EMPLOYMENT TRIBUNALS

Claimant: **Mr J Shield**

Respondent: **BPDTS Limited**

HELD AT: **North Shields** **ON:** **20, 21 & 22 February & 19, 20 & 22 March 2018**

Deliberations: **22 March 2018**

BEFORE: **Employment Judge Hargrove**

MEMBERS: **Ms E Menton**
Mrs P Wright

REPRESENTATION:

Claimant: **Days 2-5, Mrs Shield**
Respondent: **Mr S Goldberg of Counsel**

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:-

1 The claimant's claims of discrimination arising from something to do with disability, contrary to section 15 of the Equality Act, and of a failure to make a reasonable adjustment contrary to section 20, succeed only in respect of the issue of access to a disabled parking space at HPE's business premises at Cobalt Park up to March 2017. In all other respects the claimant's claims of disability discrimination, failure to make reasonable adjustments, harassment and victimisation are not well-founded.

2 A telephone preliminary hearing will be listed in May 2018 to discuss any remedy issue but it is noted that the claimant's claim appears to be limited to a claim for injury to feelings.

REASONS

1 By an ET1 received on 28 June 2017 the claimant made claims of discrimination on the protected characteristic of disability against a series of respondents including Hewlett Packard Enterprise t/a Entserve as the first

respondent and BPDTS Limited/the DWP as the second respondent. In fact it is common ground:-

1.1 That he was employed by HPE from February 2015 having worked for HPA earlier as an agency worker;

1.2 That as from 27 March 2017 the claimant's employment along with his team and managers transferred from HPE to the now sole respondent, together with his place of employment. Prior to March 2017 when working for HPE he worked at Ferguson House, Cobalt Park, Newcastle. After his transfer he worked at office premises at Benton Park View, also Newcastle. BPDTS is a company limited by guarantee and an offshoot of DWP. The team which the claimant principally worked for and still works for is the Universal Credit IT Technical Support Team. The only remaining respondent is BPDTS. It is a matter of record, for the purposes of any time point that arises, that the claimant did not conciliate with this respondent until 6 July 2017 which was also the date of receipt of the EC certificate. Thus the claimant gets no extension to the appropriate time limit, which was three months back from 28 June less one day, ie 29 March 2017, in respect of claims directly against BPDTS.

2 **Disability**

In his ET1 the claimant's claimed impairments constituting disability were listed as Neurofibromatosis, Scoliosis and chronic pain; and Autistic Spectrum Disorder (ASD/Asperger's). The claimant is a permanent wheelchair user in respect of the former disorders including back pain. Initially, this respondent did not deny disability in respect of the mobility impairments, but denied any of the other impairments constituted disability. However following orders made at a first CMH on 23 October 2017, and a second on 11 December 2017, the claimant provided a disability impact statement in which he identified inter alia ASD/Asperger's and also the adverse effects thereof – see page 61 of the bundle. We cite the disability impact which the claimant relied on in respect of ASD:-

(a) onset: birth;

(b) treatment: no cure or treatment available;

(c) life long difficulties with verbal communication;

(d) social interaction difficulties such as interpretation of peers' body language and vocal cues;

(e) hypersensitivity to sound and smells in the office environment which can lead to becoming distracted and causes difficulty concentrating on tasks, as an example within the office on a regular interval the blinds are on either a timer or light sensor and open and close via an electric motor, this combined with other office background noises causes sensory overload;

(f) unexpected calls, texts and e-mails can send me in a complete panic and derail my entire day. At work the worst thing a manager can do is to request a verbal face to face meeting. I immediately start to feel sick to my stomach at the thought of this meeting. I start to worry about what the meeting will be

> about and why this requires a verbal face to face meeting. This is despite requesting an adjustment for all information to be in electronic written form only rather than verbally. This is because I feel extremely uncomfortable speaking due to the previous comments that have been made about my communication skills. In addition I feel there is less chance for misrepresentation or misunderstanding with written communication. Written communication also gives me additional time to process the questions that they will put forward and expect a verbal response to.

The document goes on to repeat the above details of disadvantage in respect of Asperger's, a condition within ASD. It also refers to Dyspraxia and anxiety/stress. The claimant also provided medical reports dated 22 December 2017 and 28 January 2018, the latter of which confirmed a diagnosis of Asperger's. In its latest response of 19 January 2018 the respondent continued to dispute that the claimant's Asperger's (or associated condition) amounted to a disability. It also denied knowledge thereof. It was only at the outset of the hearing on 20 February 2018 that the respondent conceded disability in respect of Asperger's but maintained its denial of knowledge thereof.

There is thus no dispute that the claimant's Neurofibromatosis, Scoliosis and chronic pain, with consequent mobility problems, constitute disability, as does his Asperger's with attendant communication difficulties. However it remains in issue whether the respondent was aware or ought to have been aware of the latter condition. None of the other conditions mentioned by the claimant including anxiety and stress, Dyspraxia and Depression have been proved to constitute long term impairments amounting to disability.

