THE INDUSTRIAL TRIBUNALS

CASE REF: 21039/21

CLAIMANT: **Jonathan McMurray**

RESPONDENT: **National Museums Northern Ireland**

JUDGMENT

The unanimous judgment of the tribunal is that all claims are dismissed

CONSTITUTION OF TRIBUNAL

President: **Mr N Kelly**

Members: **Mr T Wells**
Mr N Jones

APPEARANCES:

The claimant appeared in person and was unrepresented.

The respondent was represented by Mr R Cushley, Barrister-at-Law, instructed by Cleaver Fulton Rankin Solicitors.

BACKGROUND

1. The claimant commenced employment with the respondent as an Education Assistant on 16 September 2019.

2. The claimant resigned by email dated 30 October 2020 and his last day of service with the respondent was 24 November 2020.

3. The claimant was first diagnosed with ASD (autism) on 4 December 2020 some ten days after his last day of service.

4. The claimant lodged a tribunal claim on 24 February 2020.

5. The claimant clarified in the course of a Case Management Preliminary Hearing on 21 October 2021, in the agreed list of legal factual issues and in the final hearing that his claim had three parts:

    (a) he alleged that he had been subjected to unlawful sex discrimination contrary to the Sex Discrimination (Northern Ireland) Order 1976 as a result

of an incident on 23 October 2019. He alleged that he had been subjected to offensive and unlawful comments in the course of that incident and that it had not been properly investigated by the respondent.

(b) He alleged that the respondent had failed to fulfil its statutory duty to put in place reasonable adjustments, contrary to the Disability Discrimination Act 1995. He alleged that he had suffered from ASD during his employment and that this had been a disability for the purposes of the 1995 Act.

(c) He alleged that he had been constructively and unfairly dismissed from his employment, contrary to the Employment Rights (Northern Ireland) Order 1996, as a result of the decision of the respondent on or about 22 October 2020 to extend his probationary period for a further 12 weeks.

GALO ADJUSTMENTS

6. In the course of Case Management discussions, the claimant had asked to be given written and advance notice of all questions to be put to him in cross-examination. At a Case Management Preliminary Hearing on 22 February 2020, there had been discussion of this request and in particular discussion of the Equal Treatment Bench Book (ETBB). It was determined that the respondent should further identify the different heads of claim and the factual issues in relation to each head of claim, to enable the claimant to better anticipate the questions he would be asked in the course of the full hearing. The respondent was not required to provide written questions in advance.

7. The claimant was allowed breaks as and when requested and on occasion when those breaks were not requested by him.

8. The claimant was assisted from time to time in the course of the full hearing to understand questions and was allowed sufficient time on each occasion to respond to each question. With that assistance, he demonstrated no difficulty in doing so.

9. The claimant was informed that he could bring a companion with him to the hearing at any stage. In the event, his brother attended on the second, third and fourth days of the full hearing.

10. The respondent accepted, and the tribunal unanimously accepted, that the claimant was diagnosed with ASD on 4 December 2020, and, as a lifetime condition, it was clear that he must had ASD during his period of employment. The tribunal has no wish to query that diagnosis.

11. However, the tribunal has a duty to ensure that reasonable adjustments are as effective as possible in accordance with the ETBB, the 1995 Act and the overriding objective. The claimant had notified the tribunal in the course of Case Management Discussions that he would be subject to verbal outbursts, *"leg jigging"* and *"sniffling"* when under pressure in the course of the full hearing. None of these behaviours were observed by any of the tribunal members in the course of the full hearing. The claimant, throughout the full hearing, had been composed, articulate and relaxed. The claimant demonstrated good eye contact with members of the tribunal and indeed with Mr Cushley throughout the hearing. In general, he demonstrated no obvious difficulty in answering questions. Those answers were relevant and

demonstrated that the claimant had understood those questions, with minimal assistance. Having had the opportunity to study the medical evidence, and having had the opportunity to observe the claimant during the hearing, the tribunal is satisfied that the ***Galo*** adjustments put in place were effective.

PROCEDURE

12. Directions were given in the course of the Case Management procedure in relation to the interlocutory procedure, the ***Galo*** adjustments and the use of the witness statement procedure at the hearing.

13. The full hearing took place on 20 June to 23 June 2022.

14. The claimant gave evidence on his own behalf by adopting his previously exchanged witness statement as his evidence in chief and he was then cross-examined. The claimant did not raise anything by re-examination. Six witnesses then gave evidence on behalf of the respondent. They were Laura Hutchinson, Sue Cathcart, Christabel McCartney, Hannah Anderson, Geoff Davidson and Andy Blair. Each adopted their previously exchanged witness statement as their evidence in chief and were then cross-examined by the claimant. Ms Hutchinson was briefly re-examined.

15. Mr Geoff Davidson was isolating because of Covid and gave his evidence by WebEx.

16. The evidence was completed by approximately 12.00 noon on 22 June 2022. In order to give the claimant additional time to prepare his submissions, the parties were not directed to give those submission that afternoon.

17. At that point, oral submissions were directed to be given on the following morning. The respondent was directed to give its submission first. The claimant would then be allowed a further 30 minutes to consider his response to that submission and then his submission would be heard.

18. The decision was reserved. The panel meeting was delayed because of the holiday season. There was a panel meeting on 15 August 2022 to reach a decision. This document is that decision.

RELEVANT LAW

Disability Discrimination – Reasonable Adjustments

19.
Reasonable Adjustments

(ii) Section 4A of the 1995 Act:-

"(1) Where –

(a) a provision, criterion or practice applied by or on behalf of an employer, or

(b) any physical feature or premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provision, criterion or practice, or feature, having that effect.

(2) In sub-section (1) 'the disabled person concerned' means –

...

(b) in any other case, a disabled person who is –

...

(ii) an employee of the employer concerned;

(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know –

...

(b) in any case, that that person has a disability and is likely to be affected in the way mentioned in sub-section (1)."

(iii) Section 18B of the 1995 Act:-

"(1) In determining whether it is reasonable for a person to take a particular step in order to comply with the duty to make reasonable adjustments, regard should be had, and in particular, to –

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable to take the step;

(c) the financial and other cost which will be incurred by him taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with the respect of taking step;

(f) the nature of his activities and size of his undertaking;

(g) ...

(2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with duty to make reasonable adjustments –

(a) making adjustments to premises;

(b) allocating some of the disabled person's duties to another person;

(c) transferring him to fill an existing vacancy;

(d) ordering his hours of working or training;

(e) assigning him to a different place of work or training;

(f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;

(g) giving, arranging for, training or mentoring (whether for the disabled person or any other person);

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) providing a reader or interpreter;

(l) providing supervision or other support."

Knowledge

20. Under Section 4A (3) of the DDA above, the duty to make reasonable adjustments is triggered only if the employer knows or could reasonably be expected to have known that the relevant person was disabled and that the disability was likely to put him at a substantial disadvantage in comparison with non-disabled persons. Knowledge is not limited to actual knowledge but extends to constructive knowledge – namely, what the employer ought reasonably to have known.

21. The Equality Commission Disability Code of Practice, provides:

"5.12

Although … the employer has a duty to make an adjustment if it knows, or could reasonably be expected to know, that the employee has a disability and is likely to be placed at a substantial disadvantage. The employer must, however, do all it can reasonably be expected to do to find out whether this is the case.

An employee with depression sometimes gets upset at work, but the reason for this behaviour is not known to her employer. The employer makes no

effort to find out if the employee is disabled and whether a reasonable adjustment could be made to the person's working arrangements. The employee is disciplined without being given any opportunity to explain that the problem was from a disability. The employer may be in breach of the duty to make reasonable adjustments because it failed to do all it could reasonably be expected to do to establish if the employee was disabled and substantially disadvantaged.

