THE INDUSTRIAL TRIBUNALS

CASE REF: 15744/20

CLAIMANT: **Eamon Doherty**

RESPONDENT: **Fortress Diagnostics Ltd**

JUDGMENT

The unanimous judgment of the tribunal is as follows:-

1. The claimant's claim for breach of contract (failure to pay notice pay) is dismissed following withdrawal at hearing.

2. The claimant's claim for direct disability discrimination is dismissed following withdrawal at hearing.

3. The respondent was in breach of its duty to make reasonable adjustments and therefore the claimant's claim for disability discrimination is well founded.

4. The claimant was subjected by the respondent to harassment, on the grounds of disability, and the claimant's claim in respect of harassment is well founded.

5. The respondent is hereby ordered to pay to the claimant the sum of £7,500 together with interest of £1,065.21 in respect of injury to feelings caused by the respondent's breach of its duty to make reasonable adjustments and harassment.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Sturgeon**

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

APPEARANCES:

The claimant was represented by Mr Peter Hughes, Barrister-at-Law, instructed by James Nugent, Solicitor, of Carmel O'Meara & Co. Solicitors.

The respondent was represented by Ms Claire Louise Mooney, of Copacetic Business Solutions.

BACKGROUND

1. The respondent is a limited company established in 2000. It is a global provider of in vitro diagnostics (IVDs). The respondent currently employs approximately 55 people and operates in a premises located in Antrim.

2. The claimant was employed with the respondent from 28 October 2019 until he was dismissed on 25 March 2020. The claimant was employed as a Regulatory Affairs Officer. The claimant was diagnosed with Asperger's Syndrome in 2004.

THE CLAIMANT'S CASE

3. The claimant presented a claim for disability discrimination and breach of contract (failure to pay notice pay) on 22 June 2020. Within his claim form, the claimant alleged that the respondent subjected him to disability discrimination in the workplace by failing to make reasonable adjustments for him to take account of his disability, Asperger's Syndrome. The claimant also alleged that the respondent had subjected him to harassment on account of his disability.

Reasonable Adjustments Claim

4. The claimant argued that the respondent knew of his diagnosis of Asperger's, from the outset of his employment, as he had made them aware of it at his interview. The claimant's reasonable adjustments case was that, because the respondent had actual knowledge of the claimant's disability, from the date of his interview, they should have carried out an assessment to consider what reasonable adjustments it could have made for the claimant.

5. The claimant also argued that the respondent had applied a number of provision, criterion or practices ("PCPs") within the workplace, which had put the claimant at a substantial disadvantage, because of his disability. The PCPs, relied upon by the claimant, were as follows:-

    (i) The requirement that employees work in an office space;

    (ii) The requirement that employees work in accordance with the respondent's office plan and desk allocation policy;

    (iii) The requirement that employees, at the claimant's position, use a desktop in the workplace;

    (iv) The policy preventing employees from wearing headphones in the workplace; and

    (v) The policy requiring employees to work core hours rather than flexible hours.

6. The claimant argued that, in relation to PCPs (i), (ii), (iii) and (iv), a noisy workplace resulted thereby putting the claimant at a substantial disadvantage, in comparison to a non-disabled person, by triggering his sensory overload and making it extremely hard for the claimant to focus and concentrate on workplace tasks. In relation to PCP (v), the claimant argued that the claimant suffered a lack of break

periods, as a result of this policy, thereby causing the claimant heightened anxiety and negatively impacting on his work performance.

Disability Harassment Claim

7. The claimant also raised a claim of harassment, arising from his disability, and this claim was grounded on three incidents. The first incident related to a conversation the claimant had with the Operations Director, Dr Zolnourian, on 30 January 2020, during which he explained he was suffering from sensory overload to which she allegedly stated: *"Don't bring that shit in here."*

8. The second incident relied upon by the claimant, for the purposes of his disability harassment claim, related to an incident whereby the claimant was spoken to by Dr Zolnourian, with regard to the claimant asking a colleague for an endorsement on Linkedin, to which Dr Zolnourian allegedly snapped at him and warned him not to make any such requests.

9. The third incident of harassment, relied upon by the claimant, related to a time when the claimant raised issues around potential exposure to Covid-19 and Dr Zolnourian accused him of scaring staff and fearmongering.

THE RESPONDENT'S CASE

10. The respondent presented its response to the claimant's claim on 1 September 2020 denying all of the claimant's claims. At the outset of the hearing, the respondent conceded that the claimant had a disability for the purposes of the Disability Discrimination Act 1995. The respondent argued that the PCPs, identified by the claimant, did not constitute valid PCPs nor did they place the claimant at a substantial disadvantage in comparison to a non-disabled person. In terms of remedy, the respondent requested that the claimant, if successful in his claim, should be awarded damages within the lower band of ***Vento***.

THE ISSUES

11. Counsel for the claimant, at the outset of the hearing, confirmed that the claimant's claim for direct disability discrimination, under section 3A of the Disability Discrimination Act 1995, was being withdrawn. Counsel for the claimant also confirmed that the claimant's claim for breach of contract (i.e. a failure to pay notice pay) was being withdrawn. These claims are therefore dismissed following their withdrawal.

12. In light of the concessions made by the respondent with regard to the claimant's disability, and the claims withdrawn by the claimant, at the outset of the hearing, the legal issues for determination, for this tribunal, were as follows:-

    (i) Did the respondent subject the claimant to discrimination by way of failure to comply with the duty to make reasonable adjustments as defined in Section 3A(2) and contrary to Section 4A of the Disability Discrimination Act 1995, as amended?

(ii) Did the respondent fail to make reasonable adjustments for the claimant contrary to Section 4A of the Disability Discrimination Act 1995, as amended?

(iii) Did the respondent's behaviour amount to harassment pursuant to Section 3B of the Disability Discrimination Act 1995, as amended?

PROCEDURE AND SOURCES OF EVIDENCE

13. This case had been case managed and detailed directions had been given in relation to the interlocutory procedure and the witness statement procedure.

14. At a CMPH, on 16 June 2021, the claimant's representative made the tribunal aware that the claimant would require breaks in the giving of evidence due to his disability. The claimant's representative was directed to make further enquiry as to whether the tribunal would be required to make any further adjustments for the claimant. The tribunal received no further requests from the claimant's representative with regard to adjustments for the claimant. At the tribunal hearing, the tribunal was satisfied that the claimant was able to effectively participate in the hearing. At the tribunal hearing, the claimant was afforded regular breaks.

15. At the substantive hearing, each witness swore or affirmed and then adopted their previously exchanged witness statement as their entire evidence-in-chief before moving on to cross-examination and brief re-examination.

16. The claimant gave evidence on his own behalf.

17. On behalf of the respondent, the tribunal heard evidence from Dr Zolnourian, Operations Director, and a founder of the respondent company, and Ms Cuckoo, Quality Representative with the respondent company, and the claimant's supervisor.

18. The tribunal also received a core bundle of documents containing both parties' witness statements, all pleadings in the case and all discovery exchanged between the parties.

19. The tribunal heard evidence on Tuesday 9 and Wednesday 10 November 2021. Oral submissions were heard on Thursday 11 November 2021. The tribunal also received written submissions from both the claimant and the respondent's representative and a number of legal authorities.

STATEMENT OF RELEVANT LAW

Disability Discrimination and the duty to make reasonable adjustments

20. The relevant law on disability discrimination is contained in the Disability Discrimination Act 1995 ("the DDA"), as amended.

21. *Meaning of Discrimination*

Section 3A of the 1995 Act:-

"(1) For the purposes of this Part a person discriminates against a disabled person if –

…

(2) For the purpose of this Part a person also discriminates against a disabled person if he fails to comply with the duty to make reasonable adjustments imposed on him in relation to the disabled person.

…

(6) If, in a case falling within sub-section (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that cannot be justified under sub-section (3) unless it would have been justified even if he had complied with that duty".

22. *Duty to Make Reasonable Adjustments*

Section 4A of the 1995 Act:-

"(1) Where –

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

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

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

...

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

...

(ii) an employee of the employer concerned;

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

...

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

23. The EAT provided guidance to tribunals on how they should approach the issue of reasonable adjustments in the case of **Environment Agency v Rowan [2008] IRLR 20.** The EAT stated, at paragraph 27, that:

> *"In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:*
>
> *(a) the provision, criterion or practice applied by or on behalf of an employer, or*
>
> *(b) the physical feature of premises occupied by the employer,*
>
> *(c) the identity of non-disabled comparators (where appropriate) and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the Claimant. …*
>
> *In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1)without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage".*

24. In **Royal Bank of Scotland v Ashton [2010] UKEAT 542/09, [2011] ICR 632** Langstaff J held that a Tribunal had to be satisfied there was a PCP which had placed the disabled person concerned at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled:

> *"An Employment Tribunal – in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination – must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled".*

25. At paragraph 16, the EAT further confirmed with regard to the **Rowan** criteria that:

> *"We interpose to say that, of course, it is not in every case that all four matters need to be identified but certainly what must be identified is (a) and (d). For the purpose of the comparison, the tribunal must be able to identify the persons by reference to whom the provision, criterion or practice, either in*

its presence or its application, is said to place the disabled person concerned at a substantial disadvantage. Disadvantage is necessarily relative."

