Case Number 1602197 / 2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Mr M Nabeel Ud-Din**

Respondent: **CJCH Solicitors**

Held at: **Cardiff and Video (CVP)**
On: **23, 24 and 25 November 2022**

Before: **Employment Judge R Brace**
Non legal members Miss C Lovell and Mr R Mead

Representation

For the Claimant: **In person**
For the Respondent: **Mr M Wootton (Solicitor)**

Judgment having been sent to the parties on 28 November 2022 and written reasons having been requested in accordance with rule 62(3) Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

Written Reasons

Introduction

1. The hearing was conducted as a wholly remote hearing by video (CVP) which was not objected to by the parties.

Claims and List of Issues

2. The Claimant asserts that he was a disabled at the relevant times by reason of attention deficit hyperactivity disorder ("ADHD"), insomnia and personality

disorder. He brings complaints before the Tribunal of discrimination arising from disability (s.15 Equality Act 2010) in relation to his dismissal, indirect discrimination and failure to comply with the duty to make reasonable adjustments.

3. Prior to this final hearing, there had been six previous case management preliminary hearings:

   a. The first taking place before Employment Judge S Davies on 29 January 2020, when directions were given to prepare for a preliminary hearing on disability [33];
   b. The second taking place before Employment Judge Beard on 22 April 2020 [42]. Up to that point the Claimant had been represented and had prepared his disability impact statement although he had appeared in person at that hearing;
   c. The third and fourth preliminary hearings took place before me on 29 July 2020 (when neither party attended) [48] and 19 August 2020 (when the Claimant attended late due to connection problems) to discuss how the preliminary hearing on disability, then listed for 1 September 2020, could be conducted.;
   d. The Claimant subsequently applied to postpone the 1 September 2020 hearing due to his personal circumstances at that time, which was granted and the preliminary hearing on disability was re-listed to 13 November 2020;
   e. That fifth preliminary hearing, listed to consider the preliminary issue of disability, took place before Employment Judge Ryan on 13 November 2020. That hearing was postponed on the basis set out in Employment Judge Ryan's case management order [56];
   f. In December 2020, the Respondent made a costs application and a three hour public hearing on costs was listed. That preliminary hearing did not take place until 14 February 2022 when a costs order was made against the Claimant [76].

4. At that 14 February 2022 costs hearing, the claims and issues were also discussed and were listed in the Case Summary of the case management order of 14 February 2022 'List of Issues' [71].

5. Whilst the Respondent had written to the Tribunal and the Claimant by email on 30 November 2020, stating that '*The Respondent concedes that the Claimant is a disabled person. This is on the basis of the Claimant disclosing a letter confirming his disability of ADHD by Dr Mackay dated 21 August 2020',* the Respondent now maintains that it does not concede the Claimant was disabled by reason of his ADHD at the relevant time i.e. the date of dismissal.

6. That was far from clear from either the email to the Tribunal of 30 November 2020 and was not reflected in the written reasons for the Costs Order or case management orders made by Employment Judge Ryan on 14 February 2022. This therefore remained an issue for determination. The Respondent also disputes that the Claimant was a disabled person by reason of his endogenous depression, insomnia and borderline personality disorder.

7. The Claimant was encouraged to keep that List of Issues before him during the hearing.

Further Case Management

8. Further case management took place on the morning of the first day of the three day hearing and the following matters were discussed.

Witness statements

9. The Claimant had not complied with the case management order of Employment Judge Ryan in relation to witness statements but sought to rely on a witness statement, which he told us that had prepared early that morning. The Claimant was directed to send a copy to the Tribunal and to the Respondent, which he did at around noon on the first day. The Claimant also sought to rely on the particulars of claim attached to his ET1, as a statement of his evidence.

10. The Respondent did not object to the late production of the Claimant's witness statement and the Claimant was permitted to rely on this document, the ET1 particulars of claim and his Disability Impact Statement (which the Respondent was directed to email in as it was not included in the Bundle).

11. The Claimant also relied on a witness statement from a Petra Onderova, a statement which again the Claimant had only produced on the morning of the hearing.

12. Again the Respondent's representative did not object to the Claimant being given permission to rely on that statement and confirmed that he did not intend to question Ms Onderova. It was agreed that Ms Onderova was therefore not required to attend to give live evidence as neither the Respondent nor the Tribunal had any additional questions of her.

Additional Documents

13. The Claimant was also permitted to rely on a further bundle of documents that he had also emailed to the Tribunal and to the Respondent earlier that morning. The relevance of the documents were in question, but the Respondent's representative indicated that he was not opposing any

application for the documents to be included in the documents before the Tribunal. By consent these were also added to the Bundle.

Adjustments for the hearing

14. The following adjustments were put in place for the Claimant during this final hearing, based on discussions of how what he required currently:

    a. There will be regular breaks, every half an hour, but the judge would check with the Claimant during the hearing that this was the right amount of breaks. Increased short breaks to refocus would be permitted if necessary;

    b. The Claimant may need questions repeated and the judge will make sure the Claimant understands the question;

    c. The Claimant was permitted to type in the 'Chat Room' of the CVP hearing and read back, to himself and then aloud, what he had typed which would then be taken as his answer to any question;

    d. The judge would frequently sum up the current stage of tribunal process and what is expected;

    e. Clear, concrete language and simple, everyday words and phrases would be used;

    f. Sentences would be kept short;

    g. Single point questions were to be asked;

    h. slightly more time for questions to be processed would be allowed;

    i. Topics would be signposted.

    j. The clerk would telephone the Claimant at 9.45am each day to ensure he had not forgotten to attend the hearing.

Evidence

15. The Claimant was asked questions by the Respondent's representatives on the first day of the hearing.

16. All Respondent witnesses relied on witness statements, which were taken as read and the witnesses were subject to cross examination, Tribunal

questions and re-examination. The Tribunal heard also evidence from the following witnesses on behalf of the Respondent:

a. Tim Hartland, Managing Partner for the Respondent ; and
b. Alison Farrar, Solicitor and Operations Manager for the Respondent

17. There was a Tribunal bundle of 157 pages (the "Bundle") and references to the hearing Bundle appear in square brackets [ ] below. Any documents within the further documents disclosed by the Claimant on the first day are referred to with reference to their pdf page numbers and as the Appendix Bundle [Appendix].

18. Finally, on cross-examination of the Respondent's witnesses, reference was made by the Claimant to the Respondent's Staff Handbook, a document that was not contained in the Bundle. This appeared to the Tribunal to be a relevant document and the Respondent was directed to send a copy to the Tribunal. References to that document in this judgment are [SH].

19. The parties were informed that if the Tribunal was not referred to a document in any of the bundles, whether by way of reference to it in a witness statement, on cross-examination or in submissions, then the parties should assume that it would not be read by the Tribunal.

Disability – Law

20. The Equality Act 201 ("EqA") provides that a person has a disability if he or she has a 'physical or mental impairment' which has a 'substantial and long term adverse effect' on his or her 'ability to carry out normal day to day activities'. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA which essentially raises four questions:

a. Does the person have a physical or mental impairment?
b. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?
c. Is that effect substantial?
d. Is that effect long term?

21. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (**Goodwin** *v* **Patent Office** [1999] IRLR (EAT)). In **Goodwin** Morison P, giving the decision of this Court, also set out very helpful guidance as to the Tribunal's approach with regard to the determination of the issue of disability. At paragraph 22 he said:

"*The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question."*

22. The EqA 2010 Guidance states;

    '*In general, day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household takes, walking and travelling by various forms of transport, and taking part in social activities'* (D3).

23. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be taken into account in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations in itself, tribunals must take account of it where they consider it to be relevant.

24. The requirement that the adverse effect on normal day to day activities should be considered a substantial one is a relatively low threshold. A substantial effect is one that is more than minor or trivial (s.212 EqA and B2 Guidance).

25. Para 5 Sch. 1 Part 1 EqA provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal day to day activities if measures, including medical treatment, are being taken to treat or correct it and, but for that, it would likely to be the effect. In this context, likely is interpreted as meaning 'could well happen'. The practical effect is that the impairment should be treated as having the effect that it would have without the treatment in question (B12 Guidance).

26. The question of whether the effect is long term is defined in Sch. 1 Part 2 as

    a. Lasting 12 months;
    b. likely to last 12 months;
    c. likely to last the rest of the person's life.

27. Again, the Guidance at C3 confirms that in this context 'likely' should be interpreted as meaning it could well happen.

