimant's complaints regarding the treatment of his sickness absence as unauthorised leave. Although this

was unfavourable treatment, it was not the fact or duration of the claimant's sickness absence that was the reason for this treatment but the claimant's position when there was a reasonable basis supporting his return to work (a) given the occupational health conclusion that he was fit to return to work with the package of adjustments in place, and (b) that such a package of adjustments had been agreed by the respondent and consented to by the claimant. Alternatively, the treatment was justified.

43. As for the claimant's claim that the respondent acted in breach of its duty to make reasonable adjustments, the ET first considered the question of knowledge, holding:

45.1 The respondent had actual knowledge of the claimant's PRE disability from 18 September 2017, when he raised this in his discussion with management but, given that the claimant had ticked the relevant box when completing the respondent's documentation in September 2016, there was knowledge of disability from late September 2016.

45.2 Further enquiry with the claimant in or around late September 2016 would not, however, have identified substantial disadvantage in the workplace.

45.3 The consultation with Mr Milligan on 6 June 2017 might also have provided a sufficient basis for knowledge of disability but:

> "9.11 … we are not satisfied there was anything in this which meant the respondent knew or could reasonably be expected to know there were disadvantages arising in any aspect of [the claimant's] work. In fact, this exchange seems to reinforce the conclusion that there were none."

45.4 As for any discussions with other colleagues:

> "9.12 … We have found as a fact that he did not make any material disclosures and did not share in any respect any disadvantages he felt he was experiencing arising out of his work. Further, this is not a case where there were particular issues that might put anyone, be it colleague or a manager, on notice that there might be a particular difficulty for two reasons. Firstly, we found [the claimant] was a particularly competent adviser and well regarded by the managers and team leaders he worked under. Secondly, even when things did start to go wrong for [the claimant] in the first half of 2017, there were various

> opportunities taken to explore what was causing this and we find in none of those did he raise his disability in a way that ought to have put the respondent on notice. Indeed, the way this was explored with Mr Milligan is one such example. Moreover, these were not just tangential opportunities to raise disadvantage in passing, they were clear and relevant opportunities where the disability as we understand it now was potentially directly on point and one could reasonably expect any disability related disadvantage there was would have been raised. None was raised. This was not because [the claimant] was slow to criticise the employer where he felt it was appropriate. There was criticism raised in the DSE assessment of the delay in organising an assessment over the previous three years ... We find it hard to imagine a situation in which it would be more appropriate to raise disability related disadvantages in the workplace than a formal sickness absence process, or a stress risk assessment or DSE assessments."

45.5 For the purposes of the claim under sections 20 and 21 **EqA**, the necessary state of knowledge of both disability and disadvantage arose from 18 October 2017 (the date of the occupational health assessment with Ms Cook).

44. Having thus identified the relevant date of knowledge, the ET considered when the duty to make adjustments arose in this case, reasoning as follows:

> "9.14 … The significance of the continued sickness absence is such that what was thereafter put in place formed part of developing a managed programme of measures to assist [the claimant] return to work. As he never actually got to a point where he returned to work, where these adjustments could engage with any disadvantage caused by the disability itself, we are assessing the reasonableness of those measures as a whole and as part of a phased programme which was subject to review. We accept the thrust of Mr Gillie's submission, relying on **NCH Scotland v McHigh** EATS 0010/06 that the time to consider the duty is when there is a clear return to work date but with some qualification. We take the view that where adjustments are part of the solution to getting an employee back to work, there has to be at least a reasonable plan to implement the necessary reasonable adjustments."

45. As for the PCP of there being a requirement to read constantly from a computer screen while simultaneously talking to customers on the telephone (and a number of similar alleged PCPs), the ET:

47.1 Recorded that there was no dispute that this was a PCP applied by the respondent relevant to the claimant's role.

47.2 Further recorded that the disadvantage relied on by the claimant was that any

reading caused his PRE symptoms to "*flare up*" with a risk of a full seizure and that reading constantly caused his symptoms to intensify over time which affected his ability to perform his role and caused him stress and anxiety.