26. PCPs are not defined in legislation and so it is left to the judgement of individual courts and tribunals to see whether conduct fits the description of a PCP. **Harvey** at Division L, Part 3, Section A, paragraph 297 states that, *"A PCP has been interpreted to cover both formal and informal practices of employers, and it certainly includes rules and policies found in collective agreements, works rules and the like, as well as terms of employment specifically spelled out in job advertisements and offers of employment. Further, it does not have to be express or conscious."*

27. In **Carreras v United First Partners Research UKEAT/0266/15/RN,** the Employment Appeals Tribunal held that tribunals should adopt a "real world" approach to defining PCPs. In reaching this decision, HHJ Eady QC stated:

> *"In approaching the statutory definition, the protective nature of the legislation meant a liberal, rather than an overly technical approach, should be adopted."*

28. In **Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664**, the EAT affirming the decision in **Mid-Staffordshire General Hospital NHS Trust v Cambridge [2003] IRLR 566**, held that a failure to consult with and/or carry out an assessment of a claimant does not give rise to a freestanding reasonable adjustments claim. However, at paragraph 72, it does confirm that it is best practice to do so: -

> *"Accordingly whilst, as we have emphasised, it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so- because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments- there is no separate and distinct duty of this kind."*

29. Section 18B of the 1995 Act provides:-

> *"(1) In determining whether it is reasonable for a person to take a particular step in order to comply with the duty to make reasonable adjustments, regard should be had, and in particular, to –*
>
> *(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;*
>
> *(b) the extent to which it is practicable to take the step;*
>
> *(c) the financial and other costs which will be incurred by him taking the step and the extent to which taking it would disrupt any of his activities;*
>
> *(d) the extent of his financial and other resources;*
>
> *(e) the availability to him of financial or other assistance with the respect of taking step;*

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

(g) ...

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

(a) making adjustments to premises;

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

(c) transferring him to fill an existing vacancy;

(d) ordering his hours of working or training;

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

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

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

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) providing a reader or interpreter;

(l) providing supervision or other support."

30. It should be noted that the list of examples given, at Section 18B(2), of the DDA, of the steps which employers may need to take to comply with the duty to make reasonable adjustments is not an exhaustive list.

31. The **Disability Code of Practice on Employment and Occupation** ("the Code") gives guidance on what those steps might mean in practice. The Tribunal is bound to take into account the provisions of the Code as they are relevant to the proceedings. The tribunal finds the following provisions relevant to this case:

(a) The Code states at paragraph 5.4 : *"It does not matter if a disabled person cannot point to an actual non-disabled person compared with whom s/he is at a substantial disadvantage. The fact that a non-disabled person, or even another disabled person, would not be substantially disadvantaged by the provision, criterion or practice or by the physical feature in question is irrelevant. The duty is owed specifically to the individual disabled person."*

(b) At paragraph 5.11 of the Code, it is stated : *" The Act says that only substantial disadvantages give rise to the duty. Substantial disadvantages are those which are not minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact. What matters is not that a provision, criterion or practice or a physical feature is capable of causing a substantial disadvantage to the disabled person in question, but that it actually has this effect on him or her, or (where applicable), that it would have this effect if the disabled person was doing the job at the time."*

(c) The Code further states at paragraph 5.18: *"Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree a proposed adjustment with the disabled person in question before they are made."*

(d) At paragraph 5.24 of the Code, it further states: *"Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things such as its cost and effectiveness. However, if an adjustment is one which it is reasonable to make, then the employer must do so. Where a disabled person is placed at a substantial disadvantage by a provision criterion or practice of the employer or by a physical feature of the premises it occupies the employer must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for the employer to ask), but, where the disabled person does so, the employer must consider whether such adjustments would help overcome the disadvantaged and whether they are reasonable."*

(e) Finally, paragraph 5.26 of the Code states: "*If making a particular adjustment would increase the risks to the health and safety of any person (including the disabled person in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments, such as those carried out for the purposes of the Management of Health and Safety at Work Regulations (NI) 2000, should be used to help determine whether such risks are likely to arise.*

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

33. Finally, the breadth and extent of the duty to make reasonable adjustments was demonstrated in the case of **Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651 [2004] ICR 954**. In that judgment, the House of Lords recognised that the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is thus not just a matter of introducing a 'level playing field' for disabled and non-disabled alike, because that approach ignores

the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled ... **(Harvey on Industrial Relations and Employment Law L at [398.01]).**

Harassment on grounds of disability

34. Section 3B of the DDA sets out the definition of harassment on the grounds of disability:-

> *"Meaning of "harassment"*
>
> *(1) For the purposes of this Part, a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of –*
>
> *(a) violating the disabled person's dignity, or*
>
> *(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.*
>
> *(2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect."*

35. It is clear that there is no requirement for a comparator in cases of harassment. The tribunal must focus on the treatment of the claimant and not on any comparison with the treatment of a comparator.

Burden of Proof

36. "17A Enforcement, remedies and procedure.

> *(1) A complaint by any person that another person—*
>
> *(a) has discriminated against him, or subjected him to harassment, in a way which is unlawful under this Part, or*
>
> *(b) is, by virtue of section 57 or 58, to be treated as having done so, may be presented to an industrial tribunal.*
> ....
>
> *1(C) Where, in the hearing of a complaint under sub-section (1), the complainant proves facts on which the Tribunal could, apart from this sub-section, conclude in the absence of an adequate explanation that the respondent is acting in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act."*

37. In **McCorry and Others (as the Committee of Ardoyne Association v McKeith [2017] NICA IRLR 253** the Northern Ireland Court of Appeal summarised the relevant law regarding the passing of the burden of proof:

> ***"39***
>
> *The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in Igen Ltd v Wong [2005] IRLR 258. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.*
>
> ***40***
>
> *The issue was revisited by the Court of Appeal in England and Wales in* **Madarassy v Nomura International plc** ***[2007] IRLR 246*** *which set out the position as follows (italics added):*
>
> '56. The Court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. *The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. "Could conclude" [in the Act] must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the complaint to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by [the Act]; and available evidence of the reasons for the differential treatment.*

> *58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

38. In relation to a failure to comply with the duty to make reasonable adjustments, in **Project Management Institute v Latif [2007] IRLR 579**, it was stated by the EAT that:

> *"we very much doubt whether the burden shifts at all in respect of establishing the provision, criterion or practice or demonstrating the substantial disadvantage. These are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting on the Claimant."*

39. This was endorsed in **Jennings v Barts and the London NHS Trust UKEAT/0056/12/DM** which stated:

> *"we think that the concept of shifting burdens is an unnecessary complication in what is essentially a straightforward factual analysis of the evidence presented."*

40. **Harvey** at Division L, Part 5, Section D, paragraph 812.01 states: *"It is for a claimant to show both the PCP and the disadvantage before applying the reversal."*

41. In a harassment case, the burden is on the claimant to prove facts from which the tribunal could conclude that he suffered such unwanted conduct related to his disability, which had the required purpose or effect. If the claimant proves such facts, the burden shifts to the respondent to prove that the treatment was not related to disability or that it did not have the alleged purpose or effect.

Quantum

42. There are three broad bands of compensation of injury to feelings which are:-

    (a) The top band should normally be between £27,000 and £45,000 (as uprated for inflation). Sums in this range should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should the award of compensation for injury to feelings exceed £30,000.

    (b) The middle band between £9,000 and £27,000 (as uprated for inflation) should be used for serious cases, which do not merit an award in the highest band.

(c) Awards of between £900 and £9,000 (as uprated for inflation) are appropriate for less serious cases, such as where the act of discrimination is isolated or a one-off occurrence. In general, awards of less than £500 are to be avoided altogether as they risk being regarded as so low as not to be a proper recognition of injury to feelings **(Vento v Chief Constable of West Yorkshire (No 2) [2003] IRLR 102 CA** as amended by **Da'Bell v NSPCC [2010] IRLR 19 EAT De Souza v Vinci Construction (UK) Ltd EWCA Civ 879)**.

RELEVANT FINDINGS OF FACT & CONCLUSIONS

43. Having considered the evidence given by all the witnesses and the content of relevant documents, referred to by the parties, along with the submissions of both parties, the tribunal found the following relevant facts proven on the balance of probabilities. This judgment records only those findings of fact necessary for determination of the issues and does not include all of the competing evidence.

Relevant Background Facts

44. The claimant was born on 9 May 1997. He has Asperger's Syndrome.

45. During his final year at Queen's, the claimant had the benefit of an Individual Student Support Agreement (ISSA) which was presented to the tribunal at hearing. This ISSA indicated, and the tribunal accepts, that Autism Spectrum Disorder (ASD) is a lifelong, developmental disability that affects how a person communicates with and relates to other people, and how they experience the world around them.

46. The tribunal accepts that, at university, the claimant had the benefit of the following adjustments to cope with his disability:-

(i) flexibility with deadlines for assignments;
(ii) provision of clear and specific instructions for tasks;
(iii) occasional permitted absences from class due to anxiety;
(iv) extra time afforded in exams;
(v) regular rest breaks – up to 15 minutes per hour.

47. The tribunal is satisfied that the claimant's disability manifested itself in the following ways:-

(i) Sensory overload;
(ii) High levels of anxiety;
(iii) Panic attacks;
(iv) Easily distracted;
(v) Poor concentration;
(vi) Disorganised; and
(vii) Poor management skills.

48. The claimant graduated from Queen's University in 2019 with a degree in Microbiology.

49. The claimant was interviewed for the position of Regulatory Affairs Officer, with the respondent, on 16 October 2019.

50. The claimant made the respondent aware of his diagnosis of Asperger's at his interview on 16 October 2019.

51. The claimant was successful in interview and he commenced employment with the respondent on 28 October 2019.

Did the Respondent know or ought they to have known of the claimant's disability?

52. The tribunal is satisfied that the respondent ought to have had constructive knowledge of the claimant's disability from the outset of his employment. Once the claimant informed the respondent of his disability, at the commencement of his employment, the tribunal finds that the respondent ought to, in line with the guidance given in **Tarbuck** (see paragraph 28 above), have carried out further assessments with the claimant regarding his disability and/or make enquiries with regard to any reasonable adjustments that he may require in the workplace to avoid him being placed at a substantial disadvantage. The respondent did not do this.

53. Even if the tribunal is wrong on this point, the tribunal finds that the respondent cumulatively acquired constructive knowledge of the claimant's disability and the substantial disadvantage he was suffering when the claimant asked to be moved to a quieter desk and when he asked to wear noise-cancelling headphones.

What PCPs were applied by the respondent?

54. The first issue for the tribunal to determine, in this case, was what were the relevant PCPs applied by the respondent. The parties were not agreed as to what the relevant PCPS were. However, it is the role of the tribunal to identify the relevant PCP(s) being applied by the employer. The claimant relied on the following PCPs to ground his claim for failure to make reasonable adjustments:-

    (i) The requirement that employees work in an office space;

    (ii) The requirement that employees work in accordance with the respondent's office plan and desk allocation policy;

    (iii) The requirement that employees, at the claimant's position, use a desktop in the workplace;

    (iv) The policy preventing employees from wearing headphones in the workplace; and

    (v) The policy requiring employees to work core hours rather than flexible hours.

55. The tribunal was unable to distinguish any significant difference between the first three PCPs identified i.e. the requirement that employees work in an office space above; the requirement that employees work in accordance with the respondent's office plan and desk allocation policy and the requirement that employees, at the claimant's position, use a desktop in the workplace. It appeared to the tribunal that all three of these PCPs amounted to the same outcome – i.e. the requirement that all employees work in the office, at an allocated desk and using a desktop.

56. The tribunal therefore finds that the relevant PCPs, for the purposes of this claim, were as follows:-

(i) The requirement that all employees work in an office, at an allocated desk and using a desktop;

(ii) The policy preventing employees from wearing headphones in the workplace; and

(iii) The policy requiring employees to work core hours rather than flexible hours.

57. The tribunal is also satisfied that all three PCPs are relevant PCPs, for the purposes of the 1995 Act as, in line with the reasoning in **Harvey**, they were work rules expressly applied by the respondent.

Did the identified PCPs put the claimant at a substantial disadvantage?

58. The next issue for this tribunal to determine was whether or not these PCPs put the claimant at a substantial disadvantage compared to someone without a disability. For the purposes of this decision, and in line with the test laid down in **Rowan**, the tribunal will examine each PCP, identified at paragraph 56 above, separately and assess the extent of the substantial disadvantage suffered by the claimant in comparison with persons not disabled.

(i) <u>The requirement that employees work at a designated desk within the office</u>

59. It was common case between the parties that when Ms Cuckoo commenced employment, in January 2020, the claimant was moved from his original desk. His original desk became Ms Cuckoo's desk and he was moved to a desk in the middle of a row of individuals in an open plan office. It was also common case that the claimant had two further desk moves following his removal from his original desk.

60. There was no dispute between the parties that the claimant asked the respondent for a move to a quieter desk on several occasions. The tribunal therefore finds that that the respondent was aware that the requirement to work at a designated desk, within the office, was a workplace practice causing the claimant a substantial disadvantage.

61. The tribunal accepts the claimant's evidence, given during cross-examination, that both of the two further desk moves resulted in the claimant having to work in an open plan office at various desks, his working environment was noisy, he was situated in areas where there was a lot of people movement, people around him were constantly on the phone and noisy machinery could be heard at his desk. Moreover, the claimant's third allocated desk was next to a loading bay and it also had a tea making area behind it where people regularly congregated to talk.

62. The nature and extent of the substantial disadvantage relied upon by the claimant, in relation to this PCP, was that the noise significantly affected his ability to complete tasks, as a result of triggering sensory overload, thereby making it

extremely hard for him to focus or concentrate on workplace tasks, causing him heightened anxiety and negatively impacting his work performance.

63. Given that the claimant suffers from ASD, and the tribunal's acceptance of how it manifests itself (see paragraph 47 above), the tribunal accepts that the claimant is more sensitive to noise, sensory overload and that he will find it harder to concentrate in a noisier environment. The tribunal therefore concludes that the claimant is at a substantial disadvantage in comparison to someone who does not have this disability.

64. Accordingly, the tribunal is satisfied that the duty to make a reasonable adjustment with regard to the desk policy was engaged and that the respondent was under a duty to take such steps as were reasonable to prevent the PCP having that effect.

