Neutral Citation Number: [2019] EWHC 395 (Admin)

Case No: CO/2068/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2019

Before :

JEREMY JOHNSON QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Between :

THE QUEEN
on the application of
PAUL ATHERTON **Claimant**

- and -

SECRETARY OF STATE FOR WORK AND PENSIONS **Defendant**

- -
- -

Paul Atherton acting in person
Laura Farris (instructed by the Government Legal Department) for the Defendant

Hearing date: 13 February 2019

- -

Approved Judgment

Mr Jeremy Johnson QC:

Introduction

1. The Claimant is homeless. He suffers from Chronic Fatigue Syndrome ("CFS"). He is reliant on social security benefits. Efficient and effective communication with the Department for Work and Pensions ("DWP") in relation to his benefits is essential to him. He finds communication by postal mail difficult. That is partly because he does not have his own permanent address. It is also partly because his medical condition means that he does not know from week to week whether he will be in hospital or whether he will be staying with friends, or elsewhere. He cannot always travel, so collecting mail from a Jobcentre is difficult. He cannot communicate by telephone because he does not have one. Email communication is much easier for him. He has had difficulty in persuading the DWP to communicate with him by email. By these proceedings he initially challenged the DWP's refusal to communicate with him by email. He said that insisting on postal – rather than email – communication amounted to a breach of its public sector equality duty ("PSED") pursuant to s149(1) Equality Act 2010. He also said it amounted to a breach of its duty to make reasonable adjustments to accommodate his disability, pursuant to ss20 and 29 of the 2010 Act. The DWP, for its part, says that it has now sought to accommodate the Claimant's preferred means of communication by way of a "workaround" that enables email communication. The Claimant considers that the workaround is, itself, flawed and that there is a continuing breach of the DWP's duties under the 2010 Act.

The factual background

The Claimant's medical condition

2. The Claimant has had CFS for many years. He describes it as a "relapsing and remitting condition, with recurrences at least every few months." During a relapse he says he is unable to speak or move and he therefore spends significant periods of time bedbound. A letter from his GP in April 2013 states:

> "Paul has a long history of Chronic Fatigue Syndrome whereby he will have crashing and debilitating fatigue on and off for 2-3 days in a week. These episodes are so bad that he actually requires a wheelchair during these times and is unable even to walk a few paces. Day to day this means that some days he can get around and be mobile and other days he can't move at all, making it often physically impossible to carry out activities of daily living…
> …
> I would note that he now has dependant oedema in his legs from his lack of mobility and this in itself is caus[ing] problems with the fitting of his shoes and his mobility."

3. A further letter from his GP in June 2018 states:

> "…his disease takes a fluctuating course. He can be well and moderately energetic at times, with a rapid relapse to exhaustion and being bedbound – sometimes within hours…

> …
> Mr Atherton has been so unwell with CFS in the past that he has been [un]able to move around or to travel.
>
> The regularity and predictability of Mr Atherton's ability to move around and travel, including using public transport, is impacted by his condition."

4. The Defendant is suspicious about the genuineness of the Claimant's claims as to his medical condition and his entitlement to benefits. She says that the GP's letters are based on the Claimant's self-reporting. That may be so, but the GP does not give any indication that any clinician has ever had any doubt as to the Claimant's genuineness (the Claimant having been under specialist care since 2003). Moreover, the GP does refer to clinically verifiable symptoms (the dependant oedema). The Defendant has not herself adduced any contrary medical evidence.

5. The Defendant then points to the Claimant's prolific use of social media, which commands an extensive following. The Claimant tweets under the handle @LondonersLondon. The Defendant observes that at the time the Claimant wrote a witness statement which referred to being destitute and bedbound, he had, according to his twitter feed, attended an "absolutely stunning" performance of Falstaff at the Royal Opera House with the "brilliantly humorous" Bryn Terfel in the lead role, stayed at the Soho Hotel, dined at the "Caffe In" in Mayfair, and enjoyed the "amazing (but sad)" last ever Paul Simon concert at the Hyde Park festival. The Defendant asserts that tickets for the performance of Falstaff started at £282.50. She also points to evidence about the Claimant working for a radio station, "Colourful Radio."

6. The Claimant responds that the Defendant has been highly selective in her reliance on his tweets, that there are many others that reference his medical condition, and that they are entirely consistent with his evidence that his condition ebbs and flows, sometimes allowing him to travel and attend events, and sometimes not. His work for Colourful Radio was all pre-recorded except for one occasion when the Claimant managed to attend a live show. All of his work was unpaid. The Claimant's tweet about Falstaff included an image of his ticket which appears to show a purchase price of £0, consistent with his evidence that he is adept at securing free access to cultural events.

7. The Defendant's grounds for defending the claim do not challenge the genuineness of the Claimant's condition. Ms Farris, for the Defendant, says that the tweets were only discovered late in the course of the proceedings. However, even now the Defendant does not positively assert that the Claimant's account is untrue: when I pressed Ms Farris on this she responded that the Defendant "could neither confirm or deny" that the Claimant was disabled within the meaning of the 2010 Act, just that she had "genuine concerns". There has been no application to amend the grounds of defence to deny the Claimant's account that he has a disability (or to put him to proof on this issue), no application to cross-examine the Claimant on the veracity of his statements, no application for disclosure of medical records and no application to adduce medical evidence. The Claimant, who now acts in person, has not had a fair opportunity to respond to a fundamental challenge to the veracity of his account (for example by way of producing medical evidence).

8. In the circumstances, I approach the claim on the basis of the Defendant's pleaded defence. That does not challenge the Claimant's account that he has a disability but instead defends the claim on the grounds that the DWP has complied with the PSED and has made reasonable adjustments to its processes in order to accommodate the Claimant's disability.

9. I therefore disregard the social media material on which the Defendant sought to rely and proceed on the basis (which appeared to be common ground in the pleadings) that the Claimant has a disability amounting to a protected characteristic within the meaning of the 2010 Act. In doing so, I make no finding that is binding on the Defendant when considering the Claimant's eligibility for benefits.

Claimant's receipt of benefits

10. The Claimant has, since 2001, been in receipt of Disability Living Allowance ("DLA") and Incapacity Benefit ("IB") on the grounds of disability and incapacity for work. These are legacy benefits. They have been replaced by the Personal Independence Payment ("PIP") and Employment and Support Allowance ("ESA") respectively. ESA is, in turn, being replaced by Universal Credit. The Claimant has remained on legacy benefits because he has not undergone a work capability assessment ("WCA"). A WCA is carried out by a healthcare professional and is used to establish capability for any form of work or work-related activity, and to determine entitlement to ESA. A WCA is a necessary requirement before payment of ESA.

11. There have been occasions when the Claimant has not attended medical examinations or WCAs. This has resulted in the suspension of payment of benefits (and this is currently the position). On two occasions he has successfully appealed to the First Tier Tribunal (Social Entitlement Chamber) resulting in the reinstatement of benefit payments pending his WCA. The decisions of the Tribunal refer to communication difficulties. Thus, on 13 May 2013 Senior Tribunal Judge Mrs Ward allowed the Claimant's appeal against a decision to stop payment of benefits:

> "It was accepted also that he had not received the notice sent to his former care of address, which was no longer available to him by the time the notice was sent. Mr Atherton has given sufficient evidence to show that on this occasion he had good cause for his failure to attend. It has now been made clear to him… that arrangements can be made for him to collect mail from his local jobcentre."

12. On 1 February 2018 Judge R Singh allowed an appeal against a further decision to stop payment of benefits for failing to attend an appointment:

> "Mr Atherton has shown good cause for his failure to attend the medical assessment… in relation to the Work Capability assessment. I found him to be credible and accepted his reasons. Accordingly he is to be treated as having limited capability for work until such time that a new assessment takes place.
>
> Mr Atherton has no fixed abode and all future correspondence should be via email only."

13. The Defendant stresses that she was not represented at the hearings before the First Tier Tribunal and that the findings that the Claimant had a good reason for not attending were therefore made in the absence of oral representations on behalf of the Defendant. This does not, however, begin to undermine the conclusions reached by the independent Tribunal judges. The Defendant was entitled to decide not to attend the hearings, but she is stuck with the result. Far less does it allow me to proceed on an assumption – in direct contradiction to these findings – that it is the Claimant's fault that he has not progressed from IB to ESA.

14. The position remains that the Claimant is in a period of potential transition from IB to ESA, and thereafter to Universal Credit. If and when he is ultimately moved to Universal Credit the position will be different, because this is administered by way of an online portal. That will remove the difficulties associated with postal communication. It may give rise to different difficulties: the Claimant says that older web browsers (such as those run by computers in public libraries that he typically uses) are not compatible with the Defendant's modern online portal. Be that as it may, the issue for now concerns the management of communications with the Claimant pending his progression to Universal Credit.

DWP's response to requests for alternative forms of communication

15. Up until 2014 the Claimant was largely able to communicate with the DWP without significant difficulty. He had a single point of contact, and he communicated by email. That system broke down in 2016. The DWP said that it could not email a copy of its decision in relation to his benefits by email: it said it could not send emails when "confidential information" was involved. On 6 October 2016 the Claimant explained that his need to use emails arose not only because he was homeless but also because of his disability. On 7 October 2016 a DWP official responded "I am not a medical person nor do I have knowledge of or suggest that your disability is such that it would be a barrier or otherwise in terms of you being able to contact us in writing." On 13 October 2016 the same DWP official wrote:

> "I have spoken to our Security team and been advised that a decision notification cannot be sent by email to you. If you will tell me which Jobcentre is nearest to you, I will email a copy of the decision notification to that office via our secure network for you to collect. Please advise me of the day and time you will attend in order that I can make an appointment for you."

16. The Claimant responded:

> "I hereby grant you permission to send all notifications by email. I assume the Security Division, ludicrously, has concerns over Data Protection Act (DPA) issues. Well, as the DPA is there to protect… I absolve them of that responsibility.
>
> [The Claimant drew attention to paragraph 2 of schedule 9ZC to the Social Security (Claims and Payments) Amendment Regulations 2016 which permits the Defendant to use – subject to certain conditions – electronic communications in connection

> with claims for, and awards of, disability living allowance and incapacity benefit (amongst other benefits).]
>
> As you know, Law always supersedes Policy.
>
> If you're aware of any other legislative reason why the DWP cannot send me my information by email, then please alert me to it, so I can address it.
>
> My health (Disability) and homeless condition mean I'm not based in any one point in London at any one time, so don't have a "local" job centre. So as by law you have to accommodate for both my [disability, under the Disability Discrimination Act 1995] and my circumstances (Human Rights Act 1998 Article 14) then email is the fairest and most reasonable way to achieve this."

17. On 19 October 2016 the DWP asked the Claimant how his health problems affected him in his daily life, so that a decision could be made regarding email. The Claimant responded that the DWP had been aware of his health problems over a long period of time, but that they were as follows:

> "At my worst, as it is a relapsing, remitting condition, I'm completely bedridden unable to move or speak (a state which has in the past lasted up to 2 years). At my best I suffer from memory loss, disorientation, sound [synaesthesia] and an aversion to telephones… which is why it is imperative for me to use email…"

18. On 23 November 2016 the DWP asked the Claimant to provide a postal address (without having responded to his contention that his medical condition meant that he could only correspond by email). The Claimant replied that the DWP was fully aware that he did not have access to a postal address. The DWP responded "we do not sen[d] confidential information via email."

19. It is possible to detect signs of frustration on the part of the Claimant in his response of 24 November 2016:

> "How on heavens earth, can a bit of paper, wrapped in another bit of paper secured only by a drop of saliva, passed through a 100 strangers hands and dumped through a hole in a door, be considered to be safe? When an encrypted email, which is broken into a 100 separate parts, routed through servers across the world before being reassembled in ONLY that individuals email inbox and never encountering a human being, that's trackable, traceable, receipt confirmed and read confirmed and is protected by an algorithm that if broken would award the recipient a £1Mllion prize, as yet unclaimed, be considered unsafe?"

20. The very extensive communications between the Claimant and the DWP culminated in an email from the DWP to the Claimant on 26 January 2017 in the following terms:

> "Security team have advised me that, after speaking to data protection team that your disclaimer is insufficient alone to allow personal details to be sent by email. DWP are the data controllers and owners of the information and we have to show the Information Commissioner's Office that the data we own is not at risk. The Departmental use of email must be looked at in line with the reasonable adjustments policy and it must be demonstrated how your health problems affect you in daily life to see if the adjustment of communicating by email is reasonable. DWP have obtained information from your GP which has been used when considering the reasonable adjustment policy. DWP have also taken into account the reasons you have provided.
>
> The decision which has been made on the available evidence is that personal details or documents containing personal information will not be sent via email to you. This decision has been made following consultation with DWP security team and DWP equality team.
>
> DWP can send emails which are general and do not contain any personal information.
>
> I have noted your reply regarding why you would be unable to attend a Jobcentre, however in order to receive the documentation you require to challenge the Mandatory reconsideration you need to physically have the document MRN1."

21. An hour later the DWP sent a further email:

> "Apologies, I misunderstood what information they wanted me to inform you with. From looking at your case in more detail, the case has come to a halt as there is no correspondence address. Our alternative format team have looked into your case and decided that it is not a reasonable adjustment to send emails to you regarding your claim for the reason of homelessness. (more details provided in previous email) Without an address our Assessment Providers will not look at the claim and there is not enough evidence from your DLA file to base a decision.
>
> The suspension has been put on to prompt you to contact us. (they stated that you contacting me via email is not reason enough to lift the suspension). They are still requesting a correspondence address as we have had one previously to send you the PIP1 and PIP2.
>
> I have been informed that I can only contact you via email to gain a correspondence address but due to security I will not be able to discuss your claim in depth via email in the future. You should also refrain from putting your national insurance number in emails as it is not secure."

22. A third email was sent by the DWP later the same day:

> "…the decision to deny reasonable adjustments (emails) was made based on homelessness and not information obtained by your doctors. This reason has not been accepted.
>
> I was instructed to inform you that we require a correspondence address and the provide you with the decision for your reasonable adjustments."

23. These three emails from the DWP, together with the continuing response thereafter, comprise the decision that was initially under challenge in these proceedings.

24. A pre-action letter of claim was sent to the Defendant on 7 April 2017, challenging the legality of this decision on grounds that included incompatibility with the PSED and breach of the duty to make reasonable adjustments in the light of the Claimant's disability (in effect, if not in precise legal detail, the grounds that had been intimated by the Claimant himself in his earlier email correspondence – see paragraph 16 above). These proceedings were filed with the Court on 25 April 2017, after the time for responding to the pre-action letter and before the Defendant had provided a substantive response.

25. On 28 April 2017, in response to the pre-action letter of claim, the Defendant agreed to put what was stated to be a "temporary reasonable adjustment" in place whereby the Defendant would communicate with the Claimant by email whilst the Claimant remained homeless or until such time as the Claimant could reasonably be expected to use a "care of address". It was a condition of this arrangement that the Claimant consent to his data being transmitted outside a secure network by internet based email. The claimant has given the requisite consent (indeed he had explicitly done so in his earlier emails).

26. It was a further condition that the Claimant agree that communications for him be sent by the Defendant by post to the local DWP office using a "care of address". The officials at that office would then arrange for the letters to be sent to the Claimant by email. This "workaround" (which is described in further detail below) was necessary because the Defendant's technology simply did not permit system generated communications to be sent directly by email. The Claimant considered that it was unclear as to where responsibility would lie for ensuring the forwarding of communication, and his experience of the DWP led him to believe that there was a significant margin for oversight or error. An issue also arose as to the risk that communications to the Claimant from other Government Departments might be caught up in the workaround and might go astray.

Other evidence of difficulties in persuading the DWP to make reasonable adjustments to its methods of communication in order to accommodate disability

27. The Claimant is not alone in having these types of difficulty. He has filed witness statements from:

(1) A 38 year old man with epilepsy and depression who says that he could not reliably communicate by telephone due to his epilepsy and memory loss. The DWP refused

to communicate with him by email because email was said to be an unsafe form of communication. He did not consider that the risk of data loss with email was as real as the actual data loss that he had experienced many times with postal communication from the DWP. He had to make repeated calls to request a reasonable adjustment and he experienced serious distress. The DWP only agreed after the threat of legal action under the 2010 Act.

(2) A 55 year old woman with bowel disease who, for a period of time, lived in Spain. Her disease made it difficult to leave the house in order to post or collect letters. Her benefits were terminated, it seems as a result of communication difficulties:

> "I had my first panic attack and my mental health went into free fall from then on. I asked the DWP to email me because I couldn't access the letters and also because they had written to me to ask me to attend an appointment with very short notice that I could not accommodate because of my bowel disease. I did not know what a reasonable adjustment was – and so didn't put my request in those terms, but explained I was disabled and couldn't access the post and so needed communication by email. The DWP refused my requests."

It was only after a solicitor intervened on her behalf that the DWP (eventually) agreed to use email for a period of 6 months.

(3) A 53 year old woman with post-traumatic stress disorder who has difficulty leaving her home (because of agoraphobia, telephone phobia and flashbacks). Numerous requests to use email or fax were wither ignored or refused. She utilised an internal complaints procedure, and her complaints were upheld at a second tier process (by the Director General of the DWP). Since then, she has been able to email the complaints office directly when she has needed urgently to contact the DWP. More recently, the DWP has agreed to send all of its correspondence to her to the Birkenhead Alternative Formats Team, where it would be converted into an electronic document in portable document format ("PDF") and sent as an email attachment. However, she had to respond by post:

> "This 'reasonable adjustment' did not take into account my disabilities. In an email sent 1st June 2018, I asked why I was being asked to print off and post back forms and correspondence. I reiterated that the reasons for asking for email as a reasonable adjustment is because I am largely housebound and often unable to make or accept telephone calls. Therefore, their proposed system of a local Alternative Format Team scanning letters and emailing them to me, and for me to then post forms and letters back, would not suitably adjust the system to account for my disabilities.
>
> I received a response 5th June 2018 that the team had considered my case and on "this occasion" were willing to accept PDF documents by email from me."

(4) A 58 year old man who is registered blind. The DWP did agree to email him, but redacted key information which he needed when required to give proof of receipt of benefit. He was advised by a solicitor that he had grounds to bring a legal claim, but he was not eligible for legal aid. He sent a pre-action letter of claim as a litigant in person. The DWP responded positively, setting out how it had sought to comply with its duties and explaining that it was committed to making further changes. A single point of contact was provided, and all emails were sent with attachments in "Word" format so that they could be edited.

28. The Claimant's former solicitor has also provided a statement in which she sets out the experience of two further individuals, "Q" and "R", who wish to remain anonymous. For that reason the evidence needs to be treated with some caution. It is, however, consistent with the other evidence that has been filed on behalf of the Claimant and it is not explicitly challenged by the Defendant.

29. "Q" describes herself as a woman in her mid-20s with various physical and mental impairments including a visual processing disorder and debilitating migraines. She says:

> "After the DWP agreed that I required some form of reasonable adjustment, a DWP employee phoned me to discuss how the reasonable adjustment would operate in practice. I was concerned about sensitive information being sent by email, so requested that they password protect the document and send it as an attachment and tell me the password by phone. I was told that the DWP was not allowed to do this.
>
> As an alternative to this, I also requested the document by a password protected CD. The DWP stated that they did not have the facilities to provide that.
>
> I was made to feel this was a favour that was being done for me, rather than a reasonable adjustment that I was entitled to. I was made to feel like a massive inconvenience for requesting a reasonable adjustment to the DWP's communications policy."

30. "R" is a middle aged man with visual dyslexia and CFS. He describes his CFS in similar terms to the Claimant. He too has had great difficulty in persuading the DWP to adopt reasonable adjustments. He received no response to a request that the DWP provide letters in a suitable font and background colour. He now receives audio CDs, which are recordings of a person reading DWP letters to him:

> "I do not understand why the ESA team cannot just send me the letters digitally by email or send the letters in the font and colour required. I still get the 'normal' ie unadjusted DWP ESA letters in the post with the audio CD, which is confusing and distressing if I think I have to work out what it says. I am concerned that there is a significant time delay in the letters being sent to me and that one day I may suffer or be otherwise negatively impacted as a result. A letter and CD dated 6th March 2018 only

> arrived by post [on] 26th April 2018… The stress and anxiety that this has caused me has delayed my recovery."

31. The Claimant also relies on evidence from witnesses who work for bodies that have particular experience of the difficulties encountered by those with certain disabilities when seeking to communicate with the DWP.

32. Samantha Fothergill is a senior legal adviser at the Royal National Institute of Blind People ("RNIB"). The RNIB's ambition is "to change the world for those living with, and at risk of, sight loss." Ms Fothergill has represented a number of individuals in respect of complaints about the DWP's failure to provide accessible information. All of the cases were eventually settled. The RNIB has engaged with the DWP since 2013 in an attempt to secure the provision of a system of communication by the DWP which is suitable for use by those who are blind or partially sighted. She accepts that the DWP's policy is to provide email to blind and partially sighted customers who request that as a reasonable adjustment. She is, however, concerned that this policy is not sufficiently well advertised, and that the disclaimers and requirements for consent discourage the use of the system. Ms Fothergill says:

> "RNIB believes that where the DWP introduced new computer systems e.g. with Universal Credit, these should have been set up in such a way that not only allow for the recording of required format details without any detriment to the client, but also the system should be able to generate digital communication direct to the client again without the client having to forgo or risk any specific detriment as a result of the communication system in place. Where there are older systems still in operation, which we anticipate will be the case for some years to come before Universal Credit is fully rolled out, the Department must either make reasonable adaptations to allow for the recording of preferred format and permitting electronic communication directly without detriment to the individual, or make clear the justification for not making those adaptations.
>
> RNIB is extremely concerned by the Department's approach to the provision of accessible information. It does not appear to us that the Department has been at all proactive in considering the provision that it makes for people whose disability prevents them from accessing standard communications. The Department only appears to be prepared to take on board these comments and take action when they are accompanied by the threat of litigation and even then the process is extremely slow…. Almost 20 years after the requirement to make reasonable adjustments came into force, we still appear to be dealing with the most basic of accessibility issues."

