Case Number: 1600347/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr Callum Redmond**

Respondent **Virgin Media Ltd**

Heard at: **Cardiff** **On: 20 – 23 March 2017**

Before: **Employment Judge P Cadney**
Members: **Mr W Davies**
Mrs M Humphries

Representation:
Claimant: Mr V Redmond (Father)
Respondent: Mt T Sheppard

JUDGMENT

The unanimous Judgment of the Tribunal is:

i) The claimant's claims of a failure to make reasonable adjustments pursuant to section 20 Equality Act 2010 in the failure to allow him to be accompanied by his father at meetings on 11th November 2015 and 14th January 2016 are dismissed.

ii) The claimants claim of victimisation pursuant to s27 Equality Act 2010 in the imposition of a medical suspension between27 January and 18 April 2016 is dismissed.

iii) The claimant's claim of failure to make reasonable adjustments pursuant to s20 Equality Act 2010 in the failure to adjust his duties and working hours are dismissed.

REASONS

1. This claim comes before the Tribunal for final hearing. The claim was the subject of a Preliminary Hearing held on 7 July 2016 at which, from the narrative of complaint set out in the ET1 an agreed series of issues were identified which would be determined by the tribunal.

2. In summary there were four allegations:-

   i) The first is that the Respondent had a PCP of only allowing employees who attended internal disciplinary or absence review meetings to be accompanied by a colleague or trade union official. The Claimant wished to be accompanied by his father at a meeting (which is wrongly identified in the Preliminary Hearing as 22 October 2015) held on 11 November 2015 which the Respondent did not permit. The Claimant alleges that to allow his father to represent him at that meeting would have been a reasonable adjustment within the meaning of Section 20 of the Equality Act.

   ii) The second allegation is identical legally in that the Claimant wished to be represented by his father at a meeting on 14 January 2016 and that a reasonable adjustment would have been to allow his father to attend.

   iii) The third allegation is an allegation of victimisation in that the Claimant was placed on medical suspension between 27 January 2016 and 18 April 2016 which he asserts was a detriment that arose as a result of him making a complaint of disability discrimination in a grievance submitted on 2 December 2015.

   iv) Finally there is an allegation that adjustments which the Respondent did make in respect of altering his duties and reducing the length of his working day and allowing for greater flexibility and start times had not been made when they should have been and had therefore been unreasonably delayed.

3. There is also a dispute as to whether the claimant, who it is accepted is disabled, is disabled by all three of the conditions from which he suffers.

Procedural Issues

4. This case was originally listed for Final Hearing beginning on 5 December 2016. The hearing commenced and the Claimant began to give evidence and was in the middle of being cross examined when the Tribunal broke for the night. Unfortunately overnight the Employment Judge suffered a bereavement and the hearing had to be adjourned and re-listed. The parties agreed that the same lay members would be on the panel but with a different Employment Judge.

Limitation of Evidence

5. At the beginning of the hearing the Tribunal had been asked to make a ruling by the Respondents about the extent of the evidence which would be admitted. The ET1 had been lodged in May 2016 and as set out above all of the matters about which complaint was made as identified in the Preliminary Hearing in July 2016 in fact related to events which had concluded by the end of April 2016. There were other matters canvassed in the Preliminary Hearing and the Respondent apparently conceded that it would be permissible for events up until the end of June 2016 to be considered but objected to any consideration of events beyond that date unless and until there was a successful application to amend by the Claimant. The reason for this was that the Claimant's Witness Statement extended to events which post dated the ET1 by a considerable extent which if admitted would mean the Respondent asserted that it would need to call a large number of other witnesses to deal with the matters complained of.

6. Although no formal written Order was ever made it is accepted that the Tribunal did order that the evidence would be limited to the period until the end of June 2016. The Respondent submits that whilst that was never reduced to writing it is still an Order made by the Tribunal. It has not been appealed and therefore it binds us in this hearing and/or in any event the ruling was right and that we should make the same ruling. As the Claimant accepts that was a ruling made by the original Tribunal in our judgment we are bound by it. In any event we agree that in the absence of any application to amend we could not consider matters beyond those set out in the Preliminary Hearing.

Evidence

7. The hearing itself took an unusual turn. The Tribunal used the first morning for reading. The Claimant began to give evidence in the afternoon

and his evidence concluded in the morning of the second day. The Respondent called two of its four witnesses, Mr Parkin and Mr Campbell. Mr Parkin's evidence was concluded on the second day of the hearing and Mr Campbell's evidence was concluded on the morning of the third day. That left two witnesses Mr Starling and Ms Beech who were present to give evidence and whose witness statements had been exchanged. The Claimant is represented by his father who took the view that the Claimant was not well enough to continue with the hearing at that point. The Tribunal enquired whether he was asking for the case to be adjourned, either for the day or to go off part heard and Mr Redmond said that he was not. In the circumstances he was content not to put any questions to the Respondents remaining witnesses. He had already produced written submissions and was content to abide by the decision of the Tribunal based upon the evidence it had already heard together with the Witness Statements of Mr Starling and Ms Beech taking into account his written submissions. The Respondent had also prepared written submissions in anticipation of the evidence concluding in the early afternoon of the third day and indicated that it too was content with that course. The Tribunal therefore released the parties and reserved its decision.