47.3 Found, however, that the evidence did not support a finding that reading caused the claimant's symptoms to "*flare up*", concluding as follows:

> "9.20 … We accept that reading is a trigger for myoclonic seizures and may intensify when under stress. To the extent that these occur during any reading, they are momentary and are not said in themselves to cause any inherent disadvantage. To the extent these are a disadvantage of the PCP of reading in the workplace, we have concluded they do not pass the threshold of substantial. So far as the disadvantage manifest in the employment relationship, there was no material detrimental effect arising on [the claimant's] ability and performance in his role. However, so far as the disadvantage may manifest in a personal sense, the frequency and nature of myoclonic seizures is still transient but it serves as an indicator to the prospect of a tonic-clonic seizure before it arises. We accept that a tonic-clonic seizure is a serious matter. Reading does not inevitably cause such a seizure but, by the very nature of the condition, it does increase the risk of such a seizure occurring. That is enough to amount to a substantial detriment."

47.4 Further found that the respondent did not have knowledge of the disadvantage thus identified before 18 October (wrongly recorded as September in the ET reasons) 2017 and could not reasonably have been expected to have such knowledge.

47.5 Identified the adjustments contended for by the claimant as being: additional breaks; reducing his performance expectations; providing text reading software; giving extra time to do the work; providing a Bluetooth headset. Reaching the following conclusions in respect of those adjustments:

> "9.23 We do not accept that the text reading software and the provision of a Bluetooth headset are reasonable adjustments. The question of reasonableness engages two scales. On one side are factors such as the cost or disruption to the employer of implementing the adjustment, the effect on others, and the extent to which it might create further disadvantages etc. We accept they carry minimal weight in this example. On the other side of the scale is the extent to which it would address the disadvantage in question, either to remove it or to substantially mitigate its effect. We have been unable to understand how this could remove reading altogether. As the trigger for myoclonic seizures could be found in shorter episodes of reading from screen and reading from paper, we have nothing to suggest that the text reading

> software would, in itself, have any meaningful effect. However, if the cost and disruption of implementing was minimal, the benefits also only have had to be minimal to make it an adjustment that was reasonable to make and it may have formed part of a wider package of adjustments, the sum of which was reasonable. In this case, the bottom line is that the respondent did not refuse to make this adjustment and was more than prepared to explore the scope for such auxiliary aids or technological solutions. Time was planned to be available to explore the efficacy of these measures with involvement from Access to Work during either the period of work conditioning or the phased return itself. [The claimant] never reached a point of starting his work conditioning and was never in the workplace at a time when the duty would otherwise have arisen. Ultimately, there has not been a failure to make the adjustment.
>
> 9.24 Similarly, we are satisfied that additional breaks, additional time to do work and reducing performance expectation were all ready to be in place on [the claimant's] return to work. [The claimant] never reached a point of starting his work conditioning and was never in the workplace at a time when the duty would otherwise have arisen due to his continued sickness absence for stress and depressive symptoms. He was therefore never exposed to the disadvantage at a time that the respondent was under the duty to make the adjustments."

46. In the circumstances, the ET concluded that the respondent had not acted in breach of its duty to make reasonable adjustments.

The Grounds of Appeal and the Parties' Submissions

47. The claimant's appeal was permitted to proceed to a full hearing on four grounds. By ground (1), the claimant contends the ET erred in determining the date of knowledge of his disability and the substantial disadvantage it caused him; in particular, it is said the ET erred in failing to consider the issue of imputed knowledge. By ground (2), the claimant says the ET erred in adopting too narrow an approach to substantial disadvantage. Ground (3) relates back to ground (1), with the claimant contending the ET erred in its approach to determining when the duty to make reasonable adjustments was triggered. Ground (4) is linked to ground (2) and challenges the ET's conclusion that the claimant was not dismissed because of his sickness absence; by this ground, the claimant also contends the ET erred in concluding that dismissal was proportionate when the respondent had not gone through its capability process and dismissal had been without notice.

48. In submissions, the claimant first addressed grounds (1) and (3). On the issue of imputed knowledge, the claimant says: (i) the ET failed to refer to this concept in its summary of

the relevant legal principles; (ii) it wrongly considered it significant that there had been no passing of knowledge from Manpower to the respondent; (iii) it did not consider whether Manpower's knowledge (actual or constructive) could be imputed to the respondent; (iv) it failed to address his case (set out in his ET1 and witness statement) that he had informed his first manager, Ms Smocynzinksi, about his condition, mentioning how it impacted upon his call handling (corroborated in the grievance investigation notes from 4 May 2018). The claimant says these points are material because the ET's conclusions regarding the reasonableness of adjustments, and the respondent's compliance with its section 20 duty, were premised on the fact that he was absent from work when the duty to make reasonable adjustments arose (see the ET, paragraphs 9.14 and 9.23); those conclusions would be unsafe if the respondent had knowledge of both the claimant's disability, and the substantial disadvantage to which it put him, from 2014. These points were also material for the ET's findings in respect of section 15 discrimination: a failure to make reasonable adjustments would have a material impact on the ET's conclusions that the respondent had acted proportionately (see paragraph 5.21 of the **ECHR Code of Practice**).

49. The respondent contends the ET clearly considered the issue of imputed knowledge. In respect of what was known to Manpower (and, as agent, it would have had to have had actual rather than constructive knowledge; paragraph 6.22 **ECHR Code of Practice**), it had found there was nothing that could impute knowledge to the respondent of the substantial disadvantage relied on by the claimant (ET, paragraph 7.6). As for Ms Smocynzinksi, there was a dispute on the evidence and it was apparent the ET had accepted the more limited information recorded in the grievance investigation (ET, paragraphs 7.6, 9.10 and 9.12). In any event, the ET: (i) considered whether the respondent had culpably failed to identify the impairment from the outset but found there was no such failure; (ii) had found the claimant's sickness absence was due to stress unrelated to PRE; (iii) had correctly held that the duty to make adjustments was not triggered until a return-

to-work date was identified. As for the section 15 claim, as the ET had found the claimant's sickness absence was not caused by PRE, even if there had been a duty to make reasonable adjustments, the adjustments would not have avoided the disadvantage in issue.

50. Turning to grounds (2) and (4), the claimant argues: (i) it was perverse for the ET to conclude that the relevant PCP put him to a substantial disadvantage through only one element of his impairment (the increased risk of tonic-clonic seizures) and not another (myoclonic seizures) when the repeated occurrence of the latter constitutes the existence of the former; (ii) the ET failed to consider his absence seizures (separately identified by the claimant in his witness statement and disability impact statement), and whether he was put to a substantial disadvantage by the PCP in respect of them; (iii) the ET had wrongly characterised the claimant's case on stress – in his ET1, witness statement and disability impact statement, he had made clear that there was a symbiotic relationship between PRE and stress, with the lack of adjustments exacerbating his symptoms from PRE which, in turn, led to a decline in his mental health and to his having to take sickness absence – and that necessarily infected its decision on the cause of the claimant's absence; (iv) the ET had further failed to consider, when dealing with the question of proportionality, whether the respondent had failed to follow its capability procedure, alternatively whether unauthorised absence could constitute gross misconduct and/or whether a lesser penalty (such as a dismissal on notice) would have been more proportionate.

51. In relation to ground (2), the respondent contends: (i) in holding that the claimant's myoclonic seizures did not put him to a substantial disadvantage, the ET was making a permissible finding on the evidence; (ii) the ET approached its task having regard to how the claimant had put his case and on his evidence at the hearing, in which he interchangeably referred to myoclonic seizures as "absence seizures"; (iii) as for the question of stress, the ET carefully considered the evidence and permissibly concluded that PRE was not the cause of the claimant's stress, anxiety and depression and his absence

did not arise in consequence of PRE. Relatedly, in respect of ground (4), the respondent says: (i) the ET permissibly concluded that the reason for the claimant's dismissal was his refusal to engage with the measures put in place to assist in his return to work; (ii) on the evidence before it, the ET made rational findings on the question of proportionality.

The Relevant Legal Principles

Disability Discrimination

52. The definition of disability is provided by section 6 **Equality Act 2010** ("EqA"):

> "(1) A person (P) has a disability if— (*a*) P has a physical or mental impairment, and (*b*) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> …"

53. By section 15 **EqA**, it is provided that:

> "(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."

54. Section 20 **EqA** imposes a duty to make reasonable adjustments, providing (relevantly):

> "(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.
>
> …"

55. By section 21 **EqA**, it is then provided that:

> "(1) A failure to comply with the first, … requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

…"

56. By paragraph 20 of part 3 of schedule 8 **EqA** (the "applicable Schedule" for these purposes), it is provided that:

> "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know… (b) that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage referred to in the first, second or third requirement."