33. Sally Etchells, of the National Deaf Children's Society ("NDCS"), says that the NCDS is aware of difficulties young deaf people have in requesting email communication as a reasonable adjustment. It has campaigned for an online application system and for the email address to be included on the DWP's PIP website. The DWP had refused to publish a correspondence email address.

34. Svetlana Korova of Inclusion London, a charity run by Deaf and Disabled people promoting equality and inclusion, has also provided evidence. She says:

> "In March 2017 Inclusion London conducted a small survey of claimants who had requested an email communication as a reasonable adjustment. Only 2 individuals managed to secure an agreement from the DWP to communicate via email out of 22, who needed an email communication because of the difficulties they have with reading letters or communicating over the phone. None of the respondents with autism or mental health support needs was able to get an agreement to communicate via email.
>
> From my experience Disabled people are often unaware they can ask for communication via email and the DWP does not make it clear to them. Moreover, those who ask for email communication are discouraged by the frontline staff. For example respondents in our 2018 survey said they were told from the outset by the DWP telephony staff that communication via email was not possible.
>
> …We sent a [request under the Freedom of Information Act 2000] to the DWP asking for information about the number of complaints made to the DWP about the failure to make adjustments to communications policy on equality and disability grounds. Their response says that they do not collect this information, which is in itself concerning."

35. Michael Nastari of Stonewall Housing has explained the impact of the DWP's insistence on a postal address on homeless disabled people:

> "Having no fixed postal or care of address can be a significant barrier for homeless people accessing benefits and in accessing their right to appeal negative decisions. The issue is particularly acute for homeless people with mobility issues, who can find it impossible to get to a care of address."

36. A review by the Defendant of "Alternative Format Communications" in March 2015 (and carried out following the engagement with the RNIB referred to at paragraph 32 above) set out the responses of thirty five national disability organisations to a series of questions:

> "**Please tell us how easy it is to obtain DWP letters and leaflets in an Alternative Format?**
>
> …the general theme was that it was often very difficult, and at times impossible, to obtain the information in the required format. Customers were sometimes informed the adjustment or format was not available. Making a complaint about the service was bureaucratic… Often customers were referred to Complaints Helpline who, in turn, referred the person back to the same location… where the original problems occurred.

> **How consistent is the provision of Alternative Formats once you have requested it?**
>
> The general theme, again, was that success in obtaining Alternative Formats was inconsistent. Often DWP would provide a communication in a requested format, only to revert to standard format for subsequent communications.
>
> **When information is provided, was it in a format that could be used, for example… email.**
>
> Again, the response here was that information is provided in a helpful format inconsistently. … Email communications were rare and agreement to email as an Alternative Format was inconsistent, often requiring repeated requests from the claimants.
>
> **If you could improve the provision of letters in Alternative Formats from DWP, what you would change about the current service?**
>
> The most common responses received were:
>
> • Allow contact by email
>
> …
>
> **Overall, on a scale of 1-10 with 10 being excellent and 1 being poor, how would you rate the consistency of information in Alternative Formats from DWP?**
>
> Overall the responses gave low scores, with many scoring only 1 and some suggesting that a negative score would be appropriate if available…"

37. The Defendant's response to the extensive evidence that I have summarised above is, with some understatement, to accept that this identifies "shortcomings" with the DWP's provision of email as a reasonable adjustment which, she says, has not been "flawless". She argues that the DWP is not legally required to provide a "perfect" system and that it is only required to provide "reasonable adjustments where possible". She says that the "evidence advanced by the RNIB and the various other campaigning organisations…. has been duly noted" and that it will "where possible, be used to improve the implementation of the Policy." She also points out that this evidence is of less direct relevance now that the focus of the claim has changed.

DWP's evidence as to its use of email

38. The DWP is able to, and does, communicate by email with benefit claimants in relation to matters such as invitations to appointments. However, it operates a rule that such communications must not contain personal information. This is to ensure the safeguarding of personal data. Charlotte Knaggs is the DWP's Head of Customer Communications and accessibility. She says:

> "It is important to bear in mind that the current security policy has to be placed in the context of a world where cyber-crime and data theft are rising at an exponential rate and keeping one's data safe and secure is becoming ever more difficult. The Department, as one of the largest Data Controllers in the UK, is required by data protection legislation to process data in a secure manner and avoid data loss/theft as far as reasonably possible. It is for this reason that staff working at the Department are keen to avoid the use of insecure email where possible, unless there is good reason to do so. It does need to be remembered that the Department is doing this for the benefit of its customers and is not merely seeking to put in place rules and regulations which cause individuals inconvenience and distress for no reason."

39. The prohibition of the use of email for communications that include confidential information means that the ability of benefit claimants to communicate by email with the DWP is significantly restricted.

40. The DWP recognises that in certain circumstances its statutory obligation to make reasonable adjustments under the Disability Discrimination Act 1995, and now the 2010 Act, includes a duty to communicate with benefit claimants by way of email, even where this would involve the communication of confidential information. It first decided to provide email communications as a reasonable adjustment in 2010, more than a decade after the statutory duty to make reasonable adjustments came into force. Its "Providing ESA Alternative Formats" policy states:

> "DWP has a legal duty under the Equality Act 2010 to make reasonable adjustments to ensure alternative formats (AF) are available in Braille, Large Print, audio as standard. We are also able to offer emails and bespoke requests such as coloured paper if these do not meet the claimant's needs."

41. Ms Knaggs, in her witness statement, makes an unambiguous commitment on behalf of the DWP:

> "the Department's policy in relation to email as a reasonable adjustment is clear; email is made available to disabled customers who require it as a reasonable adjustment."

42. Where the DWP agrees to use email as a reasonable adjustment the prohibition on the inclusion of personal information in emails is disapplied, although DWP staff are encouraged to limit the amount of such information to that which is necessary.

43. The DWP accepts that, as it puts it, the understanding of its frontline staff as to the obligation to provide email as a reasonable adjustment "has not always been consistent throughout the UK." There is evidence that the DWP has sought to address this by way of an entry in a weekly update that was sent in November 2014 to its Operations Line Managers "for you to cascade and discuss with your team".

44. Ms Knaggs refers to the work done between the DWP and the RNIB over a period of years (see paragraphs 32 and 36 above) to seek to address the issues. She accepts that

by 2015 it was clear to the DWP that the provision of alternative formats offered by the DWP "was falling short of what it should be".

45. The work with the RNIB culminated in a report in March 2015 (so 1½ - 2 years before the Claimant was pressing for the use of email communications by way of a reasonable adjustment to accommodate his disability). The forward to the report was written by the Minister for Disabled People. He said:

> "It is vitally important that information about our services is accessible to all and that we treat people fairly and equally. This includes making reasonable adjustments to meet the needs of all our claimants or customers who have a disability as defined by the Equality Act 2010… we will continue to take steps to improve current processes, for example by raising awareness of our people."

46. As a result of that review a Ministerial taskforce was established in 2015 in order to consider how best to improve the accessibility of DWP's services to those who are disabled. That taskforce meets quarterly and is attended by a number of charitable organisations, including the RNIB, Inclusion London and the British Deaf Association.

47. In December 2016 the DWP, in internal correspondence, recognised:

> "the service we currently provide to our disabled customers is inadequate. We are not meeting the communications needs of a significant number of our customers and are not meeting our duties under the Equality Act, so immediate intervention is required."