Disability

8. The Claimant asserts that he is disabled by reason of (1) knee and back pain (2) Crohn's disease and (3) reactive hypoglycaemia. The Respondent has conceded that the first two either individually or cumulatively amount to disabilities within the meaning of Section 6 of the Equality Act but do not concede that the reactive hypoglycaemia does. In the light of the way the case is put it is necessary to deal in some detail with the medical evidence which is before us and which was before the Respondent.

Back and knee Injury

9. In a report dated 24 September 2015 Dr Carl Harry states as follows:

"*Callum has worked for the company for over 20 years. Just prior to working for them he was involved in a serious road traffic accident where he sustained a bad injury to his right knee in 1995…. He was very vague about the injury and the damage, but from what he tells me, and on examination, it looks like he had an anterior cruciate repair. His back was badly damaged and he thinks that six discs were injured at the time. He demonstrated to me that his right knee which is incredibly unstable and it looks like the anterior cruciate and possibly the posterior have both been snapped and although repaired it would appear that the repairs have*

completely failed and he has an incredibly unstable right knee. However he has managed to work with this over the last 20 years. On examination of his right knee it was completely unstable and could be moved forwards and backwards considerably as if both his anterior and posterior cruciates were snapped. When he does various jobs in peoples houses he kneels down onto his left knee and has to climb up onto a piece of furniture to get himself off the ground but he has been doing this apparently for 20 years. He has chronic back pain and stiffness and when asked to bend forwards he was able to reach his knees with his hands but certainly couldn't bend any further. This has also been a problem for 20 years but he has managed and coped at work. For the last few years he has had a verbal agreement with his line manager that rather than carrying a full tool box into every house, which is extremely heavy, he has been allowed to carry a restrictive number of tools into premises. It was unclear as to whether his back problem was disc injury or spondylosis."

He goes on:

"*He has managed work with his bad knee and back for the last 20 years and that doesn't seem to have posed a problem. I am very surprised at this as his knee was quite a serious issue on examination today. From my point of view he has coped remarkably well and very impressively*."

In terms of adjustment he stated:

"As for fitness to work I feel he is currently fit to carry on with work…. In terms of adjustments and restrictions it would help if he continued with the lighter tool box which he has been allowed for the last year or two. I do wonder in fact whether he should go back to see a specialist to further attempt to repair the right knee because I felt it was the most unstable knee I have ever seen. It doesn't seem to cause him any pain but will undoubtedly cause him arthritis in years to come."

10. There is a further report from Dr John Bastock dated 2 October 2015. In relation to the back and knee pain that report states:

"In 1995 he was involved in a road traffic accident and sustained an injury to the right knee. He did undergo surgery on the right knee at that time. On examination there was some instability in the right knee. He has undergone a number of investigations because of these conditions. When he undertakes jobs in peoples homes he tends to kneel down on his left knee, but then often has to support himself to get off the ground. He can also suffer with chronic back pain and stiffness. He stated that he does have an agreement with his manager that he is allowed to carry a restricted number of tools into the premises rather than carrying a full tool box."

In respect of the adjustments the only specific adjustment which relates to the back and knee injury is that he should continue to not lift his heavy tool box but take a lighter number of tools with him when he undertakes his work.

11. The next report is dated 24 February 2016 from Dr Adrian Massey:

"The advice in Dr Bastock's report remains unchanged in my view insofar as the account of Mr Redmond's health problems is concerned these being confirmed by the report we have received from his own doctor and insofar as the corresponding workplace adjustments are suggested."

Crohn's Disease

12. In Dr Harry's report of 24 September he states:

"*Unfortunately on top of this he went on to develop Crohn's disease at the end of 2104. Again he is seeing a specialist…. This gives him abdominal pain and diarrhoea which can vary but often frequently affects him first thing in the morning. He claims about one day out of ten he gets quite sever diarrhoea when he gets up which causes a delay in getting to work. He sometimes turns up to work a little late when this happens. He says he has been criticised for this whereby a course he was supposed to attend between 8am and 12pm he got to at 8.03am and that the tracking device on his van showed that he showed up 3 minutes late. He nearly always needs the toilet at lunchtime and on two occasions has soiled himself during the morning and had to go home and get changed. In terms of functionality at work he has remained at work for the last 20 years. His issues with work are that when he gets bad nights with the hypoglycaemia and feels hung over in the morning and his Crohn's disease gives him profuse diarrhoea he can turn up to work late. In terms of adjustments he states "it would help if his employer would put some allowance in for him turning up a little late for calls. I feel his employer will have to offer him some allowance on targets because of the issues he is having at the present time. That is all he is asking for at the moment until he learns to cope with the hypoglycaemia and gets some treatment for his Crohn's."*

13. In Dr Bastock's report he simply states:

"He developed Crohn's disease in 2014. This can cause abdominal pain and bowel symptoms. This can affect him first thing in the morning. He can suffer from symptoms 10% of the time and this can cause a delay in getting in to work. He stated that he has been criticised for attending work late on occasions."

