EMPLOYMENT TRIBUNALS

Claimant: **Mr Holyfield**

Respondents: **(1) Climar Industries Ltd**
(2) Staffordshire Garden Fencing Ltd

Heard At: **Cardiff By Video** **On: 11th, 12th, 13th & 14th July 2022**

Before: **Employment Judge Howden-Evans**
Tribunal Member L Owen
Tribunal Member L Thomas

Representation:
Claimant **Mrs Holyfield,**
Claimant's Mother

Respondents **Ms K Kaur, Respondents' Legal Representative**

JUDGMENT having been sent to the parties on 2nd August 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The unanimous decision of the Employment Tribunal was that the Claimant was an employee of Climar Industries Limited; that Climar Industries Limited had a duty to make reasonable adjustments for the Claimant and had failed to comply with this duty and that in its decision to dismiss the Claimant from employment, Climar Industries Limited had treated the Claimant unfavourably because of something arising in consequence of his disability.

The Parties

1. Staffordshire Garden Fencing Limited is a wholly owned subsidiary of Climar Industries Limited; the respondents manufacture and install home and garden products.

2. Parties agree the Claimant, Mr Holyfield, was employed, as an accredited installer / fitter, from 1st May 2020 (although the tribunal notes there is some evidence that he had started work for the respondents

prior to this, for instance he has a payslip dated 30th April 2020). The Claimant was dismissed with a payment in lieu of notice on 18th December 2020. There is an issue as to which Respondent was the Claimant's employer.

3. Mr Holyfield has ADHD. The respondents assert they were not aware of Mr Holyfield having ADHD at the relevant time.

4. Early conciliation started on 13th March 2021 and ended on 24th April 2021 (in respect of the First Respondent); in respect of the Second Respondent, Acas early conciliation started on 16th March 2021 and ended on 27th April 2021.

5. The claim form was presented on 19th May 2021 and made allegations of discrimination arising from disability and failure to make reasonable adjustments. The claim form had also included a claim of automatic unfair dismissal, but this was dismissed following withdrawal at the preliminary hearing.

6. A preliminary hearing for case management took place on 18th January 2022 at which the List of Issues was agreed.

The Hearing

7. The 4-day final hearing was conducted wholly remotely by video, before a tribunal of three. Mr Holyfield was a litigant in person and was represented by his mother; the Respondents were jointly represented by Ms Kaur, legal representative.

8. We had the benefit of being able to consider a bundle of documents of approximately 356 pages.

9. At the start of the hearing, we discussed the List of Issues and agreed they remained as set out in the Case Management Order following the hearing on 18th January 2022.

10. The Tribunal heard evidence on oath from Mr Morris, Mr Bowen, Mr Holyfield and Mrs Holyfield.

11. All witnesses relied upon written witness statements which the tribunal had read prior to each witness taking the oath. The procedure adopted for each witness was the same – there was opportunity for supplemental questions, followed by questions from the other side and tribunal questions and then an opportunity for re-examination / the witness to clarify any of the answers they had previously given.

12. By consent, parties exchanged written closing submissions by 5pm on 13th July 2022 and had the opportunity to make any further written submissions by 10am the following morning. The Tribunal started its discussion at 10am on 14th July and was able to deliver an oral decision during the afternoon of 14th July 2022.

The Issues

13. Having been provided with medical evidence, by the time of the final hearing, the Respondents accepted the Claimant had a disability at all relevant times, by reason of him having ADHD.

14. By the time of closing arguments, the issues the Tribunal had to determine were:

Correct Respondent

1. Which is the correct respondent? Who was the Claimant's employer?

Discrimination arising from disability (Equality Act 2010 section 15)

2. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

3. Did the Respondent treat the Claimant unfavourably by:

    a. Refusing to allow the Claimant to be accompanied at this disciplinary hearing by his medical carer; and/or

    b. Dismissing him?

4. Did the following things arise in consequence of the Claimant's disability: The claimant's lack of self confidence, his lack of self esteem and his need to be liked?

5. Was the unfavourable treatment because of any of those things? The Claimant asserted that because of the matters above he was unable to challenge or influence his manager while on duty and went along with what his manager did or told him to do and this was the reason for his dismissal.

6. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

    a. To ensure that all company procedures and policies were followed

7. The Tribunal will decide in particular:

    a. was the treatment an appropriate and reasonably necessary way to achieve those aims;

    b. could something less discriminatory have been done instead;

c. how should the needs of the Claimant and the Respondent be balanced?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

8. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

9. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

   a. Providing employees with the statutory right of accompaniment at disciplinary hearings (ie to be accompanied by a trade union representative or employee colleague

10. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was unable to cope with stress which affected his ability to understand what was going on and be able to respond effectively unless he had his carer present for moral support?

11. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

12. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

   a. To allow the claimant the opportunity to bring his mother and carer to the hearing so that he could feel supported better understand what was going on and be better able to respond to the case that was put to him.

13. Was it reasonable for the Respondent to have to take those steps and when?

14. Did the Respondent fail to take those steps?

Findings of fact

15. The Claimant started employment around the 1st May 2020, as a fitter installing fences at various residential properties.

16. His line manager was Mr Williams the territory manager. The Claimant was not able to drive and was reliant on his line manager to drive him from job to job in the company van during the working day. As the territory manager, Mr Williams was also responsible for following up leads, arranging new appointments, generating and arranging new work

in the region. This meant he would sometimes be stopping in the van to take or make calls to clients and potential customers.

17. The Claimant has ADHD. In 2012 his mother became his medical carer.

18. The Claimant was doing a good job in his new employment; there is positive customer feedback about the claimant's work in May and June 2020.

19. The Claimant's probationary review was conducted by his line manager Mr Williams on 30th September 2020. Mr Williams noted his work was of a very high standard and the Claimant passed his probation.

20. The Claimant's line manager, Mr Williams, was dismissed by Mr Morris on 10th November 2020 for failing to meet his own objectives in his probationary period.

21. On 11th November 2020 a colleague made allegations about the Claimant's line manger Mr Williams and the Claimant.

22. On 13th November 2020 the Claimant was suspended on contractual pay to allow an investigation to take place and subsequently attended an investigatory meeting with Mr Morris and the Respondents' HR officer on 18th November 2020. At this meeting the Claimant showed Mr Morris and the Respondents' HR officer the medication he was taking and said "I do take prescription drugs for ADHD, that's methylphenidate hydrochloride"

23. On 8th December 2020 the claimant returned a form acknowledging he had received the staff handbook. He was also provided and signed his Statement of Terms around this time

24. The Claimant was invited to attend a discplinary hearing. On 9th December 2020, by email the Claimant asked for his mother to be able to attend the disciplinary hearing – this request was denied by the Respondents' HR officer who said he was only entitled to be accompanied by a work colleague or union official.

25. On 14th December 2020, Mr Morris "on behalf of Climar Industries Limited" notified the Claimant he was being furloughed until 18th December 2020.

26. The same day the claimant attended a disciplinary meeting conducted by Mr Morris at the Holiday Inn. His mother drove him to the meeting. As he entered the meeting, the claimant said *"My mum is in the car – please can she come in the meeting with me?".* This request was denied. In response to questions during the meeting, the Claimant said *"all this is making me ill"* and when the Claimant was struggling to respond Mr Morris agreed to take a break during the disciplinary meeting. During the same meeting, the claimant read out a prepared statement and offering to do a further probationary period

27. During the disciplinary meeting the Claimant was asked to account for various occasions on which the van appeared to be parked in laybys and there was no obvious work activity being undertaken. The Claimant was often overwhelmed by these questions.

28. On 21st December 2020 the Claimant received an email attaching his P45. Subsequently, he received Mr Morris's letter in the post, confirming he had been dismissed.

29. A number of allegations had been made about the Claimant and Mr Wiliiams but were not upheld by Mr Morris. However Mr Morris decided to dismiss the claimant with a payment in lieu of notice on grounds of misconduct namely wasting company time by being in a vehicle that was parked in various non-work locations. Mr Morris accepted the van was being driven by the Claimant's line manager Mr Williams, but Mr Morris formed the view that the Claimant ought to have challenged or reported his line manager for wasting time and that the Claimant's failure to do so amounted to a breach of trust.