48. The minutes of a taskforce meeting in February 2017 (so around the time that the Claimant was told that DWP could not communicate with him by email because of security concerns – see paragraph 20 above) record:

> "Taskforce members raised concerns about customers not being able to send and receive information in their chosen format, such as braille, or email… Derek and the team are working to raise awareness amongst staff. Security staff [have] now agreed that email as a reasonable adjustment can be used. So the team will now be working on [e]nsuring that staff are aware."

49. In the same month a submission to the Minister for Disabled People stated:

> "Alternative Formats and customer communications needs have now been built into both the local and national quality check regimes for ESA, to further improve the level of staff compliance. We have also improved the quality of our telephony scripts and staff instructions across all working age benefits."

50. The DWP interacts with recipients of Universal Credit via an online portal. If and when the Claimant moves to Universal Credit that will address the concerns that have given rise to these proceedings (although it may well give rise to other, different, concerns –

see paragraph 14 above). In the meantime, communications with the Claimant in relation to ESA will be controlled by older computer systems.

51. The Defendant has filed extensive evidence as to the practical difficulties that arise as a result of its use of relatively antiquated IT infrastructure. Some of its systems are over 20 years old. They run on code that is written in obsolete computer languages. The Defendant has undertaken a "High Level Budgetary Estimate" of the work that would be required for those in receipt of ESA to receive system generated communications in an "alternative format." This would be achieved by adding a new data item to each entry in the Defendant's database in order to record the appropriate format of communication for that person. That might vary between a default format (such as hard copy with a font size of 12 point), Braille, large print, "Font 16", email and "other". The batch processing that is undertaken for sending communications would be amended so that it produces an output in accordance with the desired format. It is estimated that this would require between 1,400 and 1,650 days work. That would cost up to around £750,000. The Defendant says that this is an excessive cost for a legacy system that will become obsolete.

52. Instead, the DWP has adopted what it describes as a "workaround". This involves changing the address of a benefit claimant to the address of a central Alternative Formats team ("the AF team"). The effect is that system generated correspondence (which accounts for 80% of correspondence relating to ESA) is sent through the post to that address. The AF team then converts the correspondence into the requested format (eg email) and sends it to the benefit claimant.

53. The workaround has a wrinkle. The addresses of benefits claimants are stored in a Customer Information System ("CIS"). This is a database holding in excess of 105 million records. It is a "cross Government asset", meaning that it is used not just by the DWP but also other Government departments. As a result, the operation of the workaround will change the address not just for the purpose of the DWP but also potentially for the purpose of some communications sent by other Government departments. Ms Knaggs says:

> "Local Authorities use CIS for the assessment and maintenance of Housing Benefit/Council tax claims. DVLA use CIS to verify identify and to confirm entitlement to VAT exemption. BT Basic use CIS to verify phone charge reductions.
>
> The CIS system would broadcast a care of address to Local Authorities, HMRC via their Child Benefit System (which is hosted on the Department's network) but not directly to other HMRC systems, however, users from Other Government Departments will be able to view this data and in some cases it will automatically apply to records that they hold."

54. So correspondence from Government departments other than the DWP (particularly those identified) might end up being sent to the AF team rather than the intended recipient. Accordingly, anyone who wishes to make use of this facility must give their consent after being made aware of the potential that this might occur. In the event that a communication from another Government department is received by the AF team it is returned to the department concerned with an explanation that the AF team's address

should not be used. The DWP accepts that this is "not ideal" but it is unable "to identify another feasible or reasonable solution within [its] IT system constraints." It stresses that it has not received any complaints as a result of the diversion of mail from other Government departments. It carried out research over a 2 month period in order to assess the extent of the problem. This research showed that 13% of correspondence received by the AF team was from other Government departments rather than from the DWP.

55. As at September 2018 there were 3,700 benefits claimants who used the AF team. The vast majority of these request correspondence in large print. Only 32 request correspondence by email. It is anticipated by the DWP (but disputed by the Claimant) that both these numbers will increase.

Application of the workaround to the Claimant

56. On 31 August 2018 the DWP clarified how it would operate the workaround in the case of the Claimant.

57. Currently, all correspondence with the Claimant is by email. That is because of the very particular circumstances that apply to him (as a person whose Incapacity Benefit was suspended and then reinstated). When he moves to ESA communications would ordinarily be by post. However, the DWP has agreed to apply the workaround that is described above, by way of what it contends is a reasonable adjustment. This means that all correspondence relating to the Claimant's ESA claim will be sent by email, with the system generated correspondence being processed by the AF team in the manner indicated. The Claimant will be given the use of a shared email inbox so that he has access to two-way email communication.

58. A formalised process has been adopted for dealing with mail that arrives from other Government departments using the CIS details:

> "**Process**
>
> 1. Centralised team receive unopened non DWP post via Mail Opening Unit.
>
> …
>
> 2. Sorting of non DWP post.
>
> The origin of non DWP mail may be from HMRC or a Local Authority or another Government Department. The volume of post should be low, but if necessary it should be sorted accordingly for despatch.
>
> …
>
> 3. Preparation for Despatch.
>
> The non DWP mail will be inserted into a new covering envelope and the following typed statement using headed notepaper should be inserted into the envelope.
>
> *We have agreed with the correspondent in this letter that their correspondence is diverted to us to enable us to apply their*

> *chosen reasonable adjustment so that they can receive correspondence from DWP in their chosen format. However this arrangement does not include any non DWP communications. Therefore this correspondence has been returned to you unopened and undelivered. Should you wish to discuss this matter, please contact (insert name of sender and AF team address).*
>
> 4. Despatch Mail.
>
> All non DWP mail should be re-routed to the original sender on a daily basis to prevent any undue delays.
> …"

59. The application of the workaround to the Claimant will be kept under review. Improvements will be offered if these become feasible in the future.

60. The Claimant has refused to accept the workaround. As explained below he does not consider it amounts to a reasonable adjustment or to the discharge by the DWP of its PSED.

The course of the proceedings

61. The claim form was accompanied by a statement of facts and grounds, settled by counsel and setting out both the background facts and the grounds of claim in considerable detail. The case was stayed until 19 June 2017, and then again until 4 July 2017 with permission being granted to the Claimant to file amended grounds. This was done on 3 July 2017, the amended grounds responding to, and challenging, the workaround proposal in place of the original decision to refuse to offer a reasonable adjustment. The claim was then further stayed until 31 October 2017 to allow the parties to engage in mediation. The Acknowledgement of Service and Summary Grounds were filed on 22 November 2017.

62. Permission to claim judicial review was refused on the papers by an order dated 20 December 2017. The Claimant renewed his application for permission, and limited permission was granted to pursue amended grounds 1 and 2, namely that the offer of a workaround failed to comply with the DWP's obligations to comply with the PSED under s149 of the 2010 Act (ground 1), and that the workaround did not amount to a reasonable adjustment under s20 of the 2010 Act (ground 2).

63. By 8 March 2018 the matter had been listed for hearing on 7 November 2018 for 2 days. Directions were given for filing evidence and skeleton arguments. On 17 October 2018 the Claimant's solicitor applied to vacate the hearing and stay the claim (but not for more than 6 weeks, because it was said that the Claimant was "still experiencing prejudice") so as to allow alternative dispute resolution to take place. This was opposed by the Defendant on the ground that vacating the hearing would only "increase costs and lead to duplication of work, in a case where a very considerable amount of legal cost had already been incurred." A meeting between the parties took place but did not result in resolution.