57. Pursuant to its powers under the **Equality Act 2006**, the Equality and Human Rights Commission ("ECHR") has prepared and issued a statutory **Code of Practice** relating to the employment provisions of the **EqA** ("the Code"). Whilst **the Code** does not impose any legal obligations and is not itself an authoritative statement of the law, we take account of such provisions that appear to be relevant to questions arising in these proceedings.

58. The respondent relies on **the Code** in support of its submission that, for an agent's knowledge to be imputed to an employer, the knowledge in question must be actual, not merely constructive; see paragraph 6.21 of **the Code**:

> "If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agency) knows, in that capacity, of a worker's or applicant's … disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. …"

59. That, the respondent contends is consistent with the guidance provided at paragraph 8-208 **Bowstead & Reynolds on Agency** 22nd edn, as follows:

> "… Where a principal has a duty to investigate and make disclosure, the principal may be imputed not only with facts which the principal knows but also with material facts that relevant agents might have been expected to tell the principal."

60. For his part, in addressing the interrelationship between his reasonable adjustments claim and his case under section 15 **EqA**, the claimant places reliance on paragraph 5.21 of **the Code**, which provides:

> "if an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified for the purposes of a

discrimination arising from disability claim."

The Approach of the Appellate Tribunal

61. In considering the ET's reasoning, the respondent reminds us of the guidance provided by the EAT (Waite J presiding) in **RSPB v Croucher** [1984] ICR 604, at p 609G-610A:

> "… decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake [ETs] are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and … what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an [ET's] favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not …"

62. The respondent also draws our attention to the recent judgment of the Court of Appeal in **Volpi and anor v Volpi** [2022] EWCA Civ 464, where the following guidance was provided by Lewison LJ (with whom Males and Snowden LJJ agreed), at paragraph 2:

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

63. Although not specifically cited before us, we note that the guidance provided in **Volpi** is not dissimilar to that laid down by Popplewell LJ in **DPP law Ltd v Greenberg** [2021] EWCA Civ 672, at paragraphs 57-58 and by Singh LJ in **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694, at paragraph 42.

Discussion and Conclusions

64. Adopting the same approach as the parties, we have first considered grounds (1) and (3) of the claimant's appeal, which focus on the ET's approach to the question of knowledge insofar as that is material to the reasonable adjustments claim. As the claimant acknowledges, the respondent was under no duty to make reasonable adjustments if it did not know, and could not reasonably have been expected to know, that the claimant (i) had a disability, and (ii) was likely to be placed at the relevant substantial disadvantage. As for the section 15 claim, the claimant's arguments are contingent upon his succeeding in his submissions on the question of knowledge for the purposes of sections 20 and 21 **EqA**: this point is only material to the ET's reasoning under section 15 if it can be said that the respondent had failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment complained of (see paragraph 5.21 of **the Code**).

65. Turning then to the ET's findings on the question of knowledge, it was clearly satisfied that the respondent could reasonably have been expected to know that the claimant had a disability from September 2016 (when he completed the documentation for direct employment). There is a further question whether the respondent ought also to have been held to have had imputed knowledge of the fact of the claimant's disability from the time of his agency placement through Manpower in 2014: certainly the ET accepted that the claimant had communicated the fact of his PRE to his contact at Manpower soon after commencing this placement (ET, paragraph 7.6). Even if the ET erred in this respect, however, absent knowledge of substantial disadvantage, the mere fact that the respondent could be taken to know of the claimant's condition would not give rise to any obligation

under sections 20 and 21 **EqA**.

66. As for the question of disadvantage, although the ET did not accept the claimant's characterisation of the substantial disadvantage he suffered as a result of his disability, it did find that reading – given that it was a trigger for the myoclonic seizures suffered by the claimant, which served as an indicator of the prospect of a tonic-clonic seizure – increased the risk of his suffering a tonic-clonic seizure and that *this*, therefore, gave rise to a substantial disadvantage (ET, paragraph 9.20). It is the claimant's case that the ET ought to have found that the respondent had imputed knowledge of this disadvantage from an earlier stage, by virtue of his disclosures (i) to Manpower, and/or (ii) to Ms Smocynzinksi.

