Case: 1805295/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Ingham**
Respondent: **Bestway Panacea Holdings Limited**

Heard at: **Leeds** **On: 11th, 12th 13th and 14th September 2018 (reserved decision 21st September 2018)2018**

Before: **Employment Judge Lancaster**
Members; **Mr D Wilks**
Mr M Brewer

Representation
Claimant: Miss C Bell, counsel
Respondent: Ms A Niaz-Dickinson, counsel

JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Claimant was treated unfavourably because of something arising in consequence of his disability

3. The Respondent failed to make reasonable adjustments.

4. Remedy is adjourned to 11th December 2018, as already provisionally listed.

REASONS

1. The Claimant commenced work for the Respondent (which trades as "Well Pharmacy") on 5th February 2008. He was a dispensing assistant at the Lincoln Green Road branch in Leeds.

2. He was dismissed on grounds of capability on 1st December 2017. That is admitted to have been a dismissal for a potentially fair reason under section 98 (2) (a) of the Employment Rights Act 1996 ("ERA").

3. The Claimant suffers a number of health issues. It is not in dispute that he has a mental impairment which constitutes a disability within the meaning in the Equality Act 2010 nor that the capability issues that led to his dismissal are something which arises in consequence of that disability.

4. Both counsel have put in helpful written submissions setting out the relevant legal principles, which are not, in any material respect, in dispute. We do not therefore need to set these out in full.

5. We agree with Ms Niaz-Dickinson that in essence this case boils down to a consideration of what, if any, are the legal consequences of the Respondent's decision to dismiss without allowing further time for an intervention by Access To Work. As at the date of termination, 1st December 2017, the Respondent was made aware that Access To Work had already confirmed (as of 3rd November) that arrangements could be made – either by the employee or the employer – for the provision of a fully funded support worker (up to a maximum grant of £1872.00). This was to provide to the Claimant 6 x 3 hours of "Work Related Coping Strategy Training" and also 3 hours of "Disability Awareness Training" for him together with up to 12 of his colleagues/supervisors. These measures had been recommended in a Report by Access To Work dated 16th October 2017 following a workplace assessment of the Claimant on 13th October and the provision of the grant monies had been confirmed (subject to completion of the necessary paperwork by the Claimant) to him and to the Respondent by letter dated 18th October 2017.

6. There is an agreed list of issues which we shall refer to (in bold below).

7. There is an agreed chronology in this case which again we do not therefore need to set out in full. The material backgrounds facts are however set out below.

8. Michelle Stone, who dismissed the Claimant, had been promoted to manager of the Lincoln Green Road branch in June 2015. It was at that time an underperforming branch and Ms Stone held conversations with all staff to assess their capabilities and identify any shortcomings in professional standards. At that stage the Claimant was on sick leave, having complained that "bullying" by a previous interim manager had caused him stress.

9. The Claimant returned to work on a phased return in about November 2015. Ms Stone did not immediately begin any assessment of his capability but in February 2016 she began to hold "recorded conversations" where a brief written record is made for the employee's personnel file of concerns that have been raised by a manager.

10. Ms Stone then initiated the formal Improving Performance Procedure ("IPP") and held a meeting with the Claimant on 23rd May 2016. The Claimant appealed the outcome of that meeting and at a hearing on 5th July 2016 Jenny Copley-Farnell agreed that the IPP should be postponed pending consideration of an occupational health referral and an assessment of whether any reasonable adjustments were required. It was not the intention that the IPP should be halted altogether but that is effectively what happened because at around that time Ms Stone was on sickness absence and Mrs Copley-Farnell was replaced as Regional Development Manager so that the matter was not followed up.

11. What in fact happened was that after a two month gap during which she had sought to commence the formal process Ms Stone then recommenced the holding of recorded conversations between July and November 2016. She then, in discussion with HR,

intended to restart the IPP and a fresh referral to OH was made. That assessment, which was again done only by telephone, did not in fact take place until 10th January 2017 when the Claimant returned from a further period of about 3 weeks sickness absence.