30. By letter of 2nd January 2021 the Claimant appealed the decision to dismiss him. He was asked to provide specific grounds for appeal. With his mother's assistance he wrote the letter of 8th January 2021 in which he explained he had been dismissed for association with his line manager (Mr Williams) and pointed out that a part of his disability was his need to please and be liked and his lack of self esteem and confidence. In his appeal letter he said *"I was doing as I was told by my employer at all times"* and went on to say that he had worked hard and had always done as instructed and this appeared to have backfired on him. In his letter of 8th January 2021, the Claimant sent his employer various attachments including correspondence from his psychologist confirming his diagnosis of ADHD and correspondence confirming he was in receipt of employment and support allowance based upon his health condition.

31. By letter of 11th February 2021, Mr Bowen invited the Claimant to attend an appeal hearing.

32. The Respondent's HR officer had again suggested that the Claimant could only be accompanied by a work colleague (rather than his carer). Subsequently it was agreed that if the Claimant obtained evidence confirming the Claimant's mother was his "official medical carer" she would be permitted to attend the appeal hearing. The Claimant obtained a letter from his GP confirming his mother was his medical carer and the Claimant's mother was permitted to attend the appeal.

33. By email on 23rd February 2021, on behalf of the Claimant, his mother explained *"Even if [the Claimant] thought he [Mr Williams] was doing something wrong, because of [his] disability [he] would never challenge him. [His] disability is such that regardless of whether [he was] aware or not that "wastage" was occurring [he] would do everything [his] boss*

asked of [him] for fear of being disliked and rejected and of course, even losing [his] job."

34. The Claimant was unwell with stress and the appeal was rescheduled twice. On 1st March 2021 the appeal was able to go ahead. Mr Bowen chaired the appeal and it was attended by the Claimant and his mother. At the end of the appeal meeting, Mr Bowen decided to adjourn the meeting to consider his decision.

35. On 16th March 2021, the Respondents' HR officer emailed the Claimant's mother and explained that Mr Bowen had not reached a decision in relation to the appeal and was requesting an occupational health assessment to inform his decision.

36. The Claimant confirmed his consent to this referral to occupational health. Following a remote assessment, Dr Sperber, Consultant Occupational Physician confirmed in his report dated 3rd May 2021 that the Claimant was likely to have a disability as defined in the Equality Act 2010 by reason of his ADHD anxiety and depression. In response to specific questions he noted

"This gentleman does have a background history of ADHD and anxiety. According to [the Claimant] this does affect his confidence and increases the need for him to want to please people. <u>This is certainly possible and may prevent him from asking questions.</u>

[The Claimant] can distinguish between right and wrong, including when his actions could result in criminal activity. He would be able to challenge his line manager if he felt that what he was doing was a criminal offence, <u>although he may not challenge his line manager with a less serious offence.</u> This may not, however be entirely due to his background psychological condition. I do not have sufficient information from an expert within the information provided in this field (ie a psychiatrist) in order to determine whether this will be the case. Management may wish to consider requesting an independent psychiatric assessment to clarify matters further." [Tribunal emphasis]

37. Mr Bowen's evidence was that in May 2021 having received the occupational health report he read the section that reported the Claimant can distinguish between right and wrong and decided to uphold the decision to dismiss the Claimant. Mr Bowen confirmed he had nothing further to do with the appeal from May 2021 onwards and did not relay this decision verbally to the Claimant. Mr Bowen believed a letter had been sent to the Claimant in May 2021 confirming the outcome of the appeal but accepted there was no appeal outcome letter in the bundle. The Claimant and Mrs Holyfield's evidence was that they had not received a letter confirming the appeal outcome. The Tribunal accept it is more likely than not that the Respondents have never written to the Claimant confirming the outcome of the appeal.

38. On 19th May 2021, the ET1 claim form was issued.

39. In August 21 there was correspondence from the Respondents' HR officer indicating that she was trying to arrange a reconvened appeal hearing with Steve Brown being the chair (not Mr Bowen the previous Appeal manager). The Claimant was too unwell to attend, so written answers were provided to questions. There wasn't any further appeal meeting, appeal hearing or conclusion to the appeal.