3 **The issues**

There was a failure in particular by the claimant, but also contributed to by the respondent, to comply with repeated orders for the identification of the issues specific to the case. At the time of the presentation of his claim on 28 June 2017 the claimant was represented by solicitors. His first pleaded case is set out in grounds of claim at pages 15-21 of the bundle. Under a paragraph headed "unfair discrimination" there is a detailed story but there is no reference to any relevant type of discrimination under the Equality Act 2010. This respondent's response was received on 17 August 2017 following which there was a first CMH on 23 October 2017. Again the claimant was represented by a solicitor. The claimant was ordered in particular to provide by 13 November 2017 the required details of the four statutory heads of claim then identified by the Tribunal, namely failure to make reasonable adjustments – section 20, harassment – sections 26 and 40, discrimination arising from something to do with disability – sections 15 and 39(2), and victimisation – section 27 of the Act. The respondent was ordered to respond to that information by 27 November 2017. In paragraph 14 there was an order for the parties to agree a list of issues. The full hearing was listed for 20-22 February 2018. A second telephone CMH was listed on 11 December 2017. At that stage there had been a failure to comply with the previous orders in particular relating to the identification of issues. The claimant's difficulty was said to be in giving instructions which may have been medically related – he was off work sick at the time, but not

due to one of the accepted impairments. Employment Judge Buchanan reset the timetable. The heads of claim were now to be provided by 5 January 2018 by the claimant. Full compliance with the amended orders was expected.

On 14 December the claimant's solicitor came off record. We accept the claimant's evidence that he sought free representation from some time later in December or early January, but received no positive response thereafter from the FRU. Nonetheless, he failed to comply with the amended timetable as a litigant in person. A third telephone CMH was listed on 12 January 2018 where the claimant was represented by his mother who has little or no legal knowledge. However, on 11 January 2018 the claimant did provide to the respondent and to the Employment Tribunal a second version of his claims. The second version, although it did give some details of the harassment claims, was not in a form in which it was possible to identify the assertions being made under the other potential heads of claim. At paragraph 9 of the orders made on 12 January the EJ noted "At the suggestion of the respondent I have reversed the requirement for the claimant to prepare the final list of issues and instead make that the responsibility of the respondent with the claimant to comment on the list of issues in readiness for the final hearing. This was reflected in paragraph 2.3 and 2.4 of the orders which gave a requirement on the respondent to send to the claimant by 12 February a draft list of issues the claimant replying on 16 February. There is no suggestion that the respondent objected to the terms of that order, indeed the notes record that it was suggested by the respondent's solicitor. Accordingly, this Tribunal was disappointed when at the outset of the reading day there was no list of issues whatsoever; and on enquiry of counsel for the respondent there was provided what may be described as a generic list of the elements of each of the four statutory heads of claim with no reference to the facts of this particular case. In addition, the contents of the claimant's witness statement again amounted to a recitation of facts but not the identification of the relevant statutory heads of claim or the issues.

It is impossible to try a complex discrimination case where none of the factual or legal issues have been identified before the hearing of evidence begins. The claimant is clearly at fault because he has chosen to continue to pursue his claims without representation and we do not accept that he was incapable intellectually of identifying how to label the matters about which he claimed. There is no evidence that either of his accepted impairments constituting disability hindered him from doing so. He blamed stress for not complying with the order, but it was not part of his disability. Nor was depression. He did not notify the Tribunal before 20 February that he was in anyway unable to comply with the order. On the other hand the respondent has likewise failed to comply with an order to identify legal issues, some of which were clearly identifiable, for example the car parking and toilet accessibility issues. The parties were under a duty to cooperate with each other and to comply with the overriding objective to ensure a proper trial of the issues. As the respondent may now recognise, the Employment Tribunal was faced with difficult choices. If the Tribunal had merely ordered the evidence to begin and not intervened it would not have resolved the problems. It would have not led to a fair trial of the issues under Article 6. We decided, having identified from the claimant's witness

statement, a number of separate matters about which the claimant complained, to ask him to explain at the commencement of his sworn evidence how they constituted any of the statutory heads of claims. There was some resistance to this from the respondent's counsel, but the logic of that position was that the claimant's claim would be untriable. There was clear inequality of arms here. The claimant was a litigant in person at the time when the Tribunal's later orders for the identity of issues came into effect. In consequence, we took the view that we had to intervene to assist the claimant in identifying the legal issues. We are supported in that action by provisions in the Equal Treatment Bench Book of February 2018 – see in particular page 1.4 onwards to 1.17 and in particular paragraph 62:-

> "It could be hard to strike the due balance when assisting an LIP in an adversarial system. LIPs may easily get the impression the judge does not pay sufficient attention to them or their case especially if the other side is represented and the judge asks the advocate on the other side to summarise the issues between the parties. Consider:
>
> - Explaining the judge's role during the hearing.
> - If doing something which might be perceived to be unfair or controversial in the mind of the LIP explain precisely what you are doing and why then
> - Adopting to the extent necessary an inquisitorial role to enable the LIP fully to present their case (though not in such a way as to appear to give the litigant in person an undue advantage)".

4 **The relevant statutory provisions and our self directions relating to them**

4.1 Section 15 of the Equality Act 2010 materially provides as follows:-

> "Discrimination arising from disability
>
> (1) A person A discriminates against a disabled person B if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment was a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability".

In the employment context discrimination is defined in section 39 of the Act:-

> "(2) An employer A must not discriminate against an employee of A's (B) …
>
> (c) by dismissing B …
>
> (d) by subjecting B to any other detriment".

We are correctly referred in relation to section 15 by counsel for the respondent to the case of **Basildon & Thurrock NHS Trust v Weerasinghe [2016] ICR page 305 para 26**:-

> "The current statute requires two steps. There are two links in the chain, both of which are causal, although the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus on the words "because of something", and therefore has to identify something – and second on the fact that that something must be "something arising in consequence of B's disability" which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that it is because of something arising and that it is unfavourable to B. I shall return to that part of the test for completeness though it does not directly arise before me".

Section 39(4) of the Act states that:-

> "(4) An employee A must not victimise an employee of A's (B) –
>
> (d) by subjecting B to any other detriment.
>
> (5) A duty to make reasonable adjustments applies to an employer".

Section 20 of the Equality Act provides materially as follows:-

> "Duty to make adjustments
>
> (1) Where this Act imposed a duty to make reasonable adjustments on a person this section … and the applicable schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".

Schedule 8, paragraph 20 of the Act provides as follows:-

> "Lack of knowledge of disability etc
>
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –
>
> (a) …
>
> (b) that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first … requirement".

In other words, if the employer does not know and could not reasonably be expected to know of the particular disability and/or that it was likely to place the claimant in the substantial disadvantage, he is not under the section 20 duty.

Section 26 of the Act defines harassment as follows:-

> "(1) A person A harasses another B if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b) each of the following must be taken into account –
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect".

Section 27 defines victimisation as follows:-

> "(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.
>
> (2) Each of the following is a protected act –
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act …".

In other words there are two essential elements to this particular cause of action. First of all, there has to be a protected act by the employee or it has to be established that the employer believed that the claimant had done a protected act. As to that, the claimant relies upon grievances that he raised in which he asserts he raised a complaint that he had been discriminated against. There must then be some detriment to which he is subjected, and there must be a material influential link between the doing of the protected act and the subsequent act or acts of detriment. An act or omission to act constitutes a detriment for the purposes of all of the above provisions if a reasonable person might perceive that he was put at some disadvantage in relation to his employment thereafter. An unjustified sense of grievance is however not a detriment. See for example **Shamoon v The Chief Constable of the RUC**.

Section 136 contains a special provision about the burden of proof in discrimination cases. It reads as follows:-

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person A contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

What this provision means in effect is as follows. There is an initial burden on the claimant to produce evidence from which a Tribunal could reasonably conclude that he had been discriminated against in relation to one of the protected characteristics. The claimant may do that by his own evidence, or that of his witnesses, or by cross-examination of the other side's witnesses, or by reference to other evidence particularly in the form of documentary evidence. If the claimant satisfies this initial burden, the burden shifts to the employer to show that the reason for the particular treatment of the claimant had nothing whatsoever to do with the protected characteristic.

Time points

4.2 Section 123 of the Act provides as follows:-

> "(1) … Proceedings on a complaint within section 120 may not be brought after the end of –
>
> (a) the period of three months starting with the date of the act which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section –
>
> (a) conduct extending over a period is to be treated as done at the end of that period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary a person P is to be taken to decide on failure to do something –
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) P does no inconsistent act, on the expiry of the period in which P might reasonable have been expected to do it".

In connection with time points there is a complicating factor because some of the acts of discrimination relied upon by the claimant took place when he was employed by a previous employer to the

respondent and in respect of which regulation 4(2) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 applies:-

> "(2) Without prejudice to paragraph (1) but subject to paragraph (6) and regulations 8 and 15(9) on the completion of a relevant transfer –
>
> (a) all the transferors rights, powers, duties and reliabilities and/or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
>
> (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee".

5 We next identify what we consider to be the relevant issues in the chronological order which follows. We heard the following witness evidence:-

5.1 The claimant, on 21 and 22 February, his evidence was concluded early on 19 March. We made the following adjustments to assist the claimant in respect of his disability. We delayed starting the hearings until 11:00am on each day except on the last day of his evidence on 21 February when we delayed the start to 10:30am. Also during his evidence we gave the claimant regular breaks of approximately 10 minutes every hour. We allowed the claimant to sit next to his mother who is representing him so that she could assist him by page turning whilst he was looking on his computer. The claimant objected to any of the respondent's witnesses being in the room whilst he was giving evidence. We did not accede to that request but we did ensure that the respondent's witnesses were out of the claimant's line of sight whilst he was giving evidence and for that purpose we moved counsel for the respondent to the witness table so that he was within the line of sight during cross-examination. We also refused the claimant's application which he had highlighted during the case management hearings that he should either not be cross-examined or asked questions in writing and allowed to reply in writing. We did not consider these to be a reasonable adjustment. In the end however we were satisfied that the claimant was well able to answer the questions which were put to him in cross-examination having regard to the other adjustments which we had made.

5.2 Michael Storrar, no longer employed by the respondent but who deputised for the usual team leader Shaun Burnip at the time of the claimant's return from secondment in 2016.

5.3 Shaun Burnip, (SB) team leader of the Universal Credit Live Support Team.

5.4 Elliott Sutton, (ES), the claimant's line manager from May 2015 at EntServe, also an organisational manager who was SB's line manager when SB was team leader.

5.5 Cheryl Crossan, organisational manager, who became the claimant's manager in November 2016 in place of Elliott Sutton following a grievance which had been raised by the claimant essentially against ES.

5.6 Jennifer Pye, an organisational manager with the respondent who was detailed to hear the claimant's grievance of 7 July 2017, but who prior to the grievance hearing had had no contact with him.

The parties agreed at the conclusion of the evidence and cross-examination to provide sequential closing written submissions, the respondent to begin. The claimant responded and there were oral submissions which took place on the morning of 22 March 2018.

6.1 The claimant commenced employment with HPE on 20 February 2015 in a technical support role initially at Mercury House before moving to Ferguson House in May 2015. This was situated on the Cobalt Park Industrial Estate. At that time he was working within the Universal Credit Live Support Team and his team leader was SB and the organisation manager, SB's line manager, ES. At or about that time the claimant put in a request for a disabled parking bay. We find the following facts in connection with that parking bay. The claimant's case is that although the provision of the parking space was itself adequate to enable him to gain access to the building where he worked, he being required to attend work and being disadvantaged by his lack of mobility, he was hindered in his use of the car parking space in particular by a senior manager of HPE, who he named at the hearing as being David Cummins and or his personal assistant Marissa Osborne, who had the practice of taking his space. The result of this was that the claimant would have to park either immediately behind the offending car but not in a designated space, or on a verge, or in the office drop off point. In addition contractors' skips were occasionally directed to use his parking bay. There were occasions when he was called out to move his car from where he had alternatively left it. There are photographs at pages 564-565 which corroborate this. The claimant says he raised the issue with the facilities manager and there is an e-mail to a Philip McAndrew from the claimant dated 12 January 2017 (page 234) in which he raises a complaint.

We accept his evidence as to these events. Applying the **Weerasinghe** test we find:-

6.1.1 that in this respect the claimant was treated unfavourably;

6.1.2 that treatment was because of something namely the occupation by others of the claimant's designated parking space; and

6.1.3 that was something that arose from his disability because as a disabled person with mobility problems he was denied access to it.

We reject Mr Goldberg's submission that there was nothing which arose from something to do with the claimant's disability because those who parked in his space did not do so because of the claimant's disability because it was merely a more convenient place for them to park. We have no doubt that these actions amounted to a detriment to the claimant. The claimant needed a guaranteed space to facilitate his arrival at work particularly as he was entitled to arrive late and most other spaces would be occupied; and a disabled space to enable him to unload and access his

wheelchair. We firmly reject the respondent's alternative submission that there was no detriment because the claimant could park elsewhere – the elsewhere was not a designated parking space and the claimant could be called upon to move his car which was itself a detriment for a wheelchair user. There was alternatively a PCP under which people who were not disabled used his parking space causing him substantial disadvantage and a reasonable adjustment would have been to take steps to prevent them from doing so. It is conceded that this claim was not made out of time. We conclude that there was a continuing state of affairs which came to an end very shortly before the claimant moved to Benton Park View and the employment of the respondent on 27 March 2014. Mr Goldberg concedes that it was a claim that was originally made against HPE in time having regard to the extension granted for the early different conciliation period in respect of that respondent. It is convenient next to deal with the separate car parking issue which arises in respect of the space at Benton Park View granted to him after March 2017. The claimant was granted two ordinary car parking spaces next to each other wide enough for him to unload and access his wheelchair. The spaces were marked with a disability sign with the word 'reserved'. This situation is evidenced by a photograph at page 557. The claimant would habitually park across part of both parking bays. He does not assert that others parked in that space or that it was otherwise obstructed. His complaint is that there was a failure to delineate the space properly by surrounding the space with yellow paint with the result that it would not be obvious when occupied by his car that it was occupied as a disabled space. There was undoubtedly some delay and indeed the space has not yet been so marked. The detriment which the claimant claims in the form of disadvantage was that that on one occasion about two days after the move a facilities manager was observed pointing at the car and the way he had parked it. We do not accept that there was a breach of section 15 or section 20 in this respect and we do not accept that this amounted to a detriment. In addition there is an issue as to whether or not the respondent had control of the parking space or spaces as opposed to the site owner, HMRC. The claim fails.

6.2 It was not only the claimant and his team who transferred to the respondent on 27 March 2017 but also the management structure including all of the witnesses for the respondent from whom we have heard. ES remained as the claimant's line manager at least until November 2016. He had been acting in that capacity since May 2015. As such we accept that he had regular meetings with the claimant. Clearly ES was aware that the claimant had serious mobility problems. He made a series of referrals of the claimant to the HPE occupational health adviser BUPA. The referrals begin at page 84 in August 2015. At page 85 ES wrote:-

> "Jamie has been off and late repeatedly and before I receive a BUPA alert I thought it best to bring Jamie's condition to your attention. Jamie has neurofibromatosis which is a condition that affects the central nervous system. Please make contact with Jamie for further information and take into account his condition when referring to his absenteeism".

The report is dated 25 August 2015 – see pages 87-89. The material parts are at pages 87-88. It is noteworthy that the claim only refers to the

claimant's condition of Neurofibromatosis. There is no suggestion of Asperger's. The reason for referral was three or more absences in six months. There was a description of the affects of the condition. The recommendation that was made was that "You consider a reasonable increase in your tolerance of Mr Shield's sickness absence in relation to neurofibromatosis". No other adjustments were recommended. The claimant's original working hours commenced according to which shift he was allocated commencing between 7:00am and 10:00am on each day. The claimant was expected to work 7.5 hours per day with a half hour break. We accept that sometime after the first BUPA report there was a first adjustment made to the claimant's working hours in that it was arranged by agreement with the claimant that he should be placed on a shift under which his work started at 10:00am. The next occupational health report is dated 10 November 2015, triggered by gastric symptoms, there were no further adjustments suggested at that stage.

6.3 We find as a fact that there was a further adjustment made sometime in the period January to March 2016 whereby the claimant was given as a matter of discretion a further extension of time of up to 10:45am. We accept that the reason for this was that the claimant was reporting that he was frequently in considerable pain on arrival and parking his car and that he would spend time in the car recovering. There is a lack of clarity as to when this additional adjustment was made but we note that the next occupational health report of 19 April 2016 (page 92) states:-

> "He advises he is managing his symptoms in the workplace and does not require any further adjustments at the present time".

Prior to that however in November 2015 the claimant had been called to a pre-disciplinary meeting notes of which are ES's. The claimant's evidence does not deal in any detail with this meeting but see paragraph 10 of ES's witness statement. He says that there were two reasons for that meeting. The first being his concerns about the claimant's timekeeping and in particular that he was repeatedly late in arriving at work notwithstanding the adjustment then in place and that he was not making up time at the end of the working day. The second concern was as to the claimant's personal mobile phone use allegedly for matters other than calls of a medical nature, which according to ES had become excessive. The issue of the claimant's timekeeping in that respect and of the claimant's use of his mobile phone was a continuing issue at least from that time. The fundamental issue which we have to decide is that whether the concerns that were raised with him about these issues had anything whatsoever to do with either of his disabilities.

6.4 The next issue with which we shall deal however, is not that issue, but the fundamental issue of whether or not the respondent had knowledge or ought to have known of the claimant's condition of Asperger's. The claimant asserts that he notified all of his employers at the start of each employment that he had that condition. It is a feature of this case that there are no documents within the lengthy bundle which record information gathered at the time that the claimant was first appointed to the post at HPE in February 2015. These would have been documents in the possession of HPE which could have been expected to have been kept on a personnel file and in ideal circumstances would have been passed onto the present respondent at the

time of the TUPE transfer. The claimant also asserts that he specifically notified ES of his autism during a discussion in early 2016. At paragraph 18 of his witness statement, and in his evidence to the Tribunal when challenged, ES stated that he did not recall the claimant ever bringing up either ASD or Asperger's with him. It is in our view of significance that the claimant was not referred to occupational health for advice on the claimant's condition of Asperger's or of anything related to it until later in the chronology. Nor was it mentioned in the occupational report dated 9 June 2016. The claimant was at that time off work with stress. There was a further BUPA health risk management report dated 25 July 2016 at pages 103-105 which likewise mentions Neurofibromatosis but not any other condition in the next occupation health report dated 25 July 2016. There was however a further referral to occupational health on 19 August 2016 which starts by describing his physical diagnosis and continues in the third paragraph:-

> "Also describes having Asperger's which gives him difficulty in communication sometimes. It is probably to a mild degree because I could not pick up any signs of it today on my assessment but he does find at times how people can misinterpret at times when he is not meaning to be confrontational or irritable".

The letter notes that the claimant had stipulated that the report must not be sent to ES. In consequence of the claimant's refusal, on the same date, Dr O'Reilly the occupational health physician wrote to ES confirming that the claimant had been seen on 19 August for assessment and that the report had been sent to the claimant but continued:-

> "We will send the report to you as soon as Jamie Shield contacts us confirming his consent to release it".

There is continuing correspondence on this issue up to and including 26 September, at which time the claimant was maintaining his lack of consent to the disclosure. Next, the claimant was the subject of a mid year performance and career conversation, or more shortly a mid term review ,with ES in about July 2016 covering the period from 1 November 2015 to 30 April 2016. The notes of this meeting are at pages 172-175. Materially, there are entries to which the claimant objects. On page 172 ES notes:-

> "Jamie can work well with his colleagues and Jamie did really well with an escalated incident which was called out by his team lead. He went above and beyond to help out the customer and resolve the issue. He also enjoys mentoring others and James Fegan (another member of the team) has benefited from his wisdom. Conversely Jamie needs to be mindful that he is a team player and his indiscretions listed later in the mid term report have a detrimental effect on team harmony".

Secondly there was feedback from other members of the team. ES records that the feedback from selected employees was generally poor. His main positive traits are his ability technically and he has been known to mentor and pick things up quickly. Development suggestions included addressing a lack of pro activity and poor timekeeping. On page 173 there are a series of six quotations from colleagues. These included:-

> "I feel that Jamie could also develop on his communication skills as he can come across confrontational", and
>
> "Jamie has provided no contributions when he came here and when he came back. For example he didn't chase up any of his passwords when he came back and another member of our team had to do everything just so he could get back on track".