64. By the time of the hearing on 7 November the Claimant had not filed a Skeleton Argument and it was said that his condition had relapsed and he was bedbound. The hearing was vacated with directions.

65. On 17 November 2018 the Claimant informed his solicitor that he did not wish her to act for him any more. He filed a notice of change of legal representative to indicate that his solicitor was no longer acting on his behalf and that he would be acting in person. His legal aid certificate had been discharged but he wrote to the Legal Aid Authority to ask it to reinstate the certificate. He said that he was in the process of appointing new counsel. On 12 February 2019 the Claimant sent to the Court an application asking that the hearing be adjourned to enable him to secure legal representation. I refused that application on the papers. I made it clear that (1) the Claimant could renew his application at the start of the hearing, and (2) if the hearing proceeded then, subject to representations from the parties, I would adjust the conduct of the hearing in order to assist the Claimant and in particular to seek, so far as was practicable, to put him on a level playing field with the Defendant and to accommodate his health difficulties.

66. The Claimant renewed his application to adjourn at the start of the hearing. He had not been in touch with any lawyer with a view to him being represented at a future hearing. He frankly accepted that he might be unsuccessful in securing legal assistance and that the case would then be no further forward, save that he would then have suffered the additional stress of the ongoing proceedings (which is impacting on his CFS). I refused the renewed application for the reasons given in my judgment of 13 February 2019. However, after discussion with the Claimant, I adjusted the hearing so that: (1) the Claimant could seek breaks in the hearing whenever he required them, (2) Ms Farris, for the Defendant, would make her submissions first, (3) the Claimant would be provided with a written note of the key issues on which he might wish to make submissions, (4) the Claimant would then make his submissions at a point during the day when he was best able to do so, and (5) the Claimant would have the opportunity of making further submissions in writing following the hearing. The Claimant expressed satisfaction that this would ensure a fair and just process. The hearing took place accordingly. Following the hearing the Claimant provided extensive further submissions and evidence, which were copied to the Defendant. The additional evidence did not seem to me to make a material difference to the evidential picture that was before me at the hearing and I did not therefore ask the Defendant to respond to it (and I have not referred to it above).

The legal framework

The public sector equality duty

67. The PSED is imposed on public authorities, including the Defendant, by s149 Equality Act 2010 which states:

> "149 Public sector equality duty
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

…

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

> (7) The relevant protected characteristics are—
> …
> disability;
> …
> (8) A reference to conduct that is prohibited by or under this Act includes a reference to—
>
> (a) a breach of an equality clause or rule;
>
> (b) a breach of a non-discrimination rule.
>
> (9) Schedule 18 (exceptions) has effect."

68. In *R (Brackling) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 McCombe LJ set out, at [25], the principles that apply when determining if there has been compliance with the PSED:

> "(1) …equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements…
>
> (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice…
>
> (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action"…
>
> (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:
>
> i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;
>
> ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
>
> iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to

the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria."…

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them"…

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

"[77] …I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then… it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors…"

(ii) At paragraphs [89–90]

"[89] It is also alleged that the PSED in this case involves a duty of inquiry... that… the duty of due regard under the statute

> requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. …
>
> [90] I respectfully agree…."""

The duty to make reasonable adjustments

69. The Defendant, when administering social security benefits, is a service-provider within the meaning of s29(1) of the 2010 Act. By s29(7) the Defendant has a duty to make reasonable adjustments. The scope of that duty is defined by s20 and schedule 2 to the Act.

70. Section 20 states:

> "20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 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.
>
> …
>
> (6) Where the first… requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
>
> (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
>
> …"

71. A "substantial disadvantage" for the purpose of s20(3) is a disadvantage that is more than minor or trivial – see s212(1).

72. Paragraphs 1 and 2 of Schedule 2 to the 2010 Act state:

> "**SERVICES AND PUBLIC FUNCTIONS: REASONABLE ADJUSTMENTS**
>
> **1 Preliminary**
>
> This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part.
>
> **2 The duty**
>
> (1) A must comply with the first, second and third requirements.
>
> (2) For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally.
>
> …
>
> (4) In relation to each requirement, the relevant matter is the provision of the service, or the exercise of the function, by A.
>
> (5) Being placed at a substantial disadvantage in relation to the exercise of a function means—
>
> (a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or
>
> (b) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.
>
> …"

73. By s21(2) of the 2010 Act a failure to comply with the duty under s20 amounts to discrimination against a disabled person.

74. Proceedings relating to a contravention of the 2010 Act may be brought by way of judicial review – see s113(3)(a).

75. The duty to make reasonable adjustments "necessarily entails an element of more favourable treatment" or "a measure of positive discrimination" so as "to cater for the special needs of disabled people" – see *Archibald v Fife Council* [2004] UKHL 32 *per* Baroness Hale at [47] and [57]. The purpose is "so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the

public" – see *Roads v Central Trains Ltd* [2004] EWCA Civ 1541 *per* Sedley LJ at [30].

76. The Equality and Human Rights Commission has issued a code of practice pursuant to its powers under s14(1) Equality Act 2006. By s15(4) of the 2006 Act the code of practice is admissible in evidence and may be taken into account insofar as it appears to be relevant.

77. The Code of Practice states:

> "7.3 The duty to make reasonable adjustments requires service providers to take positive steps to ensure that disabled people can access services. This goes beyond simply avoiding discrimination. It requires service providers to anticipate the needs of potential disabled customers for reasonable adjustments.
>
> 7.4 The policy of the Act is not a minimalist policy of simply ensuring that some access is available to disabled people; it is, so far as is reasonably practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public. The purpose of the duty to make reasonable adjustments is to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large (and their equivalents in relation to associations or the exercise of public functions).
>
> …
>
> 7.10 The Act states that where the provision, criterion or practice, or the need for an auxiliary aid or service, relates to the provision of information, the steps which it is reasonable to take include steps to ensure that the information is provided in an accessible format….
>
> …
>
> 7.20 …the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service, avail themselves of a function or participate in the activities of an association.
>
> 7.21 Service providers should therefore not wait until a disabled person wants to use a service that they provide before they give consideration to their duty to make reasonable adjustments. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. Failure to anticipate the need for an adjustment may create additional expense, or render it too late to comply with the duty to make the adjustment. Furthermore, it may not in itself provide a defence to a claim of a failure to make a reasonable adjustment.
>
> Example: A person with a visual impairment regularly receives printed letters regarding his social security benefits, despite the

> fact that on previous occasions he has indicated his need for Braille and this has been provided. He finds this repeated need to telephone to ask for Braille frustrating and inconvenient, but is told that the software, which generates communications, does not enable a record to be kept of customers' needs for alternative formats. This may constitute a failure to make reasonable adjustments if it is judged to have left the disabled person at a substantial disadvantage and there was a reasonable adjustment that could have been made."

78. The question of whether or not a step is a "reasonable" step must be judged objectively – see *Allen v Royal Bank of Scotland* [2009] EWCA Civ 1213 *per* Dyson LJ at [40]. If a claimant identifies a potential reasonable adjustment then the burden is on the defendant to prove that the adjustment was not a reasonable one – see *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 119 *per* Dyson LJ at [38], and s136 of the 2010 Act.

