EMPLOYMENT TRIBUNALS

Claimant: Mr R. J. Bryce

Respondent: Sentry Consulting Limited

Heard at: Nottingham Employment Tribunal

On: 3, 4 and 5 October 2022 and 3 November 2022.

Before: Employment Judge Rachel Broughton sitting with members A Blomefield and D Green.

Representatives

Claimant: In Person
Respondent: Mr Munro – solicitor

RESERVED JUDGMENT WITH REASONS

The judgment of the Tribunal is that:

1. The claim under the Part- time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is **not** well founded and is dismissed.

2. The claim under section 45A Employment Rights Act 1996 is **not** well founded and is dismissed.

3. The complaint of direct disability discrimination under section 13 EqA is **not** well founded and is dismissed.

4. The complaint of disability discrimination under section 15 EqA **is** well founded and succeeds.

5. The claim of a failure to make reasonable adjustments **is** well founded and succeeds.

6. Separate case management orders will be issued for a remedy hearing.

THE REASONS

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Background

1. The claimant was employed by the respondent, a company which provides security services, from 25 December 2020 to 8 January 2021 as a Relief Security Officer.

2. The claimant presented his claim on 25 February 2021 following ACAS early conciliation from 16 February 2021 to 24 February 2021.

3. The claim is in essence an allegation of discrimination on the grounds of his disability and part time worker status. The claimant complains about not being given further shifts by the respondent after around 8 January 2021.

4. The respondent does not accept that the claimant was an employee or worker.

Preliminary Hearing : 20 May 2021

5. There was a Preliminary hearing for case management before Employment Judge Brewer on 20 May 2021. The claimant represented himself.

6. The record of that hearing recorded that the claimant says he suffers from Asperger's Syndrome and Dyslexia which impacts on his ability to process information quickly and how he communicates. It noted that the claimant will need time to process questions and to respond and will require regular breaks during the Tribunal hearing.

Claims and Issues

7. Employment Judge Brewer set out in his record of the Preliminary hearing of the 20 May 2021, the claims and issues. The parties were informed that if the list was incomplete or wrong they must inform the Tribunal and the other side by 11 June 2021. Neither party contacted the Tribunal to correct the claims and issues as set out.

Part Time Workers

8. The issues as set out above had not identified the comparator for the Part Time Workers case. The Tribunal went through the issues with the parties at the commencement of this final hearing, during which the claimant identified that the actual comparator he relies upon is the person the respondent had referred to in their letter of the 12 February 2021 (in response to his grievance) albeit not by name. The respondent had referred to a member of staff who they had asked to change shifts to accommodate the claimant but who was not able to do so because of his own health issues (p.95). The respondent confirmed when discussing the issues at this final hearing, that the person referred to was Mr James Nason Senior.

Working Time Regulations 1998 (WTR)

9. Employment Judge Brewer recorded in his summary of the Preliminary hearing on the 20 May 2021, that the that the claimant was alleging a breach of regulation 4 of the Working Time Regulations 1998 but that the Tribunal does not have jurisdiction to deal with complaints about regulation 4.

10. In discussion with the parties, it was agreed that the Tribunal does have judication pursuant to section 45A Employment Rights Act1 996 to deal with a complaint about the treatment he alleges he received *because* he complained about a breach of regulation 4 of the WTR.

11. Mr Munro confirmed that as the claimant had identified this claim with the Tribunal at the previous Preliminary hearing, the respondent had no objection to including that claim within the complaints to be determined. That issue was included with the agreement of the parties.

Discrimination – disability : employee/ application for employment

12. The claimant's case is that he responded to an advertisement for work with the respondent which had been placed on Facebook (a social media platform). The claimant confirmed that his claim was brought on the basis that he was an employee at the time of the alleged discrimination under section 39 (1) EqA or in the alternative, on the basis that he was applying for work and was not offered the work, which would be a claim under section 39 (2) EqA . The claimant confirmed that he was relying upon both provisions and Mr Munro confirmed that he understood that was how the claimant was putting his case and raised no objection.

13. The respondent's position is that the claimant was truly self-employed and was not an *employee* or an applicant for *employment.*

Disability: section 6 definition

14. The respondent confirmed at the outset of the hearing that it accepts that the claimant had two long term conditions; Asperger's Syndrome (the description as adopted by the claimant) and dyslexia and that the only issue in dispute is whether the effects on his normal day to day activities were substantial (i.e. not the existence of an impairment or the longevity of the effects).

15. The Tribunal discussed the issues with the parties at some length and it was agreed that the following issues were those to be determined by the Tribunal:

1. Employment Status

1.1 Was the claimant an employee or worker of the respondent within the meaning of regulation 1 of the Part- time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the Part- time Workers Regulations") and section 230 ERA?

1.2 Was the claimant an employee or applicant for employment, of the respondent within the meaning of section 83 of the Equality Act 2010?

1.3 The claimant is relying upon section 39 (1) and/or (2): EQA :

(1)An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2)An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

2. Less Favourable Treatment – Part- time Workers Regulations

2.1 Did the respondent do the following thing:

2.1.1 Not give the claimant shifts after around 8 January 2021?

2.1.2 By doing so, did it subject the claimant to a detriment within the meaning of regulation 5 (1)(b) of the Part- time Workers Regulations?

2.1.3 If so, was it done on the ground that he was a part-time worker?

3. Remedy for less favourable treatment – Part – time Workers Regulations

3.1 What compensation is just and equitable in all the circumstances?

4. Disability

4.1 Did the claimant have a disability as defined by section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1. did he have a mental impairment? The claimant says he has Asperger's Syndrome and dyslexia and this is not in dispute

4.1.2 Did it have a substantial adverse effect on his ability to carry out day to day activities? The longevity of the effects is not in dispute but the effects are.

4.1.3 if not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day to day activities without the treatment or other measures?

5. Direct disability discrimination (section 13)

5.1 Did the respondent do the following things:

5.1.1. Not give the claimant shifts after around 8 January 2021?

5.2 was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's

If there was nobody in the same circumstance as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The comparator is Mr Nason Senior or a hypothetical comparator.

5.3 If so, was it because of disability?

5.4 Did the respondent's treatment amount to a detriment?

6. Discrimination arising from disability (section 15)

6.1 Did the respondent treat the claimant unfavourably by:

6.1.1 Not giving the claimant shifts after around 8 January 2021.

6..2 Did the followings things arise in consequence of the claimant's disability:

6.2.1. The claimant's timekeeping
6.2.2 The claimant's attention span
6.2.3 The claimant's memory issues
6.2.4 The claimant's learning difficulty; and

6.2.5 The claimant's communication disorder?

6.3 Was the unfavourable treatment because of any of those things?

6.4 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

7. Reasonable adjustments (section 20 & 21)

7.1 *Did the respondent know or could it reasonably have been expected to know that the claimant had the disability ? From what date?*

7.2 Did the respondent have the following PCP:

7.2.1 A requirement to work specific shift patterns, to arrive at a specific time and/or work long 12 hour shifts?

7.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

7.3.1 The claimant complains that the substantial disadvantage the PCP caused him was ;

7.3.1.1 the impact on his time keeping – he was not able to arrive on time always
7.1.1.2 the long shifts and frequency of them overwhelmed him

7.4 Did the respondent know or could it be reasonably have been acted to know that the claimant was likely to be placed at the disadvantage?

7.5 what steps could have been taken to avoid the disadvantage ? The claimant suggests:

7.5.1 Adjusting his shift patterns
7.5.2 Allowing him 20 – 30 minutes 'leeway' to start work

7.6 was it reasonable for the respondent to have to those steps and when?

7.7 did the respondent fail to take those steps?

8. The *Working Time Regulations 1998 – detriment (section 45A ERA)*

8.1 was the claimant subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the claimant –

(a)refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998?

(b)refused (or proposed to refuse) to forgo a right conferred on him by those Regulations?

(f)alleged that the employer had infringed such a right and was the claim to the right and that it has been infringed must be made in good faith?

Adjustments at the Final Hearing

16. The claimant requested that the temperature in the Tribunal room was adjusted . He explained that if it was too warm it would affect his concentration. This was accommodated. The claimant was content to let the Tribunal know if he required any other adjustments. The claimant had familiarised himself with the Equal Treatment Bench Book and asked that by way of an adjustment, the Tribunal take into account that if his evidence appeared to be misleading this may be due to his disability and that he may experience challenges with his memory and use of language

17. The claimant was assured that the Tribunal had reminded themselves of the relevant provisions of the Equal Treatment Bench Book. The relevant sections of it had in fact been copied and been provided by Employment Judge Broughton to the Non- Legal Members for ease of reference. Some adjustments were suggested by the Tribunal which the claimant found helpful, including the provision of a ruler for him to mark his place in his witness statement when giving evidence.

18. The claimant also asked to have the timetable for the day set out and this was done at the start of the hearing. The Tribunal also arranged a break every 40 minutes for 10 minutes as requested and the claimant was made aware that he could request further adjustment to those breaks if required. The claimant was also given time to reread all the witness statements before he gave his evidence and his right to give supplemental evidence was explained and he did so.

19. The claimant was also provided with a pad of paper while giving evidence to record the evidence he was giving under cross examination, he was concerned about his ability to recall his evidence afterwards. He had no notetaker present.

20. Mr Munro confirmed that he had no objection to any of the adjustments which were put in place.

21. Mr Munro also helpfully kept his questions in cross examination short.

Preliminary Applications

Application under Rule 43 and Human Rights At 1998 - Article 6

22. The claimant made an application to exclude the respondent's only witness, Mr Nason, Managing Director of the respondent from the Tribunal room while giving his evidence. The claimant explained to the Tribunal that the claimant had a particular interest in the law, he had a law degree and he had conducted research in support of his claim and made his application in support of his convention rights under the Human Rights Act 1998.

23. The claimant made his application in writing on 2 October 2022 by email and the Tribunal considered the grounds of his application at this final hearing. The claimant also made further oral submissions. In essence the application was made on the grounds that the claimant was concerned that it would give the respondent an advantage to hear his evidence, to *'eavesdrop'* as he put it, on his evidence . That application was opposed by the respondent.

24. The claimant sought to rely on his convention rights under Article 6.

25. The claimant referred in his submissions to having no objection to the respondent's representative, Mr Munro taking instructions from Mr Nason immediately after the

claimant had given his evidence. The claimant in his submissions informed the Tribunal that he is not alleging that he has any reason to believe that Mr Nason would act in bad faith during these proceedings, that was not his concern.

Legal Principles

26. The Employment Tribunal has the power under Rule 43 to exclude witnesses in the interests of justice until the time that person gives evidence.

27. Article 6 of the Human Rights Act 1998 provides as follows:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

28. Article 6 requires the Tribunal to ensure an equality of arms which is also a requirement set out in rule 2 of the Tribunal Rules. In considering the application, the Tribunal must deal with cases fairly and justly which includes so far as practicable, ensuring that the parties are on an equal footing.

Conclusion

29. The parties in the case have exchanged their witness statements and those witness statements give each party advance knowledge of what the others party's evidence is and how they put their case. There has been disclosure of documents and there is an agreed bundle of evidence. Further, the claimant confirmed that he had no objection to Mr Munro taking Mr Nason's instructions after the claimant's evidence, before Mr Nason gave his own evidence, which would run counter to the claimant's stated concern of Mr Nason having advance knowledge of his evidence under cross examination before he gave his own evidence. Therefore all it would seem excluding Mr Nason would achieve, would be to cause unnecessary delay in the proceedings. The Tribunal could not identify any actual advantage to the claimant of excluding Mr Nason or any prejudice to the claimant he was seeking to alleviate.

30. The claimant did not allege that there was any reason to believe that Mr Nason, intended to swear a false oath or falsify an affirmation to tell the truth. He expressed no concern about giving his evidence in the presence of Mr Nason and did not assert that it would in any way impair his ability to do so.

31. The Tribunal was not persuaded that Mr Nason's presence would interfere with the claimant's right to a fair trial and create any inequality between the parties in their ability to present their case.

32. In the circumstances, the Tribunal were not persuaded that it was in the interests of justice to exclude Mr Nason from the Tribunal room while the claimant gave his evidence.

33. The application was refused.

Amendment Application

34. The claims and the issues were discussed at the Case Management Hearing back in May 2021, and they were set out in some detail in the Case Management Summary that was then sent out to the parties.

35. It is now approximately 16 months since those claims and issues were identified and that order made. At the start of the first day of this final hearing and only on clarifying the issues and claims with the parties at the outset, did the claimant then apply to amend and add to the complaints.

36. The claimant had clearly prepared carefully and carried out research in support of his claim and presented himself throughout this hearing competently. The Tribunal nonetheless took into consideration the impact of the claimant's conditions, while also cognisant of clearly how detailed and thoroughly the claimant has been in terms of his preparation of the case including reference to the applicable legal principles, statutory provisions and case authorities.

37. The Tribunal took quite some time with the claimant on the first day of the hearing to establish clearly what the claims were.

38. In terms of the complaint under the Part Time Workers Regulations (**PTWR**) the claimant is asserting that he was treated less favourably by not being given more shifts around 8 January 2021 and that is clearly the crux of the his complaint. He however applied to include an allegation that there was less favourable treatment in terms of the training and development that he received as a Part Time Worker (**PTW**) and applied to include that as a complaint of both disability discrimination claim and a claim under the PTWR.

Submissions

39. The claimant in his submissions referred to being surprised that the claims he now seeks to include were not already part of his claim. He accepted that his claims were outlined by EJ Brewer however he submits that it would be a reasonable adjustment to allow him to amend his claim now and that he is not seeking to make this application simply as a 'Trojan horse'.

40. The claimant went on to refer to some failings by the respondent including not filing its ET3 in time and not complying with certain Case Management Orders in time, as a result of which the claimant had made an application for an Unless Order during the course of the preparations for the hearing . He argues that as the respondent had been in default of some Case Management Orders that he should be permitted, as a 'quid pro quo' as it were, to amend his claim. The claimant submits that it would not be in the interests of justice to permit the respondent to escape lability for the claims .

41. Although he has a law degree and experience of ligation, he submits that he remains a litigant in person and should be considered as such.

42. The claimant raised that he was not employed after 8 January 2021 because of his poor performance which is linked with his disability.

43. The claimant submits that the disability claim he wants to include is 'more likely' to be a section 15 claim than a section 13 namely that because of the effects of his condition he needed more training and development. He also asserts that there was a failure to make reasonable adjustments and when asked to do so, identified the PCP as the client's requirements but added that the instructions were "vague" and not written down and he sometimes needed instructions written down to recall them. He did not identify what client instructions in particular he had difficulty recalling or what he needed more training for.

44. The claimant also wanted to include a claim that the failure to provide more training and development was discrimination on the grounds that he was a PTW. He submits that when he could not do full time hours, those hours were given to Mr Nason Senior

and as a result of those hours being passed to Mr Nason Senior, Mr Nason Senior then became full time. When asked whether it was his case that the discrimination therefore took place under the PTWR before Mr Nason (his comparator) became full time, he accepted that was his position; "*Yes, to be honest, I'm not sure of his status of him, I don't know if Mr Nason Senior was full or part time before I left* ." The claimant referred to Mr Nason Senior being seen as "*more valuable*" to the respondent's business because he had received more training but conceded that he was only assuming that Mr Nason Senior had received more training than him, he was not asserting positively that he had.

Respondent submissions

45. The respondent opposes the addition of new claims and refers to Employment Judge Brewer's orders back in May 2021 setting out clearly what the claims and issues in dispute were.

46. It is submitted that this application had only come about because the Tribunal had gone through the claims and issues in detail and it then occurred to the claimant that there may be other complaints he could include.