5.15

If an employer's agent or employee (such as an occupational health adviser, a personnel officer or line manager …) knows, in that capacity, of an employee's disability, the employer will not usually be able to claim that it does not know of the disability, and that it therefore has no obligation to make a reasonable adjustment … Employers therefore need to ensure that where information about disabled person may come through different channels, there is a means – suitably confidential – for bringing the information together, to make it easier for the employer to fulfil its duties under the Act".

22. In relation to constructive knowledge, the EAT in ***DWP v Hall [2005] UKEAT/0012/05/DA*** emphasised that the question whether an employer had, or ought to have had, knowledge is a question of fact for the tribunal.

23. In ***Wilcox v Birmingham CAB Services Ltd [2010] UKEAT/0293***, Underhill J took the view that the knowledge defence was that an employer will not be liable for failure to make reasonable adjustments, unless it has actual or constructive knowledge of *both* (1) that the employee is disabled; *and* (2) that he or she is disadvantaged by the disability in the way set out in Section 4A (ie by a PCP).

24. The Court of Appeal in ***Donelien v Liberata UK Ltd [2018] EWCA Civ 219,*** confirmed that the issue for a tribunal is what the employer could reasonably have been expected to know and emphasising, in making such an assessment of reasonableness of that nature, the exercise is factual in character. The Court of Appeal upheld a tribunal's decision that an employer did not have constructive knowledge of an employee's disability and therefore had no duty to make reasonable adjustments. The employer had not relied solely on an occupational health report stating the employee was not disabled; albeit later found to be wrong. It had also taken into account 'return to work' meetings and letters from the employee's GP.

25. Knowledge can be imputed to an employer where there has been evidence put before it which should have put the employer on notice of the disability (see ***Edworthy v YMCA South Devon Ltd [2003] UKEAT/0867***).

26. However, whilst an employer must make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry, especially if there is little or no basis for doing so (***Ridout v TC Group [1998] IRLR 628***; ***Secretary of State for Work and Pensions v Alam [2010] ICR 665***).

The EAT stated in ***Alam***:

> *"- two questions arise. They are: (1) did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(i)?. If the answer to that question is "no" then there is a second question; namely (2) ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(i)?"*

27. ***H J Heinz Co. Ltd v Kendrick [2000] ICR 491*** held that it is unnecessary to attach a label or a formal diagnosis to an impairment; knowledge that the claimant was suffering from symptoms falling within Schedule 1 or the manifestations of these sufficed - a formal diagnosis is not necessary for an employer to have knowledge of disability.

28. In ***Doran v Department of Works and Pensions (UKEATS/0017/14)***, whether an employer has complied with their duty to make reasonable adjustments will be judged not only on what it knew but also on what should have been known to them had they made reasonable enquiries at the relevant time; and, on the basis of such evidence, the tribunal will decide whether if such enquiries had been made the duty to make reasonable adjustments had arisen (followed in ***Nottingham City Homes Ltd v Brittain (UKEAT/0038/18).*** On the facts of this case, the claimant was seeking to rely on a retrospective opinion of a doctor given in evidence and since it was not before the employer when it took the relevant decision there was therefore not the relevant knowledge at the material time.

Reasonable Adjustments

29. In ***The Environment Agency v Rowan [2008] IRLR 20*** the EAT outlined the steps that the Tribunal must go through in order to determine whether the duty to make reasonable adjustments arises and whether it has been breached. The steps relevant to this case, are as follows:-

    (i) identify the provision, criterion or practice (PCP) applied that has put the claimant at a disadvantage compared to those who are not disabled;

    (ii) identify the non-disabled comparator (where appropriate);

    (iii) identify the nature and extent of the substantial disadvantage suffered by the claimant.

30. The EAT confirmed in ***Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley [2012] UKEAT,*** if a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage to the disabled person and no duty to make reasonable adjustment arises.

    At paragraph 76 Birtles J stated:

> *"The duty to make reasonable adjustments in Section 4A is, of course, expressed not in terms of the duty to alleviate disadvantage arising in consequence of a disability or for a reason relating to disability or (to borrow*

the language now in the Equality Act 2010) arising from disability. The duty arises only where the disabled person is substantially disadvantaged in comparison with persons who are not disabled. A disadvantage has to be because of the disability."

31. If the duty arises the Tribunal will then determine whether the proposed adjustment is reasonable to prevent the PCP placing the claimant at that substantial disadvantage. In ***Smith v Churchill Stairlifts PLC [2006] ICR 524***, the Court of Appeal confirmed that the test of reasonableness is an objective one and it is ultimately the Employment Tribunal's view of what is reasonable that matters.

32. Reasonable adjustments are limited to those that prevent the provision, criterion or practice (PCP) or feature placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. Any proposed reasonable adjustments must be judged against the criteria that they must prevent the PCP from placing him at a substantial disadvantage.

33. A proper assessment of what is required to eliminate the disabled person's disadvantage is a necessary part of the duty of reasonable adjustment ***Southampton City College v Randall [2006] IRLR 18*.**

34. In ***Nottingham City Transport Limited v Harvey UKEAT/0032/12*** Mr Justice Langstaff (stated at paragraph 17):

"Although a provision, criterion or practice may as a matter of factual analysis and approach be identified by considering the disadvantage from which an employee claims to suffer in tracing in back to its cause, … it is essential, at the end of the day, that a tribunal analyses the material in light of that which the statute requires; ***Rowan*** *says as much, and* ***Ashton*** *reinforces it. The starting point is that there must be a provision, criterion or practice; if there were not, then adjusting that provision, criterion or practice would make no sense, as is pointed out in* ***Rowan****. It is not sufficient merely to identify that an employee is being disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(1) provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP".*

35. In ***Alam*** (above), the employee had been disciplined and given a formal warning for leaving work early without permission. The EAT held that while issuing such a warning in those circumstances was certainly an option for the employer, it could not be described as a *"practice"*, for the purposes of Section 4A(i)(a) of the 1995 Act. Each disciplinary case was considered on its merits and *"it could not, on the findings of fact, be said that the practice of the employer was to issue written warnings to the employees who left work early without permission to do so".*

[Similarly, was the extension of the probationary period an individual decision rather than a *"practice"*?]

36. In ***Nottingham City Transport Limited v Harvey UKEAT/2012/0032,*** the EAT stated:

> *"In this case, it is common ground that there was no provision that the employer made nor criterion which the employer applied that could be called into question; the issue was the practice of the employer. Although the Act does not define "provision criterion or practice" and the Disability Rights Commission Code of Practice: Employment and Occupation 2004, deals with the meaning of provisions criteria and practice by saying not what they consist of but what they include (see paragraph 5.8), and although those words are to be construed liberally bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering from a disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. Those points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had to be identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual concerned."*

37. In ***Williams v The Governing Body of Alderman Davies in Wales Primary School UKEAT [2020] IRLR 589,*** the EAT stated:

> *"First, for there to be a practice, no actual non-disabled comparator need be found. It is sufficient if the putative practice would put the employee bringing the claim at a disadvantage because of their disability, compared with an employee who did not have such a disability where to be applied to them. Further, whilst, to amount to a practice there must be some element of repetition or persistence about what the employer has done, but rather than it being a one off occurrence, that element of persistence or repetition may be found within the four walls of how the employer is found to have treated an individual complainant. In the present case, the tribunal erred in law because its reason for finding that there was no practice was because it could not say that this was the approach that the head teacher would have taken with <u>all</u> processes of this nature which set the bar too high. A general or habitual approach could suffice, even if not universally followed."*

<u>*Burden of Proof*</u>

38. Section 17A of the 1995 Act (Burden of proof):-

> *"1(C) Where, in the hearing of a complaint under sub-section (1), the complainant proves facts on which the Tribunal could, apart from this sub-section, conclude in the absence of an adequate explanation that the respondent is acting in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act."*