(ii) The policy preventing employees from wearing headphones in the workplace

65. It was common case between the parties that the claimant asked permission to wear noise cancelling headphones in the workplace but that this request was refused and instead he was told he could wear earbuds.

66. The substantial disadvantage relied upon by the claimant, in relation to this PCP, was that the claimant was exposed to excessive noise, emanating from the loading bay, thereby triggering his sensory overload and so making it extremely hard for the claimant to focus or concentrate on workplace tasks due to his Asperger's diagnosis. The claimant felt that the use of headphones would help alleviate his exposure to excessive noise in the workplace.

67. The respondent's contention, for the refusal of headphones, was on health and safety grounds. The respondent contended that, as the claimant was working in a busy production area, with a loading bay close by involving the use of pallet trucks, earbuds were deemed a safer alternative for the claimant as they would allow the claimant to still hear any loud noises.

68. However, the tribunal does not accept the respondent's contention in this regard. In so concluding, the tribunal had regard to the following:-

    a) If there was a potential threat to the health and safety of employees, in working so close to the loading bay, the tribunal could not fathom why any desk based employee should be in close proximity to it and the respondent failed to offer any satisfactory explanation for this.

    b) While the tribunal notes that health and safety concerns are a relevant factor to consider (as per 5.26 of the Code at paragraph 31 above), suitable and sufficient risk assessments should be used to determine such risks. The respondent failed to demonstrate that any such risk assessment had been carried out.

    c) The respondent failed to adequately explain how earbuds were a safer alternative to headphones.

d) The respondent offered no satisfactory explanation as to why it was important for the claimant to hear the noise rather than seeing it. The tribunal felt that it was surely just as important, if not more important, for an employee to see potential danger rather than hear it.

69. The tribunal therefore accepts and so finds that, given the claimant's diagnosis of ASD, there could be little doubt that the claimant was put at a substantial disadvantage, compared to someone not disabled. The refusal of noise cancelling headphones meant that the claimant was still exposed to noise thereby triggering his sensory overload, and so making it extremely hard for the claimant to focus or concentrate on workplace tasks.

70. The tribunal is therefore satisfied that the duty to make a reasonable adjustment with regard to noise cancelling headphones was engaged and that the respondent was under a duty to take such steps as were reasonable to prevent the PCP having that effect.

(iii) The policy requiring employees to work core hours rather than flexible hours.

71. It was common case between the parties that the respondent operates core working hours in the workplace as oppose to flexible working hours.

72. The claimant's complaint, with regard to this PCP, was that by only being afforded a 40 minute break, during his working day, he was unduly impacted. As someone with Asperger's syndrome, compared to a non-disabled employee, the claimant argued that it caused him to suffer from sensory overload during the course of his employment thereby causing him heightened anxiety and negatively impacting his work environment.

73. The tribunal finds that there was insufficient evidence before the tribunal as to how the PCP of having to work core hours substantially disadvantaged the claimant any more than a non-disabled employee. A PCP must cause the substantial disadvantage and there must be causal link between the PCP and the disadvantage. The tribunal was not persuaded that the claimant's sensory overload stemmed from having to work core hours. Therefore, the duty to make reasonable adjustments was not triggered by the application of this PCP.

What adjustments were requested and were they reasonable?

74. In relation to PCP (i) (i.e. the requirement that employees work at a designated desk within the office), the reasonable adjustment sought was a quiet designated workspace or the option of working from home. In relation to PCP (ii) (the policy preventing employees from wearing headphones in the workplace), the reasonable adjustment sought by the claimant was the use of noise cancelling headphones.

75. The role of the tribunal was then to establish whether or not such adjustments were reasonable. In relation to PCP (i), the tribunal is satisfied that the reasonable adjustments proposed by the claimant (i.e. working in a quieter environment, at his old desk or working from home) would have removed the substantial disadvantage to the claimant in the workplace. Likewise, in relation to PCP (ii), the tribunal is satisfied that the provision of noise cancelling earphones would have removed the

substantial disadvantage to the claimant in the workplace. The reasonable adjustments requested were not impractical.

76. The evidence from the respondents was that the allocation of a quieter desk could not be accommodated due to the open plan layout of the office. However, there was insufficient evidence presented to show that consideration had been given to moving the claimant to a quiet office or back to his original desk. The respondent also indicated that working from home was not an option as all employees had to work at an office pc. However, there was insufficient evidence before the tribunal to show that such requested steps were impracticable, nor that financial or other costs would be prohibitive, nor that the respondent lacked the financial resources, nor that the respondent's size or resources would obviate the duty to make such a reasonable adjustment.