28. The Guidance (C4) also clarifies that in assessing likelihood of the effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything which took place after will not be relevant in assessing likelihood.

29. Finally, the burden of proof is on the claimant to show she or she satisfied this definition. The time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act (**Cruickshank** v **VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect.

Disability: Conclusion

30. The Claimant had provided a Disability Impact Statement and had included within the Bundle, the medical evidence he had sought to rely on in relation to his impairments.

31. Many of the documents provided by the Claimant post-dated the time that these are events are about and we were cautious about the relevance of such documentation.

32. In addition and in particular, within the witness statement evidence from Petra Onderova, Ms Onderova explained that she did not meet the Claimant until August 2021, some two years after the Claimant's employment with the Respondent, and whilst she explained in some detail her experience of the Claimant, we are reminded that we are assessing whether the Claimant was disabled at the date of the alleged discrimination, namely July 2019.

ADHD

33. Albeit the Claimant had not been diagnosed with ADHD until he was an adult, the Claimant's ADHD diagnosis was confirmed in the letter from the Claimant's Consultant Psychiatrist, Dr Kirsty Mackay, of 2 October 2018 [86]. At that time the Claimant was attending their outpatient clinic and was receiving medication daily for his ADHD [86].

34. The Respondent did not dispute that the Claimant had received a diagnosis of ADHD, and accepts that this is an impairment within s.6 EqA 2010. The Respondent placed weight on the date of diagnosis, 2 October 2018, over 9 months prior to the date of the alleged act of discrimination and submits that Dr Mackay's diagnosis provides no indication how long the ADHD had lasted or it would have a long term effect or cease in time.

35. The Tribunal take judicial notice of the fact however that ADHD is a lifelong condition for which there is no cure, although it can be managed with treatments and therapies.

36. In terms of timing of the impact of his ADHD, whilst the Claimant within his Disability Impact Statement spoke in general terms, rather than specifically July 2019, as this is a lifelong event, and as the Claimant had received his

diagnosis on or around 2018, we found that the Claimant had lived with the impact of his ADHD on his normal day to day activities all of his life and certainly by 2019, post diagnosis, the impact that the Claimant was describing was more likely than not the impact on the Claimant’s day to day activities as at time.

37. Within his Disability Impact Statement (§5, 7 and 12), evidence which was not challenged, the Claimant gave evidence that one of the symptoms flowing from his ADHD was anxiety which impacted on his ability to communicate. He also gave evidence that he lived a chaotic life, forgetting to have meals and getting distracted and being unable to concentrate. We accepted that evidence and found that the impact was adverse and had more than minor or trivial impact on the Claimant’s day to day activities: it met the definition of substantial.

38. We therefore concluded that the Claimant had the impairment of ADHD, that this had an adverse effect on on his ability to carry out normal day to day activities; that effect substantial and it fell within the definition of long term in that it had and would last the rest of the Claimant’s life. The Claimant was therefore a disabled person by reason of ADHD at the relevant time.

Insomnia

39. Whilst the Claimant gave evidence that he has primary insomnia, there were no medical records to support such a diagnosis, only some evidence of the Claimant reporting anxiety symptoms and sleep in 2014 whilst studying for his Masters in Strathclyde in 2014 [104]. We did not accept that the Claimant had an impairment of primary insomnia.

40. However we are conscious that a diagnosis is not always necessary for establishing whether the Claimant has an impairment and we accepted, as a result of the unchallenged evidence from the Claimant, that he was experiencing some insomnia which affected his punctuality at work at some point in 2019. There was no evidence that it had any other impact on his day to day activities.

41. We were therefore not persuaded that the Claimant had demonstrated that the insomnia that he was experiencing in 2019 had lasted or was likely to last more than twelve months or, indeed, the rest of his life to meet the definition of ‘long term’ or that it impacted on his day to day activities to the extent that it met the definition of ‘substantial’.

42. The Claimant has therefore not proven that he was disabled by reason of primary insomnia.

Depression

43. Whilst the Claimant gave evidence within his Disability Impact Statement that he also suffers from depression, endogenous depression, that did not appear to have been reflected within the medical records, albeit we accepted that the records did reflect that from time to time the Claimant suffered from anxiety as a result of his ADHD.

