Neutral Citation Number: [2024] EAT 115

Case No: EA-2023-000087-JOJ

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 14 August 2024

**Before**:

**HIS HONOUR JUDGE TARIQ SADIQ**

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**Between:**

**MR TREVOR FARLEY**

**Appellant**

**- and -**

**SUNDERLAND CITY COUNCIL**

**Respondent**

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Mr Trevor Farley the **Appellant** in person
**Mr R Stubbs** (instructed by **Womble Bond Dickinson**) for the **Respondent**

Hearing date: 2 July 2024

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# JUDGMENT

## SUMMARY:

## DISABILITY DISCRIMINATION

The Claimant, who was employed as a technical officer, brought claims limited to age and sex discrimination. His claim was then the subject of extensive case management and four preliminary hearings, which identified a disability discrimination claim for failure to make reasonable adjustments and indirect discrimination claims. The ET dismissed all the claims for age and disability discrimination arising from three incidents in April 2020. The ET found that the Claimant was not a disabled person for the purposes of the Equality Act 2010, and that the Respondent did not have the requisite knowledge of the Claimant's disability in any event. Regarding the incidents relied upon, the ET found that (i) the Claimant's case had not been made out on the facts namely there was no requirement that the Claimant work in the crematorium and/or the office and no disadvantage when he was working there, and (ii) no PCP was applied to the Claimant regarding the requirement to work at the crematorium and/or the office regarding the indirect disability discrimination claim, and no such PCP was applied regarding the reasonable adjustments claim under sections 20 to 21 of the Equality Act 2010. The ET also decided that the claims were out of time and refused to extend time on just and equitable grounds.

*Held:* dismissing the appeal.

The Claimant challenged the ET's findings that he was not disabled at the material time between 6 April 2020 and 29 April 2020, specifically that the ET had erred in failing to consider the significance that the Claimant had been prescribed an inhaler and Paragraph 3 of Schedule 1 of the Equality Act 2010. However, on the facts there was no evidence that the Claimant had in fact used an inhaler in April 2020, and the ET

found that he had recovered from a flu-like illness by January 2020. Therefore, the ET was not required to consider the significance of the inhaler and Paragraph 3 of Schedule 1 of the Equality Act 2010.

Regarding Ground 1 limb (b), the ET had not erred in law in finding that the Claimant's description of his disability namely asthma/bronchitis was wholly inconsistent with his medical records and the Occupational Health report in May 2020. There was no formal diagnosis of asthma other than a note in the Claimant's medical records that he was suspected of having asthma in November 2020, which was after the date of the alleged discrimination. Further, the ET had permissibly found that from 2015 to 2020 references in the Claimant's medical records to "chest infection", "flu-like illness" and "chronic cough" were conditions which had been treated with antibiotics and had led to the Claimant's recovery. The medical records, which had not been before the Judge at the sift stage, supported that conclusion.

Ground 2 and the perversity challenge to the ET's finding that the Respondent did not have knowledge of the Claimant's disability, was dependant on Ground 1 succeeding and the appeal against the finding that the Claimant was not disabled at the material time, which had been dismissed. In any event, the ET's finding regarding lack of knowledge of the disability was not perverse and was one which a reasonable ET could have reached.

Grounds 3 & 4 were challenges to the ET's findings that there was no PCP applied on any of the two occasions, which put him at a substantial disadvantage. The PCPs had been correctly identified following extensive case management which were the instructions to work at the crematorium and/or office. The ET then had found as a fact that the state of affairs relied upon simply did not exist namely that the Claimant had not been required to work at the crematorium and/or office, which was clearly

permissible.

Ground 5 that since the ET erred in law in concluding that no duty to make reasonable adjustments arose, it also erred in not considering the reasonableness of the potential adjustments, was consequential on the other grounds succeeding and they had not and therefore ground 5 also failed.

Ground 6 challenging the ET's finding not to exercise its discretion to extend time on just and equitable grounds also failed. The suggestion that the absence of an explanation for the delay was considered determinative was plainly wrong on a fair and proper reading of the ET's Judgment, and the ET's refusal to exercise its discretion to extend time was clearly permissible.