67. In relation to the disclosure to Manpower, without deciding the point, we are prepared to assume for present purposes that that which ought reasonably to have been known by Manpower, acting as the employer's agent, should be imputed to the respondent, as its principal. Even adopting such an approach, however, it is clear that the ET did not consider that Manpower had knowledge of the relevant substantial disadvantage, and its findings of fact do not support any suggestion that Manpower could reasonably be expected to have had such knowledge. Specifically, the ET found that the claimant had not suggested that there were any implications or potential disadvantages arising from his PRE (ET, paragraph 7.6). At most, he said that he might (not that he definitely would) need additional time to read through documents; on the ET's findings, there is nothing that might reasonably have alerted Manpower to an increased risk to the claimant of suffering a tonic-clonic seizure when reading.

68. As for the disclosure to Ms Smocynzinksi, although we have been taken to the relevant passage in the claimant's witness statement, it is apparent (see ET, paragraphs 9.10, 9.12 and 7.6) that the ET did not accept this evidence but preferred Ms Smocynzinksi's recollection, as recorded during the grievance investigation in 2018, as follows:

> "… did he ever talk PRE
> NS: mentioned, didn't know what was, asked to explain, he said if reads too much may fit but he knew what needed to do like look away from screen to prevent + said it didn't impact at work. I recom[ende]d he speak to Panna [at Manpower] to see if any support needed.
> … [the claimant] said he chased it up a few times
> NS I only remember 1 convo re this, he said didn't impact so we never went … back to it
> … So he never came back to chase up?
> NS: no."

69. This record of what the claimant said to Ms Smocynzinksi, in the early days of his deployment with the respondent, is entirely consistent with the ET's finding that he did not identify anything that might reasonably have been understood as a substantial disadvantage arising from PRE until October 2017. We do not consider that the ET ought to be taken to have erred because it did not expressly refer to the potential imputation of knowledge in its written reasons: it is apparent that it carefully considered the various different ways in which the respondent might have been expected to know of the claimant's disability, and how this impacted upon him, but was satisfied that he had not disclosed anything that might reasonably have alerted any relevant person or entity to the disadvantage he might suffer prior to the autumn of 2017. It would be wrong to assume that the ET failed to take account of the claimant's evidence regarding his disclosure to Ms Smocynzinksi when it is apparent that it had regard to this in considering what the claimant had (and had not) said to his colleagues and managers and was satisfied that the respondent could not reasonably have been expected to know that he experienced any disadvantages in the workplace (see **RSPB v Croucher**, and **Volpi**).

70. Our conclusions on these points mean that grounds (1) and (3) must fail. On the ET's permissible findings of fact (and applying paragraph 20, part 3 of schedule 8 **EqA**), until 18 October 2017, the respondent was under no duty to make reasonable adjustments when neither it, nor its servants or agents, knew, or could reasonably have been expected to have known, that the claimant was likely to be placed at the relevant substantial disadvantage. As the claimant had gone on sick leave on 18 September 2017, and as the ET was satisfied

that the respondent had put in place the relevant reasonable adjustments prior to any expected return date (see ET, paragraphs 9.23-9.24), there can be no challenge to the conclusion that the claim under sections 20 and 21 **EqA** failed. And, as the ET did not err in finding that the respondent was under no duty to make reasonable adjustments prior to 18 October 2017, it equally did not err in its approach to the claim under section 15 **EqA** in this regard: there was no reasonable adjustment that the respondent failed to make prior to the relevant date of knowledge such as to impact on the ET's assessment of proportionality for the purposes of the section 15 claim.

71. We turn then to grounds (2) and (4), and to the claimant's contention that the ET erred in how it considered the different aspects of his impairment. In support of the claimant's arguments in this regard, we have been taken to parts of the details of claim (attached to his form ET1), to the claimant's witness statement, and to his disability impact statement. We note, however, that the ET took care to clarify with the claimant how his PRE disability impacted upon him, and it recorded the claimant's own evidence as "*interchangeably*" referring to myoclonic seizures as an "*absence seizure*". More than that, however, the ET plainly took into account *all* aspects and symptoms of the claimant's condition, describing the various different effects in some detail (see ET, paragraphs 6.4 and 6.5): it was rightly concerned with making a holistic assessment of the effect of the claimant's symptoms, and correctly focused on the substantive nature of the impairment rather than the particular labels that might be attached to particular aspects of his symptoms.