47. The respondent submits that the claimant has not raised prior to today any issue about a lack of training but was very clear that his case is about the hours and shift patterns he had to work and the impact of those . This is the case the respondent has come prepared to address.

48. The respondent submits that the claims as put by the claimant in terms of this application, remain confusing. It is submitted that with respect to training, what the claimant was required to do in this job was very simple, he needed to arrive at a certain time and monitor the site and carry out patrols, it is not clear still what he is saying he needed more training for and what problems had actually encountered in doing this job. The respondent refers to the time left available for the hearing and the impact of adding new claims to the hearing time.

49. It is submitted that the claimant is raising serious matters which have serious consequences for the respondent, the respondent has not had the opportunity over the last 12 months or so to investigate these allegations. It is submitted the claimant would suffer no prejudice because his main complaint remains the hours/shifts he was required to work.

The legal Principles

50. The Tribunal has a broad discretion to allow amendments at any stage of the proceedings under Rule 29 of the Tribunal Rules. The discretion must be exercised in accordance with the overriding objective to deal with case fairly and justly in accordance with Rule 2.

51. In ***Selkent Bus Co Ltd v Moore*** **[1996] ICR 836 :** the then President of the EAT, Mr Justice Mummery, explained that relevant factors would include: the nature of the amendment, applicability of time limits and the timing and manner of the application.

52. In the recent case of **Vaughan v Modality Partnership [2021] ICR 535, EAT,** HHJ Tayler provided guidance on the correct approach to adopt when considering an application to amend. He referred to **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650** and to **Selkent Bus Co Ltd v Moore** where Mummery LJ gave the following guidance

"*Whenever the discretion to grant an amendment is invoked, the tribunal should*

take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."

53. HHJ Tayler noted that the list of relevant factors set out in Selkent did not mean that tribunals should adopt a check-list approach, as emphasised by Underhill LJ in **Abercrombie v Aga Rangemaster Ltd [2014] ICR 209, CA.**

54. In Vaughan, there is a summary of the correct approach to take and the Tribunal have taken that guidance into account.

Findings

55. The amendments the claimant applies to make to his claim are substantial and will involve significantly different lines of enquiry. The claimant makes a fleeting reference in his witness statement to having requested further training and development but he does not go on to set out what problems he encountered which would have been addressed by further training and development and he was still not in a position to explain that today.

56. The claim was presented and confirmed at the previous preliminary hearing to be put both in terms of the PTWR and disability discrimination claims, on the basis that the claimant was not offered further shifts after the 8 January 2021 and that is the claim the evidence and statements address. The crux of the claim relates to the request that the claimant made in terms of the flexibility he needed with regards to his shift pattern. There is also a claim specifically in relation to what the claimant said about not being able to work more than 48 hours.

57. The claimant had not set out the amendments he is seeking to make in writing . The Tribunal did not require him to do so, but rather took the time to understand how he is seeking to put these additional claims he was applying to include by way of amendment but it was clear to the Tribunal that he was formulating the claims 'on the hoof' during the hearing and remained unable to identify material components of them, as addressed below:

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000: PTW Regulations

58. The claimant applies to include a claim that he was subject to less favourable treatment than a full-time colleague, Mr Nason Senior with regard to the terms and conditions of employment namely the provision of training and development.

59. However, on his own case as he explained it, he is not actually asserting that he was aware that Mr Nason Senior had more training and development. He explained that he is merely "*assuming"* that Mr Nason Senior "*may"* have had more training and development but was not able to identify what training and development he is complaining Mr Nason Senior may have received which he did not receive.

60. Further, the respondent denies that Mr Nason Senior who is the Managing Director's father, was full time. The claimant explained that the claimant was not given any further shifts and he believes that Mr Nason Senior was given the shifts that he would otherwise have had and this brought him up to full time hours. He accepted that it is pure conjecture on his part that Mr Nason Senior worked full time hours once he had been given additional shifts or that he actually had more training than the claimant had received and he was not positively asserting that this was in fact the case. On his own case, Mr Nason Senior became full time only after the alleged less favourable treatment had taken place.

61. Even on his own case, the claimant is not positively asserting that his stated comparator worked full time or received different treatment, and there is nothing in the bundle of documents that we have been taken to, that would evidence that Mr Nason Senior actually received more training and development than the claimant. It is difficult to see how the claimant could therefore establish a prima facie case that he had received less favourable treatment than his chosen comparator or that Mr Nason Senior is a suitable comparator.

Disability Discrimination

62. Turning to the claims of disability discrimination: the Tribunal identified that what the claimant appears to be alleging would amount potentially to a claim under section 15 and /or section 20/21 EqA.

63. It remained unclear precisely how the claimant was putting this claim despite the time spent discussing the amendment application with him .

64. The amendment sought in terms of a reasonable adjustment, appears to be that the PCP is a requirement to comply with client requirements for the security services at the site for which the claimant needed more training. However, the claimant's evidence is that he was a very experienced security guard. The client's requirements were not set out in writing but he was not specific about what it was about the client requirements that put him at a substantial disadvantage (other than the hours of work and shift patterns).

65. The issues that were raised by the respondent about the claimant's performance in response to the grievance the claimant put forward about not being given further shifts, related to CCTV monitoring and patrolling. The claimant responded to those issues raised about his performance in writing to the respondent on 16 February 2021 (p.100- 102) and the Tribunal note that he does not assert that his failure to carry out the patrols or to carry out the CCTV monitoring had anything to do with his disability and lack of training.

66. In terms of the application to include a claim under section 15, his complaint is that things arising from his disability (listed at paragraph 6.2 of the order of Judge Brewer) impaired his time keeping and his performance and as a consequence of that he was not given the shifts after around the 8 January 2021. However, despite attempts to obtain clarity from the claimant, he was not specific in terms of what it was other than his time keeping that was impaired in terms of his performance and ability to carry out the role in terms of this potential claim. In his submissions he mentioned only that he sometimes needs instructions written down in case he forgets, however he did not identify what he was required to do which he had forgotten he needed to do and which led to the concerns about his performance. In his response to the grievance (p.101) and the allegation about not monitoring the CCTV, he did not allege he had forgotten to do it, but argued he had done it throughout the night and he that he had carried out patrols. His letter setting out his grievance is thoroughly argued and his reason for not being given more shifts, he firmly argues is related to the hours he was prepared to work. In his original grievance letter (p.92) he states;

"*I had informed Tony Austin about my disability that I would require* ***reduced hours or a reasonable adjustment to alter this shift pattern****"* and *"As said I would not be able to work more than 48 hours due to my disability and the WTR 1998."*

Tribunal stress

Time Limits

67. The Tribunal consider that the amendments the claimant is applying to include by way of amendment, amount to a substantial alteration to the pleaded case and therefore it is relevant to consider time limits.

PTWR

68. An Employment Tribunal cannot hear a complaint under regulation 8 of the PTWR unless it is brought before the end of the period of three months beginning with the date of the less favourable treatment or detriment to which the complaint relates. Tribunals retain a discretion to hear any claim under the PTWR that is brought out of time if, in all the circumstances of the case, they consider that it is 'just and equitable' to do so. The 'just and equitable' formula is the same as that applicable to out-of-time discrimination claims under S.123(1)(b) of the Equality Act 2010 :

Regulation 8

(*1) Subject to regulation 7(5), a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5 or 7(2).*

(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months (or, in a case to which regulation 13 applies, six months) beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them.

(2A) Regulation 8A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (2).

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

Disability Discrimination claims

69. The time limit which applies to the claims of disability discrimination are set out in section 123 EqA:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought *after the end of—*

(a)the period of 3 months starting with the date of the act to which the complaint relates, or
(b)such other period as the employment tribunal thinks just and equitable.

…

a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.

Extension of time: Just and Equitable

70. The three-month time limit for bringing the PTWR claim and disability discrimination claims is not absolute: Employment Tribunals have a discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so section 123(1)(b) EqA.

71. In ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA*****,** the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under what is now section 123(1)(b) EqA, there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is

just and equitable to extend time. This does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

72. In exercising their discretion to allow out-of-time claims to proceed, Tribunals may also have regard to the checklist contained in section 33 of the Limitation Act 1980 (as modified by the EAT in ***British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT***). Section 33 requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

73. In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23, CA*.**. In the Court's view, it is not healthy for the Keeble factors to be taken as the starting point for tribunals' approach to 'just and equitable' extensions. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay.

Conclusions and Analysis: amendment application

74. The length of the delay in this case is substantial. The claim was filed back in February 2021.

75. The discussions the claimant alleges took place with the respondent, around adjustments were primarily verbal and with Mr Austin, the then Operations Manager of the respondent who does not appear today as a witness for the respondent. Mr Austin is no longer employed by the respondent. There is therefore a legitimate issue about the cogency of any evidence around what may or may not have been discussed about training and development needs from early 2021 and the ability of the respondent to be able to respond to the allegations. The claimant does not allege that any alleged verbal discussions about his training and development needs took place Mr Nason who is the only witness appearing at this final hearing for the respondent.

76. It is clear from the documents in the agreed bundle that the concerns that the respondent had with the claimant's performance were addressed in writing in response to his grievance in February 2021 (p. 94). The claimant was aware of those concerns at the time, he engaged with those concerns and did not raise the issues he now seeks to raise. The claims he seeks to include by way of amendment do not arise from new information which has only recently come to light.

77. The claimant does not allege that he is only seeking to bring these claims now because of a lack of understanding of time limits. He claims that he had understood that the claims had been captured in the orders of Employment Judge Brewer however, it is evident they had not been. The orders are very clear and further, the claimant had engaged with the issues around his performance in 2021 direct with the respondent and given his cogent explanations at the time, explanations which appear directly at odds with what he now alleges. Further, the amended complaints remain unclear.

78. The claims would be significantly out of time and the Tribunal is not persuaded that it would be just and equitable to extend time, even taking into account the effects of the claimant's disabilities.

79. The balance of prejudice the Tribunal determines, favours the respondent. The crux of the complaints, taking into account not only the claim form but the grievance that was raised by the claimant, is about the shift pattern and his request for flexibility and what he had raised about not working more than 48 hours per week. It is evident from the evidence in the bundle that those are the matters that are clearly at the forefront of the matters raised by the claimant.

80. The Tribunal also take into account the apparent lack of merit in the claimant's complaints which are the subject of the amendment application. In terms of the issues that were raised by the respondent in the context of the claimant's performance (p.96), namely the failure to monitor the CCTV and not carrying out patrols, (p/101) the claimant responded at the time and did not assert that those issues had anything to do with the lack of training or understanding nor raised any link between that and his disability. What he states clearly is that he had asked for an adjustment in his hours of work and shift pattern (p.92).

81. In terms of the prejudice to the respondent, the respondent had not come prepared to deal with these new claims. Allowing the amendment is likely to require an adjournment, to allow the respondent to consider what further evidence it may need to provide and consider how to respond to what are serious and substantially new allegations of discrimination.

82. The Tribunal retains the discretion to allow an amendment even if it is brought out of time. The Tribunal have had regard to the manner in which the application has been made and that it has taken quite some time to pin down what exactly the claimant is attempting to introduce by way of further claims at what is a very late stage of the proceedings. The claimant has not produced any documents in support of these new claims and the complaints appear weak in merit and remain unclear, in terms of what duties he alleges he had difficulty performing and what further training he needed.

83. The Tribunal read on the first day until midday, the entirety of the rest of the day was spent attempting to clarify the issues and with the applications including this amendment application, leaving only 2 days to hear the evidence relating to the extant claims. Taking all the circumstances into account, including the issue of time limits, the length of delay and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, taking into account the merits of the potential claims and the prejudice it would cause the respondent in being able to respond to these new allegations almost 2 years after the event, and that the crux of the claimant's case concerns shift patterns ad hours of work, the amendment application was refused. Reasons were given orally to the parties. The claimant asked for the reasons to be set out in writing hence the detailed reasons set out in this judgment.

84. We now turn to the substantive case.

Rule 50

85. After giving his evidence and part way through cross examination of Mr Nason, the claimant indicated that he wanted to make an application under Rule 50 because he had given more information in his evidence than he intended. He asked if he could make that application in writing after the hearing had concluded. He was given leave to do so. He submitted an application on 26 October 2022. The respondent was given until 2 November 2022 to respond to it and the date for the Tribunal to deliberate was therefore arranged for after this date. The respondent did not respond.

86. The Rule 50 application has been considered and is the subject of a separate order.

The redactions in this judgment are as a consequence of that order and relate only to a certain effect of his disabilities. That specific effect is not material to the adjustments and claims, but only to the determination of the issue of whether the test under section 6 EqA is met and even then, not determinative alone of that issue.

Findings of Fact – substantive claim

87. All findings of fact are based on a balance of probabilities. All the evidence has been considered however, this judgment sets out the evidence the Tribunal considers relevant to the determination of the issues. References to numbers are to pages within the agreed bundle.

Background

Contract Terms

88. The respondent advertised available shifts for work as Relief Security Officers (guards), via the social media networking site 'Facebook' (p 73).The claimant responded to a Facebook advertisement.

89. There were copies of various different Facebook advertisements placed by the respondent in the bundle which had been disclosed by the respondent however, the claimant gave evidence that these did not include the specific advertisement he had seen and responded to.

90. The claimant gave evidence that the advertisement he saw was similar to the one at page 81 of the bundle and that it had said nothing about 'self-employed' status. The advertisement at page 81 was posted by Tony Austin, who was at that time the respondent's Operations Manager, on 18 December 2020 and includes the following wording;

"Security officers needed in derby over the Xmas period must have a sia badge

10p per shift 12 hour shifts

…

Come on people get hold of me if you want to earn good money".

91. The other advertisements in the bundle were posted by Mr James Nason, the Managing Director and sole owner of the respondent (p.83)and included the following words; *"£10 per hour **self-employed** paid after receipt of an invoice." Tribunal stress.*

92. There is another example in the bundle of an advertisement placed on the respondent's own Facebook site (p.84) which includes the wording;

"Applications must be self-employed with a UTR number (This can be area [sic] with HMRC if not) .Paid weekly in receipt of an invoice…own transport is essential and must be reliable, punctual and well presented."

93. It is not in dispute that the claimant was contacted by Tony Austin via Facebook on 18 December 2020 (p.80) with the following message;

"*Hi buddy I have work in derby building site over the Xmas period and then good money 12 hour days and nights shifts*".

94. The claimant expressed an interest in the work and he agreed to talk to Mr Austin, which they did by telephone. There is no record of that discussion however we accept the claimant's undisputed evidence that there was a discussion, which is

also supported by a message providing the claimant with Mr Austin's telephone number and asking him to: "*give me a bell" (p*.80).

95. We accept the claimant's evidence that the shifts on offer were 14 hour shifts during the week and/or 12 hour shifts at the weekends. At the weekends there were 2 shifts of 12 hours each to provide 24 hour cover (because no one was working on site at the weekends). During the week, the shifts were 14 hours each (because 24 hour cover was not required).

Rate of pay

96. The claimant's evidence is that the usual rate of pay in the industry is between £10 and £12 per hour or up to £15 depending on experience. Mr Nason described what the respondent paid as a ' flat rate'.

97. Under cross examination Mr Nason gave evidence that; "*I stipulate the rate and you say yes or no whether you take it".* Mr Nason confirmed that he "*dictated*" the hourly rate and it could not be negotiated.

98. Over the Christmas period the claimant was paid rates of £20 for 25 December 2020 (p.177), £15 on 31 December 2020 and £20 for 1 January 2020 dropping to £10 per hour from 2 January 2021, all set by the respondent and the same rate that was paid to all the guards.