77. Similarly, with regard to wearing noise cancelling headphones, there was insufficient evidence before the tribunal to show that such requested steps were impracticable, nor that financial or other costs would be prohibitive, nor that the first respondent lacked the financial resources, nor that the respondent's size or resources would obviate the duty to make such a reasonable adjustment.

78. The reasonable adjustments sought by the claimant were a quiet designated workspace, the option to work at his old desk, the option to work from home and the option to wear noise cancelling headphones. The tribunal is satisfied that the reasonable adjustments proposed would have removed the substantial disadvantage to the claimant in the workplace.

79 By not implementing the above adjustments, which the tribunal considers would have prevented the substantial disadvantage to the claimant and were reasonable, the tribunal therefore concludes that the respondent has failed in its duty to put in place a reasonable adjustment. The tribunal therefore concludes that the respondent has failed in its duty to put in place reasonable adjustments as required by the 1995 Act.

Harassment on grounds of disability

80. The claimant relied upon three instances to ground his claim for disability harassment.

a) **Meeting on 30 January 2020**

81. The first instance relates to a meeting which took place between Dr Zolnourian and the claimant. It is common case between the parties that a meeting took place between the claimant and Dr Zolnourian on 30 January 2020. The claimant relies upon this meeting as evidence for his disability harassment claim.

82. The tribunal finds that Dr Zolnourian's purpose, in speaking with the claimant on this date, was to make him aware of several complaints that she had received with regard to his conduct in the workplace particularly with regard to his singing and distracting staff members in general.

83. The tribunal accepts the claimant's evidence that he explained to Dr Zolnourian that he was experiencing sensory overload in the workplace and that this was having a detrimental effect on his mental health.

84. Before the claimant got the opportunity to elaborate any further on this and highlight precisely how sensory overload was affecting him, the claimant alleges that Dr Zolnourian replied, *"Don't bring that shit in here. Everybody has problems and they just leave them at the door."* Dr Zolnourian denies making this reply and also alleges, in her witness statement, that the claimant never spoke to her about his mental health issues.

85. The tribunal prefers the evidence of the claimant, with regard to what happened, and concludes that it is more likely than not that Dr Zolnourian did make the reply set out at paragraph 84 above. The tribunal has reached this conclusion for the following reasons:-

    (i) The tribunal finds that Dr Zolnourian displayed generally a dismissive and cold attitude throughout the course of the hearing towards the claimant and his disability. By way of example, at one point, during cross-examination, Dr Zolnourian bluntly and angrily stated *"the claimant is the source of the noise!"* The tribunal were quite shocked at this statement from Dr Zolnourian and, on pausing to reflect on it further, view it as an example of Dr Zolnourian's dismissive and degrading attitude to the claimant's disability.

    (ii) Dr Zolnarian told the tribunal that she herself suffered from depression and mental illness and that, when going to work, *"she left it at the door".* The tribunal infers from this statement that because Dr Zolnourian *"left it at the door",* she expected others to do the same;

86. For a claim of disability harassment to succeed, there needs to be a causal connection between the acts complained of and the disability. The tribunal concludes that the above comment was an act of harassment related to the claimant's disability within the scope of the 1995 Act. In so reaching this conclusion, the tribunal had regard to the following:

    (i) by making this statement to the claimant, the claimant naturally felt intimidated, degraded and reluctant to raise any further concerns, arising from his disability, about his workplace; and

    (ii) by treating the claimant's request to speak to her about his disability as *"shit"* the tribunal concludes that Dr Zolnourian had no regard for the claimant's disability or her obligations, as an employer, on how to deal with it. To dismiss the claimant's concerns, in this manner, was dismissive to say the least and had the effect of discouraging the claimant from bringing forward any other concerns he had in relation to his disability.

b) **LinkedIn episode**

87. The second incident, relied upon by the claimant, for the purposes of his disability claim relates to a conversation between the claimant and Dr Zolnourian with regard to the clamant asking for Linkedin endorsements. It is common case that Dr Zolnourian approached the claimant, on 30 January 2020, and informed him not to

be asking a colleague for an endorsement on Linkedin and further warned him not to make any such requests in the workplace. The tribunal accepts the claimant's assertion that Dr Zolnourian was angry with him, when doing so, but the tribunal finds no evidence to support the claimant's belief that this was a further example of the respondent creating a degrading and hostile environment for the claimant on account of his disability. Moreover, the tribunal finds that there was no causal connection between the act complained of and the claimant's disability.

88. If anything, the tribunal finds that Dr Zolnourian's reaction was reasonable given that a number of the claimant's colleagues had made complaints about him in the workplace distracting them with requests for Linkedin endorsements and given that the Respondent had a policy preventing employees from seeking such requests.

c) **Covid-19 scare**

89. The third incident, relied upon by the claimant, for his claim of disability harassment relates to an incident on 17/18 March 2020. It is common case between the parties that, on 17 March 2020, the claimant left work early that day mistakenly informing staff members that his flat mate, who was a nurse, had tested positive for Covid-19. Given that this was the early onset of Covid-19, and just a week before the national lockdown, the tribunal finds that this statement from the claimant would naturally have unsettled and panicked a large number of staff, particularly those with vulnerable family members.