Submissions

79. The Claimant submits that the DWP continues to be in breach of the PSED and its obligation to make reasonable adjustments. He remains dissatisfied with the workaround that the DWP is prepared to adopt. His written amended grounds of claim focussed on the risk that the workaround would result in communications from other Government departments not reaching him, or that the change of his address on the CIS from "no fixed abode" to the address of the AF team might result in other Government departments concluding that he is not, in fact, homeless. The focus of his oral and supplementary written submissions was different. He said that he should be able to exchange emails with a dedicated named contact, and that it was not sufficient simply to provide him with a communal email address. He would often receive emails from DWP officials he did not know, who had what the Claimant considered to be vague or meaningless job titles such as "customer relationship manager."

80. Moreover, the DWP should be required to use specific, rather than generic, subject headings in its emails. The use of generic headings meant that the Claimant found it difficult to locate relevant information, and this was in part a result of his disability and the "brain fog" it caused. The use of specific headings would mean that he could more easily group and file incoming emails according to their subject matter. The whole arrangement that was offered by the DWP was "too spurious". In addition, the system of payments caused confusion. Payments would be made to him but he would not know how they had been calculated or to what they related.

81. Ms Farris, for the Defendant, readily accepts that the DWP has had difficulties in discharging its legal obligations under the 2010 Act in respect of the way in which it communicates with benefits claimants. She observed that "computer says no" was not an unfair characterisation of some of the responses that the Claimant received when seeking to persuade the Defendant to comply with its legal duty to make a reasonable adjustment for him (see paragraphs 20-22 above). However, she said that a great deal of work had been done in order to address the DWP's legal obligations. She relied in particular on the engagement with the RNIB, the Ministerial taskforce and the quarterly meetings, the high level budgetary estimate and the changes that had been made to the proposed workaround to seek to address the Claimant's concerns. She also pointed out

that there had been no complaints from anyone else using the alternative format facility about the impact on communications from other Government departments. She submitted that the Defendant is entitled to reject the option of redesigning its legacy IT system in the light of the associated cost. Providing a named contact would be "too specialised" a service which goes beyond what is required by way of provision of a reasonable adjustment. The solution that has now been offered amounts, she submitted, to a reasonable adjustment, and the DWP had complied with the PSED.

Discussion

82. The Claimant is not the first person to have been frustrated at the bureaucratic refusal of a public body to respond to seemingly simple common sense requests without good or clear rationale, and sometimes with vague reference to data protection. A version of that type of response was parodied by the character Carol Beer and her catchphrase "computer says no" in the series "Little Britain". Such an approach may reflect poorly on the body concerned but it does not generally involve illegality. Under the 2010 Act, however, public bodies are under statutory duties to have due regard to the need to promote equality of opportunity for people who have a disability, and to make reasonable adjustments for the benefit of people who have a disability. Where those duties are engaged dogmatic refusals to consider measures that might promote equality of opportunity do not just defy common sense. They may also be unlawful. Moreover, it is not enough to wait for a disabled person to ask for a reasonable adjustment. Both the PSED and the duty to make reasonable adjustments impose proactive anticipatory obligations. It is obvious that benefit claimants with certain forms of disability are likely to require adjustments to the method that the DWP uses to communicate. It is not sufficient for the DWP to respond to requests made by individual claimants. It is legally required to anticipate those requests, and to design its systems and train its staff in a way that ensures that it complies with its PSED and that reasonable adjustments are made available to those who require them.

83. The evidence deployed by the Claimant amply demonstrates that he sought to persuade the DWP to communicate with him by email because his disability rendered other forms of communication more difficult. The DWP consistently refused to accede to his requests, citing security concerns. This was so even though the DWP had, at the time, a policy that permitted the use of email where this was needed on grounds of disability. That policy was not drawn to the Claimant's attention. Nor is there any evidence of its application in the extensive correspondence that took place between the Claimant and the DWP in 2016 and early 2017.

84. The Claimant was far from alone in encountering these types of difficulty in persuading the DWP to make very modest adjustments to its procedures in order to ameliorate significant obstacles facing people with certain disabilities. The extensive evidence which is summarised above shows that this was a systemic issue. The detailed statements from the 4 witnesses whose evidence is summarised at paragraph 27 above provide compelling evidence of the day to day lived experiences of those who depend on benefits but who have difficulty in communicating with the DWP by post. So too do the anonymous case studies provided by the Claimant's previous solicitor (see paragraphs 29-30 above). The evidence from the RNIB and other charitable and voluntary sector organisations (see paragraphs 32-35 above) shows that these are far from being outliers.

85. As at the date the Claimant filed his claim the DWP was in breach of the PSED by reason of its failure to ensure that (1) its front line staff were aware of the need to offer alternative format correspondence and (2) they were, in practice, offering alternative format correspondence to those claimants who had disabilities requiring such an adjustment. It was also in breach of its obligation to provide a reasonable adjustment for the Claimant.

86. So far as the Claimant is concerned, matters have moved on since the decision which initially founded these proceedings. The DWP has offered the Claimant the workaround which is described above. The issue now is whether that workaround, as developed and clarified in the course of these proceedings, is compatible with the DWP's PSED (ground 1) and whether it is sufficient to discharge the DWP's obligation to the Claimant to implement a reasonable adjustment (ground 2).

Ground 1: Public sector equality duty

87. The DWP is required to have due regard to the need to advance equality of opportunity between those who are and those who are not disabled – see s149(1)(b) of the 2010 Act. That includes an obligation to have due regard to the need to (a) remove or minimise disadvantages suffered by disabled persons in respect of their communications with the DWP and (b) take steps to meet the needs of such persons so as to take account of their disabilities (see s149(3)(a) and (b) and s149(4)).

88. The workaround, imperfect though the DWP admits it is, was implemented precisely for the purpose of enabling those with a disability, such as the Claimant, to communicate with the DWP by means that are more suitable to them than the means adopted for people who do not have a disability. The very fact that the workaround was implemented shows that the DWP had regard to the need to advance equality of opportunity between those who are and those who are not disabled. The Claimant does not argue otherwise. His point is that the system is inadequate and that it does not therefore demonstrate that the Defendant has shown "due" regard to that need. In his statement of grounds he complains in particular about the fact that the changed address is used by other Government departments:

> "Thus the very policy which is designed to assist disabled people by enabling them to have access to information in an accessible format also potentially disadvantages them by diverting information from other departments."

89. The Claimant is right about that – the potential disadvantage he identifies is inherent in the workaround proposal. That factor, though, does not in itself mean that the Defendant has failed to have the due regard that is required by s149. On the contrary, the fact that the Defendant recognised the problem, drew it to the attention of the Claimant, and took steps to ameliorate the issue tends to show that the Defendant is seeking to comply with her statutory duty.

90. The DWP could avoid the workaround altogether, and communicate with disabled persons in alternative formats without giving rise to a risk that information from other Government departments would be diverted. It could do this by amending its computer system in the manner envisaged in the "high level budgetary estimate". The Defendant has considered this option – hence, the budgetary estimate. She rejected the option

because of the cost and the fact that this is an issue that will be resolved by other means when claimants move to Universal Credit. The DWP has also taken steps to address the risks. It monitored the use of the workaround for other benefit claimants and it identified the extent of the problem. It implemented a modification, namely the sending of a note to make the position clear when mail is sent to the AF address by other Government departments.

91. More broadly, the whole issue of alternative formats was the subject of close engagement with the RNIB and detailed scrutiny by a Ministerial taskforce which met quarterly and reported directly to the Minister for disabled people. The engagement with the RNIB, the review that was undertaken and the minutes of the taskforce meetings all tend to show a rigorous approach and an open mind to the need to ensure appropriate provision of alternative formats to those with a relevant disability. It was far from being a box ticking exercise. Officials were not obscuring the real difficulties from the Minister – the documentation shows a clear acknowledgment of the problems and the respects in which the DWP was falling short in the provision of appropriate alternative formats of communication to those with disabilities. The documentation also shows that the Minister and those working on the issue were well aware of the PSED.