**HIS HONOUR JUDGE TARIQ SADIQ:**

1. This is an appeal against the Judgment of the Newcastle Employment Tribunal ("the ET") following a five day hearing that took place between 17 to 21 October 2022 which dismissed the Claimant's claims for unlawful disability and age discrimination, by Judgment dated 29 December 2022, which was sent to the parties on 3 January 2023. The parties will be referred to as the Claimant and the Respondent as they were before the ET.

2. The representation at the ET was the same as before me in the Employment Appeal Tribunal ("EAT"). The Claimant appeared in person and Mr Richard Stubbs of Counsel appeared for the Respondent. I am grateful for their assistance.

**Preliminary matters**

3. The Claimant requested and was provided with a hearing loop for the EAT hearing. He was also allowed toilet breaks at short notice, as requested.

4. The parties had not been able to agree a bundle for the EAT hearing. The EAT had directed that the Claimant must lodge one hard copy and one electronic copy of an agreed, indexed and paginated bundle of documents by 4 June 2024. The Claimant had lodged a bundle consisting of core and supplementary documents on 31 May 2024. By accompanying application dated 28 May 2024, the Claimant set out his difficulties in agreeing the contents of the bundle with the Respondent and sought permission to rely on the bundle prepared by him and to exceed the supplementary page limit. On 3 June 2024, the Respondent provided their response to the Claimant's application and bundle and in turn lodged a core and supplementary bundle prepared by them, with their own accompanying application seeking permission to rely on it and to exceed the

supplementary page limit. By email dated 5 June 2024, the Claimant set out his objections to the bundle prepared and lodged by the Respondent.

5. On 21 June 2024, Ms Vanisha Patel (authorised to act on behalf of the Registrar) directed that the core bundle prepared by the Respondent best met the requirement of section 11.3.2 of the EAT Practice Direction. On that basis, she directed that the Respondent's core bundle be the version used to assist the Judge at the full hearing. Ms Patel also directed that given the clear disagreements over the supplementary documents, the EAT would exceptionally on this occasion accept both sets of supplementary documents, on the condition that each party lodge an essential reading list by no later than 4pm, 25 June 2024. She also directed that should the Claimant seek to rely on the disputed supplementary documents in the bundle prepared by him, he should seek permission to rely on them at the outset of the full hearing from the hearing Judge. Thereafter, it would be a matter for the hearing Judge as to what documents they would hear arguments upon.

6. By application dated 24 June 2024, the Claimant applied for a general case management order or direction pursuant to section 7 of the EAT Practice Direction, appealed against the order made by the Registrar pursuant to section 8.2 of the EAT practice direction and requested an urgent hearing or consideration of an application under section 8.3. Within the grounds of the application, he expressed dissatisfaction with the Registrar's direction regarding bundles and made allegations of "procedural errors, bias of the Respondent and impropriety". By separate letter dated 24 June 2024, he requested the EAT to revert back to the original orders and directions regarding bundles. The Claimant's application/appeal against the Registrar's order dated 21 June 2024 was referred to me as the hearing Judge.

7. At the hearing the Claimant confirmed that he was appealing the Registrar's directions for the hearing bundle dated 21 June 2024. He confirmed his request that the original orders and directions regarding the bundles be reinstated. The Claimant stated that he had prepared the hearing based upon six documents only, which were all included in his supplementary bundle. He then told me he had no criticism of the Registrar's decision dated 21 June 2024.

8. I treated the Claimant's application dated 24 June 2024 as an appeal against the Registrar's decision dated 21 June 2024. Within his appeal, the Claimant made general allegations of "procedural errors, bias of the Respondent and impropriety". He requested the EAT to revert back to the original orders and directions regarding bundles.

9. An Appellant has a right of appeal against a Registrar's order pursuant to section 7.14 of the EAT Practice Direction. A Registrar or Judge may direct that the appeal be determined on the papers (without a hearing) or at a hearing (referred to as an ARO Hearing). The appeal was referred to me as the hearing Judge to determine. The Claimant had not provided copies of his appeal documents to the Respondent and had not agreed a bundle of documents for the ARO Hearing in breach of section 7.14.3 of the Practice Direction. An ARO is a rehearing and therefore I can make the decision afresh.

10. The Claimant's appeal against the Registrar's order dated 21 June 2024 was refused. It was clear to me that the Respondent's core bundle best met the requirements of section 11.3.2 of the Practice Direction and therefore the Registrar was correct to direct that the Respondent's core bundle be the version to assist the hearing Judge. The Respondent's core bundle contained all the relevant documents which a core bundle

must include, pursuant to section 11.3.2 of the Practice Direction. It also included the Claimant's medical records, as per the direction of the section 3(10) Judge, His Honour Judge Auerbach. Further, the Respondent's core bundle included some of the Claimant's supplementary documents. Other documents not included in the Respondent's core bundle were contained in the Claimant's supplementary bundle, which the Registrar had allowed in, when she accepted both sets of supplementary documents in her letter dated 21 June 2024. I also made it clear to the Claimant that he could rely upon any of the documents in his supplementary bundle insofar as they were relevant in support of his appeal. The Registrar's decision was a pragmatic and fair solution to the problems created by the parties' lack of agreement regarding an agreed hearing bundle. The Claimant's request to revert back to the original order/directions regarding bundles was clearly unreasonable and not in accordance with the overriding objective. The appeal hearing had been listed for today for one day. The appeal had been prepared on the basis of the Respondent's core bundle, which met the requirements of section 11.3.2 of the Practice Direction and contained some of the Claimant's documents. The Claimant could refer to any other documents contained in his supplementary bundle, if necessary, in support of his appeal.

11. For all those reasons, the Claimant's appeal against the Registrar's order dated 21 June 2024 was dismissed.

12. I now turn to the substantive appeal in this case.

## The Background

13. The ET set out the facts at paragraphs 17 to 29 of its Judgment. A summary of the salient facts for the purposes of this appeal is as follows. The Claimant was employed by the Respondent as a technical officer. His duties included dealing with

service requests from members of the public living in rented accommodation. Principally, he dealt with service requests regarding disrepair within privately rented properties, dealing with privately rented properties, dealing with empty properties open to access, and refusing accommodation referrals from the Housing Operations Team regarding property inspection.

14. At the material time, the Claimant's line manager was Mr Philip Scott who is the Respondent's Principal Environmental Health Officer. During the period the Claimant reported to him, the Claimant had various periods of sickness absence namely from 11 November 2019 to 22 November 2019 for a back related problem and from 6 January 2020 to 22 January 2020 for chest infection, and thereafter continuously from 29 January 2020 up to the date of the ET hearing.

15. In March 2020, the impact of the Coronavirus meant that the Government imposed severe restrictions on the ability of workers to perform their duties, which were outlined by the ET in paragraph 18 of the Judgement. On 21 March 2020, the Government announced that people at the highest risk of complications from the virus needed to shield themselves from society, including those with respiratory conditions including cystic fibrosis, severe asthma and severe COPD. On 23 March 2020, the Government announced that save for limited purposes, the public must stay at home.

16. On 23 March 2020, the Claimant’s team was informed that all staff were to avoid face-to-face contact, unless a visit was absolutely necessary, and staff should refer to their manager for specific advice regarding relevant health and safety matters.

17. On 30 March 2020, the Claimant returned to work from a period of annual leave. On 2 April 2020, Marion Dixon, the Respondent's Environmental Health, Trading Standards and Licensing Manager, asked Mr Scott whether any of his team members

were willing to work at the crematorium. Mr Scott spoke to the Claimant who agreed to volunteer on assurance that his existing contractual terms and conditions continued to be met and his existing role would remain for him to return to. Mr Scott gave the Claimant his written assurance by email on 3 April 2020. The Claimant raised no issues about his health and/or PPE at this time.

18. On 6 April 2020, the Claimant worked at the crematorium for one day only. On 7 April 2020 at 9:10am, the Claimant telephoned Mr Scott to say that he was not returning to the crematorium. Mr Scott accepted this and advised the Claimant to report to the office that day where other duties were allocated to him. The Claimant agreed to do so and raised no objection about returning to work in the office.

19. On 8 April 2020, the Government informed the public that they "must stay at home" but "can travel to and from work but should work from home if you can". On receipt of the Government letter, the Claimant informed Mr Scott that he was unwilling to come back into the office and after 7 April 2020, the Claimant did not return to the office. He worked in the office for less than one day. From 8 April 2020, the Claimant continued to work from home.

20. On 29th of April 2020, Mr Scott asked the Claimant by phone whether he was willing to do inspections of various areas in the city to see if they were open, in breach of the lockdown rules, which was followed up by email the same day. Upon receipt of the email, the Claimant informed Mr Scott by telephone that he was not prepared to undertake this work as he was "looking after his own health and safety". The Claimant sent a fit note from his GP stating "under investigations for respiratory symptoms. Please avoid home visits to clients and observe social distancing rules". It is common ground that the Claimant did not undertake any of this work and did not do any walk

by/drive-by inspections. From 29 April 2020 to the date of the ET hearing, the Claimant was on continuous sick leave.

21. On 4 June 2020, the Claimant brought a formal grievance attaching two letters in support. There was no mention in these letters about him working at the crematorium and/or in the office. The only mentioned condition referred to by the Claimant was "work-related stress".

22. In November 2020, the Claimant was suspected of having asthma, which is after the dates of the alleged discrimination in April 2020.

## The ET claim and procedural history

23. 21 November 2020 is the date the ET1 was presented. The Claimant did not bring a disability discrimination claim in the ET1. The claim was limited to age and sex discrimination. He replied "No" to box 12.1 "Do you have a disability?"

24. Thereafter, the claim was the subject of extensive case management and preliminary hearings ("PH") to identify the claims being brought. There were four PHs namely 23 February 2021, 25 May 2021, 28 October 2021 and 17 January 2022.

25. At the PH in February 2021, the Claimant first advanced a disability discrimination claim for failure to make reasonable adjustments. At the third PH in October 2021, the indirect discrimination claims were identified. These disability discrimination claims only emerged through the ET's extensive case management process and were not included in the original ET1.

26. At the fourth PH on 17 January 2022, Employment Judge Sweeney identified the disability discrimination claims which were allowed to go to the full hearing

including the PCPs regarding the reasonable adjustment claims. He spent significant time identifying these claims and the PH was concluded after 5.00pm. The disability relied upon by the Claimant was a physical impairment of the lungs (respiratory condition subsequently diagnosed as asthma and/or bronchitis). The PCP regarding the indirect disability discrimination claim was instructing the Claimant to work at the office on 7 April 2020. Regarding the reasonable adjustments claim, this was identified as follows: 6 April 2020 regarding the work the Claimant agreed to do at the crematorium, he was put at a substantial disadvantage in comparison with a non-disabled person. 7 April 2020 on instructing the Claimant to work at the office, the Respondent applied a PCP which put the Claimant at a substantial disadvantage compared with a non-disabled person.

## The ET's decision and reasons

27. Having considered the case after a five-day hearing, the ET dismissed all the claims for unlawful age and disability discrimination arising from three incidents in April 2020 namely (1) the crematorium incident (2) the office working incident, and (3) the shop visit incident. Only the disability discrimination claim regarding the crematorium and office working incidents were allowed to proceed to a full hearing following a Rule 3(10) hearing on 30 August 2023.

28. Regarding the disability discrimination claim, the ET found that the Claimant was not a disabled person for the purposes of the Equality Act 2010 - see paragraphs 11 to 13 and 28, and that the Respondent did not have requisite knowledge of the Claimant's alleged disability in any event - paragraph 29. Regarding the three incidents relied upon by the Claimant, the ET found:

(i) That the Claimant's case had not been made out on the facts namely there

was no requirement that the Claimant work in the crematorium and no disadvantage when he was working there (paragraph 22).

(ii) There was no requirement that the Claimant work in the office and no disadvantage to the Claimant when he worked in the office (paragraph 23).

(iii) No PCP was applied to the Claimant regarding the requirement to work at the crematorium and/or the office regarding the indirect disability discrimination claim (paragraph 30), and no such PCP was applied regarding the reasonable adjustments claim under sections 20 to 21 of the Equality Act 2010.

29. It is common ground that the ET did not consider the reasonableness of the potential adjustments relied upon, the claims having failed on the disability issue, knowledge, PCPs and substantial disadvantage issues. At paragraph 33, the ET decided that the claims were out of time and refused to extend time on just and equitable grounds.

## The Grounds of Appeal

30. On 22 February 2023, Mrs Justice Eady, the President of the EAT, decided at a sift that the Notice of Appeal disclosed no reasonable grounds for bringing an appeal. On 30 August 2023, there was a Rule 3(10) hearing before His Honour Judge Auerbach at which the Claimant was assisted by Mr Douglas Leach, ELAAS representative who prepared amended Grounds of Appeal. His Honour Judge Auerbach allow the following grounds of appeal to proceed regarding the dismissal of the disability discrimination claims in relation to the crematorium and the office only.

31. Ground 1 is a challenge to the ET's finding that the Claimant was not a disabled

person at the relevant time. There are two limbs to Ground 1: (a) the ET erred in failing to consider the significance of the inhaler the Claimant had been prescribed and was using, particularly having regard to paragraph 5 of Schedule 1 to the 2010 Act, and (b) the ET erred in finding the Claimant's evidence on disability was wholly inconsistent with the Occupational Health report in May 2020. The other medical records had not been considered by Mr Leach, the Claimant's ELAAS representative, or His Honour Judge Auerbach at the sift stage. His Honour Judge Auerbach said that if, on examination of the other medical records to which it was referred, the ET was entitled to say that, this might put a question mark over whether this ground ought to succeed.

32. Ground 2 is a challenge to the ET's findings regarding lack of constructive knowledge of disability, namely that the Respondent could not reasonably be expected to know that the Claimant was disabled. His Honour Judge Auerbach said this was essentially a perversity challenge. He said that in light of the guidance regarding the authorities on constructive knowledge and the May 2020 Occupational Health report, the ET arguably erred in not concluding the information that the Respondent had about the Claimant itself was sufficient to put it on notice of enquiry that he might be a disabled person, so as to satisfy the requirement for constructive knowledge.

33. Grounds 3 and 4 can be taken together. They argue that the ET erred in concluding that there was no PCP applied to the Claimant on any of the two occasions - Ground 3, which put him at a substantial disadvantage – Ground 4. The essential plank of Ground 3 is that the ET focused on whether there was a PCP in terms of the Claimant being required to attend at the two locations as opposed to being requested and having volunteered to do so, rather than considering whether a PCP was applied or there was an unreasonable failure to provide an ancillary aid to his disadvantage once he was in

fact working at each location. This is argued in harness with Ground 4, which contends that the ET erred by not considering the stipulation that a substantial disadvantage need be no more than one that is more than minor or trivial.

34. Ground 5 is that because the ET erred in concluding that no duty to make reasonable adjustments arose, it erred in not considering the reasonableness of the potential adjustments. This ground is consequential on the other grounds succeeding.

35. Ground 6 is a challenge to the ET's decision that the claims are out of time. It is alleged that the ET erred by failing to recognise that the absence of an explanation for the delay in presenting a claim is not automatically fatal to an extension of time on just and equitable grounds.

## The Parties Submissions

36. The Claimant, who is a lay person, represented himself. The ET found that the Claimant was a trade union representative of two Unions and described him as an "intelligent and articulate individual" – see paragraph 6. I agree with that description. The ET also recorded that it frequently attempted to direct the Claimant towards the relevant claims and issues at the hearing, but unfortunately the ET's directions were either overlooked or completely ignored by the Claimant in the manner in which he conducted himself at the ET hearing. For the appeal hearing, the Claimant relied upon a skeleton argument, a large proportion of which was devoted to irrelevant matters. At the appeal hearing, he also had to be regularly reminded of the need to focus upon the grounds of appeal that had been permitted to proceed.

37. The Respondent's oral submissions broadly followed the content of the skeleton argument prepared by Mr Richard Stubbs of Counsel.

Ground 1 – the disability challenge

38. Ground 1 is a challenge to the ET's finding that the Claimant was not a disabled person at the relevant time. The relevant period of time is between 6 April 2020 and 29 April 2020 – see paragraph 3 of the ET's judgment.

39. Paragraph 3 of Schedule 1 of the EqA 2010 provides as follows:

> **"5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—**
>
> > **(a) measures are being taken to treat or correct it, and**
> > **(b) but for that, it would be likely to have that effect.**
>
> **(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid."**

40. Regarding limb (a) and the suggestion that the ET erred in failing to consider the significance that the Claimant had been prescribed and was using an inhaler, the inhaler was referred to by the ET in paragraph 12 of its Judgment when it summarised the Occupation Health report dated 29 May 2020:

> "**He advises me that he had flulike symptoms at the end of December 2019 which affected his health and respiratory system. I understand that his GP treated this with three courses of antibiotics. He was also given an inhaler which he continued to use on an as-needed basis…"**

41. However, there was no evidence that the Claimant had in fact used an inhaler in January 2020, which he continued to use in April 2020. Although the Claimant referred to being given an inhaler at his return to work interview on 23 January 2019, he also ticked 'No' to the question "Do you believe your absence to be disability related?" and 'No' to the question to ongoing medical treatment. The ET also made a clear finding that the Claimant's flu-like symptoms had been treated with antibiotics and he had made a full recovery – see paragraphs 28, 11 and 13. Further, there was

nothing in the Claimant's witness statement for the ET that he was in fact using an inhaler in April 2020.

42. Accordingly, there was no evidence before the ET that the Claimant was using an inhaler in April 2020, and the ET found that he had recovered from his flu-like illness by January 2020. Therefore, the ET was not required to consider the significance of the inhaler and Paragraph 3 of Schedule 1 of the EqA 2010.

43. As regarding limb (b) of Ground 1 and the Claimant's inconsistent account, this ground of appeal was advanced and permitted to proceed at the Rule 3(10) hearing without access to the Claimant's medical records. The Claimant described in his disability impact statement his disabilities as being asthma/bronchitis – see paragraph 10 of the ET's Judgment. The ET correctly found in paragraph 11 that the Claimant's description of his symptoms and their impact was inconsistent with and/or unsupported by the medical evidence within the bundle. There was no formal diagnosis of asthma, other than a note in the Claimant's medical records that he was suspected of having asthma in November 2020, which is after the date of the alleged discrimination.

44. In March 2020, the Claimant's spirometry tests were normal and the other tests regarding the Claimant's lung function did not reveal any underlying condition. The ET also found in paragraph 11 that from 2015 to 2020 the references in the Claimant's medical records to "chest infection", "flulike illness" and "chronic cough", were conditions which had been treated with antibiotics and led to the Claimant's recovery. The medical records support that conclusion. They confirm that between a chest infection in 2015 and flu-like illness on 6 January 2020, the Claimant had not attended his GP with any respiratory issues. The reference to chronic cough on 20 July 2020 post-dates the alleged acts of discrimination. On 29 April 2020 the problem was

diagnosed as stress at work. The entry on 9 March 2020 also refers to stress at work in the history and that the spirometry test was normal. It specifically recorded "no contradictions to spirometry today, happy to proceed with spirometry" and "Wheeze absent" and "no breathlessness". On 8 January 2020, there is a reference to **"chesty cough*****sputum negative on test but CPR raised feels unwell speaking in sentences".** However, the x-rays were normal. Then on 21 January 2020, we have the reference to the fit note and flu-like illness between 13 January 2020 and 22 January 2020. The medical record states, "chest symptoms feel better with the antibiotics, asking one more course" and there was minimal wheeze on examination.

45. For these reasons, the ET was entitled to make the finding they did in paragraph 11 of the Judgment, and to find at paragraph 28 that the Claimant's description of his disability was wholly inconsistent with his medical records and the Occupational Health report. Therefore, Ground 1 fails.

Ground 2 – Knowledge of Disability

46. This Ground is a perversity challenge. It is dependent on Ground 1 succeeding and the appeal against the ET's finding that the Claimant was not disabled at the material time has been dismissed. Ground 2 also fails for the following reasons.

47. In **Donelien v Liberta UK** [2018] IRLR 535, CA Underhill LJ said at [27] that:

> **"I need to make an important point by way of preliminary. The issue for the ET was what the respondent could reasonably have been expected to know. Tribunals frequently have to make assessments of reasonableness of that kind, and it is well established that the exercise is factual in character and cannot be challenged on appeal only on the basis that the appellate tribunal might have made a different judgment."**

48. At paragraph 17, the ET made findings of fact about what the Claimant's line

managers knew. The ET held at paragraph 29 that (i) none of the managers had the necessary knowledge of the Claimant's disability; (ii) none of them were in possession of the necessary facts which should have led them to conclude that the Claimant may be suffering from a condition which amounted to disability, and (iii) all the managers had were fit notes and the contents of the OH reports, which would not lead any reasonable manager to conclude that the Claimant may be suffering from a condition which could amount to disability.

49. Further, the ET found at paragraph 17 that the unchallenged evidence of Mr Scott, the Claimant's line manager, was that the Claimant was absent due to a chest infection from 6 January 2020 to 22 January 2020. Miss Marianne Dixon, the Respondent's Environmental Health, Training Standards and Licensing Manager, also confirmed that the Claimant was absent from work in January 2020 when he suffered a chest infection which "responded well to antibiotics." Further, in the Claimant's return to work interview dated 27 January 2020 the Claimant said "No" to the question "Do you believe your absence to be disability –related" and "No" to the question whether there was any medical treatment ongoing. The ET also recorded at paragraph 14, that the Claimant in his claim form had not indicated he was discriminated on the grounds of his disability, and in answer to the question in section 12.1 "Do you have a disability", the Claimant had ticked the box marked "No".

50. In the circumstances, the ET's finding at paragraph 29 of its Judgment was clearly not perverse and was certainly one which a reasonable ET could have reached.

Grounds 3 & 4 – PCPs and Substantial Disadvantage

51. These grounds of appeal are limited to the crematorium and office incidents. The law on PCPs is uncontroversial. In **Ishola v Transport for London [2020]** ICR

1204, Simler LJ (as she then was) said that a broad approach should be taken as to what amounts to a PCP and when identifying a PCP, one should look for a state of affairs which indicates how similar cases are or would be treated – see [35] to [38]:

> **"35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.**
>
> **36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.**
>
> **37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.**

> **38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."**

52. In **Ahmed v Department of Work and Pensions** [2022] EAT 107, His Honour Judge Beard said at paragraph 25:

> **"A PCP, simply put, is where the employer has an expectation of the employee, and either the same expectation is made of other employees or there is an element of repetition in the expectation with the particular employee. In order to found a claim the PCP must create a disadvantage because of the disability constructing the PCP from the disadvantage has the danger of circular reasoning. The identification of the PCP should, because of the protective nature of the legislation, follow a liberal approach and a tribunal should widely construe the statutory definition."**

53. In **Pipe v Coventry University Higher Education Corp** [2023] IRLR 745, EAT Eady J, the President of EAT, said at [119]:

> **"It is unfortunate that in thus defining the issues between them, the parties spoke of what the Framework did, or did not, "*require*". The statutory definition no longer speaks of a "*requirement or condition*" and the language of "*requirement*" can lead to a narrowing of focus, contrary to the broader, purposive approach that should be adopted (see the EAT's judgment in *Carreras v United First Partners Research* [2016] UKEAT 0266, upheld by the Court of Appeal at [2018] EWCA Civ 323). In most cases, this will be a point of distinction without difference: the application of a PCP will generally amount to a requirement (interpreting that term broadly, *per* Carreras), but in the present case the distinction was potentially relevant to the question of comparative advantage. Even if the Framework did not (whether formally or as a matter of practice) set a requirement that an applicant have a PhD (or be working towards one), the fact that it provided that others – without the claimant's disability – might have a greater choice of routes open to them for progression (because they would more easily be able to demonstrate the skills required to obtain a doctorate) could be sufficient to demonstrate the requisite (comparative) disadvantage."**

54. In **Pipe** the allegation was not that the Claimant was explicitly ordered to work in the evenings, or subjected to other explicit pressures which had the effect of depriving him of any real choice; rather it was that it was made clear by pattern of repeated requests that he was expected to do so, and that that created a pressure on him to agree – see [31].

55. In this case, the PCPs relied upon were identified following extensive period of case management at two PHs. The PCPs were the instructions to work at the crematorium and/or office, which the ET correctly identified in paragraph 4 and which the Claimant confirmed at the ET hearing were requirements to work. In reply to questions from me, the Claimant confirmed that the PCP was the requirement to work.

56. Having correctly set out the Claimant's case that he was instructed and/or required to work at the crematorium or the office, ET then found as a fact that this was not the case, namely that the state of affairs relied upon simply did not exist. Regarding the requirement to work at the crematorium, the ET found at paragraphs 20 and 21 that the Claimant had volunteered to work at the crematorium and that he in fact only worked there for one day. As soon as he said he was no longer willing to do so, he was allocated other duties. Regarding the office, the ET found at paragraph 23 that Mr Scott, his line manager, had asked the Claimant to work in the office and he had agreed to do so. The following day when he told Mr Scott he was unwilling to come into the office, he did not work from the office after 7 April 2020 and he was not required to do so. He worked in the office for less than one day on 7 April 2020.

57. At paragraph 30, regarding the indirect disability discrimination claim the ET

found that the Respondent did not require the Claimant to work in the crematorium and/or office. He volunteered to work in the crematorium and did so for one day and then withdrew his consent. He was asked to report to the office but had the right to refuse and did refuse to do so after working there for less than one day. In both cases, the ET found that no such PCP was applied to the Claimant. In reaching that conclusion, the ET construed the phrase PCP widely. It said in paragraph 30:

> **"The phrase provision, criterion or practice, is acknowledged as one which ought to be construed widely and to include formal or informal policies, rules, practices, arrangements, criteria, conditions prerequisites, qualifications or provisions. It is effectively anything relating to the essential functions of the disabled employee's employment."**

58. At paragraph 31, in relation to the reasonable adjustments claim, the ET was not satisfied that the Claimant had established that the respondent had applied to him a PCP, relying upon its earlier reasoning. The ET reaffirmed its finding that the Claimant was not required to work in the crematorium and was not required to work in the office.

59. Recognising Mrs Justice Eady's decision in **Pipe** that the language of requirement can lead to a narrowing of the focus, contrary to the broader and purposive approach which needs to be adopted, I am of the view that this is one of those cases included in the majority of cases where this is a point of distinction without a difference. Moreover, the PCP as a requirement to work had been identified following an extensive case management process. This PCP was confirmed by the Claimant, both at the ET and at the appeal hearing. The Claimant's case was simply not made out on the facts. The ET found there was no requirement that he work in the crematorium and/or in the office. On that basis, the ET permissibly concluded that there was no PCP applied to the Claimant, which was fatal to his claims of indirect discrimination and failure to make reasonable adjustments.

60. For all these reasons, Grounds 4 and 5 are dismissed.

Ground 5 – Reasonable Adjustments

61. Ground 5 is that because the ET erred in concluding that no duty to make reasonable adjustments arose, it erred in not considering the reasonableness of the potential adjustments. This ground is consequential on the other grounds succeeding. For the reasons given above, Grounds 1 to 4 fail. It follows therefore that Ground 5 also fails.

Ground 6 – Time Point

62. The case law regarding the just and equitable extension is uncontroversial. The discretion to extend time on just and equitable grounds is a wide one and the appellate court will not interfere with the exercise of that discretion unless the ET erred in principle or is otherwise plainly wrong – see **Chief Constable of Lincolnshire v Caston** [2010] IRLR 327 CA at [23]. Regarding the delay, there is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant – see **Abertawe Bro Morannwg University Local Health Board v Morgan** [2018] ICR 1194, CA at [25]. Further, at [20] of **Abertawe** the Court of Appeal made clear that:

> **"It is axiomatic that an appellate court or tribunal should not substitute his own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the Tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre (trading as Leisure Link* [2003] IRLR 434, para.24."**

63. The suggestion that the absence of an explanation for the delay was considered determinative by the ET is plainly wrong. A fair and proper reading of the ET's decision at paragraph 33 is that the ET considered other factors as well in deciding that it was not just and equitable in the circumstances of this case to extend time. They included the fact that the claim was substantially out of time; the Claimant never alleged any disability discrimination claims at the outset in his claim form, and that he was a trade union representative for two different unions and was well acquainted with the ET system. Further, the ET did not find one or more of the complaints meritorious. In the circumstances, the refusal of the ET to exercise its discretion to extend time on just and equitable grounds was clearly permissible and was not plainly wrong.

Conclusion

64. For the reasons given above, all the grounds of appeal fail and this appeal is dismissed.