44. Whilst was some GP correspondence (which post-dated the Claimant's employment,) that indicated that at some point the Claimant has received a diagnosis of anxiety and low mood and had been prescribed anti-depressant medication, there was no medical evidence to support the Claimant's claims that he had endogenous depression.

45. Again, when we considered the Claimant's own Disability Impact Statement §14, we took from the wording of the Claimant's statement that he believed he had such a form of depression.

46. Within that Disability Impact Statement, whilst the Claimant had described symptoms and described how it made him feel, the activities described were positive, in that he described how it would make him a better researcher.

47. He did not describe how it impacted adversely on his day to day activities and did not explain over which period of time there had been any impact. We were therefore not satisfied that the Claimant had demonstrated either that he had the impairment of endogenous depression or that it had a long term, substantial adverse impact on his day to day activities at the relevant time.

48. The Claimant did not prove on the evidence before us that he was a disabled person at the relevant time by reason of endogenous depression.

Personality Disorder

49. Likewise, there was no medical evidence to support the Claimant's claims that he had a personality disorder at the relevant time i.e. July 2019. Whilst the Claimant had given evidence that he had been diagnosed by Dr MacKay in March 2019 (§2 Disability Impact Statement,) with borderline personality disorder ("BPD"), none of the correspondence that the Claimant had provided from that particular clinician referred to such a diagnosis (see [84 – letter 3 September 2020, 85 – letter 21 August 2020, 86 – letter of 2 October 2018).

50. Whilst the Claimant set out in his Disability Impact Statement some of the symptoms of BPD[1] , of how the Claimant felt and his emotional state, we had no evidence before us of either the impairment itself or indeed the impact on the Claimant's day to day activities.

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[1] §13 Claimant Disability Impact Statement

51. On that basis, we were not satisfied that the Claimant had proven that he was disabled by reason of BPD at the relevant time in July 2019.

Disability discrimination claims

Findings of fact

52. The findings of fact given by the Tribunal are again made on the basis of the evidence before us and based on the balance of probabilities.

53. The Respondent is a firm of solicitors operating in South Wales. It employs around 150 staff across a number of offices including an office in Cardiff.

54. The Claimant was employed by the Respondent, from 15 July 2019 until the termination of his employment on 24 July 2019, as a Compliance and Enforcement Paralegal within the Anti-Piracy and Compliance Team of the Respondent ("AP&C Team"), based in the Respondent's Cardiff office. That AP&C Team employed around 50 staff and within its Compliance and Enforcement team, there were around 20 employees, with around 17 being female.

55. As reflected in his CV, the Claimant had, prior to accepting employment with the Respondent, an impressive and varied education [113]. This indicated that after studying for a BTech in Computer Science and Engineering and a Masters Degree in Biomedical Engineering, between 2018-2019 the Claimant had undertaken the one year Graduate Diploma in Law at Cardiff University.

56. The Claimant also indicated within his CV that he was proficient in 6 languages and had given examples of his legal work experience which included work at the CAB and acting as a McKenzie Friend. His CV set out a list of what he considered to be his personal qualities which included, amongst others:

    a. Coping effectively in demanding circumstances;
    b. Good time management, adopting a flexible approach to work;
    c. Working with people.

Interview

57. The Claimant applied for a role within the Respondent' organisation as a paralegal using that CV. The Respondent understandably was extremely impressed with the Claimant's CV, given that the Claimant had a background in both law and engineering and that he could speak a number of languages,

languages that were spoken in the geographical areas that the Respondent operated in and covered.

58. He was interviewed for the post by Tim Hartland, then the Managing Director of the Respondent and Stuart Clarke, an employee within HR.

59. Tim Harland gave evidence on cross examination that he recalled the Claimant presenting as confident at that interview, promoting his own skills. He was more than happy to offer the Claimant the position as a result of his CV and confidence in interview, being excited by the Claimant's skill set and was optimistic that the Claimant could be promoted to research and development.

60. What was said in that interview by the Claimant to Tim Hartland is in dispute and is relevant to the issue of the Respondent's knowledge of the Claimant's disability:

    a. The Claimant claims (§2 ET1 Particulars of Claim [15]) that he brought his disabilities to the Respondent's attention in that job interview;

    b. The Respondent disputes this, expressly denying that the Claimant made the Respondent aware of the disabilities that he referred to in his Particulars of Claim, either at the interview or indeed at any later stage when he actually started working with the Respondent (§7-9 ET3 Grounds of Resistance [28]).

61. The Tribunal heard evidence from both the Claimant and Tim Hartland on this specific issue and both were questioned on whether the Claimant had told Tim Hartland at interview that he lived with the disabilities that he now relies on for the purposes of this claim, whether ADHD or otherwise.

62. Tim Hartland was clear and unequivocal that at no stage did the Claimant raise concerns regarding his health, or say that he was 'suffering from a disability', as he put it. Tim Hartland's further evidence was that if the Claimant had raised that he had a disability, that he would have asked the Claimant how the disability had manifested itself and how the Respondent could accommodate that. He was clear that at interview the Claimant had confidently promoted his skills and the Claimant's health had not been discussed or mentioned.

63. The Tribunal preferred the evidence of Tim Hartland and found that the Claimant did not tell the Respondent at interview of his disability of ADHD, or for the avoidance of doubt, any other health conditions of insomnia, depression and/or personality disorder.

64. When cross-examining Tim Hartland, the Claimant asked Mr Hartland whether that as a certain degree of negativity was required to be a good at research, a skill the Claimant held, it would have been therefore self-evident that the Claimant would have an underlying disability, such as depression. He further asked if that was the case this should have put Tim Hartland on notice to '*peel back'* (as it was put,) i.e. to enquire about any underlying health issue the Claimant may have. Tim Hartland rejected that suggestion and we also did not accept that suggestion to be credible.

65. The Tribunal were not persuaded that simply because the Claimant was good at research that this put the Respondent on some form of notice that there may be an underlying disability.

66. We found that the Respondent did not know and could not reasonably have been expected to know that the Claimant was disabled following that interview.

67. Whilst not directly relevant to the Claimant's disability claims, we also accepted Tim Hartland's evidence that at no time during that interview did the Claimant say that he had organised a mini-pupillage for 18 July 2019.

Offer letter and contract of employment

68. The Claimant was sent an offer letter which provided that his working week would be 40 hours and that his working hours would be 8.30-17.30 Monday to Friday [117]. The Claimant subsequently signed a contract of employment on 15 July 2019, the first day of employment [119]. This contract set out the Claimant's main terms and conditions and included provisions in relation to:

    a. Hours of Work (Section 2) which indicated that normal hours were 08.30a.m. to 5.30p.m. Monday to Friday with a 1-hour daily break for lunch;

    b. Probationary Period (section 5) which provided that the first 6 months of employment would be a probationary period, when the employment could be terminated with 1-week's notice; and

    c. Disciplinary and Grievance procedure (Section 16), which provided that these were included in the Employee handbook and did not form part of the employee's contract of employment.

69. We also found that the Respondent had an unwritten policy that if members of staff started work at 8.00am, rather then 8.30am, their working day would end not at 5.30pm, but at 5.00pm. This was reflected in the email sent to the claimant by Daniel McNeil on 22 July [132].

70. We also found that the Respondent was flexible regarding lunchtime, reflected in the flexibility given to the Claimant to attend a court hearing on 17 July 2019.

71. We also found that the Claimant had been told to attend work at 9.30am that on the first day of employment, 15 July 2022. This was reflected in the email from William Claydon. We found it more likely than not that this instruction was for the first day only as:

    a. We noted that the date within in the email from William Claydon was highlighted in black type;
    b. The offer letter and contract of employment does not reflect a start time later than 8.30am; and
    c. We accepted the evidence from Alison Farrar, given in cross-examination, that it was not normal practice for the Respondent to commence training at 9.30am and her personal account and recall of witnessing the Claimant's trainer waiting on the Claimant to arrive.

72. The Claimant's employment was also subject to policies set out in a non-contractual staff handbook ("Staff handbook") which contained provisions applying to all staff (Clause 2.2) and included policies relating to:

    a. Equal opportunities at Sch4 [SH 39];
    b. Disciplinary Rules at Sch 9 [SH 89] which provided that the Disciplinary Policy applied to all employees regardless of service (s1.3) but that the Respondent reserved the right to vary any procedure as appropriate in any case (s1.5) [SH 82]

Claimant's Time-Keeping

73. The Claimant attended training for the first week of his employment, 15-19 July 2019. The Claimant asserts that he was told that he could commence work at 9.30a.m. each day. For the reasons already given, we consider it more likely than not that this was the start time for the first day only.

74. The Claimant submits this is important as it impacts on the accuracy and in turn the credibility of Alison Farrar's evidence. The Claimant challenged her on the accuracy of her evidence due to discrepancies in her timings on the Claimant's lateness, as reflected in the Grounds of Resistance, compared to those contained in her written statement, a statement which she additionally had to correct in a number of instances, before cross-examination.

75. The Tribunal did not consider those inaccuracies, described as administrative and mathematic errors, undermined the credibility of Alison Farrar's evidence. Rather they were marginal inaccuracies in the exact time the Claimant commenced work.

76. In any event either way, even if the Claimant was right that he was permitted to start late that first week, what is not in dispute is that the Claimant was late for work every day that week as, on the Claimant's own evidence[2] he accepted that he was:

    a. 30 minutes late on 15 July (AF – 20 minutes)
    b. 15 minutes late on 16 July (AF - 30 minutes)
    c. 25 minutes late on 17 July (AF – 20 minutes) ; and
    d. 9 minutes late on 19 July (AF – on time).

77. The Claimant also accepted that he had been:

    a. 20 minutes late on 22 July;
    b. 2 minutes late on 23 July; and
    c. 8 minutes late on 24 July.

Conversation on 17 July 2020

78. On 17 July 2020, the Claimant requested to take his lunch at 11.30a.m. as he was attending court. There has been evidence before us of the reason that the Claimant was attending court. The Claimant maintains that he made it clear that he was attending his own eviction hearing. Alison Farrar and Tim Hartland both gave evidence that they did not know the specific reason for the court hearing.

79. We accepted the evidence from Claimant that this was the reason for his attendance and from Alison Farrar and Tim Hartland, that they did not know the exact reason

80. Either way, the Claimant did not return to work after an hour. Rather the Claimant returned to work at 1.45pm, some 2 hours 15 minutes later. Whilst we accept that the Claimant may very well have been attempting to contact the Respondent to explain that the court hearing was taking longer than anticipated when his phone ran out of charge, we also found that the Claimant did not as a result notify anyone that he was returning late.

81. Alison Farrar spoke to the Claimant on his return. She was also, by that time aware that the Claimant had been late for work each day since the commencement of his employment and determined to speak to him about his time-keeping.

82. We found that the conversation was informal and more likely than not limited to that contained in the written document that she prepared the following day

[2] Claimant WS §6.1

for the benefit of one of the Respondent's partners, Stephen Clarke [131] when she warned him that he needed to improve his timekeeping moving forward and that he needed to arrive between 8.00am and 8.30am.

83. The Claimant was also spoken to about a mini-pupillage that he had arranged for the following day. A pupillage that the Claimant claimed he had told Tim Hartland of in his interview. The Claimant was reminded that he needed to record his absence on the Respondent's annual leave software and was permitted annual leave to attend that pupillage the following day.

84. The Claimant in his submissions focussed on terminology used by Alison Farrar in both her note to Stephen Clarke of 18 July 2019 and in her written statement, that she had said to the Claimant that they had '*gotten off on wrong foot',* suggesting that this indicated that she was aware of the Claimant's disability and reason for his poor time-keeping.

85. However she had also given clear evidence, both in her written statement and on cross examination, that at no time, either during this conversation or indeed at any other time during the Claimant's employment, had the Claimant told her that he had any impairments or made her aware of any disability. She also gave evidence that the Claimant had never given her any reason to think he may have a disability. She denied that the Claimant had told her that he was not intentionally arriving late but that his lateness arose in consequence of his disabilities.

86. We accepted that evidence. Alison Farrar was not challenged on her use of that phrase during cross-examination and we read nothing into the common phrase. It certainly did not infer to us that the Claimant did or may have raised issues regarding his impairments or disability more generally.

87. We found that Alison Farrar gave the Claimant a verbal warning for his time-keeping. We also found that at that point, no warning was given regarding any other behaviour or conduct as, at that time, she likely not aware of those concerns or the extent of concerns, concerns which had been communicated to Tim Hartland and Stephen Clarke, two of the firms equity partners.

18 July 2019

88. the Claimant was not in work the following day, but Alison Farrar spoke to Stephen Clarke and that stage provided the written documentation set out at [131]. She was advised that if the Claimant's time-keeping did not improve, that she had authorisation to terminate the Claimant's employment.

89. The Claimant was not late on the Friday of that week but by this time Alison Farrar had received verbal reports from those working with the Claimant, including his trainers, of concerns regarding the Claimant's behaviour.

90. Similar concerns were being voiced to Tim Hartland. He gave evidence, which we accepted, that this was a 'red flag' for the partners who had discussed concerns made by three valued and trusted members of staff.

91. The only written evidence supporting the complaints were provided *after* the Claimant was dismissed and the Claimant has challenged Mr Hartland on the timing of the documents and subjectivity of the comments as a result.

92. We accepted that the written documents reflected concerns that had been verbally articulated prior to the termination of the Claimant's employment [138]. Whilst Tim Hartland accepted that they were subjective comments, there was more than one complaint and the concerns came from staff who were in trusted and/or supervisory positions. We did not consider it unreasonable for him to rely on such feedback;

93. In terms of timing of the documents i.e. after the Claimant had been dismissed, we accepted Alison Farrar's explanation for that as credible i.e. that they needed a contemporaneous written record of why they dismissed. We accepted this as normal practice of any reasonable employer.

Reason for dismissal

94. We sought to reconcile the evidence of Tim Hartland and Alison Farrar as to the reason for dismissal. We found that Alison Farrar was not the decision-maker but that the decision-maker was Stephen Clarke after discussing the matter with Tim Hartland.

95. Whilst Alison Farrar might have thought time-keeping, was the only reason for the Claimant's termination of employment, we accepted the evidence of Tim Hartland and found that in the minds of the decision-maker, the reason for the dismissal of the Claimant was not just his time-keeping but also the disruptive impact that his attitude and behaviour was having on the team.

Dismissal

96. On the morning of 24 July 2019, the Claimant again attended work late and was immediately asked to meet Alison Farrar. At that meeting the Claimant was provided with a letter dismissing him with immediate effect. Whilst the letter does not contain the reason for his dismissal, Alison Farrar explained to him that his dismissal was due to his poor time-keeping and attitude towards other members of staff [141].

97. Later that day the Claimant submitted an appeal [135] in which for the first time he referenced disability. The Respondent wrote to him the following day

confirming that as he had been employed for under two years he had no right of appeal [142].

98. On 3 October 2019, the Claimant had commenced early conciliation and on 31 October 2019, an Early Conciliation Certificate ("EC Certificate") had been issued by ACAS. On 30 November 2019 the Claimant had issued an ET1 claiming disability discrimination.

Issues and Law

Burden of Proof

99. Section 136 provides that:

> (2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provisions.

100. Guidance as to the application of the burden of proof was given by the Court of Appeal in **Igen** v **Wong** 2005 IRLR 258 as refined in **Madarassy** v **Nomura International Plc** [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination.

S.15 EqA 2010 - Discrimination arising from disability

101. Discrimination arising from disability is defined in s15 EA 2010:

> *(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.*

102. As for the correct approach when determining section 15 claims we refer to **Pnaiser** v **NHS England and others** UKEAT/0137/15/LA at paragraph 31.

103. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent.

S.19 EqA 2010 – Indirect Discrimination

104. S.19 of the Equality Act 2010 is in the following terms:-

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a 15 relevant protected characteristic of B's.*
> *(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant characteristic of B's if –*
>
> > *(a) A applies, or would apply, if the person to whom B does not share the characteristic,*
> > *(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with person with whom B does not share it,*
> > *(c) It puts, or would put, B at that disadvantage, and*
> > *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

105. The burden of proof lies with the Claimant to establish the first, second and third elements of the statutory definition of indirect discrimination. Only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legitimate aim (affirmed in **Essop and ors v HO (UK Border Agency) and another** 2017 ICR 640)

S.20 Duty to make reasonable adjustments

106. Section 20 EqA states that: …

> (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.*

107. *Section 21 EqA states 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.

Knowledge

108. In relation to knowledge of disability the correct questions are, in relation to the relevant time:

    a. Did the employer know both that the employee was disabled and that his disability was liable to disadvantage him substantially?
    b. Ought the employer to have known both that the employee was disabled and that his disability was liable to disadvantage him substantially?

109. The required knowledge is of the facts of the disability, not that they meet the legal definition.

110. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a reasonable step for an employer to take will depend on the circumstances of each individual case (para 6.29). The examples previously given in section 18B(2) DDA remain relevant in practice, as those examples are now listed in para 6.33 of the Code of Practice.

Disability Discrimination: Conclusions

111. As the Tribunal concluded that the Claimant was a disabled person by reason of ADHD at the relevant time, he was permitted to bring complaints of disability discrimination.

112. The issue of whether the Respondent knew or could it reasonably have been expected to know that the Claimant had a disability and from what date is relevant to both the s.15 claim and s.20/21 EqA 2010 claims.

Knowledge

113. We accepted the evidence of both Tim Hartland and Alison Farrar that the Claimant had not told them that he was disabled or that he lived with the impairments that he now relies on to bring these claims, whether ADHD or otherwise. We did not accept the Claimants evidence that he had told those at interview of his disabilities. We did not accept the Claimant's evidence that he had told Alison Farrar of his disabilities.

114. We considered whether it could be said the Respondent could reasonably have been expected to know that the Claimant had the disability of ADHD (or indeed other impairments that he relies on to demonstrate that he was a disabled person). Again we found that it could not be said that the

Respondent could have reasonably have been expected to know as we have explained in our findings of fact, We would reiterate:

a. Nothing in the Claimant's CV or conduct at interview would have put the Respondent's on notice;
b. Nothing in the Claimant's ability to research would have placed anyone on notice that this might point to an underlying disability, whether ADHD or otherwise;
c. We did not accept that poor time-keeping over the course of 7 days at the commencement of employment should have put this employer on notice of a potential underlying disability. We distinguish the Claimant's position, a new employee to the example given by the Claimant of a long serving employee, whose time-keeping starts to go awry;

115. On that basis, the claims under s.15 and/or s.20/21 Equality Act 2010 do not succeed and are dismissed.

S. 19 Equality Act 2010: Indirect Discrimination

116. Turning to the complaint under s.19 Equality Act 2010, we made the following conclusions:

    a. With regard to the 'provision, criterion or practice ("PCP"), the Tribunal was asked if the Respondent had the following PCP:

        a. A Lateness policy - We found that the Respondent did have a policy that staff had to attend work between the hours of 8.00 and 8.50am and that this was capable of amounting to a PCP;
        b. Disciplinary Policy - We found that the Respondent did have a disciplinary policy and that its application was capable of amounting to a PCP;
        c. Probationary Policy - We found that the Respondent did have a policy of employing new staff on a probationary period of 6 months and that it terminated employment on one week's notice in accordance with its probationary period terms; that this too was capable of amounting to a PCP.

117. Did the Respondent apply the PCPs to the Claimant?

    a. The Tribunal found that the Respondent applied the PCP to the Claimant of requiring him to attend work between the hours of 8.00 and 8.30am and applied the PCP of a probationary period to the Claimant.
    b. The Tribunal found that the Respondent did not apply the disciplinary policy to the Claimant.

118. Did the Respondent apply the PCPs to persons with whom the Claimant does not share the characteristic or would it have done so?

    a. Yes, both the policy of requiring staff to attend work on time and for new starters to have a probationary would have applied to comparators who were not disabled by reason of ADHD.

119. Did the PCPs put persons with whom the Claimant shares the characteristic, at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic.

    a. No. We concluded that the disadvantage must adversely affect an actual or hypothetical group that shares the relevant protected characteristic with the Claimant. There are several methods possible of establishing disparate impact, including statistics, relative proportions, expert and other evidence as well as judicial notice of a particular disadvantage.

    b. The Tribunal did not conclude that there was any evidence before it to conclude that new starters at the Respondent, who were also disabled by reason of their ADHD, would be put at a particular disadvantage compared to new starters who were not so disabled.

    c. The Claimant has provided no evidence to persuade us that those who live with ADHD would be more susceptible to being disadvantaged by the PCPs of time-keeping or a probationary period.

120. On that basis, the complaint of indirect discrimination under s.19 EqA 2010 also does not succeed and is dismissed.

121. The disability claims against the Respondent are therefore not well-founded and are dismissed.

Employment Judge Brace

Date 12 December 2022

REASONS SENT TO THE PARTIES ON 13 December 2022

FOR THE TRIBUNAL OFFICE Mr N Roche