In terms of adjustments he stated*:*

"He may require some flexibility to his start and finish times due to his bowel condition. He may require more regular breaks and he should have regular contact with his manager. He may require some allowance with his targets because of his medical conditions. He may need a further period of time to learn to manage his conditions and also receive some treatment for Crohn's disease"

(As set out above the report of Dr Massey confirmed Dr Bastock's opinion.)

Hypoglycaemia

14. In Dr Harry's report he sets out the history of the onset of what was subsequently diagnosed as hypoglycaemia:

"In January 2014 he collapsed when out shopping with his wife and he describes what seems to have been a focal fit affecting his right arm. He says that the hypoglycaemia can affect him during the night and make him feel quite unwell disrupting his sleep. He can wake up in the morning with what he describes as a "hangover" feeling nauseous with a headache and quite unsteady on his feet. He also described it as like travel sickness. When I went through all the listed symptoms of hypoglycaemia he claims to have 90% of them including unclear thinking, sleeping problems, palpitations which he gets extremely badly at night, fatigue, dizziness, light-headedness, sweating, headaches, depression, nervousness, irritability and he can also become irrational, confused and bad tempered."

The recommendations that Dr Harry made are set out above.

15. Again in the report of Dr Bastock he states:

"He stated that he believes his body produces too much insulin and this results in a drop in his blood glucose. He was tested during an episode and low blood sugar was identified. He does try to each frequent meals four or five times during the day. The episodes of low blood sugar can affect him during the night and make him feel unwell. He can wake up in the morning feeling nauseous and with a headache and being unsteady on his feet. He can suffer with a number of symptoms due to the episodes of low blood sugar. These include fatigue, dizziness, light-headedness, sweating and irritability."

In addition to the adjustments he recommended set out above, he added: *"If he does suffer with memory issues then he should make good use of memory aids such as his smart phone and a note book and pen."*

Again as stated earlier Dr Massey confirmed the adjustments as set out in the report of Mr Bastock.

16. In our Judgment the Claimant is clearly a disabled person by reason of the reactive hypoglycaemia as well as the other two conditions. The onset of the condition appears to have been in January 2014 and is anticipated to continue. No specific cause has been found for it. The symptoms described particularly in Dr Harry's report in our judgment clearly had a substantial effect on the Claimant's day to day activities and accordingly in our judgment that condition in and of itself satisfies the statutory definition. Accordingly in our judgment the Claimant is a disabled person by reason of all three of the conditions from which he suffers.

Facts

17. The Claimant has been employed by the Respondent from 15 February 1999 initially as an installer and is now an access field technician. His main role was to install and repair Virgin Media phone lines, digital TV and broadband services and to advise customers. This is normally a lone role which involves driving to the customer's house. The normal working hours are a four day shift pattern totalling 37.5 hours. As is set out in the medical evidence above, prior to the events with which we are specifically concerned the Claimant's medical conditions have not required any adjustment to his duties other than a removal of the requirement to carry a full tool box and an allowance that the Claimant could carry a lighter reduced quantity of tools.

18. Following his collapse in January of 2014 the Claimant was absent from work for an extended period. At least during the latter part of that period the reason for absence was that whilst the cause of the collapse and the focal fit was being investigated that the Claimant's driving licence had been removed. That meant that he was unable to fulfil his ordinary role and in addition was also unable to travel to an alternative fixed or office based role. However this difficulty was resolved by the end of July of 2014 and he returned to work in an office based role as a hubman from 29 July 2014. His driving licence was restored to him and he was able to return to his ordinary role by the end of August 2014. That was on the basis of a phased return to work. In a meeting on 12 September 2014 he agreed that

he felt capable of returning to the full ten hour four day a week shift pattern from 17 September 2014.

19. The events which led to this Tribunal began in April 2015 when he was summoned to an investigation meeting for the loss of what is known as a Smart Card, which is the card which is inserted into the customers Virgin Media box which once activated allows customer's to receive the Virgin Media services. (This has now changed and the cards are now no longer necessary for that purpose). The Claimant had lost one of those cards and at a disciplinary meeting held on 6 May 2015 he was given a verbal warning for doing so.

20. On 1 September 2015 there was a further disciplinary hearing held by Mr Gough following the loss of a further Smart Card and some other equipment. In the course of that hearing there was the following exchange:

"It does seem like your stock managing is not working properly, do you agree?"

"Yes, but I'm not well. I'm struggling at work and in my private life."

"Did you get any support from us?"

"Yes, but cannot be fixed overnight. I'm struggling at the moment especially since I was diagnosed. I am forgetful and I can fall asleep at any time. I'm not doing this on purpose. I'm not having a good year."
"I do appreciate it and I'm fully sympathetic. The fact is this isn't the first time. We've explained this process to you before and I'm sure Andy would have helped you as much as he can. Can you speak to your doctor and find out how they can help you?"