12. It is quite clear to us that there were at about this time genuine concerns about the Claimant's performance. On 20th February 2017 one of his colleagues wrote expressing her concerns about his performance and abilities and on 2nd March 2017 the branch pharmacist sent a letter in similar terms. Both these communications are expressed in moderate and considerate terms. They do not, as the Claimant contends, demonstrate a failure to understand his disabilities but rather they simply record objectively the effects of his skills deficit.

13. The Respondent keeps a "near misses" log. This is a handwritten record, either on a template document or simply on a piece of paper, initialled by the supervising pharmacist and documenting when the checking process has identified errors on the part of the dispensing assistant. We accept that in addition to making a note in the log each error will at the time have been brought to the attention of the employee whose mistake it was. Because these errors have been discovered by the pharmacist they necessarily have not resulted in any actual harm being caused. At all stages, before or during any performance management process and irrespective of whether that process was formal or informal, the Claimant has made significantly more mistakes of this nature than any of his colleagues.

14. On 6th March 2017 Ms Stone then re-instigated the IPP and the Claimant was required to attend a meeting on 9th March. As the outcome of that meeting an action plan was prepared.

15. The Claimant was set a target of improving his performance so that the time he took for the preparation of prescriptions went down to 3 minutes. His average time for carrying out this task, which was essential to his role as a qualified dispensing assistant, was at that stage measured at 4 minutes. His colleagues had an average time of 2 minutes, twice as fast. Measures were put in place to assist him in achieving this aim, in particular he himself identified a more efficient way of working and the Respondent provided (at the Claimant's request) a large clock in the dispensary as well as instructing him to dispense in the quieter areas of the store so as to minimise interruptions. The Claimant has never been required to match the performance of his colleagues in this area of his work: the target set was still 50 per cent slower than anyone else.

16. The Claimant was set a target of improving his performance so that the time he took manually to count and record the total number of prescriptions at the end of the day was reduced to 45 minutes. His average time for carrying out this task was measured at that stage at 1 hour 45 minutes in contrast to an average time for his colleagues of only 20 to 25 minutes. It was agreed that to facilitate the achieving of this target the Claimnt would work quietly at the back bench and at an allocated time. The Claimant has never been required to match the performance of his colleagues in this area of his work: the target set was still 100 per cent slower than anyone else.

17. The Claimant was set targets to address his acknowledged high level of forgetfulness. He was instructed to write down all telephone conversations immediately and a

message book was provided for this purpose. He was instructed to ensure that he follow up on all requests to place orders for medication, either from colleagues or from customers. He was instructed to ensure that he follow security procedures if he was the lase t to leave the store. Whilst this last instruction was as a result of his failure on 16th December 2016 to lock the shop door at the end of his shift – which is obviously an extremely serious error in a pharmacy stocking drugs, but for which he was never disciplined – it was not an error which was in fact ever repeated.

18. The Claimant's forgetfulness is the most concerning consequence of his disability within the context of his work. Because this is primarily an underlying medical condition the action plan records quite properly that the Claimant is to continue engaging with his GP and attend counselling to help him to manage his stress and anxiety. It is however specifically recorded that the Claimant consented to OH requesting further information from his doctor with a view to considering any further adjustments which may be implemented. The Respondent's managers undertook to engage with its Pharmacy Support Team to seek to obtain additional support.

19. Within the Action Plan it is noted as an example of the "Claimant's Performance Gap/Shortfall" that there had been feedback from colleagues regarding concern over patient safety. However, neither the identity of the colleagues who had written in February and March 2017 nor the actual content of their letters was ever discussed with the Claimant. This is the only specific refence to "patient safety" that is made within the IPP process until September 2017, but what that alleged concern about "patient safety" was at this stage was never articulated.

20. It was noted in the action plan that the Claimant had difficulty in multi-tasking, although this was a normal incident of his job in a busy pharmacy. It was, however, agreed that this would not be an area of performance that was actively reviewed periodically under the IPP so that the Claimant could concentrate on improving in the first three areas identified.

21. It was a target for the Claimant to come into work smartly dressed. A new uniform was to be ordered for him with longer shirt tails so that he, being a large man, would have less difficulty in keeping his shirt tucked in but the requirement to wear a tie, fasten his cuffs and ensure that his uniform was clean was, perfectly reasonably, expressed to be with immediate effect.

22. This same Action Plan was reproduced without alteration as the outcome of the further IPP meetings on 7th April 2017 and 12th May 2017. No separate Action Plan was prepared as the outcome of the meeting on 29th September 2017 and it is clearly the same one that was being replicated, save that at this letter stage the target of 3 minutes for preparation of prescriptions had been increased to 4 minutes as from the date of the stress assessment conducted on 1st September 2017. The substance of the Plan was never amended to take account of any matters that ought to have been deleted (for instance the historic concern about a single failure to lock up on 16th December 2016) nor to include any further specific matters that were required to be addressed.

23. Although the first IPP meeting on 9th March 2017 had expressly stated that a GP's report would be obtained and commented upon by OH this had not happened by the

time of either of the next two meetings under the formal process, which were on 7th April and 12th May 2017.

24. That appears to have been entirely the fault of the arrangements made between the Respondent and OH, who did not make the request to the doctor until 8th May 2017. The Claimant had provided the necessary consent form immediately after the first IPP meeting on 12th March 2017. It took nearly two months for any action in this respect.

25. The Claimant was forced to appeal the outcome of the third formal IPP meeting in order to prevent the process continuing inexorably towards possible dismissal but still in the absence of any proper medical evidence. The invitation to a final IPP meeting scheduled for 16th June 2017 had been sent to him on 15th May 2017, immediately after the third formal IPP meeting. This appeal was submitted on 22nd May 2017.That appeal, which was also heard by Ms Copley-Farnell, took place on 9th June 2017. Although she did not in terms allow the appeal she rightly and properly postponed the process until the report - which clearly should, in these circumstances, have been available before either the second or third meetings had gone ahead before Ms Stone - had been obtained and there had been a further referral to OH to consider once again any reasonable adjustments in the light of the GP's opinion. She therefore directed Ms Stone not to proceed immediately to the final IPP meeting (where dismissal would still expressly be in contemplation) but to hold an interim meeting instead. This was held on 21st July 2017.

26. Once the referral from OH had in fact been made on 8th May 2017 the Claimant's GP replied promptly on 25th May 2017. A letter was also provided from the Claimant's counsellor dated 11th July 2017.An appointment was then made (but not until the meeting on 21st July 2017) for the Claimant to see an occupational health doctor. This was, for the first time, a face-to-face assessment and was with Dr Paul Davies on 10th August 2017: his report is dated the same day. The advisability -in conjunction with the awaited GPs report - of a "face-to face" assessment by OH, rather than an appointment over the telephone, had first been raised (apparently with no objection from the Respondent) by the Claimant's trade union representative at the 12th May meeting.

27. Dr Davies suggested considering what he described as "additional adjustments". In reality these are non-specific general observations, and not, in fact additional measures: providing more administrative time to carry out tasks that was given to others; giving more frequent breaks than to others; discounting higher levels of sickness absence if they in fact arose as a consequence of his proneness to chest infections; reviewing training needs, and; allowing attendance at appointments with his treating team. It was the doctor's opinion that terse adjustments were "likely to be necessary long term". It is not recommended that the IPP be halted, only that any meetings might be at a neutral venue, that breaks be allowed and that the Claimant should be represented. All these measures were already available.

28. Most significantly Dr Davies for the first time raised the possibility of Access To Work being involved. Initially the Respondent mistakenly believed that it could make the approach to Access To Work, and no the employee, and so HR undertook to do this as at 4th September 2017. After the Claimant himself had then made the necessary approach Access To Work arranged a workplace assessment on 13th October 2017. Their report is dated 16th October 2017 and the confirmation of the amount of the

available grant was sent to both the Claimant and to the Respondent on 18th October 2017. To access these funds the Claimant needed to sign the appropriate declaration: this he had done by 3rd November 2017. The confirmation email sent to the Claimant on that date also included a number of attachments containing additional information about the process. We accept his evidence that the Claimant was, for some reason, unable to open these attachments immediately; he was reliant upon attendance at an internet café to access his email account. We are satisfied that in context that is all that the Claimant was in fact referring to when after a conversation with him at some time before 22nd November 2017 Ms Stone recorded her understanding – which was not correct – that he had "still not finished all the paperwork". The Claimant had expressly informed Ms Stone on 3rd November – the date of the confirmation from Access To Work – that they had been in touch and that he understood somebody would be in to see him at work.

29. Whilst these arrangements were still being made with the OH adviser, and subsequently with Access To Work, Ms Stone nonetheless progressed the final stages of the IPP. On 25th July 2017, immediately after the "interim meeting" which had been directed by Ms Copley-Farnell, the Claimant was invited to a final IPP meeting (where he was once more told the outcome may now be termination of employment). This was scheduled for 25th August 2017 but then appears to have been rearranged for 1st September 2017. It was then postponed, on 25th August at the suggestion of HR, and an "informal stress risk assessment" meeting was substituted. Any correspondence formally notifying the Claimant of these changes is not documented in the bundle. On 4th September 2017, however, the final IPP meeting was rescheduled for 29th September and the confirmation of this new date was sent to the Claimant on 8th September. The Claimant was only told at this meeting that it would not in fact be the final meeting and that the he was not therefore facing dismissal at that stage. Ms Stone had held a one hour meeting with the Claimant only the day before (28th September 20117) but had not thought to tell him in advance that he was not then still facing potential immediate dismissal. A Third Stage (final) performance improvement notice was reissued on 6th October 2017. The Claimant was then on 24th October again invited to a final meeting on 3rd November 2017. This meeting did not in fact go ahead, but it is not known why not. The invitation to a final meeting was re-issued on 24th November 2017 and it took place on 1st December 2017 when the Claimant was dismissed.

30. Following the meeting on 1st September 2017 it was agreed that rather than Ms Stone aim to meet with the Claimant informally with the Claimant for 5 minutes at the end of each day (which had been an arrangement put in place as from 2nd March 2017 – the date of the first stress-risk-assessment) but which had already expanded into sessions of about an hour, there should now be a planned longer meeting twice a week. Although there is a dispute between the parties as to whether these earlier short meetings had indeed taken place regularly or whether they constituted what the Claimant regarded as "quality meetings" we accept that Ms Stone did then meet with the Claimant , as she has documented, on 12th, 15th, 21st, 28th of September, on 4th, 11th and 27th October, and on 3rd, 19 0th and 24th November 2017. These meetings were, as appears from Ms Stones' "minutes" used primarily to put performance issues to the Claimant, any discussion of possible management support that might be offered to him was more incidental. The "minutes" were never shown to the Claimant and they we not formally incorporated as part of the IPP review process. We are satisfied, on balance, that the reason Ms Stone began to keep these more detailed records of

alleged poor performance at this stage was, however, in anticipation of a dismissal on the grounds of capability.

31. We find as a fact Ms Stone had already determined in advance of that final IPP meeting that the Claimant would now be dismissed. In her witness statement she refers to having used a pre-prepared "script", upon which she then made hand-written notes in the course of the meeting itself. That document is in the bundle. It does have some manuscript annotations against the bullet points for use in the first part of the meeting which certainly do appear to record the Claimant's responses. It also includes, after a reminder to take a planned adjournment purportedly to "consider next steps", the text, already written out, of the terms of the announcement of termination. In order to explain the format of the document in the bundle Ms Stone has given evidence that, implausibly, she discarded the original hard copy of the "script that she had taken into the meeting and which only went up to the point of the adjournment; she then rewrote the document by adding the wording of her decision and reprinted it with the full text, and; subsequently (rather than type it up at the same time that – on her account - she amended the whole text) she then wrote by hand next to the first part of the document her recollection of the Claimant's responses, that would have been therefore in addition to having an independent contemporaneous note of the meeting taken by Portia McLean from HR and which she and the Claimant had both signed at the end of the meeting. That account is a lie.

32. Ms Stone had referred the Access To Work report to Dr Davies for his opinion. His reply to her is dated 6th November 2017. Dr Davies gave the opinion (based of course upon his single consultation with the Claimant three months earlier) that the proposed "Coping Strategy Training" "has the potential to improve his coping strategies to stress" and that "there may be some moderate improvement in performance seen". Ms Stone clearly did not consider that a "moderate improvement" would be sufficient nor that the adjustments that had been put in place for the Claimnt were sustainable long-term. She expressed these views in a "Performance Analysis Report" dated November 2017 but which was not disclosed to the Claimant. This reinforces the finding, if any reinforcement were needed, that the outcome of the meeting on 1st December was pre-determined.

33. We are satisfied, therefore, that Ms Stone had in fact already decided therefore that she would not in any circumstances postpone the final meeting until the Access To Work proposals had been implemented. We do not accept Ms Stone's purported explanation, given at the final meeting, that it would have been a breach of patient confidentiality or of data protection regulations to have allowed an external support worker to work alongside the Claimant. This had never preciously been identified as an issue although it must have been clear that this was what Access To Work were recommending in their report. Any issue of confdentiality could have been satisfactorily addressed by securing appropriate undertakings on the appointment of the support worker, just as it would have been on the appointment of a new employee.

Unfair Dismissal

Did the Respondent act reasonably in all of the circumstances and within the meaning of section 98 (4) of the ERA?

34. The reason why there had been a delay in obtaining appropriate medical information, and why, therefore, that information had only materialised at a late stage within the IPP process is the responsibility of the Respondent.

35. As a consequence of that delay the OH suggestion that Access To Work should be approached was not considered until after the initiation of the final stage of the IPP. There was a 5 month delay between the Claimant giving his consent to OH obtaining a report from his GP and Dr Davies eventually considering that doctor's letter on 10th August 2017. Had this matter been dealt with promptly there would have been ample time for the application to Access To Work, which resulted from that OH assessment, to have been processed and a support worker put in place before 1st December.

36. The Claimant has consistently asserted that being on the IPP has contributed to his stress. Although he has never identified a specific incidence of poor performance which he attributes to those additional stresses caused by the process we accept that it will have been a contributing factor to his level of mental impairment throughout this period. That is a view which is substantiated by the GP's assessment of 25th May 2017 where she says: "It is the opinion of Doreen (sc. The Claimant's counsellor – who in fact later provided a separate letter to this effect) and also my opinion that it is partly the performance reviews which cause increase (sic) stress for Chris and can in turn then affect his performance further. This results in a sort of vicious circle for him."

37. In those circumstances we find, by analogy with McAdie v Royal Bank of Scotland [2007] All ER (D) 477 that it was incumbent upon the Respondent employer to "go the extra mile". The Respondent had, by implementing the IPP, engendered a situation where the Claimant's performance was adversely affected and had also then materially contributed to a state of affairs where a possible amelioration of that position could not be effected in good time.

38. A reasonable employer in these circumstances would have appreciated that it had to "go the extra mile" to accommodate an employee who was in the position he was because of its own actions. That is particularly so when the Clamant had worked for the Respondent for nearly 10 years. Going the extra mile in this case means adjourning the final determination of the IPP process until the funded Access To Work interventions had taken place. By failing to act in this way, but rather by putting into effect a pre -determined decision to dismiss without recourse to Access To Work the Respondent acted unreasonably.

39. This defect was not addressed at the appeal hearing. Shakeela Akhtar confirmed the decision to dismiss without having even read the Access To Work report.

Was the decision to dismiss the Claimant within a band of reasonable responses?

40. Also following McAdie the fact that the Respondent caused or contributed to the reason for dismissal does not mean that it could never be fair to dismiss the Claimant on grounds of capability.

41. However by dismissing at this juncture without waiting for Access To Work we find that the Respondent acted outside the range of reasonable responses open to a reasonable employer in this situation.

If the Claimant's dismissal was procedurally unfair, would the Claimant have been dismissed in any event?

42. Even if the Claimant had been able genuinely – and without the decision having already been taken - to respond to the specific allegations of poor performance, properly itemised and set within the context of the formal IPP process rather than being addresses tangentially and anecdotally in "side meetings" he would still have had serious issues of underperformance to address over a substantial period of time.

43. Even if the interventions from Access to Work had been put in place there is by no means a guarantee that there would have been a satisfactory level of improvement tin the Claimant's performance.

44. Ms Stone still remains the person best placed to assess the Claimant's performance. We have no reason to doubt her conclusions from November 2017 that his current level of performance, even with the support measure that had been put in place up to that point, was still below 50 per cent.

45. Dr Davies had expressed an opinion that the Access To Work proposal for "Coping Strategy Training" had the potential to improve the Claimant's ability to manage stress and this was then likely to have a positive impact on his anxiety. His opinion is however only that following on from this "There may be some moderate improvement in performance".

46. We assume that as at 1st December 2017, even allowing for Christmas and the New Year, the 6 sessions of "Coping Strategy Training" could have commenced almost immediately. There would then have had to be reasonable period in which to assess the effectiveness of that training upon the Claimant's continuing performance. Taking our guide from Dr Davies' view that it would be a number of months before it was likely that any additional treatment options would see any significant improvement (whilst accepting that the Access To Work training was not in itself a "treatment") we consider the appropriate period to await a final review of the Claimant's performance would have been 3 months.

47. After that 3 months we find, however, that there would have been a 90 percent probability that the Claimant would then have been fairly dismissed. Only a moderate improvement from such a low baseline as "less than 50 percent" would have still meant that his capability was below the acceptable standard within this business. In those circumstances a manager, taking account of the possible safety implications, would have then been acting within the band of reasonable responses to dismiss.

Discrimination arising from disability
Was the Respondent pursuing a legitimate aim?
Are the following legitimate aims?
Securing patient safety
Having employees performing to the requisite standard

48. Only the first of these potential legitimate aims has in fact been specifically addressed within this hearing.

49. On 29th September 2017 Ms Stone had for the first time within an IPP meeting raised the issue of patient safety. At the dismissal meeting on 1st December she was then at pains to stress that "My major concern in this whole process is patient safety".

50. Although we accept that patient safety must be a major concern in the pharmaceutical industry – as Ms Stone said at one stage "patient safety, it's what we do – we acknowledge Miss Bell's argument that throughout the whole of the IPP from 23rd May 2016 until 29th September 2017 this had not been expressed to be the issue.

51. Whatever the concerns about the Claimant's performance they had resulted only in a potential, rather than an actual identified risk to patient safety. The aim that was being pursued at the point of dismissal was therefore to secure patient safety in the face of deficiencies in the Claimant's performance which had not, up to that time, led to any actual harm.

52. That we accept could be a legitimate aim in this context.

Was the Claimant's dismissal a proportionate means of achieving those aims?

53. The achievement of that legitimate aim could have been arrived at by a less discriminatory means. Therefore the unfavourable treatment of the Claimant was not proportionate.

54. The Claimant's performance had been monitored for a considerable period, during the whole of which – apart from a short period of sickness absence in December 2016 to January 2017 – he had been in work. There is no good reason why that level of scrutiny should not have continued for a further period of 3 months to await the Access To Work intervention. Had he been so monitored there is equally no reason to think that there would have been no actual harm resulting to any patient, just as there had not been in the comparable 3 month period from 1st September to 1st December 2017.

55. Dismissal without having at least given the opportunity for the Access To Work recommendations to have been implemented and their possible effects considered is - though we acknowledge that the legal tests are different - unjustified just as it is unreasonable.

Failure to make reasonable adjustments
The IPP

Did the Respondent's practice of requiring underperforming staff to d go through the capability procedure place the Claimant at a disadvantage, when compared to his non disabled colleagues?

If so, would the adjustment of suspending the IPP and reassessing performance after the recommendations of the Access To Work Report had been implemented, have avoided the disadvantage?

Access To Work recommended:
6 x 3 hour of work related coping strategy training
Disability awareness training for the Claimant's colleagues

Support worker for the Claimant (nb Access To Work in fact recommended a tutor to provide the coping strategy training and not any other "support worker")

Were such adjustments reasonable?

56. It would not have been a reasonable adjustment to have disapplied the IPP altogether. The employer's right to monitor unsatisfactory performance, in a potentially safety critical business, does not place the underperforming disabled employee at any particular disadvantage compared to his underperforming non-disabled colleagues.

57. Adjustments to the process such as changes to venue and timings and ensuring the availability of representation, so as to make it, if at all possible, less stressful were already incorporated.

58. However at the point when the Claimant fell to be dismissed at the end of the IPP process he was disadvantaged as compared to a non-disabled person who had similarly reached the end of the line. That is because there was a further, as yet unexplored possibility, which for him as a disabled person may yet have affected that outcome. To this extent it was a failure to make reasonable adjustment not to have allowed additional time for the completion of the Access To Work sponsored training.

59. This failure to make a reasonable adjustment is therefore coextensive with the "discrimination arising from disability". It would have removed the disadvantage of being immediately liable to dismissal on capability grounds as at 1st December 2017 but would have been an adjustment only for the limited period that it would take to deliver the funded training.

Performance Targets, Forgetfulness and Multitasking

Did the Respondent's practices in relation to script preparation, script counts, multitasking and remembering client information, place the Claimnt at a disadvantage when compared to his non-disabled colleagues?

If so, would the following adjustments have avoided that disadvantage:
Implementing the recommendations of the Access To Work Report
Maintaining the increased target rates for script preparation and script counts
Providing support through regular one to one n meetings with e Claimant's line manager

Were such adjustments reasonable?

60. It was, of course, a requirement of his contract that the Claimant fulfil the duties of a dispensing assistant. Because of his impairments the Claimant was unable to perform these functions to the same level as his colleagues. Adjustments were made accordingly. The Claimant was, for instance, never required to be a quick as others were in performing essential tasks. There is however a minimum standard which the Respondent is entitled to expect even after making adjustments

61. We do not accept Miss Bell's submission that what Ms Niaz-Dickinson describes as a "plethora" of adjustments in this area are in fact merely a "sticking plaster" whereas the Access To Work Recommendations would have addressed the root cause of the problem. The "Coping Strategy Training" would not have been a cure all for the Claimant's deep-seated and long-standing problems – and nor was it intended to be.

62. The adjustments that were put in place before the consideration of the medical evidence are not thereby automatically rendered less significant than a proposal which came out of the last OH referral. It is the substance of the measures that is relevant and we find that the Respondent did not in fact fail to make reasonable adjustments to its performance indicators in the face of the Claimant's evident deficiencies. It did what it appropriately could to facilitate improved performance.

63. It is not a reasonable adjustment to create a job for a disabled employee who cannot perform their duties under the actual contract of employment (even though in 2016 Mrs Copley-Farnell contemplated such a situation had the Claimant wished to change location to work alongside a particular manager). We accept that – even if he had been suitable - there were in fact no healthcare assistant roles vacant and that this post was being phased out of the Respondent's business structure in any event.

64. At best a successful Access To Work intervention would have led to an improvement in the Claimant's performance such that he would have been able to meet the modified performance target that were required of him. It would not have entailed any adjustment to those targets. The failure to postpone the IPP pending that intervention cannot therefore properly be cast as a further failure to make reasonable adjustments under this alternative heading.

EMPLOYMENT JU DGE LANCASTER

DATE 28th September 2018