Shifts

99. The claimant agreed the shifts he would work in text messages with Mr Austin (p.88)

100. The claimant maintains that the Facebook advertisement he replied to was sent by Mr Austin and it did not identify the name of the respondent. He refers to the following message to Mr Austin as evidence in support of his contention that by this stage he did not know the name of the company behind the advertisements.

"*Just remind me of your company name in case I'm asked by the relief guard or in case there an incident and police ask who I would be working for*".

101. The claimant was sent a message from Mr Austin confirming the respondent's identity (p. 88). The claimant points to this as evidence that the advertisement he responded to was not one posted on Sentry Consulting Limited's own Facebook page otherwise he was would have known the company name, further support for his contention that the advertisement he responded to was not one of those posted by Mr Nason which referred to self-employed status.

102. Mr Austin was not called as a witness. The Tribunal take into account that the Facebook message which the claimant alleges was similar to the one he responded to (p.81) was posted on 18 December 2020, which is the same date of the messages between the claimant and Mr Austin when the claimant first wrote expressing his interest in the work (p.80). Nowhere within the Facebook post at page 81 does it make any reference to this being work on a self-employed basis.

103. The Facebook advertisements on the respondent's own Facebook website which Mr Nason sent out (p.83, 84,85) were mainly posted much earlier in the year, in or around June 2020. There is one which is in December 2020, but that is dated 8 December 2020 (p.69). The Facebook post which is closest in proximity in time to the discussions the claimant had with Mr Austin and which was sent out by Mr Austin, is the one which makes no reference to the work being offered on a self-employed basis.

104. The Tribunal prefer the claimant's evidence taking into account the documentary evidence, that the Facebook post he responded to was one sent from Mr Austin, did not include the respondent's name and made no reference to the work being on a self-employed basis.

105. The claimant's evidence is that he did not consider he would be working as a self-employed person but that he was gaining short term employment. It is common between the parties, that in his industry, security guards are taken on as employees or on a self-employed basis and that the practice differs.

106. The claimant agreed the initial shifts and his evidence is that he had discussions with Mr Austin about more work which would be available after these initial shifts . The claimant understood that he would be offered more shifts but he does not allege that he was promised any particular number of shifts or for a particular duration. The claimant's evidence is that he was lead to believe however that work would be available for as long as the respondent retained the contract with this client, and that is consistent with the evidence of Mr Nason. The Tribunal accept that Mr Austin had indicated to the claimant that as long as the respondent kept the contract more shifts work would be available.

107. There is a Facebook message from Mr Austin (p.72) confirming a 'set' of shifts the claimant was to work at the Old Derby Royal Infirmary which were 12 hours shifts on the following dates:

    25 December 0600 to 1800

    31 December 1800 to 0600

    1 January 1800 to 0600

    2 January 1800 to 0600

    3 January 1800 to 0600

108. In terms of the duties involved, Mr Austin later sent a general Facebook message to all night staff (p.87) on 7 January 2021 confirming what duties had to be performed during the shift. It is not in dispute that these were the duties the claimant understood he had to perform. Those duties were:

    1.10 patrols at night must be done checking the front gate and bottom gate and the small side gate at the back of the cabins

    2. The alarm must be on all the time and only taken off on a patrol

    3. QR code will be at each point for you to scan on every patrol.

109. The undisputed evidence of Mr Nason in cross examination is that there is some flexibility in the work, in that the claimant could use his discretion when to patrol, it could be every 40 minutes or 1 hour and 10 minutes but they ask for 10 patrols per shift.

Monitoring

110. Mr Nason monitored the sites remotely and as they are activated by motion he would know if a security officer was not patrolling the site. If they were not doing the patrols, he would remove them off shift.

111. Mr Nason also gave evidence that if someone is late once or twice to attend their shift, they would normally not use them again.

Substitution

112. Mr Nason gave evidence only under cross examination that the claimant could have sub-contracted out the shifts if he had wanted to bring someone else in . He would need to put "*someone else on the invoice*" . In answer to a question from the Tribunal, he confirmed that he had never explained to the claimant that the claimant could send a subcontractor out to cover the shifts he had agreed to do.

113. Mr Nason confirmed that none of the staff had ever subcontracted out their work but if they did, he would have to agree who it was and check their licence and experience was acceptable.

Licence

114. The claimant's undisputed evidence which the Tribunal accept, is that by 19 December 2020 Mr Austin asked him to show his SIA (Security Industry Authority) licence. The SIA is a legal requirement to work as a security operative in the UK, where the work involves supplying services to another organisation. The claimant was responsible for arranging his own licence and duly provided it.

Contact Information

115. The claimant was sent a text massages (p. 72) with details of who to contact in an emergency, Mr Austin or Mr Nason. He was given the telephone number of the security office on site and the padlock code.

116. All the claimant's discussions about the working arrangements were with Mr Austin and conducted over the telephone, outside of a few Facebook messages.

Invoices

117. The claimant denied sending invoices to the respondent for his fees. Invoices were included in the bundle however, the claimant denies that he provided those . The claimant alleges that he had only seen those invoices as part of the disclosure exercise for these proceedings (p.177).

118. The invoices do not include the claimant's bank details. It is not in dispute however that he had provided those in a message to Mr Austin

119. It is not in dispute that the sums on the invoices are the actual amounts paid to the claimant.

120. Mr Nason could not confirm who had generated the invoices although he believes it would have been the claimant. Mr Austin would have received the invoices. Mr Nason had no direct involvement in any discussion with the claimant about sending invoices and they were not sent to him personally. The invoices are not signed and the respondent has not disclosed any emails from the claimant sending in those invoices. On a balance of probabilities we accept the claimant's oral evidence, that he did not generate the invoices.

Tax and NI

121. The invoices show the hourly amount paid which was without deduction of tax and NI.

122. The claimant's evidence is that he assumed there would be deductions made at source i.e. he would be paid as an employee with statutory deductions made by the respondent. The claimant's bank statements however show that the amounts on the invoices (which are based on the hourly gross rate) are the same amounts paid into his bank account (i.e. with no deductions).

123. The claimant's evidence on this point was not consistent. The claimant stated;" *I would expect the respondent to do it*" i.e. pay the tax. He repeated this a number of times. The Tribunal take that into account when assessing the weight to be attached to his evidence, the impact of his disabilities however, he was clear and unequivocal and repeated that his assumption was that the respondent would pay the tax, that there was nothing in writing to say who would be responsible for the tax but he expected the respondent to do it .

124. It was only when the Tribunal asked about the payments made gross into his bank account that the claimant then alleged that he believed that he had been owed a tax rebate because he had been unemployed from July to September 2020 and hence he did not question why no tax had been deducted. He does not allege that he was not aware that tax had not been deducted or that he did not understand that tax and NI should have been deducted.

125. The claimant does not assert that he made any enquiries of HMRC or the respondent to check his tax position.

126. The claimant gave evidence that he did not know whether he would get payslips or not, that it varied with different employers but he did not receive any from the respondent and he does not allege he asked for payslips.

127. The respondent had in the exchange of correspondence about his grievance, written to the claimant on 12 February 2021 stating; " *I will also be contacting the HMRC to declare your earnings while being* ***self employed*** *by Sentry Counselling Ltd."* (p.99). Tribunal stress. The claimant replies: *"Thank you for informing HMRC about my taxes. I hope you would have anyway unless you were suggesting you do not properly administer your taxes"* (p.102). The claimant throughout his grievance maintained that he had worker status however, what is notable is that he did not in his response state that he understood the respondent was making the necessary statutory deductions and not treating him as self-employed in terms of those arrangements.

128. The Tribunal did not find the claimant's evidence credible on this issue.

129. The claimant presented his case carefully and diligently and invited the Tribunal to consider relevant case authorities and statutes. He has a law degree and experience in litigation. The claimant only put forward this explanation about a tax rebate when he was asked a question from the Tribunal, he did not produce any evidence that he was owed tax but more compelling is that the sums he received matched exactly the gross hourly rate he had agreed. He was clearly someone who appreciated that different tax treatments apply where someone is employed or self-employed but does not allege that he took any steps to check with HMRC or the respondent, why no tax or NI was being deducted at source.

130. The Tribunal find on balance that the claimant knew that he was to be responsible for his own tax.

Payment

131. The payment for work was sent direct to the claimant's own bank account. He did not have a business bank account .

Working for others

132. The claimant accepted that he could over the period 25 December 2020 to 8 January 2021 when working for the respondent, have worked for someone else outside of those shifts, if he wanted to but in the event he did not.

Equipment

133. It is not in dispute that the claimant did not have a badge identifying him as working for the respondent.

134. He was not provided with a uniform but there was a standard dress code he had to comply with, namely the industry standard of black trousers and white shirt . He gave undisputed evidence that he has been doing this type of work for 18 years. He provided most of his own equipment; stab vest, UV (staining) spray, handcuffs, body camera, high vision vest which says security.

135. The respondent provided the radio but no PPE equipment for the claimant

Sick pay holiday pay

136. The claimant does not allege he was entitled to any sick pay or holiday pay.

Contract of employment

137. It is not in dispute that the claimant was not issued with any sort of written contract.

138. The terms were agreed in the Facebook messages and verbally by telephone.

139. The claimant confirmed that the extent of the arrangement was to turn up on time and carry out the hours and look after the site. There is no job description for the role, certainly we accept the claimant was not provided with one.

140. If someone was late to attend their shift or he was late, the claimant would call Mr Nason or Mr Austin so that they could arrange cover.

141. We now turn from the arrangements about his work to the circumstances which led to the respondent not offering the claimant further work from 8 January 2021.

Lateness

142. The claimant confirmed that he was late to work on **25 December 2020 (p.94).** Rather than attend at 6am, he arrived at 6:05 and entered the site at 6:10am

143. The claimant accepted that on **2 January 2021** he was again late for his shift. This was not a morning shift, it was due to start at 6pm. He arrived 5 minutes later.

144. The claimant was also late on **7 January 2020** by 15 Minutes.

145. The claimant blamed his lateness on a "*combination of things*" and that it was " *partly disability and partly circumstances*". He referred to it being during the Covid pandemic, that it was also the time of year, it was " *cold, frosty and snowy*" . The claimant also complains that he was having to get up at the "*crack of dawn"* and go to a place he was not used to travelling to.

146. He could not, he said recall actually what happened on the 25 December, but recalls snow and ice, he was going to a new place, he did not foresee the risks

which may have made him late, his cognitive ability to plan and prepare impacted on his ability to get to work on time . He alleges that repetition (i.e. going to the same place a few times), helps him plan for the journey and be less anxious.

147. He could not recall what happened on the 31 December either that meant he was late to arrive for his shift.

148. He complains that it is quite a long journey from his home in Stafford to Derby and getting up early was difficult because of his disability. He was he accepts also late for the afternoon shifts and described it as follows;

" Stress levels, numerous things can have a domino effect – I'm not intentionally late – I will try to be on time – no matter how I plan it fails – to prevent me failing I'm always going to be late for my own funeral"

149. In answer to a question from the Tribunal, the claimant accepted that what he was saying was that he was always going to be late:

"Yes, I'm always late for everything, sometimes I'm on time, different contributing factors such as traffic, if do not foresee danger, I'm like a rabbit in the headlights".

150. The claimant gave evidence that he had a digital clock and if he is not fully alert in the mornings, he will read the numbers wrong and think he has more time and then if he is running late, this will increase his anxiety .

151. However, he accepted that he had been able to arrive on time on 31 December, 1 and 3 January 2021. The claimant described how some days he functions fine but some days his cognitive functioning is not the same.

Further Shifts

152. The claimant was asked to do more shifts and worked on the **6th, 7th , 8th January 2021** (the shift on the 8th of January finished on morning of the 9th January) (p. 179/95).

153. The claimant does not allege however that there was an obligation to offer him more shifts, just that he had been told there would be more work available. His evidence is that ; "*coming to end of agreed shifts and given further shifts."*

154. The claimant does not allege that he was obliged to work these further shifts or that the respondent was under any obligation to offer them to him . His evidence is that it was up to Mr Austin who he put on the rota to do the shifts. He also does not allege that he understood that he was obliged to work the shifts that he was offered but when he accepted them he understood there was an expectation he would do them and if he did not, he would not expect to be offered more shifts.

7 January 2021 meeting – knowledge

155. It is not in dispute that on 7 January, which was the third occasion the claimant had turned up late, there was a meeting between Mr Austin and the claimant where lateness and performance was addressed with him.

156. Mr Nason gave undisputed evidence, which the Tribunal accept, that Mr Austin told him at the time about this meeting. Mr Nason accepts that at this meeting with Mr Austin, the claimant informed Mr Austin that he had Asperger's Syndrome and dyslexia which the respondent was unaware of prior to that.

157. The claimant in his evidence in chief (paragraph 4.2) asserts that the respondent had knowledge of his disability between 8 January 2021 to 11 January 2021 which is consistent with Mr Nason's evidence.

158. The claimant's evidence, which is undisputed and which we accept, is that he explained to Mr Austin that he was late to work because he was struggling because of his cognitive functioning in the morning. He gave examples of the impact of his conditions to Mr Austin, including problems reading his digital clock.

159. The claimant's evidence is that he told Mr Austin at this meeting that he wanted some *'leeway'* to be 15 to 20 minutes late for shifts but he was open to their suggestions.

160. He alleges that Mr Austin offered him 6 further shifts for the week after the 9 January 2021, however this would have meant working more than 48 hours in that week and that he had said to Mr Austin that he could not work 48 or over 48 hours with no adjustments;

"*I said, I am not doing 48 hours – it was an open question – I could see myself struggling to do 48 hours – could see myself doing beyond 48 hours if adjustments"*

"unless adjustments, no point setting up to fail to do 48 hours, if did 48 hours still need adjustments"

"I said I cannot do over 48 hours with no adjustments"

161. In his claim form (p.20) the claimant refers to ; "*not able to work more than 48 hours due to the claimant's disability*".

162. In his grievance letter of the 8 February 2021 (p.92) he referred to being discriminated against because he refused to work more than 48 hours .

163. The claimant was concerned that he would feel "overstretched" because of his Asperger's Syndrome and that working this number of hours would be a problem for him because he would become "*overwhelmed*" and unable to cope.

Requirement to work over 48 hours

164. The claimant admitted under cross examination that he was not forced to accept the 6 shifts and that work was offered on a first come first serve basis but that: "*to some extent I was given ultimatum, it was the client's requirements".*

165. The claimant alleges that this conversation with Mr Austin about 6 shifts being *"on the table*" was on or around the 7 January 2021. He was already by 7 January on the rota to work on the 8 January 2021.

166. The claimant in his evidence in chief wavered between saying that he had told Mr Austin that he could not work 48 hours and that he had told him that he could not work **more** than 48 hour. He also accepted under cross examination that he was not required to accept any number of shifts although he considered there was a *"presumption*" that he would accept the shifts offered to him. There was a lack of clarity in the claimant's evidence over what he alleges he had actually said to Mr Austin at the 7 January meeting and what had been said to him about the 6 shifts.

167. The claimant conceded in cross examination that ultimately Mr Austin would decide who to rota for the shifts, which the Tribunal find implies that while 6 shifts may have been available, the claimant understood that even if he had wanted them all, he may not have been rota'd for them all.

168. The claimant also made the statement in cross examination that he had believed that the following week he would be given all 6 shifts but: *"I expected Mr Nason Senior's shifts would be mine – they would fill the void*".

169. However, the Tribunal accept the undisputed evidence of Mr Nason which is not rebutted by any evidence to the contrary, that Mr Nason Senior only worked 2 weekend shifts of 12 hours each (24 hours in total). If the claimant had been told that Mr Austin would ask whether Mr Nason Senior would be willing to swap his shifts with the claimant, this would not have equated to 48 or more than 48 hours of work in a week. If the claimant had elected to work weekends shifts, he would have worked no more than 24 hours per week.

170. After the 7 January meeting, there were a series of messages between the claimant and Mr Austin.

171. The claimant sent a message on 11 January 2021:

"*Further to our conversation the following dates I need to avoid is*

27th and 28 January and 1st, 8th, 9th ,10th and 26th February

Hope we can still work together despite my predicament relating to the hours were too long" (p.90).

172. The claimant chased for a response on 14 January 2021 and Mr Austin replied;

"*Hi mate not yet just waiting for the lads to get back to me mate" (p.90)*

173. *On 21 January 2021 the claimant wrote again;(p.91)*

"HI boss

Any further news? Really hope my conversation about my disability and working ***beyond 48 hours*** *didn't have an impact. As I really need the work and I feel that has had impact plus you mentioned you would help" Tribunal stress*

In response to which Mr Austin states;

"Mate it's got nothing to do with that it's the lads who have the set days and times if they don't come back to me ***to say they can change*** *there [sic] days that is with them il [sic] make some calls again to them and update u soon."*

The claimant then replies:

" oh right I just understood I was lined up to do the following week but you said you would get the hours covered. Following from my conversation".

Mr Austin replies:

" I also said I had to wait to see if the lads could change there [sic] days to accommodate you"

The claimant acknowledges that was the discussion between them:

"Yes I remember I was just following up from our conversation to see what the outcome was. Given time has passed."

174. The above is consistent with Mr Austin agreeing to speak to other staff to try and change the rota to offer the claimant weekend shifts. The benefit of weekend work is that with two 12 hour shifts, if the claimant was late, there would be another

guard already present on site ready to do the handover, able to wait for him to arrive. During the week, there was only one shift of 14 hours, if the claimant did not arrive on time, the site would be left without any security presence.

175. On balance, given the confusion in the claimant's oral evidence and the clear wording in the message of the 21 January 2021, the Tribunal find that the claimant was expressing concern about working **beyond or over** 48 hours per week in his discussion with Mr Austin. That the concern was about working more than 48 hours would also be consistent with how long the shifts were, in that 3 x 12 hour shifts equates to 42 hours whereas 4 x 12 hours was *in excess* of rather than amounting to exactly 48 hours (ie 56 hours).

176. The claimant's oral evidence before this Tribunal was;

" *I thought I was going to get 6 shifts, performance was raised, I mentioned adjustments and it would be an open question - it could have even the adjustments we mentioned today or it could be less shifts .* ***I was happy to be on 6 shifts but could there be a 15 minute allowance - please do not get confused – I was happy to work 6 days per week but with adjustments – I was trying to fit round them".*** *Tribunal stress*

177. The claimant's evidence is that he thought Mr Austin was going to change the shift patterns, but he did not know to what and he does not allege he set out what changes he would need but "*left the door open"* for Mr Austin to come back and make some proposals.

178. The claimant does not allege that at any point Mr Austin told him that not working all the 6 shifts or more than 48 hours would be a problem. The claimant does not allege this in his messages sent after that conversation with Mr Austin on 7 January 2021.

179. That the respondent needed or wanted the claimant to work more than 48 hours is disputed by Mr Nason. It is also not consistent with the shifts the claimant did work. The claimant worked in the week of the 4th to 10th January, 3 shifts of 14 hours i.e. a total of 42 hours (weekday shifts). He does not allege that Mr Austin had any issues with him working less than 48 hours during that week.

180. Further, the rota supplied, which the claimant does not dispute (p.174) shows various individuals working a variety of hours (p.174) for example *'Jim*' worked 26 hours during 14 to 20th December, in January 2021 'Jim' worked 24 hours in the week of 28 January and James worked one 12 hour shift.

181. Mr Nason gave evidence that his understanding was that the claimant wanted some leeway in case he was late for work and that this was the only adjustment had had asked for and that Mr Austin looked into changing the rota to offer him weekend work but this was not possible. He had understood from Mr Austin that the claimant did not want further shifts after the 8/9th January because he could not get to work on time.

182. Mr Nason gave evidence that his understanding was that the claimant was just asking about adjustments to the start times and not to the hours he worked, because he could choose what shifts to accept.

183. Mr Nason disputed that the claimant would have been offered 6 shifts by Mr Austin on 7 January. His evidence is that there were 3 shifts of 14 hours (midweek) available and he knew that because he prepared the rota's. Mr Nason alleges that by 4 January the Monday and Tuesday shifts were covered and that if

the claimant did not want to do a shift, he could refuse or he could choose to have a gap between this shifts and refuse some shifts.

184. Mr Nason also gave evidence that the claimant could also have worked split shifts (i.e. worked only 6 hours) if the respondent or claimant was able to find someone to work a split shift with him. Mr Nason's evidence is that this may well have been possible and something the respondent would have agreed to however, Mr Nason accepted that the advertisements for the role did not refer to being able to split the shifts and it was "*possible*" Mr Austin had not explain this to the claimant . He does not allege he ever personally mentioned this to the claimant.

185. The Tribunal find that the option of possibly splitting the shifts was something the respondent may have been able to accommodate but the respondent never discussed this with the claimant and the respondent took no steps to try and find someone to split the shifts with the claimant.

186. Mr Nason's evidence is that Mr Nason Senior was asked about changing his shifts on or around 9 or 10 January 2021 to weekday shifts, so that his weekend shifts could be offered to the claimant . It is alleged, and this is not disputed by the claimant, that Mr Nason Senior was not willing to work weekday shifts , it suited him better to work the shorter weekend shifts because he did not have to patrol as often (due to knee problems). Mr Nason's undisputed evidence which the Tribunal accept, is that Mr Nason Senior had worked for the respondent for a couple of years by this stage and Mr Nason prioritised his preference for weekend shifts because he had worked for the respondent longer; "*yes, it was time served."*

187. However, there were two 12 hours shifts at the weekends and when asked who was working the other shift, Mr Nason's undisputed evidence which we accept, is that he or Mr Austin usually worked the other weekend shifts but he went on to say that he did not believe they worked the weekend night shifts in January because he wanted to step away from working the night shifts which is why they recruited more staff. The Tribunal accept the undisputed evidence of Mr Nason that he and Mr Austin had been carrying out the security work themselves, but took on extra security officers in December so that including himself and Mr Austin there were 6 security staff in mid-December 2020, reaching 8 in total by the end of December 2020 .

188. Mr Nason could not recall who worked the other weekend shifts in January 2021 and had not produced the relevant rota's at the Tribunal. He alleges however that Mr Austin had asked other guards if they would change their weekend shifts to midweek but they refused however he did not question Mr Austin any further about what enquiries he had made and he does not know what reasons they gave for not wanting change their weekend shifts.

189. Mr Nason accepted that if the weekend shift work could be accommodated, the claimant could have stayed for the whole duration of the contract with the client which is still ongoing.

Mr Nason Senior

190. Mr Nason's oral evidence is that the respondent considered full time hours to be 4 shifts of 12 hours i.e. 48 hour working week however, in his letter responding to the claimant's grievance (p.97) he had referred to full time equating to 42 hours and he repeats that later in the same letter The claimant had worked 4 shifts (48 hours) and then 3 shifts, but explained that he did not want to work 48 hours going forward.

191. The evidence of Mr Nanson, which the claimant did not dispute was that Mr Nanson Senior had some health issues requiring a knee replacement, which meant that he did not want to work 14 hour shifts, he only wanted to work weekends when the shifts were 12 hours each.

192. The undisputed evidence of Mr Nason which was on balance we accept (the claimant was not able to adduce any evidence to rebut it), is that Mr Nanson Senior at the time the claimant worked for the respondent, had worked consistently for the respondent for the previous 2 years, worked only 2 weekend shifts of 12 hours, (from 6am to 6pm) and worked on a self-employed basis, submitting invoices and paying his own tax and had an accountant to deal with his tax affairs. Mr Nason's evidence is that his father did not work extra shits .

193. The Tribunal find on the evidence that Mr Nason Senior was therefore part time based on the custom and practice of the respondent as identifying full time as someone who works at least 42 hours per week but in any event, worked less hours than the claimant had worked or indicated he was prepared to work .

194. Mr Nason in his letter of 12 February 2021 did not identify his father but stated:

"*We have a member of part time staff that has a disability but still is an asset to our team and would never be discriminated against because of a disability or any special requirements as you wasn't [sic]. This was also the member of staff we asked to change their shifts with you but they could not due to their circumstances , they had* ***worked for us longer*** *than you so they had preference and we honoured their decision. Again this was disabled member of staff that we value greatly …"*

195. There is no evidence that Mr Nanson Senior was in fact given extra shifts after 9th January 2021 and Mr Nason denies that he was. However, the Tribunal find that what the claimant was actually complaining about, was the more favourable treatment afforded to Mr Nason Senior *because* he had worked for the respondent for longer than the claimant and the claimant considered this to be unfair. The claimant refers in his witness statement to (paragraph 4.6): *" I believe the Respondent decided it would give priority to other staff who had worked "longer*" .

196. The claimant in setting out his case at the outset at this final hearing when discussing the issues and claims, referred to being '*got rid of'* because he was seen as more dispensable and the respondent preferred to offer the work to someone who had been "*employed for longer".* The claimant informed the Tribunal; '*to be honest I'm not sure of the status of him, I don't know if he was full time or part time before I left*". '

197. The claimant appears to confuse length of service with part time status.

198. How long Mr Nanson Senior had been employed by the respondent is not relevant to a claim under PTWR.

Grievance

199. The claimant submitted a grievance on 8 February 2021 (p,92). In this grievance, he complained of not being offered further shifts;

"…*I believe have been [sic] discriminated against and/or unfairly dismissed as I refused to work more than 48 Hours as is my entitlement under the Working Times [sic] Regulations 1998. I had informed Tony Austin about my disability that I would require reduced hours or a reasonable adjustment to alter the shift pattern [i.e. Split shifts].I had explained that my disability would be affected by the time management and concentration pattern. My disability is Asperger's Syndrome and Dyslexia…"*

200. The claimant clearly indicated in this letter, that he no longer expected the respondent to make adjustments which would enable him to carry out further work for them (p.93):

"*in the time I have been in limbo waiting for a reasonable period for Tony Austin to make the adjustment. It is no longer reasonable to leave me in abeyance on the pretense [sic] that Tony Austin is going to get round to it…"*

201. Mr Nason replied on 12 February 2021 (p.94). His undisputed evidence which the Tribunal accept, is that it is a small company and there is no grievance policy. He did respond to the grievance however he does not allege that he discussed the grievance with Mr Austin. His evidence was that as the claimant no longer worked for the respondent, he took no steps after he received the grievance to resolve it but he did reply to it.

202. In his reply he referred to the claimant's disabilities only being raised by the claimant when his performance was challenged. He referred to the claimant's lateness and his performance on site, namely not monitoring the site, spending time while on shift using social media and not patrolling the site because of an alleged tripping hazard. Mr Nason complained that the claimant had not followed standard operational procedures (p.95). He referred also to the issue of start times (p.95):

"It was only at this point you then disclosed having a disability , this wasn't a problem for us at all and Tony explained that we have specific start times as requested by our client and these couldn't be changed, but he would seek to discuss with other members of staff to try and accommodate to you but this wasn't possible";

203. The claimant replied on 6 February 2021 referring to the PTWR and case law on employee status (p.100). The claimant sets out here why he believes he was not given more shifts;

" *What stood out more was the timing of my request followed by no work. When I was told I could do more shifts, but the intervening event was the reasonable adjustment and WTR request."*

204. Mr Nason under cross examination gave evidence that on reflection he could have dealt with the situation differently. He could have gone on site and understood better the claimant's issues with timekeeping and found out what he needed and tried to implement it. However, he relied on what Mr Austin was telling him and there was as he put it, a bit of " *Chinese whispers*", by which the Tribunal understands him to mean, that he may not have received wholly accurate information from Mr Austin.

205. Mr Nason's evidence is that the contract to provide security at the Birmingham site finished a couple of weeks after the rota which ended on 3 January 2021 (p.174) , which would have been around 20 January 2021. He was not sure of the exact date and he was not sure if the contract had been only to continue with CCTV surveillance after Christmas . He could not confirm that there were no weekend shifts available at the Birmingham site after December 2020. With respect to the client's second site at Derby, there are still 3 staff currently working there as at the date of this hearing.

206. Mr Nason was candid that although there was an Equal Opportunities policy in place he had no training on the Equality Act 2010 that he could recall

Post 8 /9 January 2021 Employment

207. The claimant gave evidence under cross examination that he secured new work on 4 June 2021. There is in the bundle a letter from Staffordshire County Council dated 4 June 2021 confirming his appointment as a debt recovery officer from 17 June 2021 to 16 June 2022 . He has been unemployed since 17 June 2022 (p.185).

208. The claimant alleges he was actively looking for work before June 2021. He has produced a print out of job applications which appears to show jobs applied for from January 2021 (p.180 - 184). All the work he has applied for has been employed positions because he does not want the lack of employment security associated with self-employed work. His evidence is that during the pandemic there was no need for security work and hence he was not able to secure this to mitigate his losses before June 2021. He did not give evidence about the reasons why the job with the Council ended.

209. When employed as a debt collector he also carried out security work at the weekends as a worker or casual worker as a security officer, however this weekend security work finished in August 2021. . He could not recall the dates he worked at the weekends . The claimant is currently looking for work but not security work because following an incident in August 2021 (when he was involved in a fight) his licence has been suspended

210. The claimant has been out of work since 16 June 2022.

Disability

211. The claimant gave evidence that the dyslexia affects his reading, writing, arithmetic and memory recall while Asperger's Syndrome affects his social interactions.

212. He describes the effects of each as different but that the effects 'play off' each other and 'amplify' each other.

213. The claimant's undisputed evidence is that environmental factors such as room temperature and stress impact on the effects of dyslexia.

Adjustments : substantial disadvantage

214. The claimant alleges that this disabilities make it difficult to get up for early morning starts at 4 or 5 am and work long hours.

215. Long hours cause him to feel overwhelmed. It was both the length of the shifts he worked for the respondent (12 and 14 hours) and the frequency of them which was an issue for him.

216. In terms of time keeping, the claimant gave evidence that he needed some '*leeway'* to start his shift perhaps 5 to 15 minutes late.

217. He described how he relies on a digital and analogue alarm clock to wake him. He has an analogue in the kitchen or bathroom and a digital to wake him up but he finds it difficult to read the numbers on the digital clock and can sometimes misread them and this can impact on his time keeping.

218. The claimant gave oral evidence in cross examination that in terms of his ability to start work on time, his time management was an issue in that he will miscalculate the time and fail to plan ahead and take account of possible factors which may make him late (e.g. traffic or the weather) and; "*I will always be late with my disability."*

219. He describes not being able "*leap out of bed*". He compared his cognitive functioning in the mornings to setting up a computer and he described needing more time for his cognitive functioning to start processing properly than those without his disabilities which can affect his ability to get to places on time.

220. He gave evidence that the Asperger's Syndrome is a social impairment characterised by significant difficulties in social interaction and non-verbal communication and engaging in restricted or repeated patterns of behaviour and interests. He gave evidence that it has led to a failure to develop friendships because difficulties in social interaction, and lack of reciprocity, social and emotional, impaired nonverbal behaviours in eye contract, facial expression, posture and gesture.

221. The claimant gave evidence that his behaviours, interests and activities become restricted and sometimes abnormally intense or focused. He asserts that he sticks to inflexible routines and preoccupies himself with specific and narrows areas of interests. His favourite topic is the law.