"This cannot be treated." "

What is the best you can get to?"

"Reactive hypoglycaemia makes you forgetful."

"Are you fit to work?"

"Yes, I'm just very forgetful."

"It's very concerning. You have to drive your van and use power tools at work." "The DVLA allowed me to drive."

Mr Gough decided to issue the Claimant with a first written warning and also asked Mr Campbell to refer him to Occupational Health at which conclusion was set out in a letter of 3 September 2015.

21. By an undated letter at which apparently received on 23 September via note paper headed "Redmond Paralegal Services" and signed by the Claimant's father, he submitted an appeal against that decision. The appeal was initially due to be heard by Mr Parkin on 22 October but in fact eventually took place on 11 November.

22. Prior to that there was an exchange of emails; on 22 October Mr Redmond emailed stating *"Also can I take this opportunity to confirm that Mr Vic Redmond will be accompanying me with everything from now on and will be with me at the meeting*."

23. On the same day he received an email stating a decision had been taken and been confirmed by letter dated 21 October that his father could not attend the appeal. The letter from Mr Parkin states "*In regards to your request that your father attending as your representative, I have checked this with our case management team and we cannot allow your father to act in this capacity or attend the appeal hearing. In exceptional cases where the employee has a severe condition we would allow a health care professional to support a colleague where mobility or severe mental health conditions exist. In your case however we would ask you to comply with our policy of having a colleague or a member of a trade union attend*."

24. By letter dated 26 October Mr Redmond senior stated "*There are reasons which came out at the meeting with OH which I accompanied Callum. He has to have me with him. Medical reasons which are relevant only to him and OH and Virgin Media HR. From the above I will be coming with Callum to the meeting, if I am refused entry then Callum will not, due to his medical condition, be entering the room on his own*." That received a response on 27 October confirming that it, from Lindsay Ring the Case Adviser for the Case Management Team confirming the decision that he would not be allowed a companion other than a colleague or trade union adviser. On the same day Mr Redmond senior sent a letter complaining about this and on 27 October the Respondent reiterated its position by letter and email.

25. In fact in the meeting which was held on 11 November the Claimant did attend with a representative Mr Eugene Caparos who is a full time trade union official. Following it Mr Parking partially upheld the appeal. The points of appeal which he upheld were that the initial disciplinary meeting should not have gone ahead when the Claimant made it clear that he, for whatever reason, had not seen the letter inviting him to the meeting and therefore had insufficient time to prepare. He also took the view that once

the Claimant had raised a medical explanation for the loss of the company's property that the disciplining officer should have taken further advice from HR and that having decided to ask for an Occupational Health Report he should not have gone on to consider a disciplinary sanction prior to receiving that report. However by the time of the appeal the Occupational Health Report of 2 October had been received and had been seen by Mr Parkin. However, he concluded that the Claimant bore some responsibility effectively as this was the second occasion upon which this happened and it was therefore clear that whatever mechanisms the Claimant had put in place to remind himself had not succeeded in preventing further loss of property, but he concluded that in the light of the medical evidence that he would downgrade the warning to a verbal warning.

26. In addition, in the outcome letter of the 18 November he indicated that he would like a more in depth assessment of the Claimant's condition and asked for his consent to that and said:

    "To assist in the interim I will also ask Andy to ensure that you complete a checklist on every visit to ensure you have consciously checked H & S requirements and you will arranged to reconcile your checklist against visits completed and audit to ensure you are compliant with the requirements of the checklist."

    Mr Parkin's evidence is that effectively this was for both the benefit of the company and the Claimant. That in essence if the Claimant's forgetfulness had caused loss of property, forgetfulness might also cause failure to properly or completely install or service equipment at a customer's house which might have health and safety implications, but could certainly have customer service implications and that the check list was therefore designed specifically to allow both the company and the Claimant to be certain that he had completed every part of the job at every property.

27. Mr Campbell met the Claimant on 1 December at which time the Claimant was refusing to give consent on the basis that the respondent had had the Occupational Health Report for two months and had not acted on it, and also was refusing to carry out the checklist. In evidence before us the Claimant stated that the refusal to carry out the checklist was because he viewed it as a performance tool and that there was no question in relation to his performance and that there was therefore no reason he should agree to it.

28. On 2 December the Claimant lodged a grievance in relation to the investigatory/disciplinary and appeal hearings between 20 August 2015 and 11 November 2015. It isn't necessary to set out in detail the grounds of the grievance as no complaint is made about the grievance or its

outcome save that it is contended that as a consequence of the grievance he was subsequently put by Mr Campbell on medical suspension. It is accepted by the Respondent that the grievance contained allegations of disability discrimination which are a protected act within the meaning of Section 27 of the Equality Act.

29. There was a further meeting, about which there are disputes of fact (which have no bearing on the issues before us) but following it on 4 December Mr Parkin sent an email saying:

"In the meantime you are to consider a number of short adjustments which are as follows: *(1) allocate the correct amount of travel downtime when working out of area to allow sufficient time to travel home to arrive on time. Andy will work with FSOC (2) you asked us to be reasonable with your KPI's performance and not fail a measure if you almost hit a target. We will continue to score the KPI's as per the scheme. However we will be considerate of the reason for underperformance if it relates to your condition i.e. low productivity being due to volume of work completed. Once we have the medical assessment we will know what type of work and volume of work it will be reasonable for you to complete. (3) You asked not to be marked down in Aspire if you are late starting work and it does not appear to be marking you down in Aspire. However it does record your discussion on the subject of time slot arrival. (4) You asked Andy to stop asking why you are late starting work and suggested he should assume that it is always due to your condition. Andy does have a duty of care to follow up when he is advised that you have not started work and I feel it is reasonable to enquire as to why that is. (5) you asked for longer time at the stores. Andy will schedule more time to allow you to read any important documents left in your pigeonhole for information. (6) You asked for more local routing in Port Talbot. There is not always enough work in the area to allow us to do this. However we will do anything possible to reassign the work we can, but still meet our customer appointments times. You raised a concern about the request we made for you to use the self audit sheets as a memory aid to ensure you complete all the essential elements of the visit. I consider my request to be reasonable and necessary given the symptoms you communicated in relation to forgetfulness. However to ensure you have the time to complete these checks I have agreed with Andy that you will not be required to complete the service and install checklist until further notice."*

30. On 8 December Mr Redmond advised, although it is not contended to be a disability in itself or part of the disability, that he attended hospital and that a scan had shown a 5cm tumour on his right kidney stating "*I'm going to need some time off while sorting it out and getting into a better frame of mind and health to come back. I'm due to work this Wednesday and Thursday then rota days off until Monday. I'm due to take annual leave on*

Monday 14th and Tuesday 15th can you cancel these dates as I will be on sickness this time I will take the leave again at a time when I can, either the end of the year or beginning of 2016."

31. The grievance meeting was held on the 21 December and Mr Starling agreed that that was a meeting at which the Claimant could be accompanied by his father. Again it is not necessary to deal with the detail as there is no claim relating either to the conduct or the outcome of the grievance. However his grievance was unsuccessful and on 8 January he lodged an appeal against its outcome.

32. On the 11 January Mr Campbell replied to an email from the Claimant saying:

    "*Firstly you asked what reasonable adjustments have been put in place for your return to work. Previously we have agreed to make the following adjustments and these would remain as and when you return (1) an extra 20 minutes at every store visit if required (2) local routing when available (3) no ladder work (4) allocation of fault only calls (5) flexibility in your start time (6) be provided a memory aid checklist to assist you in ensuring you do not forget vital elements of your role. When you are due to return we will have a meeting to discuss these adjustments along with any further adjustments that may be recommended by Occupational Health. As you are fully aware we referred you to Occupational Health again and they are currently awaiting information from your GP in order that they can assess your conditions and make recommendations to the business as to what adjustments they feel are appropriate. <u>You have previously said the business had not put reasonable adjustments in place, but you have not provided us with any details as to what you feel these adjustments should be. Therefore as you have raised a complaint with the business not meeting your needs we do not feel that it is appropriate for you to return to work until we have guidance from the medical experts as to what adjustments we should be considering to allow you to return to work.</u>"*

    (Our underlining. This is the passage specifically relied on by the claimant in relation to his victimisation claim).

33. On 14 January following an email from the Claimant Mr Campbell stated "*I confirm that your doctors note dated 22 December 15 is valid until 21 January 16 and that you are currently still off sick at the moment. If you continue to feel unwell on 21 Jan then please return to your doctor to get another Fit Note. If you are feeling better at that point and are intending to return to work but we have not received the report back from Occupational Health, then due to our duty of care towards you it will be necessary for us to medically suspend you until such time as the report is received. At that*

point we will arrange a meeting to discuss reasonable adjustments and a return to work plan."

34. On 28 January 2016 the grievance appeal hearing was conducted by Michelle Beech. Again as there is no issue as to the conduct or outcome of that at least in the context of disability discrimination it is not necessary to set out any of its contents in detail.

35. On 5 February Mr Campbell sent to both Michelle Beech and to the Claimant details of the adjustments which were effectively set against the specific recommendations of the Occupational Health Report of the 2 October. This received the response from the Claimant:

    "*Thanks for this email the contents of which are noted. Please be advised I will not be accepting these adjustments. Please refer to J Parkin's email dated 18 November 2015 which states that you will not make recommendations until the OC Report has been received. As this has still not been received I am rejecting most of these especially the 12 point "must do" checklist as this is discriminatory and not a reasonable adjustment, but only adds to the pressure on me due to its wording which I feel is threatening and inconsistent with a reasonable adjustment.* "

36. On 29 February Ms Beech sent her outcome of grievance appeal meeting. At or around that point the updated medical report was received. In fact as set above it did not make any additional recommendations or suggest any further adjustments beyond those contained in the earlier report . A return to work meeting was held on 9 March with the Claimant, Andy Campbell, Ms Beech, Mr Redmond senior and Catherine Wilson. It set out arrangements which had been agreed:

    (1) heavy lifting 2 x tool bags to be issued to you immediately, you also agreed that you would investigate more suitable options if these Virgin Media tool bags were not suitable. (2)Hours of work. Business as usual working hours following completion of a six week structured phased return to work. See attached plan. (3)Communication. 15 minute catch up call every week, day to be agreed, to discuss your wellbeing and any concerns or issues you may have (4) Breaks. If you are unwell and require a break then you should contact me the principal technician so that FSOC can support you and we can effectively manage your workload. Targets. Consideration will be taken in respect of productivity in relation to your condition, however it is important that customer service remains a priority and exception cannot be made with the delivery of quality service. (6) Managing your condition. We will allow time off for doctors and hospital appointments and will provide support where required (7) Attendance. In relation to your knee condition as above appointments will be supported as required. Performance Reviews. Monthly one to ones and weekly calls

to offer support and discuss issues before they impact performance. He goes on to discuss the 12 point checklist and that if the Claimant didn't wish to use it or he wanted an alternative way of ensuring that he was meeting operational requirements, it states "I am also aware that you have requested that installs are removed from your work. Whilst this has not been a recommended adjustment in order to support your return to work I will be happy to remove this activity from you during your return to work plan."

37. The Claimant replied on 31 March stating:

"*I am concerned that I will be coming back without the full adjustments. I am wondering what happened to the following which are missing in your letter. Extended time in stores of 20 minutes at each visit. Removal of ladder work. Local routing. Flexibility of starts and finish times. No install work. Allocation of correct amount of travel downtime when working out of area. Re-assessment of volume and amount of work required to complete. I am also concerned that you have put business as usual after six weeks.*"

38. On 5 April Mr Campbell replied:

"(1) Extended time in stores of 20 minutes every visit agreed. Removal of ladder work according to Michelle Beech's grievance appeal outcome letter Michelle has confirmed that this point as detailed at 2(c) was not relevant and had not been on the recommended list of adjustments from Occupational Health so therefore not applicable. (3) Local routing agreed when and where possible in accordance with the volume of jobs available to keep within SA12 and SA13 postcodes (4) Flexibility of start and finish times agreed (5) No install work agreed within phased return and to be reviewed as part of ongoing support (6) Allocation of correct amount of travel downtime and working out of area as per 3 I would expect this not to occur as I will not be allocating any jobs out of your area. Re-assessment of volume and amount of work required to complete agreed within phased return to be reviewed as part of your ongoing support. The decision to offer a six week phased return was to make sure you had enough time to allow you to build up to your full time working pattern. The timescale is merely a suggestion which will hopefully allow you time to recover sufficiently to take up your previous role with adaptation."

39. On the 12 April the Claimant replied stating in respect of ladder work:

"This is not irrelevant as you stated. This was an adjustment you informed Chris Starling was in place as of 4 December 2015. Although ladder work is not mentioned on the OH Report the Report does state the advising doctor is worried about my right knee. If you want to dismiss the adjustment for whatever reason the grievance appeal outcome is

irrelevant as it is being dismissed as misdirection by Michelle Beech and is now subject to legal matters, and please be advised that if anything happens whilst on a ladder due to my knee giving way I will be holding you and the business responsible. And in respect of install work, again this is in place as per Chris Starling's outcome letter as being in place as of 4 December 2015. Nowhere does it state that this is for a phased return to work."

40. This received the response on 17 April:

"*Regarding the subject of ladder work and install work. We have considered the points raised and propose to implement the adjustments detailed below: Installation work is divided into two activities in the main, two person teams and one person teams, where the former is responsible for cabling an uncabled home and the latter attends to modify an existing home installation. We would only expect you to work on one person installation work as we consider this activity to be very similar to service work both expected to modify or replace cabling in the home and up to the external team. Given the issue raised regarding your knee we will not expect you to complete any ladder work during the installation or service visit, however we will expect you to notify your AFM as soon as it's apparent that a ladder is required so that arrangements can be made to either attend that appointment whilst you are on a site visit or visit the property later to complete your temporary cable installation. We will review these adjustments in 3 months time.*"

41. The Claimant returned to work on 18 April. The six week phased return to work was due to end on 27 May but was in fact extended for another four weeks to 24 June and was then further extended until 8 July, which takes us to the point as set out earlier beyond which the earlier Tribunal determined that it would not hear evidence.

<u>Conclusions</u>

<u>Complaint 1 and 2</u>

42. The first two complaints are of the failure to allow the Claimant to be accompanied at meetings on 11 November and 14 January by his father. This is put as a failure to make a reasonable adjustment.