39. The Employment Appeal Tribunal in the case of ***Project Management Institute v Latif [2007] IRLR 578*** Elias concluded that:-

> *"The paragraph in the DRC's Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably have been inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing substantial disadvantage engages the duty but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could be reasonably be achieved or not."*
>
> *"[We] very much doubt whether the burden shifts at all in respect of establishing the provision, criterion or practice or demonstrating the substantial disadvantage. These are simply questions of fact for the Tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant".*

Constructive Unfair Dismissal

40. In ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35***, the Court of Appeal (GB) set out the basic propositions of law relating to constructive dismissal. It stated that they were:

> *"1. The test for constructive dismissal is whether the employers' actions or conduct amounted to a repudiatory breach of the contract of employment: **Western Excavating (ECC) Ltd v Sharp [1998] IRLR 27**.*
>
> *2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see, for example, **Malik v Bank of Credit and Commerce International SA [1997] IRLR 462**, **464 (Lord Nicholls) and 468 (Lord Steyn).** I shall refer to this as 'the implied term of trust and confidence'.*
>
> *3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract; see, for example, per Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347**; **350.** The very essence of the breach of the implied term is that it is 'calculated or likely to destroy or seriously damage the relationship'.*

4. *The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in* ***Malik*** *at p464, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".*

5. *A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last throw in a serious of incidents. It is well put at para 480 in Harvey on Industrial Relations and Employment Law:*

> *'Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify him taking that action, but when viewed against the background of such incidents, it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship'."*

41. In ***Brown v Merchant Ferries Ltd*** ***[1998]*** ***IRLR 682***, the Northern Ireland Court of Appeal said that although the correct approach in constructive dismissal cases was to ask whether the employer had been in breach of contract and not to ask whether the employer had simply acted unreasonably; if the employer's conduct is seriously unreasonable, that may provide sufficient evidence that there has been a breach of contract.

<u>*Unfair dismissal*</u>

To ground a successful claim, a constructive dismissal must, of course, also be unfair.

42. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides:-

> *"130-(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or if more than one, the principal reason) for the dismissal and*
>
> *(b) that is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) a reason falls within this paragraph if it –*

(b) relates to the conduct of the employee,

(4) where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Sex Discrimination

43. Article 3 of the Sex Discrimination (NI) Order 1976 states:

In any circumstances relevant for the purposes of any provision of this Order, a person ("A") discriminates against another ("B") if, on the ground of sex, A treats B less favourably than A treats or would treat another person

44. Article 8 deals with 'discrimination' as defined above in the employment field. It states:

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her-

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her, or subjecting her to any other detriment

(2A) It is unlawful for an employer, in relation to employment by him at an establishment in Northern Ireland, to subject to harassment-

(a) a woman whom he employs, or

(b) a woman who has applied to him for employment.

45. Article 6A of the 1976 Order states:

***6A.**—(1) For the purposes of this Order, a person subjects a woman to harassment if—*

(a) he engages in unwanted conduct that is related to her sex or that of another person and has the purpose or effect—

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,

(b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect—

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or

(c) on the ground of her rejection of or submission to unwanted conduct of a kind mentioned in sub-paragraph (a) or (b), he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.

(2) Conduct shall be regarded as having the effect mentioned in paragraph (1) (a) or (b) only if, having regard to all the circumstances, including in particular the perception of the woman, it should reasonably be considered as having that effect.

…

(5) Paragraph (1) is to be read as applying equally to the harassment of men, and for that purpose shall have such modifications as are requisite.

46. Article 63A (burden of proof), states as follows:

***63A.**—(1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.*

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent—

(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, or

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination or harassment against the complainant, or

(c) has contravened Article 40 or 41 in relation to an act which is unlawful by virtue of Part III,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.

Just and Equitable Extension of Three Month Time Limit

47. Under Article 76 of the 1976 Order, (where relevant) the tribunal shall not consider a complaint unless it is presented to the tribunal before the end of the period of three month beginning when the act complained of was done, unless, in all the circumstances of the case, it considers that it

48. A tribunal may nevertheless extend the three month time-limit where it considers it just and equitable to do so. Paragraph 7 states:-

> *"(7) A court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so."*

49. In considering whether or not to exercise the broad general discretion given to the tribunal to extend time-limits, the EAT, in ***British Court of Appeal Corporation v Keeble [1997] IRLR 336***, referred to the Limitation Act 1980 and stated that:-

> *"This requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances of the case, and in particular, inter alia, to –*
>
> *(a) the length of and reasons for the delay;*
>
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
>
> *(c) the extent to which the parties sued had co-operated with any requests for information;*
>
> *(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
>
> *(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."*

50. In the case of ***Adideji v University Hospitals of Birmingham NHS Foundation Trust,*** Underhill LJ referred to ***Keeble,*** and warned against a *"rigid adherence to a checklist"* which can *"lead to a mechanistic approach to what is meant to be a broad general discretion."* He stated that the best approach for a tribunal in considering

the exercise of the just and equitable 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.

51. It is important for a tribunal to recall that any statutory time-limit is there for a reason. There is no automatic presumption that a tribunal should exercise its discretion to extend time and the onus is always on the claimant to convince a tribunal in this regard. In ***Robertson v Bexley Community Centre [2003] IRLR 434***, the Court of Appeal held that:-

> *"The exercise of discretion is the exception rather than the rule."*

FINDINGS OF FACT

52. The claimant commenced employment with the respondent organisation as a part-time Education Assistant on 16 September 2019. He worked at the Ulster Folk and Transport Museum. Education Assistants assisted the Education Officer in the delivery of the education programme to visitors to the museum and particularly to school children.

53. The Education Officer, and the claimant's line manager, was Ms Laura Hutchinson. Two other Education Assistants were recruited and appointed at the same time as the claimant and were engaged at the same level as the claimant. They were Ms Sue Cathcart and Ms Christabel McCartney. The claimant was not senior to either Ms Cathcart or Ms McCartney and they were not senior to him. Each of three Education Assistants were at the same level and each reported to Ms Hutchinson.

54. A large part of the claimant's period of employment had been interrupted by the Covid pandemic, with significant periods of time spent either on furlough or working from home.

55. The timeline for the claimant's employment was:

    (a) 16 September 2019 to Christmas 2019 – working part-time on site.

    (b) Christmas 2019 to 4 February 2020 – annual leave and paternity leave.

    (c) 4 February 2020 to 16 March 2020 – working part-time on site.

    (d) 17 March 2020 to 4 May 2020 – working from home in accordance with Government guidance.

    (e) 5 May 2020 to 10 August 2020 – furloughed in accordance with Government scheme.

    (f) 11 August 2020 to 16 October 2020 – working from home on only one day per week.

    (g) 17 October 2020 to 31 October 2020 – fully furloughed again.

(h) 1 November 2020 to 24 November 2020 (last day of service) – working from home.

56. The claimant therefore did not work on site in the museum at any stage between 17 March 2020 and 24 November 2020, according to the evidence before the tribunal. That period comprised the final eight months of his period of employment. During that period he had either been working from home in his own environment or had been furloughed and therefore had not been working at all. During that period, he had had no in-person contact with his colleagues.

57. During the period between 16 September 2019, when employment commenced and 16 March 2020, there were significant tensions between the claimant and Ms Cathcart and Ms McCartney. Miss Hutchinson, Ms Cathcart and Ms McCartney all gave evidence that the claimant had been vocal and that he had talked over people. That evidence is accepted by the tribunal.

In or about September 2019, the claimant produced a three-page document providing *"classroom managerial tips"* which he sent to his two colleagues. That document had been produced by the claimant as he regarded himself as the only qualified teacher: it had not been requested by either Ms Cathcart or Ms McCartney. Ms Cathcart and Ms McCartney felt that the claimant had felt superior to them and that he had acted accordingly.

Sex Discrimination

23 October 2019 Incident

58. The first incident in respect of which the claimant complains to this tribunal occurred on 23 October 2019, shortly after the claimant had commenced employment. This was the incident in respect of which the claimant alleged that he had been unlawfully subjected to harassment and discrimination on the ground of his gender contrary to the 1976 Order.

59. The tribunal was presented with two different versions of what happened in the course of this incident on 23 October 2019 and indeed thereafter. One version was put forward by the claimant and the other version by the respondent witnesses.

60. It was common case that this incident took place in the Parochial Hall in the Museum. The claimant, Ms Cathcart and Ms McCartney had been delivering a wool craft workshop to a group of 60 P7 children from a particular school. Teachers and a group of six formers from the same school were also in attendance to assist the Education Assistants to run the workshop and to keep order.

61. In the course of the workshop, a group of elderly men (either 2 or 3 men), who were visiting the museum, entered the Parochial Hall. Ms Cathcart went over to that group of men and explained to them that the school children were using the hall. It does not appear that this provoked any difficulty with the group of men and it also seems clear that Ms Cathcart was then chatting with those men when the claimant appeared and asked Ms Cathcart *"is there a problem?".*

62. At this point the two different versions diverge.

63. Ms Cathcart spoke to Ms Hutchinson that day. She complained that the claimant had inserted himself between her and the elderly men, had spoken over her and had acted as if he had been in charge. She told Ms Hutchinson that she felt undermined and had, as a result, spoken sharply to the claimant. She advised Ms Hutchinson that she intended to apologise to the claimant for speaking sharply to him.

64. The next day, the claimant spoke to Ms Hutchinson. He complained about Ms Cathcart's conduct and could not understand how she had been so irritated. When Ms Hutchinson raised the *"classroom tips"* document that he had created and explained that Ms Cathcart and Ms McCartney had been irritated by that document, he alleged that that had been due to his age and gender.

65. Ms Hutchinson offered to follow up on his complaint about 23 October 2019, and asked the claimant if he wanted her to facilitate a conversation with Ms Cathcart. The claimant declined. He did not make any formal or written complaint.

66. In his ET1, lodged on 1 March 2021, over 16 months after the incident, the claimant alleged that Ms Cathcart had sworn at him and that she had claimed he was *"doing the fucking bloke thing"*. He further alleged that this had been *"followed by a brief rant on men – very angry and spiteful."*

67. In the claimant's witness statement, which comprised his evidence in chief, he stated *"I had been attacked with no warning by SC who launched into a verbal tirade using abusive terms relating to my gender in presence of public and school groups"*.

68. In the claimant's replies dated 10 December 2021 to the respondent's Notice for Additional Information, the claimant provided further details. He stated:

> *"During this portion of the day I note that around three older looking men had entered the room and appeared not to be with the school group. SC was standing to the right, not looking directly at them and nodding as well as bowing forward from the hips in a manner that indicated to me distress. As I found the situation to appear odd, and was concerned that people who were not connected with the school were in the room for child protection reasons, I went over to assess the situation and to assist if needed. I asked Sue if everything was ok. She said "yes" and furrowed her eyes. I took this to indicate that there was a problem and decided best course of action was to help move the men along. After having done so and returning she began an angry sounding speech directed against me that accused me of "doing the fucking bloke thing, aren't you?" as a rhetorical question and then claiming that men were all guilty of doing an activity she called "hosting" that was offensive to her. She claimed all men were like this and horrible for that reason. She persisted for between one to two minutes delivering invective about men which I was too shocked to absorb properly. She stated that I should never interfere with her delivery or offer to assist her as this was part of that unacceptable behaviour that was the prerogative of men. I asked if she was being attacked, should I intervene, to which she sneered a reply "of fucking course". I was confused by the exchange and anger expressed, worried by the tone as well as offended by the way in which it had focused on my gender and had been aimed at me."*

69. In cross-examination, the claimant confirmed that the incident had occurred in front of a large group of teachers and pupils and that he had been unaware of any complaint being received from any member of this group. He then qualified his position by stating that they had been *"over to one side"* and that Ms Cathcart had not been *"overly loud"* and that she had not been shouting.

70. Ms Cathcart stated, after describing the group of men entering the hall, that:

> *"The claimant suddenly appeared at my elbow and asked "is there a problem here Sue?". He then moved in front of me and started to inform the men on the history of the building. They understandably assumed that my supervisor had arrived and turned their complete attention to him. I walked off very annoyed and said under my breath "you are a pain in the arse". I did not swear or shout sexist abuse at the claimant. I was annoyed with myself for letting him get to me and continued on with the workshop and decided I had to say something. Nobody heard me say "you are a pain in the arse" as I was at the back of the hall moving away from the claimant and the girls were all in the middle of the room.*
>
> *I said it in a matter of fact manner but was sorry I had said it to the claimant out of irritation. I utterly refute the allegation that I swore at the claimant and called him a "fucking bloke". The claimant said I did this in front of school pupils, teachers and members of the public. This would have been highly inappropriate and I suggest a raft of complaints would have followed. – I was cross with JM and cross with myself for being cross, I called him "a pain in the arse" which I shouldn't have, but I did not use a swear word."*

71. Ms McCartney in her evidence stated:

> *"During the workshop I noticed two members of the public enter the hall and begin to look around. SC said she would deal with them and quickly went over to talk to them. I could see her talking to them and explaining what was happening in the hall. I continued assisting the children in the hall but I could see the conversation drawing to a close and the members of the public moving off to leave. At this point I witnessed JM stride over and began talking animatedly to the people as SC was still standing there with them. I did not hear what was being said but I could see JM's physical stance was very officious and SC had to step aside. The people left and SC returned to the school group to continue assisting with the workshop. I could see she was upset. JM also returned and continued walking around as if supervising the work rather than assisting the children. The workshop drew to a close and the children and teachers left the hall. SC asked me to accompany her to talk to JM about what had happened and I could see that she was upset and irritated but her demeanour was calm. She explained to GM that it was totally unnecessary for him to take over a situation she was dealing with capably and professionally as it made her feel undermined and foolish in front of the members of the public and children and teachers. She did so in a calm and professional manner. She did not swear or become angry or engage in an abusive rant about gender. JM seemed surprised about what Sue had said and a little confused and upset."*

72. It is clear that there had been a significant degree of tension between the claimant and his two colleagues by this date. Both Ms Cathcart and Ms McCartney had been irritated by what they had regarded as the claimant's officious and overbearing manner and in particular by the "*classroom tips"* that he had produced some days earlier, unrequested, to advise them how to conduct their duties. It seems equally clear that the claimant had been unaware of the level of tension and annoyance that he had been creating. In any event, the tribunal prefers the version of events put forward by Ms Cathcart. While she had clearly been annoyed by the claimant's intervention and by the manner in which he had appeared to act as her supervisor, it is highly improbable that she would have, in a public setting, in front of two colleagues and in front of a large group of school children and teachers, engaged in a one to two minute *"tirade"* of abuse related to gender, and using swear words. The claimant, in his witness statement, had described this as *"a verbal tirade using abusive terms relating to my gender in presence of public and school groups."* There was no suggestion from the claimant at that point that *"the public"* and the *"school group"* could not hear the *"verbal tirade"*. Their presence was put forward by the claimant as an aggravating factor. It is highly improbable, if this had happened in front of a group of school children, that no complaint would have been raised on behalf of those school children in relation to both the alleged language and to the discriminatory remarks. That would not be the sort of behaviour that any school would have expected to have been displayed in front of a group of P7 pupils. It is also difficult to reconcile the claimant's allegations of an angry and abusive tirade with his subsequent suggestion that this had happened without Ms Cathcart speaking loudly and without her shouting. Ms McCartney was clear that this tirade had never occurred. The tribunal also notes that Ms Cathcart freely and contemporaneously admitted that she had muttered under her breath *"you are a pain in the arse"* when she could have simply denied making any such remark. It seems clear to the tribunal that Ms Cathcart had been genuinely upset not just by the claimant's intervention and manner but by the fact that she had briefly lost control at that point.

73. The tribunal therefore unanimously concludes that the only potentially relevant remark made by Ms Cathcart in the course of this incident was a remark muttered under her breath or partially under her breath; *"you are a pain in the arse"*. The tribunal also concludes that there had been no reference to gender and no abusive angry tirade from Ms Cathcart.

74. The tribunal also notes the claimant's repeated statements to the effect that he had been the only man employed in this area and his statement that the annoyance felt by Ms Cathcart and Ms McCartney in relation to his *"classroom tips"* had been due to his age and gender. The tribunal also notes that he had told his consultant psychiatrist, Dr Tareen on 4 December 2020 that he does not like working with female colleagues as he finds them to be manipulative. If anyone had difficulties dealing with the opposite gender, it appears to have been the claimant. The tribunal also noted that in his evidence the claimant accepted that he had reported the matter to Ms Hutchinson his line manager and that he had *"outlined that my plans subsequently was to speak individually to SC and CM to attempt to resolve difficulties."* He alleged that no report of the incident had been made by his line manager and that details of follow up actions had not been communicated to him. He alleged that *"my report was not actioned or taken seriously by LH or by any other agent or employee of NMNI".*

75. It seems clear that the claimant's spoke to his line manager after this incident and that he complained about Ms Cathcart's behaviour. However it is equally clear that in an email of 23 October 2019 from the claimant to his line manager he stated:

> *"Hope the day went well for you, went grand for us."*

The claimant in cross-examination sought to dismiss this statement as a polite throw away remark. However that does not seem convincing. If there had been an ongoing dispute at that point, as now alleged by the claimant, that remark would not have been made and indeed the claimant would have pursued the matter with a formal complaint or grievance.

76. In a WhatsApp exchange immediately after the alleged incident Ms Cathcart stated to the claimant:

> *"Sorry for being crab head last week, I blame the swans, still wrestling with the mutant swan".*

The reference to crabs and swans remained unexplained but it was clear that Ms Cathcart was apologising to the claimant for the incident on 23 October. The claimant replied saying:

> *"Thanks for saying Sue I am glad we are dealing with stuff in a positive way. Sorry for offending u guys too."*

77. The claimant confirmed in cross-examination that he did consider lodging a grievance at this point but that he chose not to do so. The tribunal concludes that he had been perfectly capable of lodging a grievance or complaint at that time. He had been capable of lodging tribunal proceedings at that time. He produced no evidence to explain the delay. It also seems apparent that the claimant continued to socialise with and work with Ms Cathcart and Ms McCartney, going out at Christmas 2019, exchanging gifts on the birth of the claimant's child etc.

78. The claimant disclosed contemporaneous diary entries relating to the week of the alleged incident. A note, which is partially illegible, refers to the alleged incident on the Wednesday 23 October 2019. It contains a particular type of sticker attached to the entry. The same sticker appears two days later on the entry for Friday 25 October 2019. It states after the sticker; *"resolved/raised"*.

It was put to the claimant in cross-examination that this diary entry could only indicate that the complaint, as indicated by the evidence of Ms Hutchinson, Ms Cathcart and Ms McCartney had been raised and resolved informally at the time. The claimant did not accept that proposition but crucially could not suggest any other matter which would have arisen and been *"resolved"* as recorded in his own diary on those days.

79. The unanimous decision of the tribunal therefore is that all issues arising out this incident on 23 October 2019 had been raised by the claimant with his line manager and had been dealt with informally by the parties and concluded no later than a few days after the event. No further action had been required or expected from the respondent. The tribunal unanimously concludes, in any event, that there had been no gender based abuse.

Disability

80. The claimant was diagnosed with autism spectrum disorder (ASD) on 4 December 2020. This was the first occasion on which he had been diagnosed with ASD. At that stage, he was aged 36 years. He had left his employment on 24 November 2020, some ten days previously.

81. The claimant accepts, and it is in any event clear, that he had never been diagnosed with ASD at any stage during his employment with the respondent.

82. He had not notified the respondent during the pre-appointment application process that either he had been diagnosed with ASD or that he had at any stage suspected that he suffered from ASD or from any other similar condition. During his employment, he did not mention ASD, or suggest that he might have suffered from ASD, until 3 March 2020.

83. Ms Cathcart and Ms McCartney had clearly been irritated by the claimant's manner almost from the start of his (and their) employment. For example, during the first week of that employment, the claimant had directed them to repeat words or phrases in Irish. He had acted as if he had been their teacher in that language. Ms Cathcart and Ms McCartney had regarded this as strange behaviour but had thought the claimant had simply been insecure and had been showing off.

84. The claimant suggested at an early stage in his employment that he could give Ms Cathcart feedback on her teaching and that he could make suggestions about how he could improve that teaching. That offer was declined but approximately two days later he sent an email to Ms Cathcart and to Ms McCartney which set out, over three pages, detailed suggestions for classroom management tips, even though both Ms Cathcart and Ms McCartney had had considerable experience in the field of education. His guidance was not well received. However, again, there is no evidence to suggest that ASD had been put forward by the claimant at this stage or that it had even been considered by the respondent or by the claimant's colleagues. Ms Hutchinson, Ms Cathcart and Ms McCartney regarded his behaviour as officious and overbearing: nothing more.

85. The tribunal concludes that ASD had not been raised even as a possibility by the claimant before 3 March 2020 and that it had not been considered or even suspected by the respondent, the claimant's colleagues or even the claimant before that date. The claimant's line manager, Ms Hutchinson, had noticed that the claimant's behaviour had been markedly different when he was talking to men rather than women. She stated: *"I observed this far more frequently with female staff. His conversations with men were very different – he asked questions, left space for them to speak and didn't correct them. – It appeared he was making a choice when speaking to female staff to lecture, inform, advise and educate."* That corresponds to the claimant's own statement to his psychiatrist that he did not like working with women. It is also clear that the claimant's line manager, Ms Cathcart and Ms McCartney had all noticed that his behaviour had improved significantly after the 23 October 2019 incident for the rest of that year and that it did not deteriorate until his return from leave on 4 February 2020. None of that would have suggested a medical reason for the claimant's behaviour or would have alerted the respondent or his colleagues to such a possibility.

86. The level of friction and irritation continued between the claimant and his two colleagues. For example, he accused Ms Cathcart of having a colonialist attitude because she had stated that not all traditional medicine had been effective.

87. As a result of the concerns expressed by Ms Cathcart and by Ms McCartney about the claimant, Ms Hutchinson, the line manager, decided to seek advice from a Ms Clare Frazer in their HR Department on 22 October 2019. After taking advice Ms Hutchinson decided to speak to the claimant on Friday 25 October 2019.

88. However, on the Thursday 24 October 2019, Ms Cathcart spoke to Ms Hutchinson to give her details of the incident which had occurred on 23 October 2019. Ms Cathcart accepted that the way she had spoken to the claimant after the incident had been *"sharp"* as his behaviour had made her feel undermined in front of customers. Ms Cathcart told Ms Hutchinson that she had already intended to apologise and on that basis Ms Hutchinson felt that no further action was necessary as it looked as if the matter was being resolved informally.

89. On Friday 25 October 2019 the claimant asked to speak to Ms Hutchinson and gave his version of the events which had taken place on Wednesday 23 October 2019. He stated that he could not understand why Ms Cathcart had been so irritated. Ms Hutchinson explained to the claimant the basis for Ms Cathcart's reaction and further indicated that it was at least in part due to the previous friction which had existed between the claimant and Ms Cathcart where she and indeed Ms McCartney felt that he had been patronising and condescending towards them. The claimant was reluctant to accept criticism of his own behaviour.

90. In any event, Ms Hutchinson offered to follow up the matter with Ms Cathcart and if necessary to facilitate a further discussion between them. The claimant declined that offer and stated that he wanted to resolve this himself. That is in fact what happened.

91. Again, there is nothing in the papers or in the evidence of the parties to suggest that either the claimant or indeed anyone else had raised the possibility of ASD at this point. This had been presented and had been treated as a personality conflict between employees. It had been made clear to Ms Hutchinson that the matter was being resolved informally and no grievance or formal complaint was lodged by the claimant.

92. It is clear that there was an improvement in relationships between the claimant, his colleagues and indeed Ms Hutchinson in the period immediately after 25 October up until his return from paternity and annual leave on 4 February 2020.

93. In his first one to one meeting on 28 November 2019, the claimant indicated that he had been *"struggling"* with a lack of plan/clarity. However he stated that things had improved with the new line manager. When asked how he was finding the team, he indicated:

> *"Likes the team, felt the issues arising were well handled by all concerned, appreciates why it is good to manage individual relationships differently, gets on with colleagues and is trying to be more aware of the mood and people in the office to work towards building and strengthening relationships."*

The line manager noted that the claimant had been:

> *"Getting on well with the team, has taken ownership of relationships with colleagues and is being aware and tuned into them in the office too."*
>
> *"Issue within the team has been addressed with all parties and has been put to bed, with all individuals agreeing to take a more active approach in managing their behaviour and relationships going forward."*

94. Ms Cathcart, in her evidence, noted that there had been a significant improvement in relationships after the October incident and that this had lasted until the claimant's return from paternity/annual leave in February 2020. She stated:

> *"I felt that things took a turn for the better after this and that we were on amicable terms. I thought it had been the fair thing to do as how could someone change their behaviour if they don't know what it is that is upsetting others. I thought that his previous employment seemed to point to similar patterns of behaviour but that no-one had told him what the problem was. This period continued to Christmas and we all went out for lunch to McHugh's in Belfast which we chose because they had the best vegetarian offering, several people had the Boxty and spring roll including myself. We exchanged presents later in the office via "secret santa" and WhatsApp messages bear out friendly atmosphere. JM (the claimant) goes off on leave and then tells us about the birth of his baby and we sent good wishes and presents which we have all individually purchased with thought and care. This is again borne out by WhatsApp messages. JM is off for a month or so on paternity leave and on his return it is clear that something has changed, there is an unwillingness to engage in team work and reprisal of his old role of advisor to myself and Christabel."*

95. On 10 March 2020 Ms Cathcart wrote to Ms Hutchinson to state:

> *"I am just writing this email to you to update you on my feelings about the office situation regarding Johnny. As you know there were a few problems at the beginning with Johnny taking on the role of advisor to myself and Christabel and giving us direction and information that was not needed. I worked in education for over 20 years in the Museum for 9 and Christabel has a similar background. I made the assumption that has all been resolved with a bit of discussion and explanation and indeed that Johnny understood the problem and I feel all is well up to Christmas. I thought I had a good relationship with Johnny and enjoyed his sense of humour and were working well as a team. However since Johnny came back from paternity leave there seems to be a change in his behaviour where he has reprised his old role as someone who is more knowledgeable and can therefore advise. I put this down to the stress of having a new baby but it appears to have developed into something else more recently. He has withdrawn into himself and become disengaged from most interaction with the team, he does not say hello or goodbye and does not greet or speak to anyone who comes into the office. I have to say this new development is totally baffling and I can't understand it, usually I would ask someone what the problem is but I do not feel I can as I think it would be taken the wrong way. I am now treading on eggshells, fearful of saying the wrong thing."*

96. Ms McCartney stated in her evidence to the tribunal:

> *"From February onwards until the middle of March when JM left the office to shield prior to the first Covid-19 lockdown, JM's countenance became very withdrawn and mulish, creating an atmosphere in the office of tension. He did not engage in teamwork discussions or show willingness to be involved in day-to-day work. This progressively worsened and leaving me feeling very agitated about being in the office with him, wondering what to say or not to say and trying really hard to be pleasant and involve him in everything. Unfortunately the tendency towards patronising behaviour and lecturing about irrelevant material resurfaced but this time with other female staff members, colleagues including Roisin Aiston, Enid Crowe and Joanne Glasset came to me to say that they had effectively been cornered by JM in other locations within the Museum where there were working and talked at in a superior manner for inordinate periods of time which left them feeling very uncomfortable."*

97. On 10 March 2020 Ms McCartney had written to Ms Hutchinson to state:

> *"After a couple of incidents earlier in the Autumn there was some feedback and frank but polite discussions within the team as to how a particular way of interacting was inappropriate and how it was having a negative impact on us as individuals and as a collective team. I really felt things had improved somewhat after this I resigned myself to be compassionate and tolerant with Johnathan's seeming compulsion to lecture to a captive audience. – after Johnathan returned from paternity leave in January I feel things have escalated somewhat. There had been a few frustrating incidents of lecturing and I feel there is a general attitude of arrogance and superior knowledge towards myself and Sue which makes me feel belittled, particularly when delivering sessions to groups."*

98. The claimant had booked and had taken annual leave and paternity leave in the period from Christmas 2014 up to 4 February 2020. He had in fact significantly overbooked his leave by 60 hours. He was initially required to work up that number of hours.

99. After his return on 4 February 2020 the claimant continued to give lectures to his colleagues, to talk over colleagues and to generally engage in monologues which he found interesting but which the recipients did not. These included monologues in relation to fraternal societies, the Freemasons, the Orange Order, the subjugation of the Celtic people, the Pope, Ian Paisley being bipolar and the UVF flag.

100. On another occasion, the claimant was giving a workshop which took place in the old courtroom in the museum. He asked the children if they had been in court before, and quizzed those who had responded about their experiences. That included one child who then proceeded to discuss in front of everyone her experience of a court case in which her mother had been giving evidence in relation to a personal matter. When the claimant was challenged by Ms Cathcart about this particular incident his response was that it did not matter because the child's classmates probably already knew about the issue.

101. The tribunal concludes that the claimant had demonstrated significant difficulty in interacting with colleagues in the initial few weeks of his employment. That had been regarded by his colleagues as a manifestation of insecurity. After the discussion which followed the incident on 24 October 2019, relationships between the claimant and his colleagues and line manager had significantly improved and had been noted by Ms Hutchinson, Ms Cathcart and Ms McCartney. The team had worked well together and had interacted socially, including at a Christmas dinner and in relation to the birth of the claimant's child.

None of this would have alerted the respondent or the claimant's colleagues to the possibility of ASD or the possibility of a disability requiring reasonable adjustments.

However the tribunal concludes that the claimant's attitude to his colleagues and to his work changed on his return from paternity leave/annual leave on 4 February 2020. That change persisted thereafter but was initially thought by his colleagues to be related to the stress of an additional child.

The claimant worked directly with his colleagues for a limited period thereafter before shielding: from 4 February 2020 to 16 March 2020.

102. The next one to one meeting had been held between the claimant and Ms Hutchinson on 18 February 2020.

That meeting initially went well. The claimant was asked *"how do you feel you are doing?".* His response was:

> *"Feels like he is contributing a lot to the team, gives good value to the schools, slower pace here than he is used to, going well, contributing well, feels involved".*

The claimant was asked to give notice of at least two weeks for engagement in his secondary employment and reminded of the shift start times.

Ms Hutchinson raised two issues of *"feedback"*. The first issue was the effective use of the claimant's time. She raised an example of the claimant's spending time building a model, the purpose of which was unexplained. She also mentioned the claimant going for two hour walks. She asked that the claimant communicate plans to her. Ms Hutchinson also mentioned the need for explicit instructions and she expected the instructions would be followed. It would appear that at this point the meeting ended and was reconvened on 27 February 2020.

103. At that reconvened one to one meeting Ms Hutchinson stated to the claimant that she had now observed two occasions where feedback had been dismissed or not accepted by the claimant. Ms Hutchinson stated that since the previous one to one meeting, she had noted that that the claimant was justifying every time he had left the room, asking permission to do so and mentioning the starting time. Ms Hutchinson noted that on the few occasions since he had returned to work and behaviours which had reduced pre-Christmas had returned ie talking at length about topics not related to work eg the Simon Community, Fraternal Orders, Flags gifted by the Pope, secret societies etc. She mentioned again the effective use of time.

104. The claimant first told his line manager and HR that he was in the process of obtaining a diagnosis of ASD on 3 March 2020. That was the first time that the claimant had mentioned ASD or had put forward a potential medical reason for his behaviour with colleagues. He sought a meeting with HR.

105. That meeting took place on 10 March 2020 (one week later) between the claimant, Mr Geoff Davidson and Ms Hannah Anderson of the respondent organisation. The claimant clarified that he was pursuing a diagnosis of ASD, that he was having sensory issues and that he felt certain parts of his behaviour which Ms Hutchinson had highlighted in the one to one meetings were features of ASD. He stated that he believed he was *"high functioning"* and that he *"tries to hide his symptoms".* He stated that he had had a GP appointment a few weeks ago and that the next step was tests and consultation.

106. In the course of this meeting, Mr Davidson confirmed that when the respondent received the diagnosis that they would look at specific adjustments tailored to the medical advice. However, for the time being, he should feel free to ask questions to check his understanding of instructions. No-one would take offence and it was realistic to spell things out. He should check his understanding of instructions etc.

107. On 10 March 2020, Ms Cathcart and Ms McCartney wrote to Ms Hutchinson (the line manager) to complain about the claimant's behaviour and the ongoing friction within the office.

Again, there was no suggestion arising from this correspondence or from the evidence of any of the parties that the claimant had raised the possibility of ASD or that anyone in the respondent's organisation had considered it or even had suspected it as a possibility before 3 March 2020.

However shortly thereafter the claimant started to shield because of Covid. There followed periods of working from home and furlough. The claimant was not working on site or directly with colleagues after 16 March 2020.

108. On 17 March 2020 the claimant had contacted Ms Hutchinson [as part of a friendly longstanding exchange of WhatsApp messages] to state:

> *"Hi Laura, I have been looking at the latest guidance on gov.uk website. It is advised that asthmatics such as myself should work from home where possible. Is it possible to have a chat with you about supporting arrangements to work from home? I appreciate you will probably need to check with HR. I have home office and laptop which I could use. Reposting this – texted but I know the reception is bad at work."*

109. The claimant started working from home in advance of everyone else.

110. Ms Cathcart and Ms McCartney remained in post for two days longer in March 2020 before lockdown took effect. During that period both had their probation review completed and both were confirmed in post. Their performance appraisal did not take place until later that year at approximately the same time as the claimant completed both the performance appraisal and the probation review.

111. The claimant had his probation review exercise and his performance appraisal exercise on 22 October 2020.

112. The assessment by Ms Hutchinson of the claimant's performance was positive in some respects. It stated that his key strengths lay in face-to-face delivery with a live audience of students and teachers. It stated he enjoyed imparting knowledge, delivering workshops and sessions, engaging with schools and working on the site. It stated that the claimant performed best independent or process related tasks. He was willing to volunteer and assist other teams. He had made the adjustment to working from home with apparent ease and was still sending in work regularly before the furlough period.

113. However the assessment was negative in relation to team work collaboration and working relationships. Ms Hutchinson recorded that these matters had been discussed with varied results. The claimant had been unable to take feedback on board or to respond appropriately. It noted that he had been able to amend his behaviour from October to December 2019. Ms Hutchinson made the decision to extend his probation period by 12 weeks to allow time for improvement.

114. The probation review report stated:

> *"Jonathan has a tendency to step into an assumed leadership role with his peers, which has been done in such a way as to unintentionally make them feel condescended to. Within the first month of employment of the Education Assistants, issues arose surrounding Jonathan correcting people on their knowledge or pronunciation and his manner when speaking over them. At the time this caused significant friction and subsequent heated discussions between the team members which were brought to my attention.*
>
> *Jonathan has expressed that from his point of view the problems that arose came out of the blue for him. He was unaware of the rising frustrations in his teammates during the first few weeks together so when things came to a head for his colleagues it was his first exposure to their being something amiss.*
>
> *I spoke to Jonathan and the other members of the team, and collectively agreed a plan between themselves to prevent further miscommunications or misunderstanding – they collectively agreed that they would all be open to feedback from others on how they were coming across on the back of these conversations there was a marked improvement on his behaviour it was acknowledged and appreciated by other members of the team and I appreciated Jonathan making the effort to actively improve relationships within the team. At the time, Jonathan acknowledged and appreciated the support afforded to him by myself and his colleagues. I was reassured to see how these measures did have a marked impact in the team – the original behaviours that were causing friction suggested that at times Jonathan did not have an awareness of how his behaviour impacted or could be perceived by others, and I was concerned as this was not in keeping with the values of the organisation.*

Seeing the change and improvement in the run up to Christmas, I was reassured that he had become more mindful and aware in his actions in the office and with colleagues and I.

On Jonathan's return to work after paternity leave I observed some of this behaviour returning, where he did not seem as aware that he had gone back to telling people what to do or that people could perceive him as lecturing them. In his return to work catch-up which was within a few days of his return, he already seemed to be struggling with the idea of trying not to step on toes and was having to deliberately take a step back to avoid doing so.

He suggested that if he just took the lead on something that he and his colleagues were working on together he thought it might rub people up the wrong way, but if I were to choose a task leader instead and designate someone as being in charge it would mean that people wouldn't take offence at being told what to do. I have not implemented this as I do not believe it would be in keeping with NMNI values and would discourage valuable team work.

During our one to one meetings I did draw his attention to the values laid out in the Here For Good Manual of the organisation and provided additional copies and office copies. I highlighted these as the basis for everything we do and reminded him that it was something we had all signed up to ."

115. The report was also critical of his communication with colleagues, his observance of the attendance management policy, his willingness to engage with colleagues and work planning and structure. In particular the report noted that Ms Hutchinson's view the claimant did not behave in a way that was open to constructive feedback. He appeared to be very defensive and less open to review and improvements of his work once he had returned on 4 February 2020 from paternity leave. She noted that after the second one to one meeting that had been a notable decline in his conduct within the office.

116. The report indicated that a decision had been made to extend the probation period for 12 weeks because of the following issues:

- failure to demonstrate the core values expected at NMNI, in particular acknowledging and learning from mistakes, being responsible for own development and actions, or raising standards, act professionally at all times, working together with colleagues in a respectable way, being conscious of the impact of behaviour in others, listen – really listen and respecting the diversity of opinion.

- Poor attitude in response to well-intended and thought-out constructive feedback on how he could improve and thrive in this role.

- Impact of his behaviour in other colleagues, teammates, office atmosphere and reputation of the education team than the business.

- Inability to identify the work needing done and to get on with it despite extensive and considered support in the form of structure, deadlines, to do lists, back-up tasks and several means of communication.

117. It is notable that throughout the extensive documentation in relation to the performance appraisal and the probation review, there was no mention of the meeting on 10 March 2020 when the claimant had indicated that he was pursuing a diagnosis of autism and was awaiting a report. It is surprising that neither the claimant nor Ms Hutchinson appear to raise this as an issue when the possibility of autism had been flagged up as early as 3 March 2020. At that stage, the claimant had been working from home and both the claimant and the respondent were awaiting the medical diagnosis that had been arranged by the claimant. There were inevitable delays in that respect, exacerbated by the Covid lock-down. It is however particularly surprising that the claimant did not mention the possibility of him having ASD or the forthcoming appointment with Dr Tareen, which took place on 4 December 2020.

DECISION

Sex Discrimination

118. The claim of alleged sex discrimination is out of time by some 16 months. No evidence was put forward by the claimant to explain that significant delay. He was clear that he had considered lodging a grievance and taking the matter down a formal route at that time but that he had decided not to do so. It is equally clear from the evidence that the claimant and Ms Cathcart had reached an informal resolution shortly after the relevant incident on 23 October 2019 and that relationships between the claimant and his colleagues had significantly improved thereafter. The matter had been resolved between the claimant and Ms Cathcart and there had been no formal complaint or other complaint which had required a response or other action from the respondent. No further action had been necessary by the respondent. The claim of sex discrimination as put before this tribunal is dismissed for want of jurisdiction because it was lodged out of time and because there are no grounds on which that time limit can be extended. The length of the delay had been significant and the reason for that delay had not been satisfactorily explained by the claimant.

119. Even if the claim had been within time, or if time had been extended, and if therefore the tribunal had jurisdiction to determine the claim of sex discrimination as brought before this tribunal, it is clear that the incident did not raise any matter of sex discrimination. Ms Cathcart had been annoyed at the intervention of the claimant in an incident where his presence had not been required. In that annoyance she had, under her breath, described him as a *"arsehole"*. Having heard the evidence and considered the cross examination of each witness, the tribunal is absolutely satisfied that that is the height of the incident and that no issue of sex discrimination arose.

120. The claim of sex discrimination must fail.

Disability Discrimination

121. The respondent accepts, and the tribunal accepts, that the claimant was diagnosed with ASD on 10 December 2020. Again the respondent accepts, and the tribunal accepts, that because ASD is a lifelong condition, the claimant had ASD throughout the period of his employment with the respondent organisation.

122. However, the first issue for the tribunal in this respect is the degree of relevant knowledge that the respondent organisation had or should have had and when that degree of knowledge crystalised.

123. It is clear that the first suggestion of ASD was made by the claimant on 3 March 2020 when he indicated to Ms Hutchinson that he was pursuing an adult diagnosis of autism. That was further explained by the claimant at the meeting on 10 March 2020.

124. Before the claimant raised the question of ASD on 3 March 2020 for the first time, it had not been raised by the claimant or suspected by his colleagues, his line manager or his employer. It had not been suspected by the claimant.

Furthermore, the claimant's differential conduct when dealing with male colleagues and his ability to improve his conduct significantly after 23 October 2019 until he went on leave at Christmas that year was not consistent with ASD. The claimant's conduct would not have alerted the respondent to the possibility of ASD before 3 March 2020. While this may have been due to the claimant being *"high functioning",* and that he masked his symptoms, as he claimed, it would not have indicated ASD, or the possibility of ASD, to anyone. The unanimous decision of the tribunal is that before 3 March 2020 the respondent did not actual or constructive knowledge of a disability; namely ASD. Even the claimant had not raised it during that period, despite interpersonal difficulties with his colleagues being a recurring issue with management.

125. The tribunal concludes on the balance of probabilities that the respondent had had constructive knowledge of the claimant's medical condition from 3 March 2020. The combination of the claimant's previous behaviour and his disclosure that he, at that point, suspected ASD, would have alerted the respondent to the possibility that the claimant had ASD to some degree. However, it did not know and could not have known that the claimant was likely to be placed at a substantial disadvantage for the purposes of Section 4A(3)(a) of the 1995 Act, and that the claimant had a disability for the purposes of this Act. That was not clarified until the medical report had been received from Dr Tareen after the claimant had left employment.

126. From 3 March 2020, the claimant worked part-time on site for precisely two weeks (part-time), before commencing a period of absence on the basis of shielding, working from home or furlough, which continued until his resignation. He did not work on site or directly with colleagues during that period.

127. The claimant worked from home from 17 March 2020 until his resignation. The claimant had been in control of his own working environment from that date, on those dates when he had been working and not on furlough. The claimant put forward only one concrete suggestion for an adjustment which could have applied during this period. That was an alternative work location.

128. The respondent did respond promptly to the claimant's notification of possible ASD on 3 March 2020. It held a meeting between the claimant and Mr Davidson on 10 March 2020 at which the issue was discussed in detail. The claimant indicated that he was awaiting a medical diagnosis. Ms Davidson rightly pointed out that ASD was a "*spectrum"* condition and that what might be reasonable or appropriate

adjustments for one person might not be such for another. The claimant was asked to keep the respondent "*in the loop"*. He was advised to check instructions to confirm what was required of him in the working environment. He was told the specific adjustments, tailored to his needs, would be put in place on receipt of his medical diagnosis.

129. Nothing more could have been done by the respondent in the further time available (one week) before the claimant commenced shielding.

130. The claimant's probation period was extended for the maximum period of 12 weeks. This was in circumstances where the claimant had raised the possibility of ASD. Even if the respondent had constructive knowledge of his medical condition after 3 March 2020 when conducting his probation review on 22 October 2020, that is not sufficient for the purposes of Section 4A(1). It also necessary that the respondent ought to have known that the disability had been likely to affect the claimant in the way set out in Section 4A(1). There had to have been a provision criterion or practice which placed the claimant at a substantial disadvantage in comparison with persons who were not disabled.

131. The claimant did not articulate or specify a relevant PCP in this respect which applied to the claimant after 3 March 2020 and which would have placed him at a substantial disadvantage compared to non-disabled colleagues. However, the operation of the probation period and the requirement for good behaviour might qualify. Even if that were the case, ie even if the respondent had constructive knowledge of a disability for the purposes of the 1995 Act the actions of the respondent in extending the probationary period for the maximum period possible cannot be criticised as a failure to put in place reasonable adjustments. In this case, the claimant had shown that he could improve his interpersonal relationships in work. He had done so over two months after October 2019. There had been no medical diagnosis available on 22 October 2020. Even if there had been, the extension of the probationary period for 12 weeks to allow the claimant to moderate his behaviour, as he had done previously, had been a reasonable adjustment for the purposes of the Act. In the judgment of the tribunal, in all the circumstances of this case, including in particular the claimant's demonstrated ability to improve his conduct and his ability to conduct himself appropriately with male colleagues, simply ignoring his conduct and confirming his appointment would not have been a reasonable adjustment for the purposes of the Act.

132. The claim of a failure to make reasonable adjustments contrary to the 1995 Act must fail.

Constructive Unfair Dismissal

133. The claimant made it clear in his evidence that the basis of this claim was the decision to extend his probationary period by a period of 12 weeks. He argued that he had believed that he had no prospect of having his appointment confirmed and that he had had to resign.

134. There had been no breach of contract by the respondent. The probation review was part of the claimant's employment. It had been carried out in relation to his colleagues. That had been done at an earlier date then the review of the claimant's probation because the claimant had commenced working from home early because

of shielding and for no other reason. The claimant had indicated himself in the record of the probation review meeting, although he subsequently chose to disagree with that record, that he had been prepared to adopt a positive attitude and to approach the extended probationary period in that light. The 12 week extension had not been a breach of contract. It had not been an unlawful act of discrimination. It had been a reasonable adjustment.

135. In the absence of any breach of contract, there is no basis for a constructive unfair dismissal claim. The claimant had not been entitled to resile from his employment contract and to resign.

136. The claim of constructive unfair dismissal must fail.

SUMMARY

137. All claims are dismissed.

President:

Date and place of hearing: 20, 21, 22, 23, 24, 27 and 28 June, 2022 Belfast.

This judgment was entered in the register and issued to the parties on: