THE EMPLOYMENT TRIBUNAL

Claimant: **Mr S. Moore**

Respondent: **Lasyl Audio and Visual Limited**

Heard at: London South Employment Tribunal

On: 31 October – 3 November 2022

Before: Employment Judge A. Beale
Ms B. Leverton
Mr E. Maw

Representation
Claimant: Mrs E. Moore, lay representative
Respondent: Mr S. Joshi, Counsel

JUDGMENT

(1) The Claimant's claim of direct disability discrimination is dismissed on the basis that it was brought out of time.

(2) The Claimant's claims of:

(a) detriment brought under s. 44 Employment Rights Act 1996; and (b) unfair dismissal contrary to s. 100 Employment Rights Act 1996,

fail and are dismissed.

REASONS

1. By a claim submitted on 2 December 2020, the Claimant brought claims of disability discrimination and detriment contrary to s. 44 Employment Rights Act ('ERA') 1996. The Claimant's claim was subsequently amended to include a claim for unfair dismissal brought under s. 100 ERA 1996. Oral judgment was given with reasons on the final day of the hearing, but the Claimant requested written reasons which are duly set out below.

2. There was a dispute about the precise allegations that were before the ET. These were discussed on the first morning of the hearing (31 October 2022) and the Tribunal found that each of the points the Claimant sought to rely on should be included, most because they were already pleaded and one by way of an amendment. Reasons for that decision are not included in these written Reasons, because they were provided orally on the first morning of the hearing, and written reasons for that decision were not requested. A final list of issues was subsequently produced and agreed by the parties and is reproduced in Appendix 1 to these Reasons.

Witnesses

3. The Tribunal heard from the Claimant on his own behalf and Ms Karyn Adams, Ms Rachel Leakey, Mr Alex Wiltshire and Mr Christian Hellel on behalf of the Respondent.

Documents

4. The Tribunal was provided with a bundle running to 702 pages, following additions by both parties to the original bundle of 555 pages. We did not read the entire bundle but only those pages referred to in the parties' witness statements, or to which we were subsequently taken during the course of the evidence.

Issues

5. The agreed list of issues, which was only finalised during this hearing, is appended to the rear of these written reasons for ease of reference. Whilst previous case management discussions and Lists of Issues referred to s. 44(1A)(b) ERA 1996, it was established during the course of the discussions on the first morning that the Claimant's claim was brought under s. 44(1A)(a) ERA 1996, as the step he had taken to avert what he alleged to be circumstances of serious and imminent danger was to leave the workplace.

Findings of Fact

6. The Claimant was employed by the Respondent as an Installation Engineer from 5 March 2019 until his dismissal on 24 February 2021. The Respondent is a business which supplies and installs audio visual equipment, including TV and video machines, aerial/satellite systems, data networking, CCTV, door entry, automated blinds, cinema rooms and music systems. It is a family-run business

in which two Executive Directors, Christian and Dominic Hellel, each have a shareholding of 50%. Christian Hellel's role involves project management and drawing up proposals for the client, whilst Dominic Hellel is the chief installer.

7. The Respondent is a small business, with the number of employees varying between 8 and 10, including (in addition to the two Directors), their sister Karyn Adams, who is an employee but also has the title of Director and had responsibility for staffing matters; Rachel Leakey, who began employment as a book-keeper but subsequently took on some parts of the role of office manager and a store manager, Alex Wiltshire. At the time relevant to the Claimant's claim, the Respondent also employed an installation manager, Hugo Cundell, and another installation engineer, Colin James.

8. We were told there was no clear line management structure within the Respondent, although the Claimant's job description (p. 71) states that he reported to the Lead Installer (Dominic Hellel) and the Partnership Owners (presumably Dominic and Christian Hellel).

9. There is no dispute that the Claimant is dyslexic, although the Respondent does dispute that in his case, this constitutes a disability.

10. The Claimant alleges that on 29 May 2019, Ms Adams made comments about his emails which related to his dyslexia. The Claimant initially made this allegation in a letter dated 3 December 2020, which was sent to the Respondent and the Tribunal the day after submitting his claim form. He said in that document that Ms Adams had said *"I find your emails amusing, they make me laugh"*, although he did not say when the remark had been made. He also said that Ms Adams had made him feel embarrassed, humiliating him in front of other staff members, on numerous occasions. It is common ground that the Claimant had not raised any complaint about this alleged behaviour at the time. In subsequent Scott Schedules, the Claimant said this remark had been made in May 2019 but subsequently became a "regular remark". In his witness statement, he pinpointed the date of the remark as 29 May 2019 for the first time, and stated that the remark made was *"your emails make me laugh"*. He did not give any other dates on which this or similar remark(s) had been made in his written or oral evidence. Ms Adams denies making any such remark, and gave evidence that her brother, Christian Hellel, Ms Leakey and another employee had dyslexia and that she would not have mocked individuals because they had made spelling errors. We deal with our findings on these points in our conclusions below.

11. The Claimant passed his probationary period and worked successfully as an installation engineer for several months. In January 2020, the Claimant was nominated by the Confederation of Aerial Industries for an Installer of the Year award; unfortunately, due to Covid, the ceremony was deferred and eventually took place after the Claimant's dismissal.

12. During the early days of the Covid-19 pandemic in 2020, the Respondent's shop was closed and a number of members of staff, including the Claimant and Ms

Adams, were furloughed. We find, based on the Respondent's email dated 29 May 2020 (p. 145), that Christian and Dominic Hellel had continued to work throughout the period of lockdown.

13. On 29 May 2020, Ms Leakey wrote to the Claimant attaching a "return to work" letter. The Claimant responded the same day asking how employees could work safely. Specifically, he asked about social distancing, particularly when two employees were in a van or on a job together, PPE, handwashing facilities and Covid-19 best practice (p. 147). On the same day, Christian Hellel responded to the Claimant setting out some details of the practices that would be adopted in the van; the PPE to be provided; handwashing and hand sanitising facilities and measures and the point at which the store would re-open. Mr Hellel also referred the Claimant to risk assessments to be found on the Citation (the Respondent's HR provider) portal, and attached the government guidelines for the Claimant's review. The Claimant responded *"Thank you for the clarifications and extensive response. I feel more confident about how we can work now as safe as we can with Covid 19*", and said he would return to work on the following Monday, which he did.

14. The risk assessments to which Mr Hellel referred in this email are in our bundle, and were produced by Rachel Leakey using templates from and with the assistance of Citation. There are assessments for Work in Other People's Homes and Shop & Back Office dated 14 May 2020. It is common ground that, at this stage, there was no risk assessment for use of the van. The Claimant says in his witness statement that he did not consider it necessary to review the risk assessments to which he was referred by Mr Hellel at that time, and we find that he did not read any of the Respondent's risk assessments until November 2020, just before he raised his grievance.

15. We heard evidence from Mr Wiltshire, the store manager, that although he had been on furlough until 7 September 2020, he had viewed the risk assessments on the Citation platform, Atlas. He said that he had also viewed a number of training videos relating to Covid-19 on subjects such as handwashing and social distancing. We find that the Claimant would similarly have been automatically notified of these resources and could have accessed them had he wished to do so.

16. The bundle contains some updated risk assessments dated 23 July 2020. We accept the Claimant's evidence that he only saw a notification that these documents had been uploaded onto the Atlas system on 8 November 2020 (p. 178); however, we also note that the Claimant does not seem to be aware of previous automated notifications from the Atlas system that were received by some other members of staff. We have not been able to ascertain whether the document had previously been uploaded to the system, and for the reasons we explain in our conclusions, we have not found it necessary to determine this issue.

17. Ms Adams and Mr Wiltshire gave evidence, which we accept, about the way in which the installation work was arranged between June and October 2020. Jobs

would be booked in advance and each customer would be called ahead of the job. During the call, Ms Adams or Mr Wiltshire would check whether the customer was comfortable with having two engineers entering their house, inform them that the engineers would be masked and wearing gloves, and ask them to keep windows open and if they were comfortable to do so, to go to a different room in the house. They would also ask whether anyone in the house was showing signs of Covid, and if so, engineers would not attend.

18. If the customer did not pick up the call, the engineers would still be required to attend at the premises for the job. However, Ms Adams said, and we accept, that if on arrival the engineers discovered that an occupant of the house was showing symptoms of Covid, if they notified the Respondent, they would not be required to continue and they would have been told to return to the office. We considered that Ms Adams' evidence in this regard was supported by an email from the Claimant in which he updated the Respondent that a customer's wife was shielding, and suggested that the job should be dealt with by Dominic or Christian Hellel (p. 596).

19. Throughout the period from June – October 2020, the Claimant did not refuse to undertake any job because of concerns about Covid-19. Between 4 August and 15 October 2020, the Claimant's undisputed evidence is that he interacted with around 129 clients without incident.

20. On 16 October 2020, the Claimant informed Ms Leakey and the Directors that he was required to self-isolate for up to 14 days from Wednesday 14 October, as members of the household where his partner worked as a childcare provider had tested positive for Covid-19. At this time, the Claimant believed this meant he would have to self-isolate until 28 October (p. 155). The Claimant updated the Respondent on 18 October 2020, by which time he and his partner had negative Covid tests, and said he understood he could return to work. The Claimant returned to work accordingly on 19 October 2020. However, on that same day, his partner developed a temperature, and the Claimant therefore went home to self-isolate.

21. On 20 October 2020, Ms Leakey, who was dealing with HR matters in the absence of Ms Adams, who was at this point caring for her terminally ill mother, sent the Claimant the self-isolation guidelines and asked him for an isolation note. There was then an email discussion between the Claimant and Ms Leakey about whether he needed to continue to isolate if he tested negative. It appears that neither the Claimant nor Ms Leakey was sure about this, with Ms Leakey stating that she would seek advice from Citation (p. 169). On 21 October, the Claimant informed Ms Leakey that he and his partner had tested negative, and he asked when he should return to work. Ms Leakey said that Citation were unable to assist as this was a medical matter, and had suggested that the Claimant call the 119 NHS line for clarity (p. 168).

22. On 22 October, the Claimant emailed Ms Leakey to say that he had spoken to 119 and had to abide by the isolation note, which said he was to isolate until 1 November 2020 inclusive (p. 168). Ms Leakey responded stating that she had

herself contacted 119 and believed that as the Claimant had not been directly contacted by track and trace, he did not have to isolate (p. 167 – 8). The Claimant responded to say he had called Sheen Lane Health Centre (which he said in his oral evidence was a specialist Covid-19 centre), who had also confirmed he had to continue to isolate in accordance with the note. There was then further correspondence on 27 October, in which Ms Leakey, relying first on the NHS guidelines and then stating that she had spoken to Sheen Lane Health Centre, 111 and 119, reiterated her position that the Claimant did not need to isolate. In response, the Claimant reiterated the position as stated to him by Sheen Lane, and said he had requested a private letter from Sheen Lane.

23. There were also telephone calls between the Claimant and Ms Leakey over this same period. Ms Leakey complains in her witness statement that one of these calls was heavily interrupted by "a female" who she believes to have been the Claimant's girlfriend (now wife), who argued with her.

24. We accept that the Claimant and Ms Leakey were given different information by the medical providers to whom they spoke about the Claimant's situation. However, we note that it is not clear what information Ms Leakey gave to those providers, and she may not have had the full details of the Claimant's situation available to her. We also find, based on the email Ms Leakey wrote to Kerry Matthews of Citation on or around 27 October 2020 (p. 159) that she was by this point exasperated with the Claimant's position and the position taken by his partner during the telephone call referred to above, which may also have influenced the information she gave to the medical providers.

25. At around this time, Ms Leakey spoke to at least one of the Respondent's Directors about the situation (see p. 159). She said in her oral evidence that she spoke only to Dominic Hellel, and this was confirmed by Christian Hellel, who said he had not been involved in any discussions at this time. We found Mr Hellel's evidence on this point convincing and we also note that only Dominic Hellel was copied in to Ms Leakey's final email to the Claimant on 27 October (p. 164).

26. Ms Leakey states in her email to Kerry Matthews (p. 159) that the "Directors", by whom we accept she meant Dominic Hellel, wanted to look at dismissing the Claimant "as all trust has been broken". We find that this was the position taken by Dominic Hellel at the time. Ms Leakey says, and we accept, based on the correspondence in the bundle (p. 160), that Citation advised that this would not be an appropriate course of action. No further action was taken in relation to this issue at the time, and there is no further email correspondence prior to the Claimant's return to work following isolation on 2 November 2020. However, we do also find that both Ms Leakey and Mr Hellel took the view that the Claimant was using his isolation note as an (unjustified) excuse not to attend work, and that both were unhappy with his conduct for this reason.

27. At around this time, early November 2020, the government announced new restrictions and the "tier system" in response to rising cases of Covid-19. On 4 November 2020, the Hellel brothers and Ms Adams sent an email to the

Respondent's employees (p. 172) to inform them that the plan was to continue with *"business as normal"* until advised otherwise, save that the Respondent's store would be closed to the public, and open for staff and deliveries only. The email stated that the Respondent would follow government guidelines, and that at this time the guidelines stated that if it was not possible to work from home, then individuals should go to work, which could include work carried out in people's homes.

28. Christian Hellel gave oral evidence that shortly before or after the sending of this email, he had a conversation with the Claimant outside the store during which the Claimant had made a remark that it was *"great"* they would be going *"on holiday again"* with a further lockdown. Mr Hellel responded that the Prime Minister had said it was business as usual and the Claimant then stormed off. We find that a conversation of this nature did take place, as it is clear from the Claimant's subsequent correspondence and interactions, as set out below, that he was very unhappy that the Respondent was to continue operating in people's homes. We find that the conversation probably occurred before Mr Hellel sent out the email of 4 November 2020, because otherwise the Claimant would have been aware that the business would not be closing and that he would not be furloughed.

29. We find that it is likely that this conversation with Mr Hellel prompted the Claimant to contact the Health and Safety Executive with the following query:

> *"Not sure if it's safe for the business to be open and us to work as we are residential av company going into multiple property everyday. Is this safe to work."*

30. The Claimant received a reply from the HSE on 3 November 2020 (p. 171) containing the following advice:

> *"Government guidance on working in other people's homes in England states that this can continue under all current local alert levels and guidance on the new national lockdown in England states that those who cannot effectively work from home "should continue to travel to work/attend their workplace" noting that "risk of transmission can be substantially reduced if COVID secure guidelines are followed closely. Extra consideration should be given to those people at higher risk....It is for the employer to determine whether the work is captured by the business closure requirements and carry out the appropriate risk assessment."*

31. We find that in general terms, this advice mirrored the position taken by the Respondent's subsequent email of 4 November 2020.

32. On 5 November 2020, the Claimant had a conversation with Mr Wiltshire in the store. Mr Wiltshire said in oral evidence, which accords with the Claimant's witness statement, that the conversation was about the restrictions or lack thereof that had been implemented within the business, and that the Claimant consequently felt unsafe and didn't want to come into work. Mr Wiltshire described the Claimant as having *"sheer contempt and malice"* in his voice during this conversation, and said it was clear he had a *"bone to pick"* with the Directors. The Claimant told Mr Wiltshire that he was going to report the

Respondent to Trading Standards. We accept Mr Wiltshire's account of the Claimant's tone, which is supported by the WhatsApp messages in which the two continued their exchange after they had left the store.

33. In his messages, the Claimant says that the Directors should not be operating going to people's homes; they should be providing an essential service only *"not making money for themselves"* (p. 173). He also wrote *"I've had stupid and incompetent managers and boss's before but at least somebody in the company with power had a brain and knew how to cover their ass at least."* We find that in his responses, Mr Wiltshire was attempting to draw the two parties together to resolve their differences; he also spoke to the Directors to ask them to engage with the Claimant. We find that he was surprised and somewhat bewildered by the level of the Claimant's anger towards the Directors, noting at one point "this seems personal". The Claimant responded to this by pointing to the Directors' treatment of him during his isolation, and a failure to give him a promised pay rise. We find that these factors did influence the Claimant's attitude towards the Respondent, but that his primary concern at this point was whether it was safe to continue working in people's homes, as relayed to the HSE.

34. 5 November 2020 was the last day on which the Claimant attended work. On 7 November 2020 (p. 176) he sent an email to Ms Leakey and the Directors, raising a formal grievance. The Claimant set out a number of points relating to the Respondent's risk assessments, including that they had not been maintained since 14 May 2020; had outdated information; had no information on working safely in domestic premises; that there was no risk assessment for working in company vehicles and that the risk assessment ratings were too low. He also said that some aspects of the risk assessments (e.g. training, control measures, safe cleaning equipment and isolation) had not been followed by the Respondent. He informed the Respondent that he considered it unsafe to work in these conditions; that he would not be attending work until the issues were resolved and asked to be put on furlough. The Claimant said he had been unable to discuss these issues in person because of the way he had been treated whilst isolating, and that he had raised the matter with the HSE.

35. The Claimant sent a further email to the Directors on 8 November 2020 (p. 178) after reviewing the risk assessments dated 23 July 2020, which he said had only just been uploaded to the Atlas platform. He said he still considered it unsafe to work, referring again to a lack of update to risk assessments. He asked for clarification of what work was deemed essential (as the risk assessments said *"non-essential work is not carried out"*) and in relation to staggered shifts, also mentioned in the risk assessment. He reiterated that he was not willing to work in an unsafe environment and asked to be placed on furlough.

36. At around this time, the mother of Ms Adams, Christian and Dominic Hellel sadly died, and this understandably limited their ability to deal with business matters.

37. Christian Hellel responded to the Claimant on 10 November 2020. He invited the Claimant to a grievance hearing to take place on 16 November 2020 (p. 182). He also sent the Claimant an email on the same date (p. 180), in which he said:

"I am keen to discuss your concerns and address these as soon as possible, however, I feel it appropriate to point out here that you have worked under the Companies current risk assessment and COVID-19 processes for several months now without concern."

38. Mr Hellel further stated in his email that the Respondent was of the view that the workplace was Covid secure and that all government guidelines had been followed. He said it was not possible for the Claimant to be furloughed as the CJRS was for situations where companies had no work, which was not the case for the Respondent. He asked the Claimant to return to work on 12 November 2020 and informed him that continued absence after that date would be treated as unauthorised absence and would be unpaid. He offered the Claimant the opportunity to discuss any concerns prior to such return.

39. At around this time and in response to the Claimant's grievance, Ms Adams undertook a review of the Respondent's risk assessments with Citation. We accept her oral evidence that she went through each risk assessment with the adviser at Citation and that amendments were made. It appears that the updated risk assessments were uploaded onto the Atlas portal on around 12 November 2020.

40. The grievance meeting was held on 16 November 2020 (p. 185 – 190, with amendments from the Claimant at p. 191). Mr Hellel said in his oral evidence that he had been advised by Citation to ask the same questions about each aspect of the Claimant's grievance, which resulted in a number of repetitive questions, as is apparent from the note. We find that in some cases this resulted in Mr Hellel not probing the Claimant's grievance in any depth; for example, when the Claimant said at that the out-of-date risk assessment had caused him to feel unsafe working in people's homes (p. 185), Mr Hellel did not ask for any further information about this. He was not able to explain why he had not probed further. However, on occasions, when Mr Hellel did ask for more specific information, for example in relation to control measures (p. 186 – 187) the Claimant said that he could not be more specific and that there was no time to "bring in specifics". At some points, the Claimant did raise some specific issues; for example (p. 189) inconsistent review periods for the risk assessments and a reduction of the risk on the working from home risk assessment.

41. The Claimant raised his dyslexia (described in the note as a "learning disability") in the grievance hearing, in the context of a lack of support. He did not raise the comment(s) he alleges were made by Ms Adams. In oral evidence the Claimant said he had not had the opportunity to do this; he later accepted in response to questions from the Tribunal that he could have raised this issue, but said that it had not been at the forefront of his mind.

42. On 27 November 2020, the Respondent emailed the Claimant the outcome of his grievance (p. 194 – 199). The outcome letter upheld a number of the complaints raised by the Claimant. It explained that the risk assessments had been reviewed (which we understand to refer to the review that took place before the grievance meeting) and set out the assessments to which changes had been

made, and, in some cases, new assessments that had been carried out. The letter also explained why some of the changes suggested by the Claimant had not been adopted. The letter specifically responded to the Claimant's points in relation to non-essential work (explaining that the work permitted was no longer limited to essential work only, which was factually correct) and staggered shifts (explaining that there was no requirement for staggering given the small number of employees in the workplace); p. 197.

43. The letter concluded by instructing the Claimant to return to work on Monday 30 November and informing him that any further absence would be treated as unauthorised and would not be paid. The Claimant was informed of his right to appeal, and that he could raise any queries about the outcome letter with Christian Hellel.

44. On 29 November 2020, the Claimant wrote to the Directors as follows (p. 200):

"I do not agree with your outcome of the grievance hearing and under the 1996 employment right section 44, I still can not deem to safe to return to work, therefore I will not be attending the workplace until this has been resolved. I am seeking legal advice and will be in contact."

45. On 30 November 2020 the Claimant made an early conciliation notification to ACAS and an early conciliation certificate was issued on the same date. The Claimant said in oral evidence that he had proceeded straight to the Tribunal because he did not think the Respondent would take negotiation seriously.

46. The Respondent invited the Claimant to a meeting by video link to try to find a way forward on 1 December. This meeting was to be conducted by a consultant from Citation (p. 202). The Claimant refused to attend on the basis that he did not have sufficient time to arrange for a representative to attend.

47. The Claimant submitted an employment tribunal claim for disability discrimination and detriment under s. 44 ERA 1996 on 2 December 2020.

48. On 3 December 2020 the Respondent invited the Claimant to an appeal meeting in respect of the grievance outcome, again to be conducted by the Citation consultant, Sarah Rhodes (p. 205). The Claimant declined to attend the meeting, stating that he had brought formal Tribunal proceedings. Christian Hellel replied by letter of the same date, reiterating the invitation to attend an appeal hearing, offering to discuss the risk assessments with the Claimant and any specific concerns he had and asking the Claimant to return to work on 7 December 2020. The letter stated that this was a reasonable management instruction, and that that if the Claimant did not return this would be regarded as unauthorised absence, would be unpaid, and could result in disciplinary action.

49. The Claimant responded on 4 December (p. 211), stating that the risk assessments had lapsed again; that he was still unable to return to work under s. 44 ERA 1996 and that he did not consider any meeting with Citation would be carried out in an unbiased manner.

50. On 16 December 2020 (p. 215), Mr Hellel wrote again to the Claimant setting out the details of the risk assessments relevant to the Claimant and informing him that they had been updated and revised on 11 December 2020. He invited the Claimant to meet with him to discuss any specific concerns and go over the risk assessments on 21 December 2020. He also again offered the Claimant the opportunity to appeal the grievance outcome and addressed the concerns about Citation's impartiality. He asked the Claimant to call him by the end of business on 18 December to discuss any concerns.

51. On 18 December (p. 219) the Claimant responded to say that Mr Hellel's correspondence would be passed to the Tribunal, and that he would not be attending any appeal or the meeting on 21 December.

52. Mr Hellel wrote to the Claimant on 23 December 2020 stating that he was required to contact the Respondent before 09:00 on any day he was absent from work giving the reason for his non-attendance. He asked the Claimant to confirm whether he had resigned by 29 December 2020, and, if he had not resigned, to contact him by the same date to advise him of the reasons for his absence. Mr Hellel again offered to discuss any concerns with the Claimant, providing his mobile number. He warned the Claimant that a failure to contact him by 29 December might result in the company treating the matter as a disciplinary issue.

53. The Claimant responded substantively on 28 December 2020 (p. 223). He confirmed that he had not resigned from his position. He requested his outstanding wages. He said some risk assessments contained procedures and measures that had not been implemented and addressed, although he did not give examples. He said the risk ratings in the assessments were too low, and that the new assessments had not been uploaded to Citation.

54. Mr Hellel responded on 13 January 2021. He stated that the risk assessments were being reviewed monthly. He instructed the Claimant to attend work on 18 January 2021, at which point the Claimant's concerns could be discussed (p. 228).

55. On 14 January 2021, the Claimant's partner wrote to the Respondent (p. 230) stating that all matters were now being dealt with by the Tribunal; that in those circumstances the Claimant could not return to his position and that all correspondence should be between the representatives.

56. Mr Hellel wrote to the Claimant on 20 January 2021 inviting the Claimant to a further video meeting on 25 January 2021 to discuss all outstanding matters including his return to work. The Claimant was informed that a failure to attend or return to work would be a potential disciplinary matter (p. 232).

57. On the day of the meeting at 12:04, the Claimant emailed the Respondent to say he refused to attend the meeting. The Claimant wrote that he believed it would be in relation to the tribunal case which could undermine proceedings (p. 234). He said he was entitled to proceed to the tribunal without prior meetings. He

reiterated his general position in relation to the risk assessments. At 17:18 the Respondent shifted the time of the meeting from 17:00 to 17:30 and invited the Claimant to attend at that time if he wished to, but he did not. Christian Hellel reiterated that if the Claimant did not attend that would be seen as a failure to follow a reasonable management instruction (p. 233).

58. On 10 February 2021 the Claimant was invited to an investigation meeting via video link on 15 February 2021, to discuss alleged repeated failure to follow a reasonable management instruction by refusing to attend video return to work meetings on 18 and 25 January (p. 237). An email dated 11 February 2021 included the further allegation that the Claimant had been on unauthorised absence since 26 November 2020. The Claimant was informed that these allegations were of potential gross misconduct. By email dated 13 February 2021, the Claimant refused to attend work or Zoom meetings until the problems he had raised in his earlier correspondence, which he reiterated, had been resolved (p. 241). The Claimant said in this email that he felt bullied, manipulated and harassed for raising reasonable concerns about health and safety at work.

59. The Claimant was invited to attend a rescheduled Zoom investigation meeting on 17 February 2021. He did not attend.

60. Ms Leakey produced an investigation report into the allegations against the Claimant. This consisted of compiling the correspondence in relation to the meetings the Claimant had not attended. She also summarised the position with regard to updating the risk assessments (p. 245).

61. On 16 February 2021, the Claimant was invited to a grievance meeting by video on 17 February 2021 in respect of the complaint of harassment raised in his email of 13 February (p. 248). The Claimant did not respond to this invitation and was invited to a rearranged hearing on 22 February 2021 by letter dated 18 February 2021.

62. On 18 February 2021, the Claimant was invited to a disciplinary hearing via Zoom on 22 February 2021, to discuss the allegations of failure to follow a reasonable management instruction (in not attending the video meetings on 18 and 25 January and the investigation meetings on 15 and 17 February) and unauthorised absence from 26 November 2020 to date (p. 249). He was informed of his right to be accompanied and sent the investigation note and copies of relevant emails.

63. On 22 February 2021, the Claimant emailed Christian Hellel to say that he had only received the letter inviting him to a disciplinary hearing on 19 February 2021, and requesting 28 days to allow him fully to review the attachments and respond. Mr Hellel postponed the hearing until 23 February 2021 by letter emailed to the Claimant on 22 February 2021.

64. Christian Hellel proceeded with the disciplinary hearing on 23 February 2021 in the Claimant's absence. On 24 February 2021, he wrote to the Claimant to

inform him that he had concluded that all the allegations against him were made out, setting out his reasoning, and that the Claimant was summarily dismissed for gross misconduct (p. 259). The Claimant was also informed that he would receive full contractual pay up to 26 November 2020 (the date of the grievance outcome) and there is no dispute that this payment was made to him. On the same date, Dominic Hellel wrote to the Claimant dismissing his complaints of bullying and harassment (p. 263). Both letters informed the Claimant of his right to appeal, but he did not appeal.

65. On 25 February 2021, the Claimant wrote to the Tribunal to apply to amend his claim to include an allegation of unfair dismissal. He informed the Respondent of this by email dated 9 March 2021 (p. 265).

Submissions

66. We received written submissions from the Respondent and heard oral submissions from both parties. Those submissions are referred to, so far as is relevant, in our conclusions below.

The Law

Disability

67. Section 6 Equality Act 2010 provides:

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

68. A "substantial" adverse effect is one that is "more than minor or trivial" (s. 212(1) EqA 2010). In determining whether an effect on normal day to day activities is substantial, a Tribunal should have regard to the time taken to carry out the activity (*Guidance on the Definition of Disability* [B2]) and the way in which the activity is carried out (*Guidance*, [B3]).

69. In determining whether there is a substantial adverse effect, the focus should be on what a disabled person cannot do, or can do only with difficulty, rather than on the things that they can do; see *Goodwin v Patent Office* [1999] ICR 302 at p. 309D.

70. In *Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1522, the EAT explained the exercise that should be carried out in determining whether an effect is "substantial" at paragraph 68:

"In our judgment, the only proper basis [on which to consider whether the disadvantage was substantial] is to compare the effect on the individual of the disability, and this involves considering how he in fact carries out the activity compared with how he would do if not suffering

the impairment. If that difference is more than the kind of difference one might expect taking a cross-section of the population then the effects are substantial."

71. "Normal day-to-day activities" are things that people do on a regular or daily basis (*Guidance,* [D2]), such as shopping, reading, writing, having a conversation, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. They do not include activities which are only normal for a particular person or a small group of people (*Guidance* [D4]). They do not include highly specialised work activities which are not normal day-to-day activities for most people (*Guidance* [D8]).

Direct Discrimination

72. Section 13 Equality Act 2010 provides that a person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat others.

73. In a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case (s. 23 EqA 2010).

74. Employers must not discriminate against employees in the way they afford them access, or by not affording them access to opportunities for promotion, transfer or training or for receiving any benefit, facility or service; by dismissing them or by subjecting them to any other detriment (s. 39(2((b) - (d) EqA 2010).

75. Section 136 EqA 2010 provides that, where there are facts from which the court could decide, in the absence of any other explanation, that person A contravened a provision in the Act, the court must hold that the contravention occurred, unless A shows that A did not contravene the provision.

76. It remains necessary for the claimant to prove the facts from which, absent s. 136, the employment tribunal could conclude in the absence of an adequate explanation that the respondent committed an unlawful act of discrimination. It is not sufficient to prove facts from which the tribunal could conclude that the respondent "could have committed" such an act, or that there is a possibility that the relevant act was done by the respondent; see *Igen Ltd v Wong* [2005] ICR 931 at paragraphs 28 - 29.

77. The Court of Appeal in *Madarassy v Nomura International Plc* [2007] ICR 867 explained what is meant by "could decide" (referring to the words in a previous version of this section, in the Sex Discrimination Act 1975):

57. "Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also

include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

78. The Supreme Court confirmed in *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3863 that this approach continues to apply following the passing of the Equality Act 2010, which contains slightly different wording as to the burden of proof (see paragraph 30).

Time Limits

79. Section 123(1)(a) EqA 2010 provides that a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. Where the complaint is of conduct extending over a period, the act is treated as having been done at the end of that period (s. 123(3) EqA 2010). If a complaint is brought out of time, the Tribunal may hear the complaint if it is brought within such other period as the Tribunal thinks is just and equitable (s. 123(1)(b)).

80. The Court of Appeal in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 held that in considering the "just and equitable" discretion to extend time, it will almost always be relevant to take into account (a) the length of and reasons for the delay; and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

81. In *Secretary of State for Justice v Johnson* [2022] EAT 1, the EAT held that, where granting an extension of time, even if it is of a relatively brief period, will require the Tribunal to make determinations about matters which occurred long before the hearing, that is a relevant factor to take into account in exercising the discretion. That is the case even where the delay prior to the hearing is not the fault of either party (see paragraph 23).

Section 44 ERA 1996

82. Section 44 Employment Rights Act 1996 provides as follows, so far as is relevant:

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that -

(a) ….

(b) (ba) ….

(c) being an employee at a place where -

(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that -

(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work

(4) ...this section does not apply where the worker is an employee and the detriment in question amounts to dismissal (within the meaning of Part X).

83. Section 48 ERA 1996 permits employees to bring complaints under s. 44(1) and workers to bring complaints under s. 44(1A) to the Employment Tribunal. Section 48(2) provides that, in respect of such complaints, it is for the employer to show the ground on which any act or deliberate failure to act was done. Section 48(3) and (4) set out the time limit provisions, which are not relevant to this case as there is no dispute that the Claimant's detriment claims were brought within the three month time limit.

84. Borrowing from discrimination law, a detriment will exist where a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment (see *MOD v Jeremiah* [1980] ICR 13). An unjustified sense of grievance cannot amount to a detriment, but there is no need for there to be any physical or economic consequence (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at paragraph 34).

Section 100 ERA 1996

85. Section 100 ERA 1996 provides as follows, so far as is relevant:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that -
(a)…. (b)….
(c) being an employee at a place where -

(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he

86. In considering a claim under s. 100(d) ERA 1996, the EAT in *Rodgers v Leeds Laser Cutting Ltd* [2022] ICR 1187 separated the requirements of that section out as follows, whilst stating that it was not necessary to break it down in precisely this way in every claim as long as no relevant component was overlooked. These components (save the last) are also relevant to the s. 44 claim. The potential components are:

(1) circumstances of danger;
(2) the employee believed that the circumstances of danger were (a) serious and (b) imminent;
(3) the employee's belief that the circumstances of danger were serious and imminent was reasonable;
(4) the employee could not reasonably have been expected to avert the serious and imminent circumstances of danger;
(5) the employee left, proposed to leave (while the danger persisted) or refused to return to his place of work or any dangerous part of his place of work;
(6) so doing was the reason, or principal reason, for the dismissal of the employee.

87. There is no requirement that the "circumstances of danger" referred to in s. 44(1A) and s.100 be created by the workplace itself, or that they occur specifically at the place of work or to the employer's employees; see *Rodgers* at paragraphs 31 – 32 and the authorities referred to there.

88. The parties in *Rodgers* agreed that leaving or refusing to return to a place of work could not also constitute an "appropriate step" for the purposes of s. 100(1)(e) [or, it would appear, s. 44(1A)(b)] ERA 1996, and, without deciding the point, the EAT appeared to endorse that view at paragraph 22.

Conclusions

Disability Discrimination: Time Limits

89. Having reviewed the relevant documents and heard the Claimant's evidence, we concluded that there was no evidence before us, on the Claimant's own account, that Ms Adams had made remarks allegedly mocking the Claimant's disability and/or spelling on more than one occasion. The only remark ever identified was said to have been made on 29 May 2019 and the Claimant has provided no details or dates of any subsequent remarks. As the claim form was not presented until 2 December 2020, following an early conciliation notification on 30 November 2020, any claim in respect of this alleged remark was presented 18 months out of time. We have therefore considered whether it is just and equitable to extend time in respect of this complaint.

90. The Respondent contends that it is not just and equitable to extend time. The Claimant, who was represented by his wife, who is a layperson, did not make any submissions on this point, which we do not criticise. However, the Claimant also advanced no reason as to why he had not brought a claim in respect of this alleged remark earlier, or indeed why he had not raised an internal complaint about it at any point prior to the submission of his employment tribunal claim.

91. Ms Adams could not recall making any remark of the type alleged by the Claimant, although she also said that she would not have made such a remark as her brother and two other employees are dyslexic. Her evidence in this regard was supported by that of Ms Leakey, who said she had been supported by Ms Adams in respect of her own spelling errors.

92. Taking into account in particular the factors referred to in *Morgan*, we did not consider it was just and equitable to extend time in respect of this claim. The delay in bringing it was very extensive; 18 months when the primary time limit is only three months. The Claimant gave no reasons for the delay. Further, the fact that this was said to have been an oral remark, and the Claimant raised no internal complaint about it at all over this 18 month period meant that Ms Adams was very seriously prejudiced when required to recollect the circumstances after such a long period of delay. For these reasons, we find we have no jurisdiction to hear the disability discrimination complaint because it has been brought out of time, and it is not just and equitable to extend time.

93. We have made in the alternative findings on the disability discrimination claim, which we set out briefly below.

Alternative findings: Disability

94. The Respondent submitted that the Claimant was not a disabled person by reason of his dyslexia. The Respondent accepted that the Claimant had the impairment of dyslexia, but argued that it was mild. This argument was based principally on the Claimant's performance at work, the absence of any issue in his understanding of the tasks he was to perform, and his score of 100% in the multiple choice tests he took when qualifying as an audio visual engineer.

95. We were mindful in considering this issue that the question for determination is whether there is a substantial adverse effect on ability to carry out normal day to day activities, not just on work activities. We further have to have regard to the activities that the Claimant cannot do or can do only with difficulty, rather than focusing on the things he can do.

96. We have reviewed the Claimant's disability impact statement, which was not directly challenged by the Respondent, save through cross-examination about his work achievements as set out above. The Claimant there lists 11 activities with which he has difficulty, including handwriting, spelling, taking a long time to read, short term memory, misinterpreting the meaning of words, difficulties organising paperwork and using incorrect words because of reliance on

spellchecker. The statement says that the Claimant had an amanuensis at school for reading and writing in exams, which was not challenged.

97. We noted the evidence from the psychological report on the Claimant, dated 9 December 2003 (so from the Claimant's schooldays). This notes that the Claimant's literacy scores were significantly lower than his scores in other curriculum areas, and that he was predicted to achieve a level 3 for literacy whilst being predicted a level 5 in other subject areas in his SATS. Psychological assessments from the Dyslexia Institute had concluded that a diagnosis of dyslexia was appropriate. This document is of course almost 20 years old, but dyslexia is, as the Claimant's GP points out in the letter dated 4 August 2021 at p. 90, a long-term condition, and the Respondent has pointed to no evidence which would suggest the Claimant's condition could have improved over time. We consider that, applying the test in *Paterson*, this document strongly suggests that the adverse effect of the Claimant's dyslexia on his literacy skills, including the normal day to day activities of reading and writing, is substantial.

98. We also noted that the Claimant's emails in the bundle show clear evidence of spelling and grammatical errors and use of incorrect words, which aligns with the points he raises in his disability impact statement. This occurs even in simple emails such as his updates on jobs. In more complex emails there are often several errors; for example, in his email of 22 February 2021 (attached to his witness statement), the Claimant spells "accurate" as "aquaretic", "numerous" as "numerus" and "incorrect" as "in correct".

99. The Respondent invited us to draw a conclusion that there was no substantial adverse effect because the Claimant was able to read passages from the bundle fluently during his evidence. We do not consider that it is fair or appropriate to base our decision purely, or indeed partly, on the Claimant's evidence before us. The Claimant pointed out on multiple occasions that he is very familiar with the bundle, having been preparing for this case for two years, and has read the documents multiple times. Further, we did note that the Claimant on occasions stumbled when reading out documents.

100. We also do not consider it appropriate to conclude that there is no substantial adverse effect on the basis of the Claimant's scores in his multiple choice test, as we were invited to do. Undertaking a multiple choice test is a very different task from, for example, free writing as the answers are already set out and the Claimant need only select a letter. To draw conclusions from this would be to focus on what the Claimant can do rather than what he cannot do.

101. Taking into account all the information before us, we accept the Claimant's evidence as to the difficulties posed by his dyslexia as set out in his impact statement and we consider that there was at the relevant time a substantial adverse effect on his ability to carry out normal day to day activities related to reading and writing.

102. We therefore find that the Claimant was disabled within the meaning of the Act.

Alternative findings: Direct Disability Discrimination

103. Had we not found that this complaint was out of time, the Claimant would have had to prove first that the remark he alleges was made by Ms Adams on 29 May 2019 was made at all. On the evidence before us, we would not have found that the Claimant had proved this essential fact. The Claimant did not mention this alleged incident in his grievance or at all prior to bringing his claim. He has given different accounts of the words used, and having initially alleged that the remark or something similar was made on several occasions, in his witness statement only referred to one. Ms Adams does not recall making the remark and we accept her evidence that Christian Hellel and other employees at the Respondent are dyslexic, and that she would not mock an employee for this reason. In reaching this conclusion we noted that Ms Leakey said that Ms Adams had been supportive in relation to her literacy difficulties.

Section 44 ERA 1996

104. We deal with our findings on the Claimant's detriment claims under s. 44 ERA 1996 by reference to each of the issues in the agreed list of issues.

Issues 7 and 8: s. 44(1)(c): safety committee/representative

105. It was agreed between the parties that there was no representative of workers on matters of health and safety or safety committee within the meaning of s. 44(1)(c)(i) or (ii) within the Respondent.

Issue 9: s. 44(1)(c): matters raised by the Claimant

106. It is agreed between the parties that the Claimant raised with the Respondent the matters set out at paragraph 9 of the List of Issues, which are those matters referred to at paragraphs 34, 35 and 44 above.

Issue 10: s. 44(1)(c): reasonable means

107. We find that the Claimant did bring the matters set out at issue 9 to the Respondent's attention by reasonable means, namely by way of a formal grievance and subsequent follow-up emails.

Issue 11: s. 44(1)(c): did the Claimant reasonably believe those matters were harmful or potentially harmful to health?

108. We find that, at the time he sent the emails on 7 and 8 November 2020, the Claimant did genuinely believe that the matters he was raising were harmful or potentially harmful to health and safety. We find that the Claimant was concerned about whether the Respondent's risk assessments had taken into

account the new national lockdown and the changes to government guidance produced on 5 November 2020. We find that in the circumstances, that belief was reasonable because at that stage the most recent risk assessments uploaded onto the Atlas platform dated from 23 July 2020, and thus would not have taken into account the changed situation and guidance.

109. However, we do not consider that the Claimant reasonably believed that the matters raised in his 29 November email were harmful or potentially harmful to health. The Claimant's disagreement with the outcome of the grievance hearing did not itself raise a matter potentially harmful to health; nor did his communication of his decision to seek legal advice. The only part of the email that could refer to circumstances potentially harmful to health was the Claimant's statement that it was not safe to return to work. Whilst the Claimant may have genuinely held that belief, we do not consider that such a belief was reasonable in circumstances where (a) the Respondent had updated the risk assessments having reviewed the updated government guidance on or around 12 November 2020 and, crucially, (b) in the grievance outcome the Respondent had offered the Claimant the opportunity to appeal the grievance outcome and discuss any questions or queries in relation to it prior to returning to work, which he did not take up. We do not consider that the Claimant can have held a reasonable belief that it was not safe for him to return to work without discussing any of the concerns he subsequently raised in his witness statement for this Tribunal (not identified to the Respondent at the time) with the Respondent, as he was invited to do.

Issues 12 - 14: s. 44(1)(c): the alleged detriments and the reason for them

110. Issue 12 sets out the actions alleged to have been taken by the Respondent which the Claimant contends constituted detriments. We have first considered whether these took place at all under issue 12, and if so, in each case, whether they could constitute detriments (issue 13) and whether they were done on the ground that the Claimant had raised the matters set out in his emails of 7 or 8 November 2020 (and in issue 9(a); see issue 14).

111. Issue 12(a): the Claimant alleges that the Respondent failed to answer his requests raised on 8 November 2020, which related to clarification in respect of non-essential work and staggered shifts (paragraph 35 above). We find that in fact the Respondent addressed both of these points in its grievance outcome at p. 197 of the bundle (see paragraph 42 above) and therefore conclude that this alleged detriment did not occur.

112. Issue 12(b): the Claimant alleges that the Respondent delayed his access to the risk assessment dated 23 July 2020. On further exploration with the Claimant, it became apparent that his complaint was in fact that the Respondent had deliberately uploaded a backdated risk assessment following his grievances in order to mislead or deceive him. As set out above, we have not been able to reach a positive finding as to the date on which this risk assessment was uploaded to the Atlas platform. We accept that the first time the Claimant saw it was on 8 November 2020. However, we heard

evidence from Christian Hellel, which we accepted, that it was not possible to backdate the risk assessments on the Atlas system, and that once a new document was produced, it would be generated with the present date. We therefore find that the document was produced on or around 23 July 2020, whether or not it was fully uploaded on that date, and that the Claimant has not proved the facts of his complaint as fully explained to us. We do not think that uploading – even if belatedly – a risk assessment to the portal can be described as a detriment within the meaning of the case of *Shamoon* as explained above. It was providing the Claimant with more information, and could not be viewed as a disadvantage.

113. Issue 12(c): the Claimant alleges that, in his email of 10 November 2020, Christian Hellel implied that the situation was the Claimant's fault for working under a lapsed and non-maintained risk assessment. This refers to the section of Mr Hellel's email at p. 180 quoted at paragraph 37 above. We do not agree with the Claimant's argument that this section implied that the Claimant was at fault for working under a lapsed and non-maintained risk assessment. We conclude that the clear meaning of Mr Hellel's words was to point out that the Claimant had previously been willing to work under the existing risk assessments (which, as we have set out above, was correct). Mr Hellel was not suggesting that the Claimant was at fault for doing so, rather pointing out that the Claimant's position had changed. The Claimant has not established the factual basis of this claim. We also do not consider that, on a fair reading of Mr Hellel's words, they can be regarded as a "detriment".

114. Issue 12(d): the Claimant alleges that the Respondent issued a negative grievance outcome on 26 November 2020. This allegation is not factually accurate, because the Claimant's grievance was partially upheld. However, we accept that some parts of the grievance were not upheld, and that this could reasonably be regarded as a detriment. We do not, however, consider that the grievance was not upheld because the Claimant had raised health and safety matters as set out at issue 9. The grievance was responding to those very concerns raised by the Claimant and it is illogical, in our view, to suggest that the reason why a negative outcome was reached was because the Claimant had raised concerns – particularly as the Respondent upheld some parts of the grievance relating to those same concerns.

115. Issue 12(e): the Claimant alleges that the Respondent withheld his wages. It is factually correct that the Respondent withheld the Claimant's wages for the period after 26 November 2020 (the date of the grievance outcome). However, we accept the Respondent's evidence that this was because the Claimant was refusing to attend work, not because he had raised health and safety concerns. We deal with this point under s. 44(1A)(a) below.

116. The Claimant's complaints under s. 44(1)(c) therefore fail.

Section 44(1A)(a)

Issue 15: were there, on 7 November 2020 and continuing to the date of the Claimant's dismissal, any circumstances of danger which the Claimant reasonably believed to be serious and imminent?

117. This issue combines the first three questions set out in the analysis in *Rodgers*. We have considered each of those components in reaching our conclusions.

118. Like the Tribunal and EAT in *Rodgers*, we do consider that the Covid-19 pandemic, and in particular the circumstances which were developing in early November 2020 and thereafter as numbers rose and there was a new national lockdown, constituted circumstances of danger.

119. We also accept that at the time he wrote the emails on 7 and 8 November 2020, and when he initially absented himself from work on 9 November 2020, the Claimant believed that the circumstances of danger arising from continuing to work as an installation engineer, particularly in people's homes, were serious and imminent, and that his belief was, at that time, reasonable. We have reached this conclusion because on that date, the Respondent's risk assessments had not been updated since 23 July 2020, and thus the Respondent had not, in determining its working practices, taken into account the latest government guidance and the changed situation in relation to Covid-19.

120. However, we consider that this situation changed, initially when the Respondent updated its risk assessments on or around 12 November 2020, and certainly when the Claimant received the outcome of his grievance on 26 November 2020, which explained the changes that had been made. Crucially, as set out above, the grievance outcome also offered the Claimant the opportunity to discuss any concerns or queries with the Respondent, but the Claimant chose not to raise any of the points he has now set out in his witness statement with the Respondent. We do not consider that any belief the Claimant continued to have at that time that there were "serious and imminent circumstances of danger" could have been reasonable, in circumstances where he did not take the opportunity to discuss his concerns with the Respondent. The Claimant was offered the opportunity to do this via a video link on numerous occasions as set out above in our findings of fact, right up to the end of his employment on 24 February 2021, some three months after the grievance outcome.

121. The Claimant explained that he did not take up these opportunities because he was concerned it could affect his employment tribunal claim; because he considered the Respondent to be biased and because his partner, who was his representative in the Tribunal proceedings, could not accompany him. It is apparent from the documents that as soon as the Claimant had submitted his Tribunal claim, he effectively ceased to engage with the Respondent, relying instead on the Tribunal to resolve matters. It is unfortunate that the Claimant took this view, and we do not consider that it was reasonable. The Claimant remained an employee of the Respondent, and the Respondent made extensive and evidenced efforts to engage with his concerns.

Issue 16: could the Claimant reasonably have been expected to avert any circumstances of serious and imminent danger?

122. We find that throughout the period during which the Claimant was absent from work (i.e. from 9 November 2020 onwards), even when he had a reasonable belief that there were circumstances of serious and imminent danger, the Claimant could reasonably have been expected to avert those circumstances. As set out above, we heard evidence from the Respondent, which we accepted, that numerous steps were taken in practice to ensure that employees were not exposed to Covid and that any risk was minimised; in particular, the call to households ahead of the job, social distancing measures, ventilation, the availability of handwashing facilities and hand sanitiser. Importantly, we also heard evidence, which was not challenged by the Claimant, that had any engineer felt that circumstances at work exposed them to an unacceptable risk of Covid – for example, if a householder was showing symptoms, or if social distancing could not be achieved – that engineer could inform the Directors or Ms Adams and they would be told to return to the office.

123. The Claimant never raised any discomfort with his circumstances whilst at work between June and October 2020, and from 9 November, simply refused to attend work rather than attending and taking a view of the risk on a case by case basis. We find that the Claimant could reasonably have been expected to attend work and contact the Respondent should he have found himself in a situation involving unacceptable risk. We have no reason to doubt the Respondent's evidence that in such circumstances he would not have been expected to proceed.

Issue 17: did the Claimant leave work or (while the danger persisted) refuse to return to his place of work or any dangerous part of his place of work due to his reasonable belief?

124. We accept that the Claimant did leave work due to his belief on 9 November 2020, and at that time that belief was reasonable. However, if he maintained that belief after 26 November 2020, it was not reasonable, so his absence from work after that date was not based on any reasonable belief. Furthermore, throughout the period from 9 November, the Claimant could reasonably have been expected to avert any circumstances of danger without being absent from work.

Issues 18 – 20: Did the Respondent act as set out in issue 12 above, and if so did those acts constitute detriments done for a prohibited reason?

125. We have found above that the alleged detriments set out at paragraphs 12(a) - (c) either did not occur or did not constitute detriments within the meaning of the Act.

126. Regarding paragraph 12(d) (negative grievance outcome), we accept that the negative aspects of the grievance outcome could constitute a detriment, but

we do not find that this was on the ground of the Claimant's absence from work (regardless of whether that absence falls within s. 44(1A)(a) or not). We find that the Respondent gave genuine consideration to the Claimant's grievance and upheld those parts it considered justified and dismissed those parts that it did not. The Respondent's conclusions had nothing to do with the Claimant's absence from work.

127. Regarding paragraph 12(e) (withholding the Claimant's wages), whilst this could constitute a detriment, it was not done for reasons falling within s. 44(1A)(a). The Claimant's wages were only withheld for the period after 26 November 2020. We have found that at that time, the Claimant had no reasonable belief that there were circumstances of serious and imminent danger, and his claim must therefore fail.

128. The Claimant's claims for detriment under s. 44 therefore fail and are dismissed.

Unfair Dismissal

129. The Claimant does not have sufficient qualifying service to bring a claim of ordinary unfair dismissal and his claim can only therefore succeed if the reason or principal reason for the dismissal was one falling within s. 100(1)(c) or (d).

130. The Respondent's case is that the reason for the dismissal was the Claimant's failure to follow reasonable management instructions and his persistent unauthorised absence after 26 November 2020, which are reasons relating to conduct.

131. Having heard evidence from Christian Hellel, who was the dismissing officer, we accept that his reasons for dismissing the Claimant were that he had remained persistently absent from work since 26 November 2020 despite being given repeated opportunities, latterly framed as management instructions, to engage with the Respondent and discuss his concerns about the risk assessments. In essence, Mr Hellel's evidence, which is supported by the documentary evidence in the bundle, is that the Claimant had completely ceased to engage with the Respondent from the point at which he submitted the Tribunal proceedings.

132. We accept that, by the point of dismissal, it had effectively become impossible for the Respondent to deal with the Claimant as an employee at all. The Claimant's representative suggested in cross-examination that the Respondent could have made different efforts to engage, for example by sending the Claimant written explanations of the risk assessments or updated risk assessments. However, we find that the Respondent had uploaded multiple iterations of the risk assessments and indeed sent a detailed written explanation (more detailed than the one provided to the Claimant in May 2020 (p. 145), under which he worked for several months without complaint) to him on 16 December 2020 (p. 215 – 216). In circumstances where the Claimant was refusing to attend

even video meetings with the Respondent to discuss his concerns, which were set out in general terms, we find there was little else the Respondent could have done. Possibly best practice would have entailed pointing out in terms to the Claimant that even though he had a Tribunal claim, he still needed to engage fully with the Respondent as his employer, but this does not affect the reason for the dismissal.

133. We have considered whether the Claimant's earlier absence from work when he was self-isolating in October 2020, about which Ms Leakey and Domininc Hellel were clearly very unhappy, played any part in Christian Hellel's decision. We do not consider that the position taken by Rachel Leakey and Dominic Hellel on this was reasonable, as the Claimant did have a note advising him to selfisolate until 1 November. However, on the balance of probabilities, we find that it did not play any significant part in the decision, and certainly that it did not form the principal reason for dismissal. We accept Christian Hellel's evidence that he was not involved in this issue at the time, and we also accept his evidence that any part played by Dominic Hellel in the Claimant's ultimate dismissal would have amounted to no more than a brief informative conversation. The decision was taken by Christian Hellel, who was heavily influenced by advice from Citation about whether or not it was appropriate to dismiss for the matters alleged against the Claimant.

134. For these reasons, we accept that the reason for dismissal was that advanced by the Respondent. The reason was not that the Claimant had raised health and safety concerns, so the Claimant's claim under s. 100(1)(c) cannot succeed. Further, as the Claimant's continued absence from work after 26 November 2020 did not occur in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably be expected to avert, his claim under s. 100(1)(d) must also fail.

135. The Claimant's claim for unfair dismissal therefore fails, together with his other claims, for the reasons given above.

_____

Employment Judge A. Beale
Date: 4 November 2022

Judgment and Reasons sent to the parties and entered in the Register on: :
30 November 2022 .

O.osh

Olu Oshodi
For the Tribunal Office

Appendix 1: Final Agreed List of Issues

Disability – s.6 Equality Act 2010

1. Was the Claimant at the material time disabled within the meaning of Section 6, Equality Act 2010??

Direct Disability Discrimination

2. What acts of less favourable treatment does the Claimant allege had been carried out by the Respondent?

    - In May 2019 and/or on other occasions thereafter, KA is alleged to have made the following remark: "*I find your emails amusing, they make me laugh*"

3. Insofar as the alleged remark is proven or admitted, in the absence of a nondiscriminatory explanation from the Respondent, could the Tribunal find that it amounts to less favourable treatment because of disability?

4. If so, has the Respondent proven that it did not discriminate against the Claimant because of disability.

5. Is the claim out of time?
    - The Claimant says the act of less favourable treatment took place on 29/05/2019 and/or on later dates not specified.
    - The primary limitation period expired on 28/08/2019
    - Early Conciliation commenced on 30/11/2020.

6. If so, is it just and equitable to extend time?

Health & Safety Detriments

Section 44(1)(c)

7. Was there a safety committee and/or a representative of workers on matters of health and safety at work within the Respondent organisation (s. 44(1)(c)(i))?

8. If there was such a committee and/or representative, was it reasonably practicable for the Claimant to raise the matters set out at paragraph 9 below through that committee/ representative (s. 44(1)(c)(ii))?

9. Did the Claimant:

(a) on 7 November 2020, raise the following matters with the Respondent:

i. that the risk assessment had lapsed its review period; ii. that there was information missing from the risk assessment, including information relating to safe working within domestic premises, and no assessment for safe working within company vehicles;

iii. risk ratings were too low;

iv. training stated on the risk assessment had not been provided;

v. safe cleaning equipment for decontamination was not provided;

vi. there was a failure to follow the isolation procedures set out in the risk assessment?

(b) on 8 November 2020:

i. request clarity as to what was meant by “non essential work is not carried out”;

ii. request clarity as to why the Respondent was not implementing staggering of shifts, which was said to be a control mechanism within their risk assessment;

(c) on 29 November 2020, inform the Respondent that he did not agree with the outcome of his grievance; that he felt it was unsafe to return to work and would be seeking legal advice because the Respondent had not resolved or implemented the grievance outcome?

10. If so, did the Claimant bring those matters to the Respondent’s attention by reasonable means (s. 44(1)(c)?

11. If so, did the Claimant reasonably believe that the above matters were harmful or potentially harmful to health and safety (s. 44(1)(c))?

12. Did the Respondent do the following:

(a) fail to answer the Claimant's requests raised on 8 November 2020;
(b) delay the Claimant's access to the 23/7/20 Risk Assessment;
(c) on 10 November 2020, through Christian Hellel, imply that the situation was the Claimant's fault for working under a lapsed and non-maintained risk assessment;
(d) issue a negative grievance outcome dated 26 November 2020; and/or
(e) withhold the Claimant's wages?

13. If so, did those acts/omissions constitute detriments?

14. If so, were they done because of any disclosures set out at paragraph 9 above?

Section 44(1A)(a)

15. On 7 November 2020 and continuing thereafter, were there any circumstances of danger which the Claimant reasonably believed to be serious and imminent?

16. If so, could he not reasonably have been expected to avert such circumstances?

17. Did the Claimant leave work or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work due to his reasonable belief?

18. Did the Respondent act as set out at paragraph 12 above?

19. If so, do any or all of those acts or omissions amount to detriment(s)?

20. If so, were any such detriment(s) done on the ground that the Claimant in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, left or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work?

Unfair Dismissal – ERA 96, sec 100

21. What was the reason for dismissal or, if more than one, the principal reason for the Claimant's dismissal on 24/02/2021?

22. Was the reason, or if more than one, the principal reason for dismissal the disclosures set out at paragraphs 9 above?

23. Alternatively, was the reason, or, if more than one, the principal reason for dismissal that in circumstances of danger which the Claimant reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work (s. 100(1)(d))?

24. Was the reason or principal reason for the dismissal a reason related to conduct, namely repeated failure to follow management instructions to attend return to work and investigative meetings, and unauthorised absence from 26 November onwards, as alleged by the Respondent?