43. Dealing with the second complaint first, it appears to be agreed that in fact there was no meeting on the 14 January. There is no reference to it in the Claimant's witness statement and having been taken through the

chronology there is no reference to it in any of the documents. As a matter of fact this complaint appears to be unfounded, and for the avoidance of doubt there is no evidence of any meeting at or around this time at which the claimant's father's attendance was denied so this does not appear simply to be an error in the date as is the case in respect of the first allegation. In a somewhat curious exchange in the course of his cross examination, Mr Sheppard asked the Claimant whether he accepted in the light of the documentation and the chronology that there was no meeting on 14 January which the Claimant accepted. However, when asked whether that meant that he was withdrawing this complaint the Claimant replied "no" and that he maintained all of his claims. However, as the event about which complaint is made is agreed not to have taken place the claimant's position is difficult to understand. However, for our purposes it is enough for us to find that there is no factual basis for this complaint.

44. Clearly it is correct however that the Claimant's father was not permitted to accompany him on the disciplinary appeal meeting on 11 November. The combined effects of the various sections of the Equality Act, Sections 20 and 21 in particular, is that a duty to make reasonable adjustment arises where a provision, criterion, or practice (PCP) puts a disabled person at a potential disadvantage in relation to a relevant matter in comparison with persons who are not disabled. It is not in dispute that as set out in the Respondents disciplinary policy that it has a policy of only allowing accompaniment by a work colleague or trade union representative, and that this is a PCP within the meaning of the Equality Act.. What is very much in dispute is whether this places the Claimant at any substantial disadvantage in comparison with persons who are not disabled. The Respondent submits that the fact that an individual is disabled does not in and of itself mean that representation by a colleague or a trade union representative is any disadvantage. The purpose of a representative is clearly to accompany the individual and to assist the individual in putting points forward which the individual wishes to in response to the particular disciplinary allegations. In this case, as he had done before Mr Gough in the original disciplinary hearing, the case the Claimant wished to advance was that the loss of the Smart Card and the other items of equipment had a medical explanation which lay in the forgetfulness which had arisen specifically from the reactive hypoglycaemia. The Respondents point to the fact that that explanation was clearly understood and acted upon by Mr Parkin and was essentially the reason why the disciplinary sanction was downgraded from a first written warning to a verbal warning. It is therefore self evident submits the Respondent that the Claimant was not placed at any disadvantage in terms of the conduct of the meeting by the fact of being represented by a trade union representative at the meeting and therefore the Claimant has not by definition suffered any disadvantage let alone a substantial disadvantage as a consequence of the application of the policy to him.

45. In our judgment that analysis in respect of that aspect of disadvantage must be correct and accordingly on that basis the Claimant's claim would be bound to fail. However, as is set out in the case management discussion, the Claimant's case is put on an alternative basis that stress can cause the onset of the symptoms of hypoglycaemia and or Crohn's disease. Being required to attend without the companion of his choice placed him under extra stress and therefore he was placed at a disadvantage in that the extra stress caused or could cause the onset of the symptoms of hypoglycaemia and or Crohn's disease. The Respondent submits that the difficulty with putting the claim in that way is that there is in fact no medical support for the contention that it was necessary for the Claimant to be accompanied at meetings by anyone other than a work colleague or a trade union representative. That is not mentioned as an adjustment in any of the medical reports. There is also a more general proposition; none of the medical reports make any comment about avoiding stress or stressful situations which may aggravate the symptoms of hypoglycaemia or Crohn's disease, and the Respondent submits in the absence of any medical evidence supporting this as an adjustment it is in effect no more than an assertion by the Claimant for which there is no objective evidence in support.

46. In our judgment, the case put in this way clearly is a potential disadvantage to the Claimant and might, if supported by appropriate medical evidence, lead to the conclusion that the requirement that he attend without his father even if represented by another person might place him at a substantial disadvantage. However, there is no medical evidence in support of that narrow proposition or the wider proposition that the Claimant should avoid stressful situations. It follows that in our judgment whilst this claim could potentially be put in this way there is simply not the evidence in this case before us which would allow us to conclude that the Claimant had in fact been placed at a substantial disadvantage by the application of the policy to him. It follows that the Claimant's case in relation to the first complaint must be dismissed.

47. Equally even if we had not dismissed the second complaint on the factual basis that there was no meeting, the same reasoning would be bound to apply, so on any basis both the first two complaints would be dismissed.

Complaint 3

48. The third complaint is that the Claimant was victimised by being placed on medical suspension as a consequence of having raised a grievance. Section 27(1) of the **Equality Act 2010** provides:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because -*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act."*

49. As is set out above it is accepted that complaints about disability discrimination contained within the grievance of the 2 December constitute protected acts and that if as a matter of fact the Claimant was subject to a detriment for having done so the claim would be made out.

50. However the Respondent firstly submits that there is no evidence that the Claimant suffered any detriment. Firstly the Respondent submits that being placed on medical suspension is not in and of itself a detriment insofar as all that occurred was that the Claimant remained on full pay whilst not being required to work, in circumstances in which it did not count as sickness absence and could not therefore affect any future sickness absence. It was therefore not an action which had any consequence for the Claimant other than the advantageous one of the removal of the requirement to work.