222. He described how he will be *"picky"* with his clothing and his behaviours. He will need to shower in a particular way. He has to follow a routine in the morning, he could not take a shower for example without following a certain pattern or this would send his anxiety "*through the roof".* If he miscalculates the time and he is late, he will become overwhelmed. The difficulty with time keeping he explained is an effect of dyslexia but the knock on effects in terms of his anxiety and the resulting impact on his behaviours is the effect of the interplay with Asperger's Syndrome.

223. The claimant asserts that he suffers with depression, and that if he is having a bad day he will take anti-depressant medication to address his moods and that he is susceptible to recurring bouts of depression. He does not take the medication all the time, only when he needs it . He has taken it on and off since 2016. He was not able to say how often he took it, but thought it was about 3 times a year. He did not produce GP records to confirm this but did produce his medication to the Tribunal . A photocopy of the package was taken (p.220) . This shows a prescription for Escitalopram (8 tables of a 10mg dosage) on 27 June 2022 , one to be taken daily. He also produced a copy of the package leaflet which states that the medication is an antidepressant.

224. [redacted]

225. The claimant has produced an assessment report from Mersey Care NHS Trust, Liverpool Asperger team (p. 119 – 129). This is dated 16 December 2008.

226. He has also produced a report dated 13 February 2020 from the University of Portsmouth Autism Centre for Research on Employment (p.130-154) and we have had regard to those reports.

227. The Mersey Care Trust report includes comments including the following;

"Ray has had various experiences that would indicate that he is struggling to understand social situations and respond appropriately"(p.120)

And;

"People with Asperger syndrome often find change upsetting. They often prefer to ordering their day according to a set pattern. If they work set hours then any unexpected delay, such as a traffic hold up, or a late train, can make then anxious or upset" (p.127)

228. It also states that the claimant met the criteria for Asperger's Syndrome and has been diagnosed as having it .

229. The University of Portsmouth Autism Centre report which is more recent, from 2020 is anecdotal, it lists his strengths and challenges as reported by the claimant .It includes amongst many others;

Always has difficulties planning ahead

Always finds it difficult to prioritise tasks or actions (p.145)

230. The claimant also gave evidence that he can become argumentative and disagree with what anybody tells him because he lacks a perception of reality . He refers to being short tempered although he can appear to be overly intelligent .His gave evidence that the Asperger's Syndrome, impacts on his ability to learn, read and write and problems with memory. He refers to stuttering or stammering if his brain is overloaded with complex information. He finds it easier if people are direct or give closed answer questions.

231. The claimant also refers to dyslexia impairing his ability to read numbers or words correctly.

232. The claimant gave evidence under cross examination and in response to the Tribunal's questions when asking about his memory, that he has to use certain aids to assist him which include putting reminders on his telephone or places such as the refrigerator at home.

233. He identified his needs as far as work with the respondent was concerned, as a reduction in the shifts to reduce his stress and a window of time to allow him to be late, at least for a period until he became use to travelling to the venue and suggested a window of between 5 and 15 minutes.

234. In terms of why he was late on the times he arrived at work for the respondent (p.94), the first occasion on 25 December 2020 was a morning shift when he was due to arrive at 6am.

235. On the 7 January 2021 it is not clear whether this was an early or late shift and neither witness could recall, however the claimant under cross examination said that he was late because of a combination of things ; partly his disability and partly circumstances . It was a cold so the weather was an issue, but it was a new venue and he did not know where he was going. The claimant referred to a 'domino' effect , that he will try to be on time but no matter how he plans he will fail; *" I am always going to be late…*" He referred to contributing factors, it may be traffic but the problem is that he does not foresee those types of problems and then when he comes across them he panics: " *I am like a rabbit in the headlights."*

236. It was put to the claimant in cross examination that he had managed to arrive on time on 31 December and 1 and 3 January and therefore it was put to him that his disabilities did not have the effect he was alleging they had on his timekeeping and that he had referred to the reason being a combination of factors. The claimant explained this on the basis that some days he functions better than others and external factors such as the weather can make him late because he fails to plan or mistakes in terms of reading the time accurately.

237. The respondent only really challenged the claimant's evidence on the impact of his disabilities on his timekeeping. The Tribunal accept on balance, the claimant's oral evidence about the effects of the disabilities which is supported to an extent by the reports he has produced.

Other claims

238. It was put to the claimant in cross examination that he had made other claims in the Tribunal against previous employers. It was put to him that he had made at least 10 claims against previous employers, he did not refute that number stating only that he could not recall; " *I don't know – I do not deny or confirm".*

239. The claimant however was not questioned further about those claims and it was not put to him that those claims were misconceived or vexatious or otherwise what the outcomes were. No details were provided to the Tribunal.

240. The Mersey Care Trust report comments that (p.123);"..*Ray has considered his actions reasonable when others have not. This is particularly the case in his legal prosecutions against others as a form of rule bound consequences for others actions…"*

241. The above of course does not mean that previous Tribunal claims were vexatious but may explain the number of claims he has brought and his tendency to resort to litigation to enforce what he perceives to be unlawful practice.

Submissions

Claimant's submissions

242. The claimant wanted to provide his submissions in writing. The respondent did not object and those submissions were received on 26 October 2022.

243. The Tribunal have considered both submissions in full. The full content of those submissions are not set out in this judgment. The claimant's submissions run to 23 pages albeit in the main a recital of the law and applicable statutory provisions, most of which are deal with in the legal principles section below.

244. The claimant has produced a case transcript from a case which he avers should be taken into account because the EAT had accepted in that case that his conditions amounted to a disability . The case is **Mr Bryce v Trident Group Security Limited Case No: EA -2020- 000741-OO.** The case involved an appeal by the claimant in relation to his claims for disability discrimination, whistleblowing detriment and automatic unfair dismissal. Those claims had been dismissed under rule 38 (1) because he had failed to comply with an Unless Order. The EAT set out the position with respect to the claimant's disability at paragraph 2 as follows;

" *There has been no pleaded position by the Respondent in relation to the existence of his disability; it stated in their Grounds of Resistance that it was unaware of the Claimant's disability. The existence of the Claimant's disability is not a matter that has been considered on evidence at any hearing. However, I have no reason to doubt that the Claimant does suffer from those disabilities.*

245. The claimant invites the Tribunal to consider the following case authorities:

Mrs J Madeley v Cambien Group 1309576/20; the claimant did not identify what in this judgment he considered to be relevant. The Tribunal has read the decision which includes a discussion about a Rule 50 application.

Dodds & other v MOJ &The Lord Chancellor 2202235/2019: The claimant again did not identify what specifically he relied upon in respect of this case however it has been read and considered .

246. The claimant asked in his submissions that the Tribunal do not research him on the internet or look up Tribunal judgments about him. He argues that they have not been included in the evidence and it would be unfair to consider them without giving him an opportunity to comment. The Tribunal can assure the claimant that it has not done so. It has only taken into consideration **Mr Bryce v Trident Group Security Limited Case No: EA -2020- 000741-OO.**

247. The claimant invites the Tribunal to find Mr Nason was not a dependable witness.

248. The claimant submits that the Tribunal should not accept that Mr Nason Senior was disabled because the respondent would need to establish this under section 6 EqA. and they had produced no evidence to support it.

249. The claimant submits that he has established that he was not self-employed and relies on the guidance in : **Pimlico Plumbers Ltd & Anor v Smith [2018] UKSC 29.**

250. In terms of direct discrimination the claimant compares his treatment to Mr Nason Senior or a hypothetical person.

251. We have considered the rest of his submissions in full.

252. The other case authorities to which he refers and which we have considered, are as follows:

R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136 SC)
Chief Constable of West Yorkshire Police v Khan [2001]UKHL 48
Hm Inspectorate of Prisons V Dunn EKEAT/0234/16/DM
Mr B Kuppala v HBOS PLC 2206253/2018
Baldeh v Churches Housing Association of Dudley & District Ltd [2019] UKEAT/0290
A Ltd V Z UKEAT/0273/18/BA
Mania Sewa Singh and Another v Dowell Lee and others [1983] I.C.R 385
Williams v Trustees of Swansea University Pension Scheme [2018] UKSC
Buchanan v Commissioner of police for the Metropolis [2016] IRLR 918
Hensman v Ministry of Defence UK/EAT /0067/14
O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145
City of York Council v Grosset [2018] EWCA Civ 1105
Alfonby v Accrington and Rossendale College and others [200]0] ICR
Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting 2002 ICR 646 CA
Griffiths v Secretary of Sate for Work and Pension [2017] CIR 160
Noor v Foreign and Commonwealth Office [2011] ICR 695
Ayodele v City Link Ltd [2018] ICR 748
Barton v Investec Henderson Crosthwaite Securities Limited 2003 IRLR 322
Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA
Chamberlain Solicitors and another v Chamberlain Emokpoe and Brunel v Webster [005] EWCA Civ 142
Hewage Grampian Health Board [2012] IRLR
Madarassy v Nomura internationals Pls [20O7] IRLR 246
Matthews v Kent Fire Authority [2006] ICR 365
Moultrie v Ministry of Justice [2015] IRLR 264

Respondent submissions

253. The respondent's submissions running to just over 6 pages and have been considered in full.

254. The respondent submits that there was no withdrawal of offering shifts nor a refusal to work 48 hours, but a suggestion to change the shifts of others to accommodate a different shift pattern.

255. The respondent submits that with regards to employment status it could be found that he provided work personally but there is no mutuality of obligations in that the pattern of shifts showed nothing other than individual and separate contracts; **Stevedoring and Haulage Services Ltd v Fuller [2001] EWCA Civ 651 IRLR 627**.

256. It is submitted that there was insufficient control and evidence that he was paid pursuant to invoices, no payslips were provided, no uniform provided and he provided his own equipment and there were "generic Facebook appointment ' adverts" .

257. It is submitted that the respondent did not define full or part time, all the workers had similar shifts and it is misconceived that he was not given shifts after 8 January 2021. However, Mr Munro does not expand on this point.

258. With respect to the direct discrimination claim: the respondent submits with reference to **Department for Work and Pensions v Mrs Susan Boyes [2022] EAT 76,** that what had to be justified was the outcome of the decision making process, not the process itself.

259. In terms of the section 15 EqA claim, the respondent submits that the legitimate aim was to cover security at the Derby site and that: " *There is evidence that the [sic] Mr Austin thought this actions would serve the legitimate aims relied upon and less discriminatory alternatives had been considered …".* Mr Munro does not elaborate on what he says those less discriminatory alternative were, however the Tribunal presume he is referring to attempts to find someone to change shifts with the claimant.

260. In terms of disadvantages, the respondent submits that the only specific disadvantage would be a struggle with 'time- keeping' and if the Tribunal consider that: "*Asperger's has lasted or would last longer than 12 months it cannot be reasonable that if he was late for work, that was because he was disabled, or the Respondent should or could have known".* Mr Munro submits that the duty under section 20 would be too onerous on the company with not even one employee and the size of its resources to accommodate the claimant with changing shifts or allow flexi -hours of 15- 30 minutes before any shift.

261. However, the Tribunal have reminded itself that the agreed issue in terms of section 6 EqA, is only with the longevity of the normal day to day effects. The respondent at the outset accepted that the disabilities and effects were long term, it agreed the only issue was with whether the normal today to day effects were substantial. Further, Mr Munro does not engage with the fact that the claimant's evidence, which Mr Nason is not in a position to rebut, is that he told Mr Austin that it was because of the Asperger's Syndrome that he was late and required some flexibility, and the respondent's evidence is that this could be accommodated on weekend shifts hence the attempts to swap shifts.

262. The respondent submits that the claimant was unable to carry out shifts into February because "*of him being unavailable for work*." Again, Mr Munro does not engage with the various attempts the claimant made to contact Mr Austin up to 21

January 2021and chase him for a response about the shifts he could do, ultimately raising a grievance in February 2021.

263. The respondent refers and relies on the following case authorities;

Uber BV V Aslam [2021] UKSC 5
Johnson V Transopco UK Ltd [2022] EAT 61 WLUK 136
Hall (Inspector of Taxes) v Lorimer 1994 1 ALL ER 230
Harrod v Chief Constable to West Midlands [2015] I.C.R 1311

264. The respondent submits the claims should be considered misconceived but does not go on to elaborate on why.The respondent also invites the Tribunal to consider the claimant a serial litigant.

Legal Principles

Employment Status : statutory provisions

(b)Was the claimant an employee or worker of the respondent within the meaning in the* PTW*R and/or section 45A ERA?

PTW Regulations

265. Regulation 1 of the PTWR sets out the definition of an employee and worker for these purposes of these Regulations, both employees as defined and workers are covered by the Regulations..

1.*—(1) These Regulations may be cited as the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and shall come into force on 1st July 2000.*

(2) In these Regulations—

"the 1996 Act" means the Employment Rights Act 1996

"contract of employment" means a contract of service or of apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;

"employee" means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under a contract of employment;

"employer", in relation to any employee or worker, means the person by whom the employee or worker is or (except where a provision of these Regulations otherwise requires) where the employment has ceased, was employed;

"pro rata principle" means that where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker;

"worker" *means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under—*

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue

> ***of the contract that of a client or customer of any profession or business undertaking carried on by the individual.*** Tribunal stress

266. The definition of "worker" used in the ERA is the same as the definition of 'worker' as set out in Regulation 2(1) of the Working Time Regulations 1998 and Regulation 1(2) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 .

267. The protection afforded by section 45A ERA, therefore also applies to those who are "*workers*"', rather than only those who fall within the more prescriptive definition of 'employee' within the ERA.

(b)Was the claimant an employee of the respondent within the meaning of section 83 of the Equality Act 2010?

Section 83 of the EqA provides that:

(2) "Employment" means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work…

268. There is no material distention between the wider definition of employee under the EqA and a limb (b) definition of worker under the ERA.

Judicial Guidance

Irreducible minimum – Employee status: limb (a) definition/employed under a contract of employment.

269. Mr Justice MacKenna in ***Ready* Mixed *Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*** in his Judgment stated as follows:

> '*A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's* ***control in a sufficient degree to make that other master****. (iii) The other provisions of the contract are consistent with its being a contract of service.'*

270. Lord Clarke, Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC,** referred to the *'the classic description of a contract of employment'* which he reduced down to three questions:

(1) did the worker agree to provide his or her own work and skill in return for remuneration?

(2) did the worker agree expressly or impliedly to be subject to a **sufficient degree of control** for the relationship to be one of employer and employee?

(3) were the other provisions of the contract consistent with its being a contract of service?

271. In the Judgment of Lord Justice Stephenson in ***Nethermere (St Neots) Ltd v Gardiner and anor*****:** '*there must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service'*. He doubted this could be reduced any lower than Mackenna J's test set out in ***Ready Mixed Concrete***: '*There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill'.*

272. Lord Irvine in ***Carmichael and anor v National Power plc 1999 ICR 1226, HL*****:** a lack of obligations on one party to provide work and the other to accept work would result in '*an absence of that irreducible minimum of mutual obligation necessary to create a contract of service'.*

273. ***Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA*****:** The Court of Appeal cautioned against using a checklist approach.

274. ***Clark v Oxfordshire Health Authority 1998 IRLR 125, CA*****:** In the majority of cases, the determination of an individual's employment status would depend not only on written documentation but also on an investigation and evaluation of the factual circumstances in which the work was performed.

Contractual relationship

275. For an individual to lay claim to 'worker' status whether under limb (a) or (b) of the statutory definition he or she must first show that there is an express or implied contract with the 'employer'.

276. The parties must intend their agreement to create legal relations.: ***Pimlico Plumbers Ltd and anor v Smith 2017 ICR 657, CA* .**

277. In ***Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*** **Lord** Clarke held that, in cases with an employment context, 'the relative bargaining power of the parties must be taken into account..

278. The Supreme Court expanded the scope of *Autoclenz* in *Uber BV and ors v Aslam and ors 2021 ICR 657, SC*.The Court pointed out that it was critical to understand that the rights asserted by the claimants were not contractual rights but were created by legislation. In the Court's view, it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'. To do so would reinstate the mischief which the legislation was enacted to prevent.

279. *Uber* established that key question in such cases should now be whether the relationship is one of subordination and dependence, having regard to the legislative purpose of protecting those who have little or no influence on the terms under which they work.

Personal performance of work or services

280. To fall within limb (b) an individual must undertake 'to do or perform *personally* any work or services for another party to the contract'.

281. An obligation of personal performance is also a necessary constituent of a contract of employment: ***Pimlico Plumbers Ltd and anor v Smith 2018 ICR 1511, SC.***

282. In ***Redrow Homes (Yorkshire) Ltd v Wright 2004 ICR 1126, CA*****,** the Court of Appeal observed that it does not necessarily follow from the fact that work is done personally that there is an *undertaking* that it be done personally.

283. An undertaking to personally perform work or services is fundamental to limb (b) worker status.: ***Inland Revenue Commissioners and ors v Post Office Ltd 2003 ICR 546, EAT***

284. ***Premier Groundworks Ltd v Jozsa EAT 0494/08*:** The EAT held that where a party has an unfettered right not to perform the services personally but can delegate them for any reason to someone else, he or she cannot be a worker.

285. ***Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo) 2018 IRLR 84, CAC*:** The existence of an 'almost unfettered' right of substitution was fatal to the union's argument that the contracts were for personal service.

Dominant feature test.

286. A line of case law on the 'contract personally to do work' test under S.83 EqA has focused on the question of whether the *dominant purpose* of the contract is the provision of personal services

287. In ***James v Redcats (Brands) Ltd 2007 ICR 1006, EAT*,** Mr Justice Elias, suggested that an alternative way of phrasing the test may be to ask whether the *dominant feature* of the contractual arrangement is the obligation to personally perform work, in which case the contract would sit in the employment field and the individual concerned will be either a worker or an employee.

288. The Tribunal have also considered:***Leyland and ors v Hermes Parcelnet Ltd ET Case No.1800575/17*** and ***Windle and anor v Secretary of State for Justice 2016 ICR 721, CA*** .

Client or customer exception

289. The last clause of limb (b) of the statutory definition makes it clear that if a person renders services or performs work on the basis that the person to or for whom he or she does so is a customer or client of his or her business or profession, he or she is not a 'worker'.

290. In ***Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, EAT*,** It held that the intention was clearly to create an 'intermediate class of protected worker' made up of individuals who were not employees but equally could not be regarded as carrying on a business.

Integration.

291. ***Cotswold Developments Construction Ltd v Williams 2006 IRLR 181, EAT***, held that it is possible in most cases to determine whether a person is providing services to a customer or client by focusing on whether that individual actively markets his or her services as an independent person to the world in general (and thus has clients or customers) or whether he or she is recruited to work for the principal as an integral part of its organisation**.**

Relevance of mutuality of obligation

292. There must be an irreducible minimum of mutuality of obligation for a contract of employment to exist. This is usually expressed in terms of a wage/work bargain.

293. In ***Windle and anor v Secretary of State for Justice 2016 ICR 721, CA***, the claimants were interpreters who worked for a range of organisations. In finding that they were not employed under 'a contract personally to do work' within the meaning of S.83(2) EqA, an employment tribunal took into account the absence of a contractual relationship covering the period between

engagements: HMCTS was not obliged to offer any work and neither claimant was obliged to accept any work that was offered.

Other Factors

Tax and national insurance.

294. The opinion of HM Revenue and Customs on a worker's employment status for tax purposes will never be conclusive as to his or her status for employment law purposes: ***Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace 2008 ICR 1423, CA*** and ***O'Kelly and ors v Trusthouse Forte plc 1983 ICR 728, CA***.

295. ***Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA*** **:** Lord Justice Nolan suggested that, in such cases, the extent to which the individual is dependent upon or independent of a particular paymaster for the financial exploitation of his or her talents may well be significant.

Disciplinary and Grievance Process.

296. That the claimant was subject to the employer's disciplinary and grievance procedure was a factor pointing towards employee status in ***Motorola Ltd v (1) Davidson (2) Melville Craig Group Ltd 2001 IRLR 4, EAT*** however, it may only **indicate** that the employer is affording the individual a fundamental right of natural justice rather than indicative of the true nature of the relationship ***St Ives Plymouth Ltd v Haggerty EAT 0107/08*****.**

Intentions of Parties

297. The parties' stated intention as to the status of their working relationship in law may be a relevant factor but the courts will always look to the substance of the matter**:** ***Young and Woods Ltd v West 1980 IRLR 201, CA*****. For example, in** ***Basil Wyatt and Sons Ltd v (1) McCarthy (2) McCarthy EAT 104/93***.

298. ***Massey v Crown Life Insurance Co 1978 ICR 590, CA***: Lord Denning MR stated that; *'when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation between them shall be'.*

Custom and practice.

299. The customs or practices in the particular trade or industry may be a relevant factor : ***Winfield v London Philharmonic Orchestra Ltd 1979 ICR 726, EAT*****, and** ***Addison and ors v London Philharmonic Orchestra Ltd 1981 ICR 261, EAT***

Less Favourable Treatment – Part- time workers

300. The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551, make it unlawful for an employer to treat part-time workers less favourably than their full-time colleagues with regard to their terms and conditions of employment, unless the treatment can be justified on objective grounds.

301. Regulation 2(4) sets out the criteria for establishing who is a comparable full-time worker in relation to a particular part-time worker. The effect of this provision is that a part-time worker can compare his or her position with that of a full-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place:

a. both workers are employed by the *same employer* under the *same type of contract*
b. both workers
are engaged in the *same or broadly similar work*, having regard, where relevant, to whether they have a similar level of qualification, skills and experience and
c. the full-time worker works or is based at the *same establishment* as the part-time worker.

302. Unlike discrimination claims, there **is no provision** for a comparison to be made with a hypothetical comparator.

303. The PTW Regulations define a part-time worker as follows:

> ***2.***—*(1) A worker is a full-time worker for the purpose of these Regulations if he is paid wholly or in part by reference* ***to the time he works*** *and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.*
>
> *(2) A worker is a part-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker.*

Disability claims : determination of disability

Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events *the claim is about? The Tribunal will decided:*

304. The definition in section 6 (1) Equality Act 2010 (EqA) is the starting point for establishing the meaning of 'disability. The supplementary provisions for determining whether a person has a disability are set out in Part 1 of Schedule 1 to the EqA.

305. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') under S.6(5) EqA. The Guidance does not impose any legal obligations in itself but courts and tribunals must take account of it where they consider it to be relevant para 12, Sch 1, EqA and ***Goodwin v Patent Office 1999 ICR 302, EAT*****.**

306. The Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ('the EHRC Employment Code'), which provides some guidance on the meaning of 'disability' under the EqA and this also does not impose legal obligations but must be taken into account where it appears relevant to any questions arising in proceedings.

307. The Equality Act 2010 contains the definition of disability and provides:

Section 6. Disability

(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.

308. **Schedule 1 sets out supplementary provisions including:**

5.Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a)measures are being taken to treat or correct it, and

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

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

309. The Tribunal has taken into account the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011).

310. ***Section B Meaning of 'substantial adverse effect'***

B1. The requirement that an adverse effect on normal day-today activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1).

311. ***Cumulative effects of an impairment B4.***

An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

312. ***Effects of behaviour B7.***

B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress).

313. **Meaning of 'likely' C3.**

'likely', should be interpreted as meaning that it could well happen.

314. ***Recurring or fluctuating effects C5.***

The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing ***if it is likely to recur****.*

315. ***Meaning of 'normal day-to-day activities' D2.***

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include ***shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and***

travelling by various forms of transport, and taking part in social activities. *Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.*
The following example is set out at D11:

Case Authorities

316. The time at which to assess the disability is the date of the alleged discriminatory act: **Cruickshank v VAW Motorcast Limited 2002 ICR 729** EAT.

317. **Goodwin v Patent Office 1999 ICR 302 EAT**; The EAT set out guidance on how to approach such cases and we have taken that into account.

318. In **All Answers Ltd v W 2021 IRLR 612, CA, t**he Court held that the EAT was wrong to decide that the tribunal's failure to focus on the date of the alleged discriminatory act was not fatal to its conclusion that the claimants satisfied the definition of disability.

319. The Tribunal have also considered the guidance in :***Bourne v ECT Bus CIC EAT 0288/0****8***., ***Ahmed v Metroline Travel Ltd EAT 0400/10*** , ***Tucker v Aid Call Ltd ET Case No.2351282/10*** and ***Chief Constable of Dumfries and Galloway Constabulary v Adams 2009 ICR 1034, EAT***. The EAT in ***Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT*****, concluded** that 'normal day-to-day activities' must be interpreted as including activities relevant to professional life.

320. **In *Goodwin v Patent Office 1999 ICR 302, EAT*** held that tribunals will err if they focus on the things that a person can do instead of on the things that he or she cannot Normal for whom?

321. In ***Saad v University Hospital Southampton NHS Trust and anor 2019 ICR 311, EAT*****,** stated that communication with colleagues would all fall within the definition of normal day-to-day activities.

Direct disability discrimination (section 13)

322. An employer directly discriminates against a person if it treats that person less favourably than it treats or would treat others, and the difference in treatment is **because** of a protected characteristic.

(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

323. Where the employer behaves unreasonably, that does not mean that there has been discrimination, but it may be evidence supporting that inference if there is nothing else to explain the behaviour : ***Anya v University of Oxford and anor 2001 ICR 847, CA*****.**

324. In the course of giving judgment in ***Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL***, Lord Scott stressed that a claimant who simply shows that he or she was treated differently from how others in a comparable situation were, or would have been, treated will not, without more, succeed with a

complaint of unlawful direct discrimination. The EqA outlaws less favourable, not different, treatment, and the two are not synonymous.

Knowledge of protected characteristic.

325. Paragraph 20(1) of Schedule 8 to the EqA provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know.

326. In ***Urso v Department for Work and Pensions EAT 0045/16*** EAT held that the tribunal had erred by focusing on whether the dismissing officer knew of the condition from which the employee suffered, rather than on whether he knew of the effects of her impairment.

327. The EHRC Employment Code states that employers must 'do all they can reasonably be expected to do' to find out whether a claimant has a disability.

Discrimination arising from disability (section 15)

328. The relevant statutory provision is section 15 EqA which provides 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

329. In ***Secretary of State for Justice and anor v Dunn EAT 0234/16*** **the E**AT: identified the necessary four elements that must be made out in order for the claimant to succeed in a S.15 claim.

'Unfavourably'.

330. The Equality and Human Rights Commission's Code of Practice on Employment states that it means that the disabled person 'must have been put at a *disadvantage*' (see para 5.7).

331. 87. In **Pnaiser v NHS England [2016] IRLR 170** at [31], Simler P summarised the proper approach to a s.15 EqA claim as follows and held that:

(b) …The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

332. The EHRC Employment Code states that the consequences of a disability 'include anything which is the ***result, effect or outcome*** of a disabled person's disability' — para 5.9.

Objective justification

333. The EHRC Employment Code: aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration.

334. EHRC Employment Code, which states: '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' — para 5.21.

335. The approach that an ET will need to adopt was summarised at paragraph 10 in **MacCulloch v Imperial Chemical Industries plc** [2008] ICR 1334 (EAT).

Reasonable adjustments (section 20 & 21)

336. The duty to make adjustments is set out ins section 20 EqA:

(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.*

337. The correct approach for the Tribunal in determining a reasonable adjustments claim is set out in **Environment Agency v Rowan [2008] ICR 218 at [27]** and the Tribunal have considered that guidance.

338. The burden is on the claimant to show the PCP, to demonstrate substantial disadvantage, and to make out a prima facie case that there is some apparently reasonable adjustment which could have been made (and that, on the face of it, there has been a breach of the duty): **Project Management Institute v Latif [2007] IRLR 579 at [45] and [54]**.

339. In ***Smith v Churchills Stairlifts plc 2006 ICR 524****, CA* On appeal, the Court of Appeal considered that the correct comparators were not the population at large but the six successful candidates who were accepted onto the training course.

340. The comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. ***Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT***

341. EHRC Employment Code states: 'The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular [PCP] or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. para 6.16.

342. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal: **Morse v Wiltshire County Council [1998] IRLR 352.**

343. The focus is on practical outcomes: per Langstaff P in **Royal Bank of Scotland v Ashton [2011] ICR 632 at para 24**

344. **'Substantial disadvantage' :** The relevant disadvantage must bear some relation to the disability.

345. Section 212(1) EqA states that 'substantial' means 'more than minor or trivial'.

Constructive knowledge

346. EHRC Employment Code - employers must '**do all they can reasonably be expected to do'** to find out whether a claimant has a disability.

347. An employer will not be liable for a failure to make reasonable adjustments unless it ***had actual or constructive knowledge both;***
   (i) that the employee was disabled, and
   (ii) that he or she was disadvantaged by the disability in the way set out in S.4A(1) (i.e. by a PCP or physical feature of the workplace).

Effectiveness of proposed adjustment

348. An essential question is whether a particular adjustment would or could have removed the disadvantage experienced by the claimant. It is sufficient for the tribunal to find that there would have been a prospect of it being alleviated.

349. Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA*****,** where Lord Justice Elias remarked: '*So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'*

Detriment – working Time

350. The relevant statutory provision is set out at section 45A Employment Rights Act 1996:

Section 45A ERA :

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker—

(a)refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,

(b)refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,

(c)failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations,

(d)being—

(i)a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or
(ii)a candidate in an election in which any person elected will, on being elected, be such a representative,
performed (or proposed to perform) any functions or activities as such a representative or candidate,

(e)brought proceedings against the employer to enforce a right conferred on him by those Regulations, or

(f)alleged that the employer had infringed such a right.

351. The claimant relies on the rights under regulation 4 WTR:

Maximum weekly working time

4.—*(1) Subject to regulation 5, a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days.*
(2) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each worker employed by him in relation to whom it applies.
(3) Subject to paragraphs (4) and (5) and any agreement under regulation 23(b), the reference periods which apply in the case of a worker are—
(a)where a relevant *agreement provides for the application of this regulation in relation to successive periods of 17 weeks, each such period, or*
(b)in any other case, any period of 17 weeks in the course of his employment.

352. In ***Pazur v Lexington Catering Services Ltd EAT 0018/19*** The employee's refusal to return *materially influenced the threat of dismissal.*

Detriment.

353. 'Detriment' potentially covers a wide range of unfavourable treatment, including failure to promote, refusal of training or other opportunities, unjustified disciplinary action, reductions in pay, and termination of a worker's contract.

Causation.

354. There must be a direct causal link between the imposition and the employee's action.

355. ***Arriva London South Ltd v Nicolaou EAT 0280/10*** **and** ***Arriva London South Ltd v Nicolaou 2012 ICR 510, EAT***. liability arises if the protected act is a 'material factor' in the employer's decision to subject the claimant to a detriment.

Time limits.

356. A worker may present a complaint to an employment tribunal that he or she has been subjected to a detriment in contravention of section 45A subject to the time limits section in section 48(1ZA) ERA.

Conclusions and Analysis

Witnesses

357. The Tribunal finds that the claimant presented in the main as a credible and reliable witness other than with respect to his evidence about what his understanding had been about the tax situation. .

358. The Tribunal also found Mr Nason to be in the main a credible witness. He was candid about a number of matters which were not helpful to the respondent, by way of example he accepted that he could not confirm where the invoices had come from, that he could have managed the situation better, that he may not have received accurate information from Mr Austin and that he had no training on equal opportunities. The Tribunal conclude that Mr Nason was doing his best to give accurate information but was hindered not least because it was Mr Austin who communicated directly with the claimant and he could not recall certain matters, such as who had worked certain shifts.

Employment Status

359. The starting point is to determine whether there was a contract between the claimant and the respondent.

360. The Tribunal's finding is that there was a contract as between the claimant and the respondent. The contractual terms were agreed via Facebook messages as between (Mr Austin acting on behalf of the respondent) and the claimant and in their verbal discussions.

361. Those agreed contractual terms included an hourly rate of pay, the hours that it had been agreed the claimant would work, the location where the work was to be performed (Old Derby Royal Infirmary) and it also included the duties that had to be performed.

362. The duties were quite straightforward however, it was clear that they formed part of the contractual requirements. The wording was unequivocal in that the 10 patrols "*must be done*" and the alarm "*must be on*" and there were places on site where a QR code *"will be at each point*" for the claimant to scan.

363. The claimant was required to carry out that work for which he was paid and he was obliged to carry out that work personally.

364. The parties' mutual expectations, once the claimant accepted shifts, was that he would be available for work to do those agreed shifts and that he would carry them out as directed by the respondent . When the claimant accepted a shift or set of shifts, he was subject to a 'classic wage/work bargain'.

365. The Tribunal conclude that there was mutuality of obligation, there was an intention to create legal relations between the parties, an obligation to provide and pay for work on the one hand on each occasion shifts were offered and accepted, and an obligation to perform that work on the other. There was an intention to create a legal relationship. That contractual relationship was short in duration. The claimant performed work from 25 December 2020 up until 8 January 202. In between the shifts he had agreed to work for the respondent, the claimant was not restricted from performing other work.

366. The claimant does not allege that he was obliged to work further shifts when they were offered to him. His evidence is that it was up to Mr Austin who he put on the rota to do the shifts. He also does not allege that he understood that he was obliged to work the shifts if offered. He refused shifts on the 7 January when he felt unable to work the number of shifts on offer.

367. The engagement was casual . This is not case where the putative employee/worker was regularly offered and regularly accepted work from the respondent, so that he worked pretty well continuously, which would weigh in favour of a conclusion that while working he had at least worker status.

368. There is no suggestion that in between shifts there was an obligation to provide further shifts and therefore there is no basis for a finding that there was an overarching contract as between the parties (i.e. that there was mutuality of obligation between assignments/agreed shifts). The claimant does not argue that there was an obligation to provide him with a minimum amount of shifts over a period of time: ***Nursing and Midwifery Council v Somerville 2022 ICR 755, CA*.**

369. The Tribunal conclude that contractual obligations subsisted only during assignments/shifts the claimant had agreed to work.

370. There was no overarching agreement to provide work outside of the agreed shifts and thus the Tribunal conclude that the contractual agreement was only in place

in respect of the agreed set of shifts, namely from 25 December 2020 to 3 January 2021 and then when he agreed to accept other shifts from 6th to 8th/9th January 2021. There was no agreement in place for the periods in between those shifts or after the 9th January 2021.

371. The claimant had not been offered but not agreed to work any shifts after 9th January 2021, he had expressed his interest in further shifts and was waiting to be offered shifts which would accommodate his need for flexibility. In the event, further shifts were not offered and accepted after 8th/9th January 2021 and there was no promise that there would be further shifts, Mr Austin had gone away to speak to the other guards to see if weekend shifts could be offered to him.

372. The Tribunal are satisfied that this was a contract under which the claimant undertook personally to execute the work during those agreed shifts.

373. The dominant purpose of the contract as between the claimant and the respondent, was that the claimant provide his services to a client of the respondent as a licensed security officer.

374. Taking all the circumstances into account the Tribunal conclude that there was a connection between the parties which amounted to a legal agreement when the claimant was offered and accepted the shifts but not outside of those shifts/ assignments.

375. Having determined that there was an intention to create legal relations as between the respondent and the claimant, the Tribunal now consider what type of contract this gave rise to.

376. There was a degree of control over the claimant's activities, in that the contractual terms specified the hours he was to work, where he was to work and specified certain activities which he must perform.

377. In terms of day to day control over how he organised his work; the requirements of the role were fairly straight forward however, he was monitored. He had a degree of autonomy over when he performed his patrols but it was to a limited degree; he could perform the patrols every 40 minutes or 1 hour and 20 minutes.

378. There was no negotiation about the rate that would be paid. The claimant was not told that he could delegate the work or have a substitute and that never happened in practice. There was however no restriction on the claimant's ability to work for other companies outside of the shifts/assignments he had agreed to work for the respondent.

379. The claimant was not provided with any benefits other than basic hourly rate of pay and carried no financial risk. He was required to provide largely his own tools for the job and what he provided was significant. These factors are indicative of something less than a traditional employment situation.

380. The claimant was treated as self-employed for PAYE purposes, however while a relevant factor it is not conclusive as to his status: ***Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace 2008 ICR 1423, CA*** and ***O'Kelly and ors v Trusthouse Forte plc 1983 ICR 728, CA***.

381. The statutory definition of a limb (b) worker, makes it clear that if a person renders services or performs work on the basis that the person to or for whom he e does so is a customer or client of his business or profession, then they are not covered

by limb (b) : ***Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, EAT*****:** '*the essence of the intended distinction [created by the exception] must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves'.*

382. The EAT explained that drawing this distinction in any particular case will involve all or most of the same considerations as when distinguishing between a contract of employment and a contract for services but with the boundary pushed further in the individual's favour. The basic effect of limb (b) is to 'lower the pass mark', so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless reach that necessary to qualify for protection as workers.

383. Applying that guidance to this case, the respondent had a degree of control over the work the claimant performed, the time he did it and what he had to do during the shift. The degree of control was not extensive but that has to be viewed alongside the type of work and how sophisticated the tasks were. He could also not sub-contract the work.

384. The Tribunal heard no evidence that the claimant had business accounts he submitted to HMRC. He was paid a set hourly rate for the work he performed which he did not negotiate. He was not provided with a written contract where it was agreed that he was working on a self-employed independent contractor basis.

385. There was an element of subordination and control. The claimant was required to follow the respondent's standard operational procedures (p.95) and he was spoken to about his punctuality on 7 January 2021. He had to request some flexibility in his working hours .

386. The claimant could work elsewhere when not working for the respondent, but he was not at least during the period he was working for the respondent, actively marketing his services as an independent person to the world in general (and thus had clients or customers). Once the claimant had begun to work for the respondent, he formed part of a small pool of people who were given shifts according to a rota, and to that extent integrated into the business and how it organised its services to clients.

387. The Tribunal conclude that the respondent was not a 'client or customer of any profession or business carried on by the claimant.

388. While cautious of the degree to which this is relevant, the claimant was not subject to a disciplinary policy ***Motorola Ltd v (1) Davidson (2) Melville Craig Group Ltd 2001 IRLR 4, EAT*** **and** ***St Ives Plymouth Ltd v Haggerty EAT 0107/08*****.**

389. It is not the case that either party can argue an understanding of the status of the relationship based on known industry practice.

390. The Tribunal has reminded itself that this is not a mechanical exercise but that the object of the exercise when determining employment status, is to paint a picture from the accumulation of all the details. It is a matter of evaluation of the overall effect of the detail. Not all details are of equal weight or importance in any given situation.

391. The degree of control is fundamental and there was some control while he carried out the work, there was some oversight via CCTV monitoring and the requirement to check in with a QR code and he was required to comply with the respondent own

operating procedures and to a significant extent (taking into account the type of duties to be performed), the respondent dictated the way in which the work was to performed. It was not left to the claimant to decide how many patrols would be appropriate for example.

392. The Tribunal is persuaded on balance, that the relationship between the claimant and the respondent during the period he had been offered shifts and was on the rota to work those shifts, was that of a worker or employee in the extended sense. The claimant was not an employee in the restricted or traditional sense but a limb (b) worker or employee in the extended sense under the EqA. The claimant was therefore :

392.1 A worker under regulation 1(2)(b) but not regulation 1 (2)(a) PTW;

392.2 A worker under regulation 2(1) WTR

392.3 An employee in the extended sense under Section 83 (2) EqA

Applicant

393. The claimant's complaint is that he was not offered further shifts after 8th/9th January 2021 and that adjustments should have been made.

394. The Tribunal conclude that there was no contract in place between the respondent and the claimant after 9th January 2021, which was his last shift./ assignment.

395. As of the 9 January 2021 there was no longer any mutuality of obligation between them.

396. The Tribunal has gone on to consider whether, the claimant was for the purposes of the EqA, an applicant and whether the respondent discriminated against the claimant when deciding to whom to offer employment or by not offering him employment pursuant to section 39 ((1) EqA. 'Employment' as defined for these purposes in terms of the extended definition under regulation 83 (2)(a) EqA.

397. The process for applying for the work was informal. Individuals expressed an interest either via Facebook or verbally. The shifts were then offered to the individuals and a rota prepared. The claimant had expressed an interest in further shifts. Mr Austin had agreed to come back to him. In the event further shifts were not offered but as we can see from the rota, work was available but offered to others.

398. The Tribunal consider that Mr Austin and thus the respondent was aware that the claimant remained interested in further shifts, he communicated this in his messages to Mr Austin up to 21 January 2021. The Tribunal find that this remained the situation, as set out in its findings, until the claimant sent the letter of the 8 February 2021 in which he referred to it no longer being reasonable to leave him in "*abeyance".* He accepted by this stage, that adjustments were not going to be made to facilitate his ability to carry out further work for the respondent.

399. The Tribunal conclude that the claimant was an applicant in line with the informal application process adopted by the respondent and falls within the protection of section 39 (1)EqA.

400. There is no evidence that Mr Austin informed the claimant that going forward the work would be on a self-employed basis and the arrangements in terms of further shifts would be any different from the arrangements in place previously.

Less Favourable Treatment – Part- time workers

Did the respondent not give the claimant shifts after around 8 January 2021? By doing so, did it subject the claimant to detriment within the meaning of regulation 5 (1)(b) of the Regulations?

If so, was it done on the ground that he was a part-time worker?

401. The claimant identifies Mr Nason Senior as a full time comparator. His case is that Mr Nason Senior was offered further shifts after 8/9th January because he was full time and the claimant was not given further shifts, because he was part time

402. Mr Nason's evidence which was not disputed and which is accepted, is that Mr Nason Senior was not a full time worker and that in fact he worked less hours than the claimant had worked or was prepared to work.

403. Mr Nason Senior did perform the same or broadly similar duties of securing the same site/same establishment.

404. As set out in the Tribunal findings, the agreement the respondent had with Mr Nason Senior was that he worked on a self-employed basis. He had his own accountant to sort his tax affairs and submitted invoices for the work he carried out. The Tribunal have limited evidence relating to Mr Nason Senior however we conclude that on balance, it is more likely that given there was an express agreement that Mr Nason Senior was working on a self-employed basis and submitted invoices, that he would not fall within the definition of an employee or worker within the meaning of regulation 1 of the PTWR. The Tribunal conclude that Mr Nason Senior was not employed by the respondent under the same type of contract as the claimant and thus is not a suitable comparator for the purposes of regulation 2(4) PTWR.

405. In any event, even if Mr Nason Senior was working under the same type of contract as the claimant, he worked less hours than the claimant. He worked only two shifts a week and the Tribunal conclude that he was not full time according to the respondent's own custom and practice. Further, Mr Nason Senior was not given the shifts the claimant had been offered on 7 January for which he required adjustments. Mr Nason Senor continued to work the same number of shifts he had done before. He was not treated more favourably than the claimant.

406. The reason the claimant was not given more shifts after 8 January 2021, was the Tribunal conclude, because the respondent considered that his need for a flexible start time could only be accommodated on weekend shifts and Mr Nason Senior was given priority for weekend shift work, not because he worked more shifts than the claimant but because he had worked for the respondent longer.

407. The Tribunal conclude that the claimant has failed to identify a comparable full time worker under regulation 2 (4) PTWR. The claimant has failed to establish a prima facie case that he was subjected to less favourable treatment than the respondent treated a comparable full time worker.

This complaint is not well founded and is dismissed.

Section 45A ERA : Working time cases.

408. As set out in the Tribunal's findings, the claimant did say to Mr Austin on 7 January 2021, that he was not prepared to work over 48 hours without

adjustments. The Tribunal conclude that this did amount to a refusal to forego his rights under regulation 4 of the WTR.

409. The claimant had raised concern in messages exchanged with Mr Austin after their discussion on 7 January 2021, whether the failure to come back with more shifts was because of the "*conversation about my disability and working beyond 48 hours*…". Mr Austin replied, refuting that it had anything to do with that but it was about whether the *"lads"* would rearrange their shifts to accommodate his need for flexibility.

410. The Tribunal do not find however, that the respondent imposed or proposed to impose a requirement in contravention of the Working Time Regulations 1998.

411. The respondent was not imposing on the claimant a requirement to work more than an average of 48 hours per week (over a 17 week reference period).

412. The claimant does not allege that he was told that not being prepared to work more than 48 hours would be a problem. In practice he had worked less than 48 hours per week and the rota shows that other colleagues had also worked less than 48 hours.

413. The Tribunal is not persuaded that what the claimant said about not wanting to work more than 48 hours per week, influenced the decision not to offer him more shifts, that would not be consistent with the claimant's own evidence, the evidence of Mr Nason or the documentary evidence. There is no evidence to support a link between what he said about working no more than 48 hours with not being offered more shifts. In the circumstances, the Tribunal do not consider that it is reasonable to draw any inference from any primary findings of fact which is adverse to the respondent about their reasons for not offering him further work.

414. The Tribunal conclude that the only reason he was not offered more work was because he wanted some flexibility over what time he was required to start his shifts and the respondent considered that could not be accommodated.

This complaint is not well founded and is dismissed.

Disability Discrimination

Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events *the claim is about?*

415. The only issue in dispute is the whether the disabilities had a substantial effect on normal day to day activities and if so, which.

416. In terms of the case of **Mr Bryce v Trident Group Security Limited Case No: EA -2020- 000741-OO** that hearing was to determine the exercise of the discretion to dismiss the claim, the EAT noting that from the evidence it had before it, the disabilities potentially had an impact on the claimant's compliance with the Unless Order. The EAT considered that the Tribunal should have taken that into account in accordance with the requirements of the Equal Treatment Bench Book when deciding whether to dismiss the claims. That is not an exercise to determine whether the claimant in fact met the definition under section 6 EqA and indeed that was not the express finding.

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417. The exercise before this Tribunal is to consider the evidence we have heard and which has been put before us and we are tasked with considering on that evidence the effect of the claimant's disabilities at the relevant time . The Tribunal is not therefore bound by the EATs decision in the above case. This Tribunal has a different task before it.

418. The key question is whether, as at the time of the alleged discrimination, which is from around 7 January 2021 to the 8 February 2021 (i.e. during the period in which the claimant was either an employee/ worker or applicant under the EqA), the claimant met the definition of a disabled person under section 6 EqA.

419. The respondent does not assert that the effects were not long term but only challenges whether they were substantial.

420. The Tribunal has taken into account the medical reports and the claimant's impact statement and oral evidence. It has taken into account that there were occasions when the claimant was able to attend his workplace for the respondent on time, but that there were 3 occasions over a 2 week period when he was late, which was sufficiently problematic for the respondent that it was raised with him. The Tribunal also take into account the reports produced by the claimant, which support the claimant's own evidence that because of the effects of his disabilities, he struggles with time keeping and his ability to plan ahead is impaired.