72. Having appropriately assessed the impairment arising from the myoclonic seizures, as described by the claimant, it was not perverse of the ET to conclude that the relevant disadvantage was in respect of the increased risk of a tonic-clonic seizure. The ET gave detailed consideration to the contemporaneous evidence of how the claimant's disability impacted upon him at work, and found as a fact that he did not himself identify any PRE-related disadvantages arising from his work prior to autumn 2017 (see, for example, ET,

paragraph 9.12). Assessing the claimant's evidence on this question, along with the material available from his consultant neurologist, the ET permissibly concluded that his experience of myoclonic seizures did not give rise to any substantial disadvantage in terms of his ability to carry out his work (ET, paragraph 9.20). The ET did not, however, restrict its consideration of the impact of the claimant's impairment to the actual symptoms he experienced, but looked more widely at the interrelationship between myoclonic and tonic-clonic seizures and, notwithstanding the claimant's very limited experience of the latter, accepted that this identified a risk that was sufficient to amount to a substantial detriment (ET, paragraph 9.20). We note that this was consistent with the way the issue of substantial disadvantage had been characterised in the list of issues. It was, in any event, an entirely permissible approach given the evidence before the ET; we cannot see that any error arises in this regard.

73. Similarly, the ET adopted a detailed and careful appraisal of the evidence relevant to any potential link between PRE and stress and, therefore, to the question whether the claimant's sickness absence was something arising in consequence of his disability. Notwithstanding the ET's understanding of how the claimant was putting his case, it also carried out its own assessment of the evidence and was clear that "*PRE is not the cause of [the claimant's] stress … the two are unrelated*", finding only that "*being stressed may well mean his awareness of myoclonic seizures are heightened and may be intensified*" (ET, paragraph 6.6).

74. That was a conclusion the ET was entitled to reach given (i) its findings as to the other stressors impacting upon the claimant at the relevant time (see, for example, the ET, paragraphs 7.21, 7.25, 7.29); (ii) the claimant's own failure to identify any link between PRE and stress prior to autumn/winter 2017 (see, for example, ET, paragraphs 7.44, 7.45); (iii) the contemporaneous evidence from the GP fit notes (ET, paragraph 7.51); (iv) the fact that the claimant did not identify PRE as a relevant issue with his trade union adviser,

Ms Kaur, until October 2017; (v) the fact that neither occupational health nor the claimant's trade union advisor identified PRE as a specific reason for his continued absence when he was signed off with stress (ET, paragraph 7.61). On the evidence, the ET permissibly found that the stress suffered by the claimant was entirely unrelated to his PRE disability, save that, at a much later stage (mid to late November 2017 according to the GP fit notes), his stress began to worsen the symptoms he experienced as a result of PRE. Whether or not the claimant's case ought to have been understood as postulating a symbiotic relationship between PRE and stress, the ET was entitled to find that such a case was simply not made out on the evidence.

75. In any event, as the respondent has observed, the ET went on to find that the reason for the unfavourable treatment in this case (the claimant's dismissal) was in fact the claimant's conduct rather than his absence from work (ET, paragraph 8.8). For the claimant, it is said that this is not fatal to his argument, as his conduct ought to have been viewed as a possible consequence of his stress. That, however, is not how the claimant's case was put below and is neither supported by the medical evidence before the ET nor by the ET's findings of fact.

76. Otherwise, the claimant complains that the ET failed to expressly address the question whether the respondent had acted within its own procedures in deciding that he should be dismissed and had failed to consider whether dismissal on notice might have been a less discriminatory means of achieving the legitimate aims in this case. Again we consider that these are points that are being raised for the first time on appeal. In any event, we are satisfied that the ET clearly had in mind the relevant balancing exercise it was bound to undertake in assessing proportionality (see ET, paragraphs 8.3 and 8.9). In carrying out that exercise, it was clear that the respondent had "*made all reasonable [adjustments] to support [the claimant] back to work*" (paragraph 8.9), and that the reason for the dismissal was the claimant's "*refusal to engage with the measures put in place to assist in his return*

to work" (paragraph 8.8). We further note the ET's finding on the claimant's complaint of victimisation, that the dismissal "*related to the employer's perceived sense of gravity*" (paragraph 11.5). In those circumstances, we do not consider it can be said that the ET erred in accepting that the legitimate objective pursued by the respondent (efficient absence management) was proportionately met by treating this as a conduct issue that – given the claimant's repeated refusal to comply with reasonable management requests – warranted summary dismissal.

Disposal

77. For all the reasons we have set out above, we therefore dismiss the claimant's appeal.