51. Even if contrary to that submission we were able to conclude that the medical suspension were a detriment (if for example we were to conclude that being medically suspended prevented the opportunity to work overtime) the Respondent submits that there is in fact in this case no causal link between the grievance and the medical suspension. Firstly the decision to request the Claimant attend a second occupational health appointment was a decision made by Mr Parkin as a consequence of the evidence he heard in the appeal hearing on 11 November and was communicated on 18 November. Self evidently that decision cannot be tainted or causally linked to a grievance which was not submitted until 2 December.

52. Secondly as was explicitly stated in the emails referred to above, the reason for the medical suspension was to await the outcome of that occupational health referral. If the referral was not causally linked to the grievance, and if the decision to place the Claimant on medical

suspension was based upon the fact that at the point at which he was fit to return to work on 21 January the report had not yet been received, the Respondent submits it must follow automatically that there is no causal link between the grievance and the decision and that in the absence of that causal link the Claimant's case must fail.

53. The Claimant's case is in fact based entirely on the wording of the email from Mr Campbell, and in particular the phrase *"Therefore as you have raised a complaint with the business not meeting your needs we do not feel that it is appropriate for you to return to work until we have guidance from the medical experts as to what adjustments we should be considering to allow you to return to work."* The claimant submits that this explicitly links the decision to medically suspend with the fact of the claimant having submitted a grievance as is therefore direct evidence of the causal link.

54. In our judgment this phrase must be read in the wider context of the dispute between the parties at the time. The claimant was contending that the respondent had failed to implement reasonable adjustments whereas the respondent believed it had implemented all the recommendations of the Occupational Health reports; and the claimant was refusing to comply with the use of the checklist which the respondent thought to be necessary given that the claimant had himself linked the loss of equipment to forgetfulness caused by his medical condition. The effect of the suspension, was therefore, from the respondents perspective simply the maintenance of the status quo pending receipt of the further medical report.

55. Mr Campbell denies that the phrasing of the email supports the contention that the email bears the meaning attributed to it by the claimant. In essence his evidence is that it is simply a statement of fact reflecting the matters set out in paragraph 52 above. Given that the claimant had specifically complained about the failure to make adjustments it was sensible to wait until the occupational health report had been received. Put simply, if the report had been received before 27th January 2016 the claimant would not have been put on medical suspension, or at least only for so long as it took to agree any necessary adjustments.

56. The question for us (assuming that medical suspension is capable of constituting a detriment) is therefore the factual causal one. In our judgment the respondent is correct in its assertion that there was no causal connection between the two. The decision to seek further medical evidence was taken before the protected act, and the decision to suspend was caused by the fact that the report had not been received. This claim must also be dismissed.

Complaint 4

57. The fourth complaint is itself in two parts. It is a complaint about the type of work, which was identified in the case management discussion as a requirement to carry out full installations. The history which led to the limitation on installation work as was finally put in place prior to the Claimant's return in April 2016 is set out above. The Claimant's essential complaint is that that adjustment should have been put in place earlier, although the Claimant has not identified a specific point by which it should have been put in place. The essential point the Respondent makes is that in fact the adjustment is not supported by the medical evidence and in reality the Respondent was agreeing to conditions that the Claimant was attaching to his return to work, not in fact supported by the medical evidence; and that far from demonstrating that the Respondent was acting unreasonably at any point, the fact that they were prepared to agree adjustments not supported by the medical evidence is evidence of the reasonable view they took. As is set out in the extensive e-mail correspondence above, the respondent did not and does not accept that there is any medical evidence supporting the requirement to remove full installations/ladder work from the claimant's duties. They effectively conceded the point when they did in order to secure the claimant's attendance at work.

58. As is set out above, the only adjustment recommended in any of the medical reports in relation to the Claimant's knee or back injury which is the condition which affects the installation work is the pre-existing adjustment of allowing him to carry a lighter tool kit. There is no dispute that it was maintained. There is no medical support for the proposition that the Claimant was unable to carry out full installation work or indeed that he was unable to use or perform any ladder work. However, for the reasons set out above, by 18 April those obligations had been removed from him. It follows automatically submits the Respondent that there cannot be any failure to make a reasonable adjustment if the adjustment contended for is not supported by the occupational health doctor who identified the problem with the Claimant's knee in the first place.

59. In relation to the hours of work the Respondent points to the fact that for the period during which we are concerned there is no recommendation for a reduction in hours of work merely flexibility which was put in place and that in the period in which we are concerned from the Claimant's return in April until the end of June he was on a phased return, therefore there had been an adjustment made. If and to the extent that the Claimant is contending that there should have been a permanent adjustment to the reduction of his hours of work that too is not one which is supported by the medical evidence.

60. These points are in our Judgment in reality unanswerable and it follows that these claims too must be dismissed. That deals with all the Claimant's claims, all of which have been dismissed.

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Employment Judge P Cadney
Dated: 13 April 2017

JUDGMENT SENT TO THE PARTIES ON

25 April 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.