This is a reference to the claimant returning from a 4-5 week secondment in March/April 2016 to Environmental Support and the apparent connectivity problems that the claimant had with his passwords about which Michael Storrar had reported. Another comment in the mid term review referred to the claimant having the ability to do well in the room "unfortunately I don't think that the effort or interest is there …". The overall evaluation and rating is recorded as "stalled". The report goes on to state:-

> "Probably the biggest issue over the last six months and prior to that is Jamie's timekeeping. The case was raised with BUPA as a consequence of this and their overall assessment was to assist Jamie by allowing him some flexibility based on sleep issues relating to his disability. In essence Jamie was afforded some lenience to come into the office later than 10:00am as long as he made his hours up, however this became commonplace and there were question marks over whether Jamie was staying later to make up his hours. Repeatedly Jamie was spotted coming in early and leaving the office earlier than he should. Jamie rarely informed his lead team that he would be arriving late and didn't always come straight to the office".

The claimant makes a series of points about the contents of this document. First he complains of the feedback comments and, insofar as there is a reference to his communication skills and his coming across as confrontational, he asserts that this is a consequence of his condition of Asperger's. Secondly he challenges the overall evaluation and rating and the comments upon his timekeeping.

6.5 Next, on 28 July 2016 the claimant was issued with a written performance improvement plan (PIP) by ES for a period of 12 weeks expiring on 20 October 2016 (see pages 176-177). The reason given within that document was that there were still frequent incidences of the claimant starting work much later than the agreed adjustment without appropriate process being followed. The objectives are set out at the bottom of pages 176-177. They were:-

> "During any instances of lateness you are expected to make your way directly to the office as quickly as possible without distraction"
>
> "To ensure that your team lead is informed every time you know you will be late with an estimated time of arrival given".
>
> "To make sure the full 7.5 hours are completed each day and also convert the amount of long absences away from your desk to reasonable absences as decided by your team leader and finally to limit the amount of prolonged time spent on personal mobile phone during the day to a reasonable level as discussed and decided with your team lead".

The PIP started on 28 July but was suspended when the claimant raised a grievance some time in **September 2016**.

6.6 The written grievance is at pages 185-187. The claimant raised in summary the following topics – that his rating at the mid term review had been based around mainly false information provided by selected team members and in that connection at the bottom of page 185 he stated:-

> "Due to my main disability neurofibromatosis it leads to some traits of autism/Asperger's, as a result I may incorrectly come across in a negative manner with my tone of voice, this is not intentional and I feel the statement made by the team member is direct disability discrimination as defined by the Equality Act".

The claimant made other complaints about the feedback comments. He also raised the issue about timekeeping (page 188). At page 189 the claimant stated "As the grievance involves Elliott Sutton I do not feel it is appropriate for Elliott to be involved in the handling of the PIP". On receipt of the grievance, the PIP was suspended. The capability manager Mr Cleary, was appointed to investigate it. The claimant was interviewed on 7 October. We accept that ES did not see a copy of the claimant's grievance in which the reference to Asperger's was contained. In the course of this grievance the claimant asserted that he was being covertly monitored in respect of his timekeeping. The claimant asserted that he had sometimes worked through his 30 minute lunch break and therefore left the office earlier but that he had still done his 7.5 hours so that he had left early on occasions to attend medical appointments. The grievance was not upheld and the outcome letter was sent to him by Mr Cleary on 21 October 2016 (see pages 211-213). The claimant appealed. The claimant in his appeal letter against the outcome of the grievance stated at page 214 that in relation to communication skills "both Elliott and BUPA have been made aware of my conditions and diagnosis. As it is a personal matter I feel I should not disclose this to every single team member. However I feel that comments should still be removed as they go against both HP policy guidance and/or a breach of the Equality Act 2010". The appeal was rejected by letter of 13 December 2016 and at page 218 it is recorded under communication skills "Regarding your point that comments made on the FPR2 were discriminatory and that you do not feel that you should have to share your personal medical information. My understanding is that your manager is blocked from any visibility to your BUPA records and therefore cannot be fully aware of your condition and the possible side effects and neither are your colleagues which does make it difficult for them to make adjustments". The decision maker in her conclusions stated:-

> "My recommendation is that occupational health reassess your case and the impact have on your work and to review if there are further adjustments to be considered. I also believe that if shared with your management team this will be beneficial for both parties in managing the effects of your health on your work in particular when they are reviewing comments received on FPR feedback. Hence I would encourage you to allow any relevant information/recommendations to be made available to your leaders either directly or via a third party".

On conclusion of the first grievance (the appeal) the PIP was reinstated.

6.7 On or about 10 November 2016 the claimant asked to be removed from ES's team (page 148, occupational health note). Within a short time Cheryl Crossan became the claimant's line manager although she was not part of the team or the line manager of the team in which he continued to work. The PIP was reinstated as from 9 November for 10 weeks expiring on 20 January 2017.

6.8 Cheryl Crossan was at this stage managing the claimant's performance under the PIP plan and had regular meetings with the claimant. She asserts that the claimant had hugely improved in respect of objective 4, limiting the amount of time spent on his personal mobile phone during the day, but there had been no improvement in relation to the other three objectives relating to timekeeping. In consequence of this she sought advice from HR and was advised that the business should follow the formal capability process. A letter was issued on 23 February 2017 inviting him to a capability meeting. She also drafted a further PIP improvement plan dated 1 March 2017 – pages 182-184 – in relation to the claimant's timekeeping. The claimant was off sick during this period and did not return to work until 23 March. Cheryl Crossan had referred the claimant to occupational health in **March 2017** and a report was prepared and sent to her which she received on **24 March**. The claimant had given permission for it to be sent to her. At page 163 under recommendations Dr Reilly noted the adjustments in place in relation to start time with leeway of up to 45 minutes and asked for this adjustment to be kept in place. There is a reference in the same paragraph to the issue of access to toilets. He stated:-

> "I would reiterate the need for any toilets visits which are needed and some leeway about the length of time that he needs to spend too because with his mobility problem it will take him longer to get to the toilet and if there is the situation above where other people are using disabled toilets inappropriately then this is obviously going to impact on the length of his toilet break. It may be sensible to consider further providing him with his own toilet and a key so only he can use it which should minimise the impact on his toilet breaks. If not, if other people were actually prevented from using the disabled toilet this would undoubtedly help".

The report continued:-

> "The final point is that he has Asperger's syndrome which is one of the conditions which can cause difficulty with communication and this has been mentioned to him as an issue in the past. It can cause difficulty communicating his meaning to other people without causing offence and he has been criticised in the past for becoming confrontational when he has no intention of being … Without knowing the precise situation it is difficult to comment further but it may be appropriate for the organisation to reconsider its policy on communication generally and training for people to help all teams manage communication effectively …".

Clearly, on receipt of this report Cheryl Crossan was aware of the claimant's condition of Asperger's.

6.9 The claimant transferred together with the other members of the team, and the managers including Cheryl Crossan to the present respondent on **27**

March 2017. No further action was taken to arrange a capability hearing, nor was the PIP re-imposed before the date of the claimant's ET1 on **28 June 2017**. The only other event in the chronology which is potentially relevant relates to the accommodation provided to the claimant at the new premises at Benton Park View. The claimant's team was allocated accommodation on the first floor. Because of the claimant's mobility problems arrangements had to be put in place for health and safety reasons for the claimant's evacuation in the event of an emergency. ES circulated an e-mail to all members of the team asking for volunteers for Evac chair training on 19 April 2017. There were no volunteers at that time. The claimant was for a number of weeks allocated to the ground floor away from the team but had to travel to the first floor to get his laptops from a locker. He was then allocated a desk on the second floor where Cheryl Crossan's team worked and there were existing Evac trained staff. These were not available however after 4:00pm when the claimant was frequently working because of his late start times. Accordingly, the claimant had to travel down to the ground floor (where there were no evacuation problems) with his laptops from 4:00pm onwards, to complete his working day. He had to return his laptops to the second floor. The respondent then found a spare locker for him on the ground floor on 4 July 2017, he still had to travel down to the ground floor at 4:00pm but the difficulty he had with his laptops was resolved. The claimant asserts that he was given the responsibility for data collection stats for staff, including the recording of time of arrival and leaving, as a covert way of monitoring him. The claimant raised a second grievance on 21 June 2017, pages 495-497. The issues raised were:-

6.9.1 Delays in setting up an occupational health referral by Cheryl Crossan.

6.9.2 Evac training, the specific allegation being that it made it difficult for him to conduct work for the team.

6.9.3 That he had been excluded from a circulated opportunity/secondment to the UC Digital Team.

6.7.4 Hot desking – referring to his need to relocate to the ground floor each day at 4:00pm.

7 That concludes the chronology of the events up to the date of the ET1 on 28 June.

8 On the basis of these events we need to state our further conclusions on a number of important allegations. First, having considered the conflict between the claimant and essentially ES as to ES's knowledge of the claimant's disability of Asperger's, we are satisfied that ES was not aware that he had Asperger's and did not discover it until much later from other Managers following the receipt of the final occupational health report which referred to it dated 17 March 2017 and not delivered to Cheryl Crossan until 24 March. This is an important finding. We reached that conclusion because the claimant is vague in his evidence as to the precise circumstances in which he conveyed the information to ES. Secondly, we are satisfied that if ES had been notified of that fact he would have referred to it in references to occupational health. Thirdly, the occupational health reports following meetings with the claimant did not mention the issue of Asperger's until 19 August 2016. The claimant cannot have notified OH of

that condition up to that point. The claimant objected to its disclosure to ES and it was not disclosed at that time to any member of management. Therefore the respondent had no knowledge or deemed knowledge of the existence of that condition at least until March 2017.

9 It is of importance to the claimant's complaints relating to the mid term review, where there are adverse comments about the claimant being confrontational and having communication difficulties, which in turn may have played a part in the decision to rate the claimant as "stalled". If it had been established or the respondent had deemed knowledge of Asperger's then there would have been at least the potential for a section 15 claim of disadvantage because of something arising in consequence of the disability. We do not accept that the fact that other members of the team identified communication difficulties and an apparent confrontational attitude on the part of the claimant was sufficient to put the respondent on notice that he might have Asperger's. Accordingly a section 15 claim cannot succeed.

10 Next there are a series of complaints relating to the claimant's treatment not only in the mid term review but also in respect of the imposition of PIPs based on the proposition that any timekeeping difficulties which the claimant had and which caused the respondent to act as it did, were themselves related to his other disability namely serious mobility problems of which the respondent was clearly aware. However these claims are also without foundation because we have accepted ES's evidence and that of Cheryl Crossan that the claimant was frequently late in arrival at work even taking into account the reasonable adjustments that had been made; and frequently left before completing a full day's work. These were not related in any way to his disability and occurred irrespective of any medical appointments he may have had during working hours, or his parking problems, or his toilet access problems. The extent of the claimant's poor timekeeping is corroborated by the information contained in the documents at pages 364 and 365. In short, the respondent was amply justified in imposing PIPs and notifying the claimant in March 2017 of an intention to impose a further PIP, and in inviting him to a disciplinary process.

11 **The conclusion in relation to the evac chair issue**

We have set out our findings above. We conclude that whether the circumstances are labelled as a failure to make a reasonable adjustment or a section 15 claim they must also fail. The respondent was making adjustments to deal with a complex problem arising from the provision of a safe workplace for the claimant. Various adjustments were put in place over a period of time from 27 March to 4 July which was after the date of the ET1. During this process some minor inconvenience was caused to the claimant in particular having to convey his laptops in a wheelchair after 4:00pm. We do not accept that this constituted a detriment in the circumstances in the time up to 28 June, reasonable adjustments were being made to accommodate the claimant's late working hours, themselves an adjustment, and for his personal safety.

12 **Access to the disabled toilet issue**

It is to be recognised that this was not a matter which the claimant raised in his initial ET1 dated 28 June 2017. It was mentioned obliquely in his further particulars as of 11 November 2017, page 66:-

- Access to a accessible toilet which is not abused by other colleagues and left in a dangerous condition and not a combined shower room/wet room.

And at page 67 under reasonable adjustments:-

- Radar key locks on disabled toilets to prevent use by non disabled employees.

It was mentioned in similar terms in the second further and better particulars of 21 February 2017 at page 65B. He gives more detail of this allegation in paragraphs 16-20 of his later witness statement but he did not identify when or at which premises the supposed difficulties arose. This is an example of the considerable number of diffuse matters of complaint which the claimant has raised in the course of these Tribunal proceedings. But he did not raise it as an issue in either of his grievance processes, the latter being raised on 7 July 2017. We understand that the essence of his claim relates to the difficulty in accessing the single disabled toilet at Benton Park View which was a dual use toilet because non disabled employees were permitted to use the shower within it, particularly those who cycled to work. This led to the floor being wet. We note that on **21 July 2017** the claimant slipped at work, we understand in the wet toilet, after which the claimant went on sick leave until 30 July, for one day, and then there was a further period of sick leave from 11 August to 3 December 2017, which itself led to a delay in the continuation of the formal disciplinary process to which he had also been invited on 21 July. All of these matters took place after the date of the ET1. This is an example of a claim being constructed after the event. There is no evidence that he raised it as an issue prior to 21 July 2017 and this is reflected in the fact that Cheryl Crossan does not mention it in her witness statement until paragraphs 24-25. From early August 2017 (but not before) Cheryl Crossan says that she worked with the facilities accommodation team to discuss taking the shower out of use so that the toilet could be used without the risk of a wet and slippery floor. It is a matter of record that the claimant was off sick from early August until December 2017. As it transpired, that proposal was vetoed by the HMRC and from our personal knowledge it is not uncommon for there to be dual use disabled toilets incorporating a shower for the use of the non disabled. In any event, it is not possible or practicable for an employer to guarantee immediate access on demand to a disabled toilet. We are satisfied that there was adequate provision of disabled toilets at these premises. This is not a breach of section 15 or a failure to make reasonable adjustments.

13 **Phone calls**

The claimant claims that he was the subject of criticism for the number of phone calls which he made from his desk and their length. He particularly asserts that the phone calls that he made were principally in relation to medical matters related to his impairments. If they were not, he asserts that he was discriminated against because able bodied employees had the facility to get up from their desks and go out of the room to take their own personal calls. This claim fails because we accept the evidence of ES and BP that particular calls made or received by the claimant at his desk could be overheard and identified as not being medically related, for example a particular call made in respect of his motor car. Insofar as he was accused

of making lengthy phone calls as alleged, we find that the respondent's raising of the matter was not a detriment arising from something to do with the claimant's disability.

14 There is also a generalised complaint that the claimant's team were operating an ongoing targeted campaign of criticism against him. We do not accept this matter. We accept that insofar as matters of the claimant's poor timekeeping and the state of his desk were raised by some members of the team, these issues were unrelated to his disability and insofar as they related to his supposed confrontational attitude, which might have been related to Asperger's, the respondent had no means of knowing that this might be something arising from his now admitted impairment of Asperger's.

15 We further reject the claimant's claim of harassment. Any comments or criticisms made of the claimant did not relate to his disability. There were no acts of detriment to which he was subjected because he raised issues in his grievance relating to his disability. There was thus no victimisation.

_____

Employment Judge Hargrove

Date 28 March 2018

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.