40. **The Law**

41. The Equality Act 2010 ("EqA") protects employees from discrimination based on a number of "protected characteristics". These include disability (Section 6 EqA).

42. Section 39(2) EqA provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include by dismissing the employee and by subjecting an employee to any detriment.

43. Section 39 (5) EqA provides an employer has a duty to make reasonable adjustments for a disabled employee.

44. **Disability Discrimination**

45. As Baroness Hale explained in *Archibald v Fife Council [2004] UKHL32,* disability discrimination is different from other types of discrimination, as the difficulties faced by disabled employees are different from those experienced by people subjected to other forms of discrimination,

> **"…[the Disability Discrimination Act 1995] is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminate against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment."**

46. This element of more favourable treatment is reflected in the two types of protection that are unique to disability: Section 20-21 EqA (failure to make reasonable adjustments) which requires an employer to take action in certain circumstances and Section 15 EqA (discrimination arising from disability) which is focussed upon making allowances for disability.

47. **Failure to make reasonable adjustments**

48. Disability discrimination can take the form of a failure to comply with the duty to make reasonable adjustments (see Sections 20, 21(2), 25(2)(d) and 39(5) EqA).

49. Section 20 EqA imposes, in three circumstances, a duty on an employer to make reasonable adjustments. They include, at Section 20(3) EqA, circumstances where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. The duty then requires an employer to take such steps as it is reasonable to have to take to avoid the disadvantage (Section 20(3) EqA).

50. Section 212(1) EqA defines "substantial" as "more than minor or trivial"; it is a low threshold. However, this exercise requires the Tribunal to identify the nature and extent of the claimant's substantial disadvantage in meeting the PCP, because of their disability (see *Chief Constable of West Midlands Police v Garner EAT 0174/11*).

51. Mr Hollyfield bears the burden of proving the PCP put him at a substantial disadvantage in comparison with non-disabled colleagues. (See the EAT's decision in *Project Management Institute v Latif [2007] IRLR 519*)

52. When assessing whether there is a substantial disadvantage, the Tribunal must compare the position of the disabled person with persons who are not disabled. This is a general comparative exercise and does not require the individual, like-for-like comparison applied in direct and indirect discrimination claims (see *Smith v. Churchill's Stairlifts plc [2006] IRLR 41 CA* and *Fareham College Corporation v. Walters [2009] IRLR 991 EAT*). The House of Lords confirmed in *Archibald v Fife Council [2004] UKHL 32* that an employer is no longer under a duty to make reasonable adjustments when the disabled person is no longer at a substantial disadvantage in comparison with persons who are not disabled.

53. There are supplementary provisions in Schedule 8 EqA. Paragraph 20 of that Schedule provides that the duty to make reasonable adjustments only arises where an employer knows (or ought reasonably to know) of both the disabled person's disability and that they were likely to be at that disadvantage.

54. The Equality and Human Rights Commission Code of Practice on Employment (2011) ("the EHRC Code of Practice") provides at paragraph 6.19

"**an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case.**

What is reasonable will depend on the circumstances. This is an objective assessment.

55. Once the duty has arisen, the Tribunal must consider whether the respondent has complied with it by taking such steps as it was reasonable to have to take to avoid the disadvantage. The Equality and Human Rights Commission Code of Practice on Employment (2011) ("the EHRC Code of Practice") sets out a list of possible adjustments that might be taken by employers in paragraph 6.33. In many cases, the question of compliance with the duty will turn on whether a particular adjustment was (or, if not made, would have been) "reasonable". This is an objective test to be determined by the Tribunal and can be highly fact sensitive. It is a rare example of Tribunals being permitted to substitute our own views for those of the employer where we consider, in effect, that it ought to have reached a different decision. Lord Hope explained in *Archibald v Fife Council [2004] IRLR 651*, that sometimes the performance of this duty might require the employer to treat a disabled person, who is in this position, more favourably to remove the disadvantage attributable to the disability.

56. It is important to assess whether a proposed adjustment would have avoided the disadvantage – in lay terms, whether it would have worked. The EHRC Code of Practice sets out some of the factors that may be taken into account when determining whether an adjustment was reasonable at paragraph 6.28. They include: whether the steps would be effective; the practicability of the steps; the financial and other costs of making the adjustment; the extent to which it would disrupt the employer's activities; the extent of the employer's financial or other resources; the availability to the employer of financial and other assistance to help make the adjustment (such as advice through Access to Work) and the type and size of the employer.

57. In *Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10/JOJ* Keith J confirmed that it was not necessary for the Tribunal to find there was a "real prospect" of the adjustment removing the particular disadvantage; it was sufficient for the tribunal to find that there would have been "a prospect" of that.

Discrimination arising from disability

58. S15 Equality Act 2010 ("EqA") provides,

A person (A) discriminates against a disabled person (B) if—

a. A treats B unfavourably because of something arising in consequence of B's disability, and

b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

59. The first point to note is, if the employer can show they did not know, and could not reasonably have been expected to know that the claimant had a disability the s15 claim will fail.

60. Para 5.14 of EHRC Code of Practice explains

"employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'."

61. The next point to note in a s15 claim is that the tribunal does not need to compare the claimant's treatment to that of a comparator, real or hypothetical. The claimant must prove "unfavourable treatment", i.e. that they have been put at a disadvantage, and that this was because of something arising in consequence of the claimant's disability. The EHRC Code of Practice explains that arising in consequence includes anything which is the result, effect or outcome of the person's disability.

62. The claimant has to demonstrate unfavourable treatment: it is not enough to show they have been differently treated.

63. In *Pnaiser v NHS England and anor [2016] IRLR 170 EAT, Mrs Justice Simler* summarised the proper approach to determining s15 claims at paragraph 31,

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport [1999] IRLR 572*. A discriminatory

motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.

(d) The Tribunal must determine whether the reason/cause (or, if more than one) a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act,…the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton UKEAT/0149/14* a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the 'something' leading

to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

As Langstaff P held in *Weerasinghe,* it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

Burden of proof

64. S136 EqA provides,

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

But subsection (2) does not apply if A shows that A did not contravene the provision.

65. S136 Equality Act 2010 establishes a "shifting burden of proof" in a discrimination claim. If the claimant is able to establish facts, from which the Tribunal could decide, in the absence of any other explanation that there has been discrimination, the Tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. In the well-known *Igen Limited and others v Wong and conjoined cases 2005 ICR 931*, the Court of Appeal gave the following guidance on how the shifting burden of proof should be applied:

It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant that is unlawful. These are referred to below as "such facts".

If the claimant does not prove such facts their discrimination claim will fail.

It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

In deciding whether the claimant has proved such facts, remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

It is important to note the word "could" in [s136 Equality Act 2010]. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw.

Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [disability], then the burden of proof moves to the respondent.

It is then for the respondent to prove that they did not commit that act.

To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [disability], since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [disability] was not a ground for the treatment in question.

Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

66. However, it is also established law that if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a Tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (e.g. disability). (see *Laing v Manchester City Council 2006 ICR 1519*)

Conclusions

67. The Respondents now accept the Claimant had a disability at all relevant times, by reason of him having ADHD. The Tribunal accepts at all relevant times the Claimant has had a disability as defined in s6 Equality Act 2010 by reason of his ADHD. The Respondents dispute they had knowledge of the Claimant's disability at the relevant time.

Turning to the issues, our findings were

Which is the correct respondent?

68. S39 (2) Equality Act 2010 makes it quite clear that "an employer" must not discriminate against an employee by dismissing them or subjecting them to any other detriment.

69. S39(5) Equality Act 2010 also makes it clear that the duty to make reasonable adjustments applies to "an employer".

70. So the question we had to answer was "Who was the Claimant's employer?". The Respondents submitted it was Staffordshire Garden Fencing; the Claimant submitted it was Climar Industries Ltd.

71. It is agreed that Staffordshire Garden Fencing Limited ("Staffordshire") is a wholly owned subsidiary company of Climar Industries Limited ("Climar") and trades from the same address as Climar.

72. The Claimant's Statement of Main Terms of Employment [p49] signed in December 2020……says Staffordshire Garden Fencing Ltd "employs" the Claimant.

73. The Deductions From Payment Agreement [p50] refers to Climar Industries Limited and the employee handbook [p51] sent to the Claimant refers to Climar as the employer.

74. The Claimant's payslip of 30th April 2020 [p356], and his P45 [p355] both identify Climar Industries Ltd as the claimant's employer. The Claimant was "furloughed" using the government's Coronavirus Job Retention Scheme by Climar.

75. In the ET3 submitted by Climar it identified "2 people" as being employed by Climar at the place where the Claimant worked. During oral

evidence, Mr Bowen's evidence was that the 2 people referred to would have been the Claimant and Mr Williams. This ET3 accepts the dates of "employment" set out in the ET1 claim form without querying whether Climar was the Claimant's employer.

76. In oral evidence the Respondents' witnesses, Mr Bowen and Mr Morris confirmed the Claimant and themselves were all employed by Climar.

77. Mr Morris said *"Staffordshire is a wholly owned subsidiary of Climar so anyone employed by Staffordshire is also employed by Climar and is paid by Climar".*

78. When Mr Bowen was asked to confirm who employed the Claimant he said Climar and confirmed his employer was also Climar.

79. The tribunal accepts the Claimant was an employee of Climar Industries Limited and Climar Industries Limited had a duty to make reasonable adjustments for the Claimant

Discrimination arising from disability (Equality Act 2010 section 15)

Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

80. At the outset of his employment, the Claimant completed a written health questionnaire for the Respondents and stated he had ADHD. We accept the Claimant and Mrs Holyfield's evidence that the Claimant had told his line manager, Mr Williams about his ADHD during his interview for the job. We accept that shortly after this interview the Claimant's mother had thanked Mr Williams for *"giving him an opportunity with his ADHD",* to which Mr Williams responded *"that's the reason I gave him the chance; because he has ADHD".*

81. During the investigatory meeting on 18th November 2020, the Claimant showed Mr Morris and the Respondents' HR officer the medication he was taking to treat his ADHD and explained it was medication for his ADHD. We accept that Mr Morris and the HR officer had actual knowledge of Claimant having ADHD from 18th November 2020.

82. We accept that Mr Bowen had actual knowledge of the Claimant's ADHD and the impact the Claimant's ADHD had on his self-esteem and confidence and ability to challenge others when he received the Claimant's letter of 8th January 2021 explaining the Claimant's grounds of appeal and attaching further information about ADHD.

Did the Respondent treat the Claimant unfavourably by: Refusing to allow the Claimant to be accompanied at this disciplinary hearing by his medical carer

83. The tribunal accepted the Respondents' HR officer had refused to allow the Claimant's carer to accompany him at the disciplinary meeting

(saying he could only bring a colleague or trade union official). We accepted that this refusal was repeated during the disciplinary hearing itself. We accept that being denied your carer's support during a disciplinary meeting amounts to unfavourable treatment.

Did the Respondent treat the Claimant unfavourably by: dismissing him from employment?

84. It is agreed that the Claimant was dismissed.

Did the following things arise in consequence of the Claimant's disability: The claimant's lack of self confidence, his lack of self esteem and his need to be liked?

85. The Tribunal note that the occupational health report confirmed it was "certainly possible" that the claimant's ADHD affected his confidence, increased his need to want to please people and may prevent him from asking questions.

86. This is supported by the Claimant's evidence, his mother's evidence, the older medical evidence and the Claimant's presentation during this hearing; the Tribunal accept that the Claimant experiences a lack of self confidence, lack of self esteem and a need to be liked and that this is a consequence of his ADHD.

Was the unfavourable treatment because of any of those things?

87. There are two separate allegations of disability discrimination (discrimination arising from disability contrary to s15 Equality Act 2010).

88. In relation to the first allegation - We did not find that the refusal to allow the Claimant to be accompanied at this disciplinary hearing by his medical carer was because of the Claimant's lack of self confidence, lack of self esteem and his need to be liked. We accepted the reason this had happened was the Respondents' HR officer was following the Respondents policy (albeit it ought to have been adjusted to take into account the Claimant's disability – see reasonable adjustments below).

89. In relation to the second allegation:

    a. The Claimant asserts that because of his lack of self confidence, lack of self esteem and his need to be liked, he was unable to challenge or influence his manager while on duty and went along with what his manager did or told him to do and this resulted in his dismissal.

    b. The Tribunal accepts that was the case. We accept that because of his lack of self confidence and his need to be liked he was not able to question why they were stopping in laybys or why they were spending time in the van.

c. We accept the reason the claimant was dismissed was that he had wasted company time and according to Mr Morris, the Claimant had breached the Respondent's trust by not challenging his line manager about the time they were wasting in the van.

d. The appeal was a missed opportunity to correct this error – the Claimant and his mother had set out in detail why the decision to dismiss the claimant was disability discrimination and this was supported by the occupational health report. It is a great shame that the Respondent didn't properly conclude the appeal process.

Was the treatment a proportionate means of achieving a legitimate aim?

90. The Respondents say the aim was to ensure that all company procedures and policies were followed

91. The Tribunal did not find the Respondent had followed company procedures and policies as there was no timely conclusion to the appeal.

92. Further and in the alternative, we found that there were many less discriminatory options available to the Respondents. The Respondents could have extended the Claimant's probation and/or given the Claimant a final warning. The Claimant completely follows instructions and would have heeded this warning.

93. We are satisfied that the decision to dismiss the Claimant was discrimination arising from disability contrary to s15 Equality Act 2010.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

94. As explained earlier, we have found that at all relevant times the Respondents had actual knowledge that the Claimant had ADHD.

Did the Respondent have the following provision, criterion, or practice: Providing employees with the statutory right of accompaniment at disciplinary hearings (ie to be accompanied by a trade union representative or employee colleague

95. The Tribunal accept that the policy was to only allow a colleague or trade union representative to accompany an employee at disciplinary hearings.

Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was unable to cope with stress which affected his ability to understand what was going on and be able to respond effectively unless he had his carer present for moral support?

96. The Tribunal accept that because of his ADHD the Claimant experiences low self-esteem and lack of confidence and this means that in stressful situations, such as attending his disciplinary hearing, he experiences

substantial difficulty responding effectively such that he is at a substantial disadvantage compared to someone without his disability. This was demonstrated by the Claimant's comments during the disciplinary meeting and by the meeting having to be paused as the Claimant was finding it difficult to respond.

Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

97. The Claimant met the Respondents' HR officer and Mr Morris when they interviewed him during the investigatory meeting. During this meeting (on 18th November 2020) he had told them that he was taking prescription drugs for ADHD and showed them the drugs. Prior to the disciplinary hearing he had asked for his mother to be permitted to attend the hearing. At the start of the hearing he said she had driven him to the meeting and was waiting outside for him and again asked for her to be able to attend the hearing. In these circumstances we are satisfied that the Respondents' HR officer and Mr Morris can reasonably have been expected to know that the Claimant was likely to be at a substantial disadvantage (compared to someone without ADHD) responding effectively during the disciplinary hearing.

98. We are satisfied that the duty to make reasonable adjustments was triggered.

What steps could have been taken to avoid the disadvantage?

99. The Claimant suggested it was a reasonable adjustment to allow the claimant's mother to attend the disciplinary hearing so that he could feel supported, better understand what was going on and be better able to respond to the case that was put to him.

100. The Respondent was able to make this adjustment for the appeal hearing and the Tribunal find that it was reasonable to expect the Respondent to have taken this step for the Disciplinary Hearing. We are satisfied that if this step had been taken it would have been effective in helping the Claimant to fairly participate in the disciplinary hearing and significantly reducing the substantial disadvantage that he faced.

101. This step didn't entail any additional cost or cause any difficulty for the Respondent and so the Tribunal find that in failing to take this step for the disciplinary hearing, the Respondent failed to discharge its duty to make reasonable adjustments for the Claimant's disability.

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Employment Judge L Howden-Evans

Dated: 13th October 2022

REASONS SENT TO THE PARTIES ON 13 October 2022

FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS Mr N Roche