92. All these steps show the Defendant having due regard to the matters required by s149 of the 2010 Act. It is not for the Court to review the weight that the Defendant attached to the PSED as compared to the cost of implementing an IT solution. Nor is it for the Court to micromanage the detail of the workaround. The Claimant has not identified any other alternative mechanism that would avoid the problem created by the use of CIS by other Government departments.

93. Accordingly, the Defendant is not now in breach of s149 in respect of her adoption of the workaround for the Claimant. The disadvantages of the workaround that the Claimant identifies were known and assessed by the Defendant. They do not amount to a breach of the PSED. Ground 1 therefore falls to be dismissed.

94. I stress that this does not mean that I have found the DWP is complying with the PSED more generally. The evidence raises worrying concerns as to the extent to which frontline staff appropriately signpost disabled benefit claimants to the AF team. Simply sending out a notice to supervisors about the availability of the AF team does not go nearly far enough to ensure compliance with the PSED if staff do not then proactively assist those with disabilities to access the AF team where appropriate. Nor is it good enough only to implement the workaround when threatened with legal proceedings (as happened in the Claimant's case, and cf the evidence of the witnesses at paragraph 27 above). Many benefits claimants may not have the means, knowledge and access to bring legal proceedings. Compliance with the PSED does not simply mean the promulgation of appropriate policies. It also means that those policies are applied in practice.

95. The evidence suggests that since the evidence relied on by the Claimant was filed further work has been undertaken by the DWP to address the issues, and in particular the need to ensure that staff are appropriately trained so as to be aware of the need to offer reasonable adjustments. It is not possible on the evidence filed in these proceedings (or necessary for the purpose of resolving this claim) to assess how successful that work has been.

Ground 2: Duty to implement reasonable adjustment

96. The DWP's method of communication with ESA claimants is a "practice" within the meaning of s20(3) of the 2010 Act ("the practice"). The administration of ESA is a service, and the exercise of a function, by the DWP within the meaning of paragraph 2(4) of schedule 2 to the 2010 Act. It follows that the administration of ESA is a "relevant matter" for the purpose of s20(3) ("the relevant matter") – see *R (MM) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1565 *per* Elias LJ at [39]. The practice involves the use of post rather than email, particularly where confidential information is concerned.

97. This places the Claimant at a substantial disadvantage in relation to the relevant matter ("the disadvantage"). The Claimant is homeless so does not have a fixed address. Were it not for his disability he could use a "care of" address (such as a local DWP office). The Claimant's disability is such that he cannot easily consistently and reliably travel to "care of" addresses that he might otherwise use, to collect postal mail. The result is that he is at risk of missing medical appointments and having his benefits stopped. This is what constitutes the disadvantage. It is substantial, at least in the sense of not being minor or trivial, and it arises as a result of the Claimant's disability

98. The DWP is therefore under a statutory obligation to take such steps as it is reasonable to have to take in order to avoid the disadvantage.

99. Until April 2017 the DWP took no steps to avoid the disadvantage. Its "decision" of 26 January 2017 failed to comply with the DWP's statutory obligation under s20(3) of the 2010 Act to take such steps as were reasonable to have to take to avoid the disadvantage.

100. Thereafter the DWP has been prepared to adopt the workaround. The workaround directly addresses the disadvantage to the Claimant caused by postal communication. It does so by providing an alternative means of communication which is the Claimant's preferred means of communication.

101. The Claimant says that the workaround itself places him at a substantial disadvantage and that the Defendant has failed to make reasonable adjustments to address that disadvantage.

102. There are different strands to this issue. The Claimant's pleaded case is based on the risk that communications to him from other Government departments will be diverted. There is a sound evidential basis for his concern – see paragraphs 53-54 above. However, the practical impact that this will have on the Claimant has not been identified with any clarity. That is in part because the Claimant has not given his consent to the implementation of the workaround, so the workaround has not yet been implemented in his case. As a result, it is not clear precisely what communications to him will be diverted. At one stage the Claimant was concerned that the provision to him of a "Blue Badge" (which would allow partial exemptions from certain parking restrictions) would be adversely affected. He has, however, not filed any evidence to substantiate that concern. More generally, all other public bodies whose communications might be affected by the workaround are, themselves, subject to the PSED and (insofar as they provide a service) required to make reasonable adjustments. The Claimant is therefore entitled to ask them to adjust the method by which they communicate with him. It is also difficult to see why the workaround would, in practice, cause significant

difficulties for the Claimant. As matters stand the Claimant does not have a correspondence address that he can use. The change of address on the CIS from "no fixed abode" to the address for the AF team does not therefore itself cause mail that would otherwise reach him to be diverted. It just means that mail that would not otherwise have been sent (because there was no postal address) is sent to the AF team.

103. The Claimant was also concerned that the change of his address on the CIS from "no fixed abode" to the address for the AF team might mean that other public bodies no longer treat him as homeless, and that might cause a disadvantage. Again, there is no evidence to substantiate this concern or to identify how it is likely practically to impact on the Claimant.

104. Here too the DWP has made adjustments to its practice: it has introduced a system of returning correspondence from other Government departments with an explanatory note so that the sender is aware of the position. It will provide the Claimant with a formal letter showing that he is of no fixed abode (notwithstanding the inclusion of an address on the CIS) which he can show to other public bodies if he is challenged about his homelessness.

105. In his oral and supplementary written submissions the Claimant expressed concern about the subject headings used for emails, the lack of a single identified person to deal with his correspondence and the system for making payments. These factors, which were not pleaded, do not put him in any worse position than if he were able to receive postal communications (which would, themselves, be written by different members of staff and would have different reference headings). I accept that it may mean that his email inbox is not automatically sorted as he would wish, unless he implemented his own filing system, but the same would be true of postal communication. In short, I do not consider that the Claimant has shown that the workaround puts him at a substantial disadvantage in relation to the administration of ESA (and, in particular, the exchange of messages with him about ESA).

106. The only other step that the DWP could take is to overhaul its IT system. This would be time consuming and expensive. If the workaround did cause those with a disability a substantial disadvantage, and were it not for the fact that ESA is to be replaced by Universal Credit, then it might well be reasonable to expect the DWP to incur this expense. The fact is, however, that this is a legacy issue which will no longer arise (at least not in the form it currently exists) when benefit claimants move to Universal Credit. The Defendant has established that the overhaul of its legacy IT system is not a step that it is reasonable to expect it to take.

Outcome

107. The approach of the DWP to the Claimant, and to many other disabled benefit claimants, failed over a period of years to comply with its statutory obligations under the Equality Act 2010 (and, before that, the Disability Discrimination Act 1995). Those with disabilities that meant that they had difficulty communicating by post were, in many instances, unable to secure a satisfactory means of communication with the DWP. This in turn meant that some went without benefits that were essential to them. At the time this claim was filed the DWP had still not complied with its statutory duties in respect of the Claimant.

108. It is understandable that the Claimant should continue to be sceptical about the DWP's commitment to ensuring compliance with its statutory duties. His scepticism may prove to be well-founded. As matters stand, however, the DWP has offered the Claimant a system of communication that (subject to effective implementation) amounts to a reasonable adjustment and complies with its PSED. It follows that the claim for judicial review falls to be dismissed.