90. The claimant contacted Dr Zolnourian the next morning, on 18 March 2020, saying *"Hello, this is patient zero."* The claimant confirmed to Dr Zolnourian that he had been mistaken, that his flat mate had not tested positive, that she had been exposed to people with Covid-19 and was symptomatic but that she had tested negative. Dr Zolnourian confirmed, in evidence, that she reprimanded the claimant for scaring staff during a period of national uncertainty.

91. The tribunal finds that the claimant's choice of words (i.e. *"Hello, this is patient zero.")* was inappropriate. While the claimant may have intended it as a joke, in the circumstances, it lacked sensitivity for how much he may have frightened colleagues given that this was the early days of Covid, there was widespread uncertainty and it was just before the start of the national lockdown. The tribunal accepts that it was reasonable and justified for Dr Zolnourian to be annoyed at the claimant for scaring colleagues unnecessarily.

92. The tribunal does not deem this incident as an example of a situation of the respondent creating a hostile environment for the claimant to work in nor does the tribunal find any causal connection relating it to the claimant's disability and so does not deem it as an act of disability harassment toward the claimant.

REMEDY

93. As set out above, the tribunal has found in favour of the claimant in respect of his claim for a failure to make reasonable adjustments and also harassment on the grounds of disability.

94. While neither party referred the tribunal to any case law in respect of awards for injury to feelings, the case law in this matter is not controversial. In ***Al Jumard v***

Clwyd Leisure Ltd **[2008] IRLR 345*,EAT,*** the EAT ruled that where unlawful discrimination has occurred in respect of two or more different grounds, the compensatory award for injury to feelings should be assessed in respect of each discriminatory act. The EAT held:

> *"…. where, as in the present case, certain acts of discrimination fall only into one category or another, then the injury to feelings should be considered separately with respect to those acts. Each is a separate wrong for which damages should be provided. It will also help focus the tribunal's mind on the compensatory nature of the award. For example, it would not at all follow that the level of awards should be the same for different forms of discrimination. The offence, humiliation or upset resulting from a deliberate act of race discrimination may quite understandably cause greater injury to feelings than a thoughtless failure to make an adjustment under the Disability Discrimination Act 1995. Moreover, it is important that the tribunal keeps firmly in mind that there are different forms of disability discrimination, and that they may contribute in different measure to any injury to feelings. At the end of the exercise, the tribunal must stand back and have regard to the overall magnitude of the global sum to ensure that it is proportionate, and that there is no double counting in the calculation."*

95. The tribunal considered whether the claimant had suffered any financial loss as a result of the disability discrimination and harassment. The claimant did not suffer any loss as there was no evidence brought to the tribunal's attention regarding same. However, the tribunal was satisfied that it was just and equitable to make an award of compensation in this case and the tribunal was further satisfied that the claimant was entitled to two separate awards for injury to feelings for both his reasonable adjustments claim and his harassment claim. The tribunal also felt compelled to take into account the relatively short time period for which the claimant was employed by the claimant.

96. Accordingly, the tribunal has assessed the claimant's award for injury to feelings, in respect of his reasonable adjustments claim, towards the middle end of the lower band in the **Vento** case and has concluded that the appropriate award for injury to feelings in this case was £5,000.00.

97. In respect of the claimant's disability harassment claim, , the tribunal has assessed the claimant's award for injury to feelings towards the lower end of the lower band in the **Vento** case and has concluded that the appropriate award for injury to feelings in this case was £2,500.00.

98. In line with the decision in **Al Jumard v Clwyd Leisure Ltd,** the tribunal has also given consideration to the overall magnitude of the global sum to ensure that it is appropriate and that there is no double counting in the calculation. The tribunal is satisfied that the total figure awarded is appropriate.

99. Where a tribunal makes an award for injury to feelings, it is obliged to consider making an award of interest from the date of the first act of discrimination, 30 January 2020, to the calculation date, the first day of the hearing, 9 November 2021.

100. There was not any argument made to the tribunal as to why interest should not be awarded or the period of interest varied nor did anything emerge in the course of evidence that amounted to exceptional circumstances that would enable the tribunal to conclude that serious injustice would be caused if an award of interest was made. Accordingly, the tribunal makes an award on £7,500 which it calculates as follows:

648/365 x 8% x £7,500 = £1,065.21

Interest of £1,065.21 is therefore payable.

101. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990

Employment Judge: EJ Sturgeon

Dates and place of hearing: 9, 10 and 11 November 2021, Belfast.

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