421. The Tribunal conclude that the claimant's disabilities had a number of long term effects on his normal day to day activities at the relevant time;

- The claimant was inhibited in his ability to read, write and understand information
- The claimant sometimes misread times such as times on his digital clock
- The claimant's ability to understand human non-factual information and non-verbal communication such as body language and facial expressions was impaired.
- The claimant was impaired in his ability to keep to a timetable and plan for potential factors such as traffic and weather conditions and thus is often not able to arrive on time for events/engagements..
- The claimant was inhibited in his social activities and ability interact with people generally and make friends
- The claimant could become overwhelmed if tired in terms of his cognitive functioning and find it more difficult to process information and concentrate
- The claimant found it difficult to wake and get ready for work on time particularly for early shifts
- He would suffer significant anxiety if he was late or his normal routine was broken
- The claimant's memory was impaired .
- The claimant had repetitive behaviours and an inability to break his routine such as bathing routine.

422. Getting up early to arrive at work for 6am is the Tribunal consider a normal day to day activity because it is an the activity common across a range of industries and professions.

423. The claimant also complains of feeling overwhelmed and unable to cope with long 12 hours shifts unless they are spaced out or alternatively reduced. The Tribunal has considered whether this is also an impact on *normal day to day activities.*

The Tribunal consider that the ability to concentrate sufficiently to complete 4 x12 hour shifts consecutively in a week, is also a normal day to day activity because it would not be difficult to think of plenty of jobs which require that type of shift pattern**: *Chief Constable of Dumfries and Galloway Constabulary v Adams 2009 ICR 1034, EAT*.**

424. The claimant has episodes of depression which cause extreme low mood [redacted] Depression is an impairment in its own right however, the Autism Centre report refers to those with Asperger's Syndrome experiencing difficulties with controlling emotional responses which can lead to stress and anxiety. On balance the Tribunal find that the bouts of recurring depression are likely to be an effect or linked to the Asperger's Syndrome and that there is a close connection between the two conditions. The Asperger's Syndrome, making the claimant less able to cope with stress and anxiety and thus more prone to depression.

425. The next issue is however whether those effects are substantial, namely whether those *amount to a limitation going beyond the normal differences in ability which may exist among people, having a more than a minor or trivial effect.*

426. The claimant was not specific in his evidence in terms of the detail around the different effects and the extent of each of them. The Tribunal accept his evidence that he has certain coping strategies but that when tired and under stress, his ability to manage the effects of his impairments break down. The Tribunal considers that taking the effects together, at the relevant time they had an overall substantial adverse effect on the claimant's normal day to day activities, even if the Tribunal (based on the evidence) cannot make that clear finding in relation to each individual effect.

427. The Tribunal conclude that taking into account the cumulative effect of the impairments on his normal day to day activities, they were more than trivial or minor, and the claimant had a disability at the relevant time which met the definition undersection 6 EqA.

Direct Disability Discrimination (section 13)

Knowledge

428. Mr Nason accepts that at the meeting with Mr Austin on 7 January 2021, the claimant informed Mr Austin that he had Asperger's Syndrome and dyslexia. That is common between the parties.

429. The respondent therefore had actual knowledge as at the 7 January 2021 of the underlying impairments.

430. The Tribunal have found that the claimant also informed Mr Austin at that meeting, that his disabilities impacted on his ability to get up in the morning and get to work on time and that because of his dyslexia, he sometimes misread the time on his alarm clock and he needed flexibility over this start times.

431. Mr Nason admits that Mr Austin spoke to him about what the claimant had said at this meeting and that he was aware that the claimant had an issue with timekeeping because of his impairments.

432. The respondent at least had actual knowledge of some of the effects of the disabilities.

433. In terms of the other effects, the Tribunal conclude that the respondent had constructive knowledge.

434. The respondent had failed to do all they could reasonably be expected to do to find out whether the claimant had a disability. Mr Nason accepted that he could have done more to understand the claimant's needs and what he required by way of adjustments, he could have gone on site and simply spoken to him but he did nothing to inform himself further about how the conditions effected the claimant's normal day to day activities.

435. The Tribunal conclude that the respondent had actual or constructive knowledge that the claimant was disabled.

Less favourable treatment

436. The respondent did not offer further shifts to the claimant after 9th January 2021.

437. Other staff were given further shifts after 9 January and in particular, weekend shifts.

438. The claimant compares his treatment to that afforded to Mr Nason Senior who continued to work weekend shifts.

439. In terms however of whether Mr Nason Senior is a suitable comparator under s.23(1) EqA, there must be no material difference between the circumstances relating to the claimant's case and to Mr Nason Senior.

440. The circumstances of the comparator must include the disabled person's abilities where they are material: section 23 (2) EqA.

441. What is highly material in this case, is the claimant's ability to attend work on time. There is no suggestion that Mr Nason Senior had any difficulty arriving on time for his shifts. Mr Nason Senior therefore cannot be a suitable comparator for the purposes of the direct discrimination claim.

442. The hypothetical comparator is someone who needs flexibility because they cannot guarantee arriving on time for their shift but who does not have the claimant's disabilities. .

443. How would a person with the same abilities as the claimant but without his disabilities have been treated?

444. The claimant's evidence, which is undisputed and the Tribunal accept, is that he explained to Mr Austin that he was late to work because he was struggling with his cognitive functioning in the morning and had problem with his time keeping The Tribunal also accept that the claimant had raised not wanting to work more than 48 hours per week unless there were adjustments.

445. The Tribunal does not accept however, that working more than 48 hours would have presented a problem for the respondent, for the reasons already set out above.

446. What the Tribunal has found was a problem for the respondent, was the claimant's timekeeping. They had concerns over his performance while on shifts but they had nonetheless been prepared to continue to offer him work.

447. The Tribunal accept Mr Nason's evidence (there being no evidence from the claimant to refute it and the messages from Mr Austin to the claimant are supportive of it) that the respondent did check with other staff whether they would be prepared to swap weekend shifts with the claimant. The Tribunal accept Mr Nason's evidence that his father was not willing to do so (because of his own health needs). While Mr Nason has no knowledge of what further steps Mr Austin took to try and accommodate a weekend shift with other staff, he understood some efforts were made.

448. The Tribunal has considered whether it is reasonable to draw an inference adverse to the respondent, from the failure by Mr Austin to explain to the claimant why weekend shift work could not be offered. However, the Tribunal has taken into account Mr Nason's evidence about what steps had been taken and his candour in admitting that more could have been done. The Tribunal found his evidence credible that steps had been taken. Further, the claimant does not allege that the 6 shifts which he said were offered to him on 7 January 2021, were withdrawn when he disclosed his disabilities. He alleges that he was told that Mr Austin would arrange to cover them when he said he needed adjustments to be made to his start time.

449. The treatment must be "*less favourable treatment*" in comparison with how another person would have been treated. It is not about unfair or unreasonable treatment.

450. The claimant alleges that Mr Nason Senior received preferential treatment because he had been employed for longer and did not put it to Mr Nason that had another guard who needed to start late would have received different treatment to him.

451. The Tribunal conclude that the decision not to offer the claimant further shifts, was not because of or in any way influenced by his disabilities but because of his request for flexibility over the start times of his shifts.

452. The claimant's inability to assure the respondent that he could always arrive on time was seen as a stumbling block to giving him weekday shifts because it gave rise to a reasonable and very real concern, that the site would be left unmanned for a period and the respondent would be in breach of its contractual obligations to its client.

453. Efforts, albeit inadequate efforts, were made to accommodate weekend shifts.

454. In the circumstances the Tribunal conclude that the reason the claimant was not offered further shifts after 8th/9th January, was not because of the claimant's disabilities.

This complaint is not well founded and is dismissed.

Discrimination arising from disability (section 15)

455. In consequence of the claimant's disability, the claimant had problems with his timekeeping and to have been allowed some flexibility over his start time would have enabled him to carry out further shifts. He believes that he may have only

required this flexibility for an initial period of time, until he was more familiar with the route to work.

456. The Tribunal do not find on balance that the unfavourable treatment (of not offering further shifts) was because of the effects of the disabilities on his memory, learning and communications skills but because of the impact on his timekeeping and ability to plan ahead.

457. The requirement to be on site at a specific time (because of the impact of the site otherwise being left unattended) had a specific ***effect*** on the claimant i.e. it created a particular disadvantage for him.

458. The problems he had with his timekeeping and ability to plan were more than a trivial influence on the treatment he received. We find that it was in fact the main reason for the decision not to offer him more shifts.

459. In terms of legitimate aim, the respondent did not plead a legitimate aim in its response. The list of agreed issues did not identify any legitimate aim and no aim was mentioned at the Preliminary hearing on 20 May 2021. No application was made to amend the response to include a legitimate aim. It was raised only in the written submissions and then only very briefly. At paragraph 3.9 of the written submissions, the respondent refers to the aim of being able to cover security at the Derby site.

460. For completeness however, the Tribunal makes the following observations; it accepts that there was a real need on the part of the respondent to ensure the sites they were contracted to provide security for, were manned at all times during the contracted hours. That would be a legitimate aim. The consequences of not ensuring the site was secure, are obvious in terms of potential damage/theft, the potential liability of the respondent as well as reputational risk to the respondent's business.

461. However, it is a balancing exercise when determining whether the means of achieving the aim were proportionate (section 15(1)(b) EqA) as against the discriminatory impact on the disabled person. When considering whether the means were appropriate and reasonably necessary, Mr Nason himself reflected that the matter could have been dealt with better. He was not why other staff had refused to swap their weekend shifts and he was not sure (and does not allege he checked at the time) whether here had been weekend work available at an alternative site in Birmingham. Mr Munro in his submissions simply does not engage with those points.

462. The aim of ensuring the site is secure would potentially be a legitimate aim, but the treatment in the circumstances was not in any event, proportionate. The respondent is not in a position to satisfy the Tribunal that less discriminatory measures could not have been taken to achieve the same objective .

463. As of 8/9 January 2021, the claimant was a worker or employee in the extended sense and the failure to offer further shifts was a detriment: section 39 (2)9b) EqA . After the 9 January 2021 he was an applicant and he was not considered for further shifts/offer of further employment, because of the 'something' arising from his disabilities (the impact on his time keeping and ability to arrive on time for his shifts): section 39 91)(c) EqA.

464. The respondent does not dispute that the claimant could have continued to work for them because the contract is still continuing. The Tribunal find that he would have continued to be offered other shifts beyond 9 January 2021, had the

respondent took the necessary steps to accommodate him with weekend working.

The claim is well founded and succeeds.

Reasonable adjustments (section 20 & 21)

Provision, Criterion or Practice applied

465. The respondent in its submissions does not dispute that the respondent had the pleaded PCP, namely a requirement for specific shift patterns to be worked.

466. Mr Munro in his submissions argues that the PCP did not put the claimant at a substantial disadvantage compared to others without the claimant's disability.

Comparators

467. The claimant does not identify an actual comparator in terms of the effect of the PCP.

468. Applying the guidance in: ***Smith v Churchills Stairlifts plc 2006 ICR 524, CA*** the Tribunal conclude that the correct comparators would be the other security guards who were offered other shifts during the relevant period.

469. Mr Nason's evidence when he was addressing the claimant's lateness, was that if someone is late to attend shift once or twice they would be removed. The Tribunal find that it is reasonable to draw an inference from that evidence, that the other guards who were offered shifts were those who had not been late to work on one or two occasions, unlike the claimant who the respondent had spoken to about his lateness on 3 occasions over a period of circa 2 weeks.

470. Members of that comparator group were not liable to be dismissed (because they were able to get into work on time) on the grounds of disability whereas the claimant, because of his disability, could not, on a significant number of occasions, comply with the PCP.

471. The respondent considered the number of times the claimant had been late to be serious enough (substantial enough) to speak to him about it and according to Mr Nason, he would not normally have retained someone after so many episodes of lateness. The Tribunal conclude that the disadvantage therefore of the claimant arriving late, was more than minor or trivial. The respondent certainly considered such lateness to be significant enough to warrant not offering a person further work in those circumstances.

472. The claimant was placed at a substantial disadvantage in comparison with non-disabled employees.

473. In applying this comparison exercise, the Tribunal has had regard to the guidance in : ***Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT*.**

Knowledge

474. The respondent in its submissions puts its defence on the basis that if the disadvantage the claimant suffered (namely the struggle he had with his timekeeping) was substantial it would not be reasonable that if he was late the respondent should have known that it was because he was disabled.

475. However, as we have already addressed earlier in this judgment, Mr Nason's own evidence is that he was aware that the claimant had mentioned his disabilities to Mr Austin on 7 January and he understood the claimant had a problem with his timekeeping and needed some flexibility because of that.

476. The respondent had actual or constructive knowledge that the claimant was disabled and that the disability was likely to put him at a substantial disadvantage in comparison with non-disabled persons.

Was the adjustment reasonable ?

477. The respondent in its written submissions refers to an adjustment to allow what it refers to ' flexi hours' of 15 to 30 minutes as too onerous, but Mr Munro does not expand on the reasons why it is alleged to be onerous'. Mr Nason's own evidence is that the respondent could accommodate that adjustment if the claimant was given weekend shift work. He does not allege this was too onerous.

478. Mr Nason was simply not able to explain in any detail the steps which had been taken to check whether weekend work could be accommodated. He does not know what reasons had been given by other staff and he could not recall which staff were sharing the weekend shifts with Mr Nason Senior.

479. We have considered that the claimant also raised the issue of reducing his shifts and not working more than 48 hours without some adjustments, however the Tribunal do not find that there was a PCP in place which required the claimant to work more than 48 hours per week or indeed to accept any particular number of shifts.

480. The Tribunal are satisfied therefore that given the claimant could work less than 48 hours if he preferred, the adjustment of weekend shifts work would have been effective in removing the substantial disadvantage and enabled the claimant to fulfil the requirements of the work.

481. The parties did not engage in their submissions when the duty arose however, the Tribunal conclude that all that was required was a change to the rota and a discussion with staff and therefore it was an adjustment which could have been made on or shortly after 7 January. On a balance of probabilities, the Tribunal conclude that this adjustment could have been made within a day or two and while the claimant remained employed. Therefore as at 9 January 2021, at the latest he was subject to a detriment: section 39 (2)(d) EqA.

482. The claimant was an applicant for employment after 9th January 2021. He had made it clear he was interested in more work but was waiting for the adjustments to be accommodated. He was an applicant for the shift work until 8 February 2021 for the reasons we have already set out earlier in this judgment.

483. The recruitment process the respondent followed was an informal one and the expression of interest or application for work must be seen in that context. The respondent was aware that the claimant needed the adjustment and was not prepared to make it and this was the main reason why it was decided not to offer work to the claimant but to offer it to the other security guards.

The claim is well founded and succeeds.

484. The respondent argues in its submissions, that the claimant has made multiple claims against other respondents and that these claims should be considered to be misconceived. The Tribunal is invited by Mr Munro to carry out its own search of any cases the claimant has brought. Mr Munro has not identified what the cases are, the citations, the dates of them nor has he provided transcripts . He has also not sought to attempt to explain why he alleges those other cases were misconceived or vexatious or indeed what the findings were.

485. The EAT has the power under section 33 Employment Tribunal Act 1996 to deal with persistent litigious activity where the claims or proceedings are vexatious by making a restriction of proceedings order.

486. However, the Tribunal has not found the claim before it to be misconceived or vexatious. A number of the claims have been upheld.

487. Separate case management orders will be issued for the remedy hearing which with the parties agreement will take place by Cloud Video Platform.

Employment Judge Broughton

Date: 2 Feb 2023