THE INDUSTRIAL TRIBUNALS

CASE REF: 4213/17

CLAIMANT: **Ken Fraser**

RESPONDENT: **The Executive Office**

DECISION

The unanimous decision of the tribunal is that the claimant was not discriminated against contrary to the Disability Discrimination Act 1995 (as amended) and his claim of disability discrimination is therefore dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Orr**

Members: **Mrs C Stewart**
Mr I Atcheson

APPEARANCES:

The claimant was represented by Mr Dale of NIPSA.

The respondent was represented by Mr S Doherty, Barrister-at-Law, instructed by the Departmental Solicitor's Office.

THE CLAIM

1. The claimant claims the respondent discriminated against him on the ground of his disability by failing to make reasonable adjustments in relation to the following:

   (1) The decision to discipline him under the formal disciplinary procedure for misconduct.

   (2) In applying the sanction of a formal written warning.

THE ISSUES

2. Was the claimant, at the relevant time, disabled within the meaning of the Disability Discrimination Act 1995 (as amended) in relation to his Autism Spectrum Disorder/Asperger's Syndrome and/or his depression/anxiety?

3. Did the decision to initiate disciplinary action and/or the decision to issue a formal written warning amount to a provision, criterion or practice ("PCP") placing the claimant at a substantial disadvantage in comparison with non-disabled persons and if so, did the respondent take such steps as is reasonable in all the circumstances to prevent the PCP having that affect.

4. If the duty to make reasonable adjustments was triggered, did the respondent fail to make the following reasonable adjustments?

   (i) Non-application of the formal disciplinary procedure and applying the informal process instead;

   (ii) Not issuing a formal written warning.

SOURCES OF EVIDENCE

5. The tribunal was provided with four bundles containing the witness statements, pleadings and medical evidence. The representatives of the parties referred the tribunal to documents within the trial bundle and provided the tribunal with written submissions, supplemented with oral submissions.

6. The tribunal had written and oral evidence from the claimant on his own behalf and written and oral evidence from the following witnesses on behalf of the respondent:-

   (1) Ms Grainne Killen – Director of Good Relations (at the relevant time).

   (2) Mr Gary Dempster – Acting Establishment Officer (Head of HR) (at the relevant time).

   (3) Mr Peter Toogood – Director of Finance and Corporate Services.

   (4) Ms Katrina Godfrey – Director of Programme for Government and NICS of the future (Deputy Secretary Level) (at the relevant time), currently Permanent Secretary.

CASE MANAGEMENT/REASONABLE ADJUSTMENTS

7. The respondent accepts that the claimant is disabled by way of his Autism Spectrum Disorder/Asperger's Syndrome for the purposes of the hearing.

8. The representatives agreed the following reasonable adjustments pursuant to the Equal Treatment Bench Book to ensure the claimant could participate fully at the hearing.

   (1) Questions short and concise;

   (2) Questions where possible, dealt with one fact at a time;

   (3) Counsel for the respondent sign-posted questioning, highlighted to the claimant questions to be asked and the subject area they related to;

   (4) No interruption or interrogation of the claimant;

(5) Claimant was given extra time to answer questions;

(6) The tribunal was to police any delay in relation to the claimant answering questions, if necessary;

(7) The claimant was provided with regular breaks as and when necessary.

THE RELEVANT LAW

Definition of Disability

9. Section 1(1) of the Disability Discrimination Act 1995 (as amended) ("DDA") provides:

> *'Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.'*

10. Schedule 1 of the DDA at paragraph 2(1) provides that:

> *'The effect of an impairment is a long-term effect if –*
>
> *(a) it has lasted at least 12 months;*
>
> *(b) the period for which it lasts is likely to be at least 12 months; or*
>
> *(c) it is likely to last for the rest of the life of the person affected.'*

11. Paragraph 4(1) of Schedule 1 provides that:

> *'An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following – (tribunal emphasis)*
>
> *(a) mobility;*
>
> *(b) manual dexterity;*
>
> *(c) physical co-ordination;*
>
> *(d) continence;*
>
> *(e) ability to lift, carry or otherwise move everyday objects;*
>
> *(f) speech, hearing or eyesight;*
>
> *(g) memory or ability to concentrate, learn or understand; or*
>
> *(h) perception of the risk of physical danger.'*

Since the Autism Act (Northern Ireland) 2011, the list in any such guidance now also includes:-

(i) taking part in normal social interaction;

(j) forming social relationships.

12. Paragraph 6(1) of Schedule 1 of the DDA provides that:

> *'An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.'*

Paragraph 6(2)

> *'In sub-paragraph (1) 'measures' include, in particular medical treatment'.*

13. In ***Goodwin v The Patent office [1999] ICR 302***, it was established that the tribunal's approach in determining whether a person has a disability is to consider;

(a) whether the person has a physical or mental impairment;

(b) whether the impairment affects the person's ability to carry out normal day to day activities;

(c) the effect on such activities must be 'substantial';

(d) the effects must be 'long-term'.

14. The Equality Commission Disability Code of Practice – Employment and Occupation (as amended) provides:

> "***What is a 'substantial' adverse effect?***
>
> *A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.*
>
> ***What are 'normal day-to-day activities'?***
>
> *They are activities which are carried out by most people on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or a sport, to a professional standard or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition. The test of whether an impairment affects normal day-to-day activities is whether it affects one of*

the broad categories of capacity listed in Schedule 1 to the Act. (see paragraph 9 above).

What about treatment?

Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (ie the impairment has been cured)."

15. In ***Aderemi v London and South Eastern Railway Ltd UKEAT0313/12*** Mr Justice Langstaff stated at paragraph 14:

> *"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the hearing "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other".*

16. In ***Herry v Dudley MBC [2016] UKEAT/0100/16***, the Employment Appeal Tribunal reviewed the authorities in relation to how a Tribunal should determine whether conditions described as 'depression' will amount to a relevant impairment. It set out the guidance of Underhill J (as he then was) in the case of ***J v DLA Piper UK [2010] ICR 1052***.

> *"40 …*
>
> *(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.*
>
> *(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long term basis), and to consider the question of impairment in the light of those findings.*

42 …

The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, … between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – 'adverse life events'. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40(2) above, a Tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived".

17. In ***Morgan v Staffordshire University [2002] IRLR 190*** it was held that medical notes which refer to 'anxiety', 'stress' and 'depression' do not amount to proof of a mental impairment within the meaning of the DDA.

18. In ***Ekpe v Commissioner of Police of the Metropolis [2001] IRKR 605***, the EAT held that what is 'normal' may be best understood by defining it as anything which is not abnormal or unusual (or in the words of the Guidance … 'particular' to the individual claimant). What is normal cannot sensibly depend on whether the majority of people do it. The antithesis for the purposes of the Act is between that which is 'normal' and that which is 'abnormal' or 'unusual' as a regular activity, judged by an objective population standard

19. The burden of proving disability within the definition of the DDA rests with the claimant to be established on the balance of probabilities.

Reasonable Adjustments

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

(iii) Section 18B of the 1995 Act:-

"(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 cost 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."

Knowledge

20. As per Section 4A (3) of the DDA above, the duty to make reasonable adjustments is triggered only if the employer knows that the relevant person is disabled and that the disability is likely to put him at a substantial disadvantage in comparison with non-disabled persons. Knowledge is not limited to actual knowledge but extends to constructive knowledge – namely, what the employer ought reasonably to have known.

21. The Equality Commission Disability Code of Practice, provides:

"5.12

Although … the employer has a duty to make an adjustment if it knows, or could reasonably be expected to know, that the employee has a disability and is likely to be placed at a substantial disadvantage. The employer must, however, do all it can reasonably be expected to do to find out whether this is the case.

An employee with depression sometimes gets upset at work, but the reason for this behaviour is not known to her employer. The employer makes no effort to find out if the employee is disabled and whether a reasonable adjustment could be made to the person's working arrangements …

5.15

If an employer's agent or employee (such as an occupational health adviser, a personnel officer or line manager …) knows, in that capacity, of an employee's disability, the employer will not usually be able to claim that it does not know of the disability, and that it therefore has no obligation to make a reasonable adjustment … Employers therefore need to ensure that where information about disabled person may come through different channels, there is a means – suitably confidential – for bringing the information together, to make it easier for the employer to fulfil its duties under the Act".

22. In relation to constructive knowledge, the EAT in ***DWP v Hall [2005] UKEAT/0012/05/DA*** emphasised that the question whether an employer had, or ought to have had, knowledge is a question of fact for the tribunal.

23. In ***Wilcox v Birmingham CAB Services Ltd [2010] UKEAT/0293***, Underhill J took the view that the knowledge defence was that an employer will not be liable for failure to make reasonable adjustments, unless it has actual or constructive knowledge of *both* (1) that the employee is disabled; *and* (2) that he or she is disadvantaged by the disability in the way set out in Section 4A (ie by a PCP).

24. The Court of Appeal in ***Donelien v Liberata UK Ltd [2018] EWCA Civ 219,*** confirmed that the issue for a tribunal is what the employer could reasonably have been expected to know and emphasising, in making such an assessment of reasonableness of that nature, the exercise is factual in character. The Court of Appeal upheld a tribunal's decision that an employer did not have constructive knowledge of an employee's disability and therefore had no duty to make reasonable adjustments. The employer had not relied solely on an occupational health report stating the employee was not disabled; albeit later found to be wrong. It had also taken into account 'return to work' meetings and letters from the employee's GP.

25. Knowledge can be imputed to an employer where there has been evidence put before it which should have put the employer on notice of the disability (see ***Edworthy v YMCA South Devon Ltd [2003] UKEAT/0867***).

26. However, whilst an employer must make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry,

especially if there is little or no basis for doing so (***Ridout v TC Group [1998] IRLR 628***; ***Secretary of State for Work and Pensions v Alam [2010] ICR 665***).

27. ***H J Heinz Co. Ltd v Kendrick [2000] ICR 491*** held that it is unnecessary to attach a label or a formal diagnosis to an impairment; knowledge that the claimant was suffering from symptoms falling within Schedule 1 or the manifestations of these sufficed - a formal diagnosis is not necessary for an employer to have knowledge of disability.

28. In ***Doran v Department of Works and Pensions (UKEATS/0017/14)***, whether an employer has complied with their duty to make reasonable adjustments will be judged not only on what it knew but also on what should have been known to them had they made reasonable enquiries at the relevant time; and, on the basis of such evidence, the tribunal will decide whether if such enquiries had been made the duty to make reasonable adjustments had arisen (followed in ***Nottingham City Homes Ltd v Brittain (UKEAT/0038/18).*** On the facts of this case, the claimant was seeking to rely on a retrospective opinion of a doctor given in evidence and since it was not before the employer when it took the relevant decision there was therefore not the relevant knowledge at the material time.

Reasonable Adjustments

29. In ***The Environment Agency v Rowan [2008] IRLR 20*** the EAT outlined the steps that the Tribunal must go through in order to determine whether the duty to make reasonable adjustments arises and whether it has been breached. The steps relevant to this case, are as follows:-

    (i) identify the provision, criterion or practice (PCP) applied that has put the claimant at a disadvantage compared to those who are not disabled;

    (ii) identify the non-disabled comparator (where appropriate);

    (iii) identify the nature and extent of the substantial disadvantage suffered by the claimant.

30. The EAT confirmed in ***Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley [2012] UKEAT,*** if a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage to the disabled person and no duty to make reasonable adjustment arises.

    At paragraph 76 Birtles J stated:

> *"The duty to make reasonable adjustments in Section 4A is, of course, expressed not in terms of the duty to alleviate disadvantage arising in consequence of a disability or for a reason relating to disability or (to borrow the language now in the Equality Act 2010) arising from disability. The duty arises only where the disabled person is substantially disadvantaged in comparison with persons who are not disabled. A disadvantage has to be because of the disability."*

31. If the duty arises the Tribunal will then determine whether the proposed adjustment is reasonable to prevent the PCP placing the claimant at that substantial disadvantage. In ***Smith v Churchill Stairlifts PLC [2006] ICR 524***, the Court of Appeal confirmed that the test of reasonableness is an objective one and it is ultimately the Employment Tribunal's view of what is reasonable that matters.

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 that they must prevent the PCP from placing him at a substantial disadvantage.

33. A proper assessment of what is required to eliminate the disabled person's disadvantage is a necessary part of the duty of reasonable adjustment ***Southampton City College v Randall [2006] IRLR 18*****.**

34. In ***Nottingham City Transport Limited v Harvey UKEAT/0032/12*** Mr Justice Langstaff (stated at paragraph 17):

> *"Although a provision, criterion or practice may as a matter of factual analysis and approach be identified by considering the disadvantage from which an employee claims to suffer in tracing in back to its cause, … it is essential, at the end of the day, that a tribunal analyses the material in light of that which the statute requires;* ***Rowan*** *says as much, and* ***Ashton*** *reinforces it. The starting point is that there must be a provision, criterion or practice; if there were not, then adjusting that provision, criterion or practice would make no sense, as is pointed out in* ***Rowan****. It is not sufficient merely to identify that an employee is being disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(1) provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP".*

Burden of Proof

35. Section 17A of the 1995 Act (Burden of proof):-

> *"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."*

36. The Employment Appeal Tribunal in the case of ***Project Management Institute v Latif [2007] IRLR 578*** Elias concluded that:-

> *"The paragraph in the DRC's Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably have been inferred, absent an explanation, that it has been breached. Demonstrating that there is an*

arrangement causing substantial disadvantage engages the duty but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could be reasonably be achieved or not."

"[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 throughout on the claimant".

RELEVANT FINDINGS OF FACT

37. The claimant is employed by the respondent as Head of its Racial Equality Unit (Grade 7). He has been in this role since September 2002. His responsibilities include the administration of the Minority Ethnic Development Fund (MEDF) which provides support to a range of community and voluntary groups in Northern Ireland.

38. The claimant had been on a period of sick leave from November 2009 until April 2010 due to depression. The claimant's GP confirmed he was suffering from depression in a letter dated August 2010; the letter also stated that the claimant had suffered from depression from 2008.

39. It is common case that the respondent had made an adjustment for the claimant in March 2012, in relation to his depression - specifically that the claimant was not required to transfer from his substantive role. In addition, the claimant accepts that adjustments of support from line management and improved communication were afforded to him by reason of his depression, as recommended by Occupational Health in September 2010.

40. In April 2016 the claimant was absent from work due to severe health issues of an immediate family member and the bereavement of another immediate family member. The claimant returned to work in June 2016, on a phased return, working a three day week, Tuesday to Thursday.

41. In his witness statement the claimant states:

"the week after I started back, I discovered that the letters of offer for awards under the Minority Ethic Development Fund had not been issued. Successful organisations had already been informed before the end of the previous financial year that they would be funded (to ensure continuity) for the following financial year. This happened before I left on sick leave and it was only possible because of fairly heroic efforts by members of my section. The failure to issue letters of offer in a timely fashion was not only an insult to this effort but it had a very negative impact on the organisations, their employees or potential employees and on the value for money for the tax payer of the fund. The delay in issue was subsequently a matter of some concern to the

Chair of the Executive Office in the Assembly who questioned officials about it."

42. The tribunal finds that the claimant, on his return from absence, was displeased and frustrated that letters of offer had not been issued and that he was unhappy with what he perceived to be delay in the issuing of same; this was clear from his evidence to the tribunal, his submissions to the disciplinary hearing and the content of his email to Mr A.

43. A meeting was held on Monday 6 June 2016 to discuss the content of grant award letters/letters of offer in relation to the Minority Ethic Development Fund ("MEDF"). The claimant was not in attendance by reason of his phased return to work – namely working Tuesday to Thursday. The meeting had been convened by a Grade 7 colleague, Mr A, who, after the meeting, forwarded a summary email to all attendees, clarifying and confirming what had been agreed. The email was copied to the claimant.

44. The claimant responded to this email by email dated 7 June 2016 at 11.45; it is relevant for the purposes of these proceedings to set out his email in full.

> *"This is all further complicating and delaying things and our grantees will be justified in complaining long and hard about the delay. This should have been ready by the end of the financial year.*
>
> *I disagree strongly that not granting advances would have to be "justified in terms of specific risks for specific groups". It is the granting of advances that needs to be justified. This should be done on the basis of evidence (about systems and/or past performance). This is clear from the Grants Manual extract you cite below.*
>
> *As to the advances why offer a 25% advance without a profile but require a profile when it comes to 75%.*
>
> *If you get an Ombudsman's case on any of this you will be shredded for the disparity between the LoO and the Grants Manual. This fiddling also runs counter to the work that we are committed to doing.*
>
> *I have agreed NOTHING with any statisticians. Messing with outcomes needs to be left for next year.*
>
> *As to a meeting of 32 funded groups, my folks have quite enough on their hands without extra – nugatory – work. As it is you seem to want two meetings in short order. Presumably, V&V will be organising this?*
>
> *Ken".*

45. It is common case that after sending the email the claimant went to Mr A's office around 2.00 pm; where an altercation occurred. There is a dispute as to precisely what words were exchanged however there is no dispute that voices were raised. The claimant accepted in cross-examination that he was critical of his colleague. In his witness statement he states:

"I was critical of the length of time that he had taken to progress this work, his attempts to prevent discussion on the grounds that this had been "agreed" and of the supposed "agreed" points in his email, and was fairly robust (as he had been in the past) but he refused to engage in sort of discussion. I was annoyed by what I consider to be his cavalier approach to minority ethic people and the people who helped to support them. … Our exchange which took place in his office was not witnessed by others although the sound of raised voices could probably have been overhead".

46. There is no dispute that the claimant was critical of his colleague – as the claimant stated in his witness statement - "*It is extraordinary that an officer should think that they are immune to criticism – I maintain that my criticism was warranted given the delays"*.

47. On 7 June 2016, Mr A spoke to his line manager, Ms Killen, who is also the claimant's line manager. Ms Killen's evidence, which the tribunal accepts, is that Mr A was visibly shaken and upset on 7 June 2016 when he relayed the incident to her. He informed her that the claimant had used abusive language and had undermined him in front of staff. It is not in dispute that Ms Killen arranged for a member of the Departmental HR team to be present when she spoke to Mr A later in the afternoon of 7 June 2016.

48. It is common case that on 8 June 2016 Mr A raised a written grievance. His complaint related to the content of the claimant's email and how the claimant had spoken to him in his office on 7 June 2016. He complained that the claimant had accused him of not knowing what he was doing, of holding up the process and "*farting about*"; he stated that the claimant's manner towards him had been aggressive. He also alleged that whilst leaving the office the claimant spoke to subordinate staff referring to him as 'incompetent', 'having done nothing for weeks' and 'not knowing what he was doing'. In his written grievance he referred to the fact that the claimant had often sent emails that made him feel undermined, ccing in numerous colleagues. He felt the claimant's behaviour was disrupting, upsetting and creating an inharmonious and stressful work environment.

49. It is common case that Ms Killen referred this grievance for investigation under the respondent's formal disciplinary process. The tribunal accepts Ms Killen's evidence, that the reason she took the decision to refer the matter to formal investigation was based on the following:

    (i) the impact of the claimant's behaviour on a fellow employee;

    (ii) the fact that a written complaint had been raised;

    (iii) that there had been previous incidents and complaints from both staff and external stakeholders in relation to the claimant's behaviour; and

    (iv) the existence of an extant informal warning.

50. The tribunal accepts that Ms Killen had genuine concerns regarding the impact of the claimant's behaviour on staff and that in compliance with her duty of care to all staff, she took the decision to refer the complaint to HR Connect to be investigated. The tribunal completely rejects the claimant's assertion in his witness statement that

Ms Killen was motivated in pursuing a complaint against him as a means of preventing scrutiny of her failure to progress work, there was absolutely no evidence to support this allegation.

51. There was no dispute that the claimant had been spoken to on previous occasions regarding disparaging comments and inappropriate language to members of staff and external stakeholders including remarks that they were "useless" and "did not know what they were doing". These incidents had been addressed informally with the claimant. There also existed a record of an informal warning dated October 2014 which related to an email exchange and the claimant's reaction and there had been further incidents of similar conduct since that date about which the claimant had been spoken to and had apologised for, as recent as January 2016.

52. The claimant was invited to a disciplinary hearing by letter dated 30 September 2016. The invite letter stated that the claimant's behaviour was considered to be in breach of the rules of conduct set out in the Conduct Policy of the HR Handbook:

> *"Specifically you have breached -*
>
> *(1) the NICS Disciplinary Policy in relation to Annex 1, b) "misconduct of any kind that may have an adverse effect on the working of Departments", and,*
>
> *(2) the NICS Code of Ethics Standards of Behaviour on Integrity, specifically Chapter 6, Annex 1, Section 2.1.1 b "always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings".*

53. The disciplinary hearing took place on 24 October 2016. Mr Toogood was the deciding officer. It is common case that Mr Toogood had no knowledge of the claimant prior to the disciplinary hearing and this was the first time that he had met the claimant.

54. The claimant accepts that the first occasion that he raised the possibility of having Autism Spectrum Disorder or Asperger's Syndrome was in his written submission to the investigation. It is common case that at the disciplinary hearing the claimant made reference to Autism Spectrum Disorder/Asperger's Syndrome and suggested it had an impact on his social interaction with people. The claimant did not raise any issue of Autism Spectrum Disorder/Asperger's Syndrome at the appeal hearing or in his letter of appeal.

55. There is no complaint of discrimination in relation to the conduct of the disciplinary hearing. The claimant's complaint of discrimination relates only to Mr Toogood's decision to issue a first written warning.

56. The tribunal is satisfied from all the evidence, that in deciding to issue a first written warning, Mr Toogood was fully aware of and took into account that the claimant had been on a period of sick leave and the specific circumstances of this sick leave. The tribunal accepts his evidence that he gave consideration to alternative sanctions and deemed informal resolution as not appropriate in light of the impact on Mr A; the fact that he had submitted a formal written complaint and in

consideration of the fact that informal measures had been applied in previous similar incidents with the claimant.

57. It is common case that the outcome of the disciplinary hearing was a formal written warning to remain active for two years as set out in the outcome letter dated 30 November 2016. The claimant appealed this on the following grounds:

- the matter was sent for formal processing without consideration of the informal process;
- the complaint is hearsay and the claimant had not been appraised of the actual specific allegations made against him;
- the claimant had been denied the right to challenge evidence or statements made during the investigation;
- the "*impact on the Department*" is not defined;
- the decision officer gave no consideration to mitigating factors, ie, the absence before the incident or incidents, the reason for the absence and the claimant's recognised disability. The decision officer was unaware of the recognition given to the claimant's disability by senior management some four or five years ago, despite being made aware at the disciplinary hearing, and reasonable adjustments enacted and has ignored this by recommending moving the claimant from his current work.
- The Code of Ethics allegation/charge cannot be upheld because procedure was not followed and the Policy used in this instance seems inappropriate.

58. The appeal hearing took place on 31 January 2017 and was conducted by Ms Godfrey. The appeal was by way of a review of the case. Ms Godfrey's outcome was that the disciplinary penalty was a fair one, however she reduced the duration of the written warning to eighteen months.

59. The tribunal accepts Ms Godfrey's evidence that the respondent's disciplinary procedure has both an informal and formal element. The tribunal accepts that in the course of reviewing the case and in making her decision, she took into consideration the informal warning dated October 2014 and the fact that the claimant's line manager had previously had to speak to him about occasions where his language was found to be inappropriate and abusive including as recently as January 2016. The tribunal is satisfied that for those reasons she believed the respondent's formal disciplinary procedure was appropriate.

60. The tribunal finds that it is clear from the outcome of the disciplinary hearing and the outcome of the appeal that both the claimant's ill-health and personal circumstances were taken into account. The tribunal accepts that in light of these mitigating circumstances Ms Godfrey reduced the duration of the written warning.

61. At hearing the claimant's representative contended that the informal written warning was time bound for six months by reason of the respondent's disciplinary procedure and should not have been referred to. The tribunal accepts that the informal warning is not part of the respondent's formal disciplinary procedure applied by HR

Connect. In any event, the claimant makes no allegation of disability discrimination in respect of this. The tribunal is satisfied that the informal warning dated October 2014 was taken into account by Ms Godfrey as part of her overall consideration of incidents of similar behaviour on the part of the claimant that had previously been addressed informally.

62. The extent of the claimant's evidence to the tribunal in relation to his disability is as follows:

The claimant's claim form

> *"My employers and managers are both aware that I suffer and have suffered for some years, from clinical depression and anxiety … I am also awaiting assessment as to whether I have Autism Spectrum Disorder/Asperger's Syndrome".*

In the claimant's witness statement he states under the sub-heading "Disability".

> *"To set the background to the acts I am complaining of: my employers and managers should have been aware that I suffer, and I have suffered for some years from clinical depression and anxiety. I had a significant amount of sick leave in 2008 and 2009 because of clinical depression and anxiety. I have told managers orally and through the provision of relevant documents".*

The claimant referred the tribunal to his Occupational 'Health assessment and the letter dated 30 August 2010 from his GP (both set out below at paragraph 63(c) and (d)). In any event, the claimant makes no allegation of disability discrimination in relation to this. The claimant in his witness statement referred to a note from his GP dated 6 June 2011 (this note was not provided to the tribunal), he states:

> *"I feel that any change in his job or job description would be detrimental to his mental health".*

Summary of Relevant Medical Evidence

63. The medical evidence contained within the trial bundle is as follows:

(a) Report from the Spectrum Diagnostics, Assessment and Therapy Centre dated 8 February 2019:

> *"Ken's responses to the specific questions in the AQ support a diagnosis of an underlying social and communication disorder within the autistic spectrum".*

(b) Copy of a letter dated 18 May 2010 from the claimant's GP.

> *"Dear Sirs*
>
> *Our patient, Kenneth Fraser, was on sick leave from 6 November 2009 with depression. I recommended a phased return to work following* this *from April 2009 through to September."*

(c) Letter from claimant's GP dated 3 August 2010.

"To whom it may concern

Mr Kenneth Fraser

Our patient has suffered from mental health issues – depression from 2008 and continues on treatment and attends ourselves regularly in regards to this".

(d) Occupational Health Report dated 14 September 2010.

"(1) Briefly state what the relevant conditions is (if any).

Depressive illness.

(2) State how the condition impacts on the ability to carry out the job.

Stable at present and does not prevent him from performing his duties.

(3) State (if any) what adjustment(s) may be applicable for the employer to consider.

Support from line management and improved communication.

(4) If applicable, give the medical rationale for suggesting these adjustments.

Recent restructuring within his area of work has resulted in inter-personal relationship difficulties with his line manager. His history of depressive illness may make him more vulnerable and good support from management will assist him in meeting the Departmental objectives. Improved communication will minimise the risk of conflict."

Case Management

64. This case was subject to considerable case management in relation the claimant's medical conditions and medical evidence. The tribunal considered the contents of the following Records of Proceedings:

(i) Case Management Discussion on 28 November 2017 -

"the respondent does not dispute that the claimant suffers from depression and anxiety. Mr Warnock stated that the respondent disputes that these amount to disability within the Disability Discrimination Act 1995".

(ii) Case Management Discussion on 26 April 2018 where a further Review Case Management Discussion was arranged -

"*At that hearing, I would intend to review the position in relation to the matters referred to above but also to review what progress there has been on the part of the claimant's representative in obtaining further relevant medical evidence for the purposes of the conduct of these proceedings but also, in particular, the issue of the claimant's disability*".

(iii) Case Management Discussion on 31 August 2018 -

"The claimant, in relation to his claim of discrimination, pursuant to the Disability Discrimination Act 1995, as amended, is relying on depression and/ or anxiety, which the respondent continues to dispute amounts to a disability within the terms of the 1995 Act. However, in addition, the claimant has raised an issue in relation to ADHD, which may be relevant not only to ***Galo*** *issues (see later) but also in relation to the claimant's claim of disability discrimination, relating to his disability of depression and/or anxiety, as referred to above, but, in addition, may wish to raise, as a further disability ADHD. Mr Dale recognises that if the claimant wishes to rely upon ADHD this may give rise to issues about the requirement, if appropriate for an application to amend the claimant's claim. However …*

(8) At this stage, the respondent's representative indicated that in relation to the claimant's medical evidence in relation to his depression and/or anxiety, it was not intended that the respondent's representative would require to obtain a suitable medical evidence. In that event, the representatives must liaise to ensure there is agreement whether or not the claimant's medical advisors are required to give evidence or whether their evidence can be omitted without formal proof. The respondent's representative properly indicated that, depending on what further evidence the claimant produces in relation to ADHD, following the assessment referred to above, the respondent may require to obtain a suitable medical evidence."

(iv) Case Management Discussion on 8 February 2019 - at which it was ordered that if the claimant had in his possession custody or power any further documents, relevant to the issues in this matter, which have not been previously discovered to the respondent's representative, then any such documents must be provided to the respondent's representative within 14 days of the date of this record.

(v) At a Case Management Discussion on 12 April 2019 it was recorded in the record of proceedings:

"The claimant's representative has now served on the respondent's representative the claimant's medical report. Mr Doherty confirmed that the respondent was no longer seeking to obtain its own medical evidence. Mr Doherty indicated that he was prepared to allow the claimant's medical report to be admitted without formal proof, subject to comment during the course of the hearing. However, Mr Dale indicated that the claimant intends to call to give oral evidence the claimant's medical expert. In those circumstances, the

representatives must liaise to arrange a suitable time for the doctor to give evidence, so as to avoid, insofar as possible, any inconvenience to him. Mr Doherty confirmed that the respondent does not accept that the claimant was a disabled person at the material time and/or had the relevant knowledge at the material time, pursuant to the terms of the Disability Discrimination Act 1995."

CONCLUSION

Disability

65. It is for the claimant to establish that he is disabled for the purposes of the Disability Discrimination Act 1995 at the relevant time – namely: at the time the decision to initiate formal disciplinary action was taken and the imposition of the formal written warning.

66. The claimant claims that he has two disabilities:-

    (a) Autism Spectrum Disorder/Asperger's Syndrome; and

    (b) depression/anxiety.

67. The respondent accepts that at the relevant time the claimant was disabled by reason of Autism Spectrum Disorder/Asperger's Syndrome. The respondent relies on the statutory exemption set out in Section 4A(3) that it is not under a duty to make reasonable adjustments as it did not know or could not reasonably be expected to know of the claimant's Autism Spectrum Disorder/Asperger's Syndrome at the relevant time.

68. The respondent disputes that the claimant's disability of depression/anxiety amounts to a disability at the relevant time. The respondent does not dispute that the claimant suffers from depression/anxiety.

69. Neither party raised the issue of whether the impairments considered separately had no substantial adverse effect on normal day to day activities and therefore account should be taken of whether the impairments considered together have the requisite substantial adverse effect; furthermore no evidence was adduced on this issue. Accordingly the tribunal is not required to make a determination on the issue.

Autism Spectrum Disorder/Asperger's Syndrome

70. For the purpose of these proceedings, the claimant obtained a medical report from the Spectrum Diagnostic Assessment Therapy Centre dated 8 February 2019. This confirmed that the claimant's responses to the specific questions in the Autism Quotient Questionnaire supports a diagnosis of an underlying social and communication disorder within the autism spectrum. The respondents do not dispute that the claimant is disabled by reason of Autism Spectrum Disorder/Asperger's Syndrome in light of the contents of this report. The issue to be determined is the respondent's knowledge at the relevant time.

71. The claimant's representative accepted that at the date Ms Killen took the decision to proceed to formal investigation the respondents could not have been aware that

the claimant suffered from Autism Spectrum Disorder/Asperger's Syndrome. Therefore the claimant's case of reasonable adjustments in relation to the decision to initiate the formal disciplinary procedure must fail by reason of lack of knowledge of this disability.

72. The height of the claimant's case appears to be that Mr Toogood, like the claimant, was possibly aware that he suffered from Autism Spectrum Disorder/Asperger's Syndrome. *(Tribunal emphasis.)*

73. The test for knowledge in a reasonable adjustments case is two-fold, as set out above; the knowledge required is both that the claimant employee is disabled and that he is disadvantaged by the disability by reason of the PCP.

74. It is clear from the evidence that the first time the claimant raised Autism Spectrum Disorder/Asperger's Syndrome as a potential disability to the respondent was in his written submission to the investigation.

75. The tribunal concludes that the extent of Mr Toogood's knowledge was that he was aware of the claimant's belief of a possibility that he was suffering from Autism Spectrum Disorder/Asperger's Syndrome. However the tribunal finds that there was no information or evidence before him at the disciplinary hearing that this impairment was likely to place the claimant at a substantial disadvantage by reason of the application of the relevant PCP – namely - the imposition of a written warning.

76. Accordingly, the tribunal is satisfied that the respondent did not have actual or constructive knowledge on the date that the formal written warning was issued that the claimant was disabled by way of Autism Spectrum Disorder/Asperger's Syndrome taking into consideration the following:

    (1) The claimant himself was not clear or certain that he had Autism Spectrum Disorder/Asperger's Syndrome at the disciplinary hearing, it was a mere possibility. The tribunal notes that as per the record of proceedings dated 31 August 2018 (two years after the disciplinary hearing), the claimant was asserting he potentially suffered from ADHD as a disability and not Autism Spectrum Disorder/Asperger's Syndrome.

    (2) Mr Toogood was not aware of any of the claimant's social interactions with members of staff prior to the disciplinary hearing as he did not know or had never met the claimant.

    (3) The minutes of the disciplinary hearing make no reference to any disadvantage that the claimant was likely to be placed at by reason of his disability.

    (4) The focus of the claimant at the disciplinary hearing and appeal was that his personal circumstances, namely his absence and the reason for his absence, had not been fully taken into consideration.

Depression/Anxiety

77. The respondent disputes that the claimant's disability of depression/anxiety amounts to a disability at the relevant time. The respondent does not dispute that the claimant suffers from depression/anxiety.

78. The claimant in his claim form states:

> *"My employers and managers are both aware that I suffer and have suffered for some years from clinical depression and anxiety. … I am also awaiting assessment as to whether I have Autistic Spectrum Disorder/aspergers syndrome*".

79. The respondent's response form clearly states:

> "*for the purposes of these proceedings, the respondents at this stage do not admit that the claimant meets the statutory definition of disability within the Disability Discrimination Act 1995 as amended and therefore currently required the claimant to formally prove same*".

80. The claimant and his representatives were undoubtedly aware from this early stage in the proceedings that the respondent was disputing that the claimant's depression/anxiety amounted to a disability under the DDA and that the issue of his disability was a matter to be determined by the tribunal.

81. The claimant's witness statement contained no evidence of whether his depression/anxiety substantially affected his ability to carry out normal day to day activities. The extent of the claimant's evidence in relation to his disability was as follows:-

> *"My employers and managers should have been aware that I suffer, and have suffered for many years, from clinical depression and anxiety. I had a significant amount of sick leave in 2008 and 2009 because of clinical depression and anxiety.*

82. No medical evidence was adduced on behalf of the claimant nor did the claimant's witness statement contain any evidence of the effect (substantial or otherwise) of the claimant's mental impairment on his ability to carry out normal day to day activities. As set out above, the burden of proof is on the claimant to show that he was disabled within the meaning of the DDA at the relevant time.

83. The tribunal finds it extremely difficult, if not impossible to make any findings on how the claimant's mental impairment of depression/anxiety impacted on his ability to carry out normal day to day activities. Throughout the claimant's case he has been represented by a qualified Trade Union Representative from NIPSA. The tribunal carefully considered the records of proceedings and unanimously concludes that it was clear that the claimant's witness statement must be a complete statement of the evidence relating to the issues in respect of both liability and remedy. The tribunal is satisfied that it was patently obvious from the respondent's response and throughout the various case management hearings that the issue of whether the claimant's depression/anxiety amounted to a disability was an issue to be determined. This was repeatedly referred to throughout case management.

Furthermore the tribunal is satisfied that the claimant and his representatives were fully aware of the need to produce evidence, including medical evidence, to the tribunal on the issue of the claimant's alleged disability namely depression/anxiety. They did not do so. In the claimant's witness statement the only medical evidence referred to was the Occupational Health Report and his GP letter. (see paragraph 63(c) and (d) above). None of the medical evidence identifies the claimant's anxiety or depression as a disability nor does it provide any evidence of any impact on the claimant. Accordingly, the tribunal concludes on the basis of the evidence before it that the claimant has failed to establish that he is disabled by reason of his depression/anxiety, at the relevant time, for the purposes of the DDA.

Reasonable Adjustments

84. Even had the claimant satisfied the tribunal that he was disabled and that the respondent had the requisite knowledge, the tribunal would have dismissed the claimant's claim for the following reasons:-

(1) There was no evidence that the decision to refer the claimant's conduct to formal investigation or to issue a formal written warning substantially disadvantaged the claimant in comparison with those who are not disabled. The disadvantage relied on by the claimant is 'unnecessary and undue stress' caused by the respondent's decision to proceed to formal disciplinary action and issue the first written warning. The tribunal concludes that non-disabled employees would suffer similar upset and stress by a disciplinary process and disciplinary warning. There was no evidence before the tribunal that either of the identified PCPs placed the claimant at a particular substantial disadvantage by reason of either disability. As per ***Nottingham City Transport Ltd v Harvey*** there must be a causative link between the PCP and the disadvantage. If a non-disabled person would be affected by the PCP in the same way as the disabled person, then there is no comparative substantial disadvantage to the disabled person. Therefore the tribunal determines that the duty to make reasonable adjustments was not triggered.

(2) Furthermore had the duty to make reasonable adjustments been triggered, the particular steps requested by the claimant namely the application of an informal process or a decision not to issue a disciplinary penalty are not, in all the circumstances of this case reasonable adjustments under Section 18B (1) (b) and (c) for the following reasons:

(i) The respondent's disciplinary policy sets out standards of behaviour expected from employees and the purpose of the disciplinary process is to emphasise and encourage improvement of an individual's conduct.

(ii) The disciplinary policy applies to all staff. The respondent has a responsibility for the welfare and well-being of all its staff.

(iii) The informal process had been applied to the claimant on a number of occasions and further misconduct had occurred; when the informal procedure did not have the desired result, the tribunal is satisfied that

it was reasonable in all the circumstances of this case for the respondent to invoke the formal procedure.

(iv) At the hearing the claimant maintained his position that his conduct did not warrant any disciplinary action, formal or informal. It was his view that he had not committed any misconduct and that his behaviour, whilst upsetting to a colleague was entirely justified given his role as a civil servant.

(vi) The claimant accepted that if an employee acted in a way that had an adverse impact on the working of the Department it was reasonable that the formal disciplinary procedure be invoked and that a diagnosis of Autism was not "carte blanche" for inappropriate behaviour or misconduct.

(vii) The tribunal accepts that Mr Toogood and Ms Godfrey both took into account the claimant's personal circumstances and the reason for his absence at the time the misconduct occurred.

85. The claimant's claim is dismissed in its entirety.

Employment Judge:

Date and place of hearing: 16-19 September 2019, Belfast.

Date decision recorded in register and issued to parties: