EMPLOYMENT TRIBUNALS

Claimant: **Mr Z Fawell**

Respondent: **Securitas Security Services (UK) Limited**

Heard at: **Teesside Justice Centre** **On: 17 - 20 October 2022**

Before: **Employment Judge Newburn**

Members: **Mr Dorman-Smith**
Mr Gallagher

Representation:

Claimant: **In person**
Respondent: **Ms Brooke-Ward (Counsel)**

WRITTEN REASONS

1. Further to oral reasons being given at the hearing, the Claimant thereafter made a request for written reasons.

The Issues

2. The issues in dispute were largely agreed at the preliminary hearing of 1 December 2021, and at the outset of the hearing, the Tribunal discussed the Claimant's claims in order to clarify the specifics of each complaint being made. Further to that discussion, the final list of issues was agreed as follows:

   Time limit:

   2.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 13 January 2021 may not have been brought in time.

2.2. Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2.2.2. If not, was there conduct extending over a period?

2.2.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.2.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

2.2.4.1. Why were the complaints not made to the Tribunal in time?

2.2.4.1.1. In any event, is it just and equitable in all the circumstances to extend the time limit?

Failure to make reasonable adjustments:

2.3. Did a physical feature of the Claimant's workplace, namely:

2.3.1. the lighting from the LED over-head street lights; and/or
2.3.2. the glare from reflected surfaces; and/or
2.3.3. the glare from the computer screens; and/or,
2.3.4. the heating in the gatehouse,

put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

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

2.4.1. What steps could have been taken to avoid the disadvantage?
2.4.2. Was it reasonable for the Respondent to have to take those steps?
2.4.3. Did the Respondent fail to take those steps?

Discrimination arising from disability (Equality Act 2010 section 15)

2.5. The unfavourable treatment that the Claimant complained of was his dismissal.

2.6. Was this treatment a proportionate means of achieving a legitimate aim? The Respondent says its aims were workforce planning and ensuring it met its contractual obligations.

2.7. The Tribunal will decide in particular:

2.7.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;
2.7.2. could something less discriminatory have been done instead;
2.7.3. how should the needs of the Claimant and the Respondent be balanced?

Unfair dismissal

2.8. The Claimant says the dismissal was unfair because:

2.8.1. the process was not meaningful as the outcome was predetermined;
2.8.2. the Respondent had failed to adequately investigate his health condition; and,
2.8.3. the Respondent did not consider alternatives to dismissal.

2.9. The Tribunal needed to decide whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant.

The Tribunal will usually decide, in particular, whether:

2.9.1. The Respondent genuinely believed the Claimant was no longer capable of performing his duties;

2.9.2. The Respondent adequately consulted the Claimant;

2.9.3. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.9.4. The Respondent could reasonably be expected to wait longer before dismissing the Claimant; and

2.9.5. Dismissal was within the range of reasonable responses.

Background

3. In his claim form dated 20 June 2021, the Claimant brought complaints of unfair dismissal, unpaid holiday pay, and claims of discrimination on the grounds of age, race, disability, gender reassignment, sexual orientation, and religion or belief.

4. At the time he submitted his claim to the Tribunal, the Claimant had not been dismissed; he was not dismissed until 30 July 2021. Further to an application to amend, a claim for unfair dismissal was added to the Claimant's claims.

5. There had been two preliminary hearings in this matter. At the second preliminary hearing the Claimant withdrew his claim for unpaid holiday pay as well as his complaints of discrimination and harassment on grounds of age, race, sexual orientation, religion or belief, and a claim in respect of unpaid holiday pay. The

Claimant confirmed that he wished to focus on his complaints of failure to make reasonable adjustments, ordinary unfair dismissal, and discrimination arising from disability. The Claimant was ordered to provide further information on his reasonable adjustments claim and the Claimant provided succinct responses to each question raised.

The Hearing and Evidence

6. At the start of the hearing we discussed reasonable adjustments to the hearing format. To accommodate the Claimant. the artificial lighting in the room was turned off, it was agreed that we would take regular breaks and ensure breaks were offered frequently, and the Claimant was given additional time to consider his notes whilst the Respondent's witnesses gave evidence and prior to giving his final submissions.

7. The Tribunal had a digital hearing bundle numbered and running to page 521I. References to page numbers in these reasons are references to the numbers as stated in the hearing bundle.

8. The Claimant represented himself and gave oral evidence. The Claimant's witness statement did not fully address the Claimant's claims regarding failure to make reasonable adjustments and ordinary unfair dismissal. The bundle, however, contained the Claimant's more substantial particulars of claim as well as the responses he had given to the request for specific information set out in the Case Management orders of 1 December 2021.

9. The Claimant responded to questions from the Tribunal and was cross examined by the Respondent's Counsel in order to clarify his claims, and the information provided by the Claimant, alongside the Claimant's witness statement, was treated as the Claimant's evidence in chief.

10. The Respondent was represented by Counsel. The Respondent submitted witness statements from Mr Gilliland, Mr Snowdon, Mr Austin, Mr Hillier, and Mrs Pearsall. All gave oral evidence except for Mr Austin, whom the Respondent had not been able to contact.

11. On the first day of the hearing the Respondent informed the Tribunal that Mr Austin had left the Respondent's employment, they had not spoken to him since the previous week and had only an email address as a contact method for him. As Mr Austin's evidence was limited in terms of the issues in dispute and he had a significant distance to travel, the Respondent's counsel anticipated she would be making an application that Mr Austin could provide his evidence via video link later in the hearing timetable. We discussed this with the Claimant. The Claimant confirmed with regular breaks and adjustments he believed he would be able to hear Mr Austin's evidence via a video link on a screen and cross examine him.

12. The following day the Respondent confirmed it had been unsuccessful in its attempts to contact Mr Austin and made an application for a witness order, or in the alternative for his witness statement to be considered in his absence with the Tribunal attaching weight to it as it saw appropriate.

13. The parties agreed that Mr Austin's evidence was relatively uncontested. The bundle contained detailed notes of the Claimant's meeting with Mr Austin and the evidence in Mr Austin's witness statement did not deviate greatly from the information contained within it. The Claimant confirmed he had few questions for Mr Austin and those questions could be put to Mrs Pearsall, the appeal officer. In light of that and the fact that the Respondent did not have any other contact details for Mr Austin save as for an email address to which he was not responding, a witness order did not appear to be appropriate; instead, it was in the interests of justice to continue with the hearing and accordingly Mr Austin's evidence was accepted with the Tribunal attributing weight to it as it saw appropriate in the circumstances.

Findings of Fact

14. The Tribunal gave due consideration to all of the evidence before it, including the information in the bundle, the witness statements, and the oral evidence. These written reasons are not a rehearsal of all the evidence heard, but provide the salient parts of the evidence upon which the Tribunal based its decision. Where there was a conflict of evidence in relation to the facts between the parties, the Tribunal determined those facts on the balance of evidence.

15. The Respondent is a security guarding business. The Claimant was employed as a security officer and was transferred to the Respondent's employment further to a TUPE transfer in 2011. The Claimant was based at the premises of one of the Respondent's clients in County Durham. The Claimant was a lone worker at the Respondent's client's site.

16. The Claimant worked inside a building known as the gatehouse at the client's site. His work included booking vehicles on and off site, giving visitors passes, opening and locking up the site, computer usage and CCTV monitoring, patrols during the nights and weekends taking approximately 10 minutes with potential driving duties.

17. Further to a hospital admission on 13 November 2016, the Claimant was initially diagnosed with iritis; the Claimant was 32 years old at this time. His condition deteriorated and the Claimant explained that he had lost vision in one eye, he had mature cataracts in both eyes, a swollen optic disc, synechiae**,** and macular degeneration. In December 2016 the Claimant was diagnosed with bilateral anterior uveitis. The Claimant continues to attend medical appointments and undergo treatment for his condition.

18. The Claimant described the symptoms of his condition in his particulars of claim as photophobia with exposure to light causing severe pain to his eyes, tearing, halos, pressure to head and eyes, swollen face, sleep problems, loss of vision, stiff neck, back pains, eating disorders, sleep disorders, burn out, poor concentration, swollen optic nerve, abdominal pains, water infections, over-reactive metabolism, hot and cold flushes, weak immune system, poor concentration, and tinnitus.

19. The Claimant's evidence was that whilst working on the client site he was exposed to high levels of sunlight, which was reflected from metal surfaces around the client site and into the windows at the gatehouse. At some point in 2015 – 2016 the computer screens in the gatehouse were replaced and the brightness settings on the screens could not be adjusted, resulting in screen glare. Additionally, in 2016 the over-head amber sodium street lights positioned within the client site were replaced with energy saving LED blue light bulbs which the Claimant says were excessively bright. From 2016 until some point in 2017, the heating in the gatehouse was broken, resulting in the heating being permanently switched on with no way to turn it off; this was fixed at some stage in 2017.

20. The Claimant's evidence was that the levels of light exposure from the sun on the reflective surfaces at the client site during the day was further exacerbated by the blue LED over-head street lights, the glare from the non-adjustable computer screens, and the dryness of the air in the gatehouse due to the broken heating.

21. The Claimant believes the cumulative effects of these physical conditions at the client site caused him to develop his eye condition.

22. After discussions with the Tribunal on this point, the Claimant understood that the cause of his eye condition was not an issue that would be determined at the hearing and the Tribunal would not make a finding on this issue.

23. Further to his hospital admission in November 2016 until April 2018 the Claimant had to take a significant number of days off work due to his eye condition and the effects of his condition. During this time he attended medical appointments for further investigations, procedures, and treatment including cataract surgery, injections, and steroid medication. The Claimant's eye condition overall did not improve. The Claimant explained that he would self-medicate with painkillers on the days he was able to attend work and wore sunglasses whilst on duty both day and night in order to limit the light exposure and ease his photophobia and pain.

24. The Claimant had requested to work more night shifts to ameliorate the exposure to the sunlight and confirmed in is oral evidence that the Respondent agreed to this.

25. After the over-head street lights were upgraded, but before August 2016, Mr Weldon, another Security officer employed by the Respondent working at the client site, obtained permission from the client site manager Mr King, to erect a "sun visor" in the gatehouse. This was a sheet of material which was placed over the window to limit the ingress of light through the gatehouse window. This "sun visor" was visible from both inside and outside of the gatehouse.

26. From 2016, until his retirement in December 2017, the Claimant's manager was Mr Hall. The Claimant says Mr Hall would visit the client site to speak to the client and during these visits he would also speak with the Claimant.

27. The Claimant's oral evidence was that he had spoken to Mr Hall about the light exposure into the gatehouse and about the glare from the computer screens; Mr Hall agreed a reasonable adjustments plan including tinting the windows to the gatehouse to reduce the ingress of light (and that a similar thing had been done on another site in Peterlee) and that he would obtain screen filters for the computer screens. On 22 August 2017, Mr Hall visited the client site and met with the Claimant regarding his reasonable adjustment plan.

28. The Claimant's oral evidence was that the heating in the gatehouse was broken and left permanently on for approximately a year in 2016, and that this was rectified at some point before Mr Hall's visit in 2017.

29. Mr Hall left the Respondent company in December 2017. The Respondent asserted that because of amount of time that had passed since Mr Hall had left the Respondent, it was not possible to obtain witness evidence from him.

30. Mr Gilliland and Mr Snowden both gave evidence that they understood Mr Hall had purchased filters for the computer screens to assist with the glare. Mr Snowden's evidence was that he distinctly remembered them being ordered because Mr Hall had to ask for permission to order equipment and this request was unusual.

31. Mr Gilliland's evidence was that he was sitting with Mr Hall when the computer filters were ordered and heard Mr Hall making the phone call to order them. Thereafter, he says Mr Hall informed him that he had taken them to the client site. Mr Gilliland said that when he had visited the site he saw new computer monitors in situ. As a result of this, Mr Gilliland stated that he had believed that the screens had been changed and a filter had been placed on them to limit glare.

32. The Claimant's evidence was that the Respondent did not make adjustments to the computer screens.

33. After Mr Hall left the Respondent, Mr Gilliland became the Claimant's manager.

34. Mr Gilliland's evidence was that he had a handover meeting with Mr Hall during which he was informed about the Claimant's eye condition. He understood from this meeting that adjustments were in place to help the Claimant, which included the sun visor in the gatehouse which tinted an area of the glass to limit light exposure, that the Claimant was wearing sunglasses whilst on duty on either day or night shift to limit his photophobia, and that new computer screens had been put in place along with filters to limit glare.

35. On 23 January 2018, the Claimant was working at the Client site and had left his medication at home. The Claimant attempted to contact the Respondent for relief cover. The Respondent did not respond and as a result Mr King, the

Respondent's client's site facilities manager, provided cover for the Claimant until he returned with his medication.

36. After receiving no response from the Respondent when requesting cover, the Claimant was angry and contacted the Respondent HR by telephone and complained that the Respondent had not reverted to him to provide cover and that he was expected to return to work after having obtained his medication.

37. Later that same day, Mr King (the Respondent's client's employee) sent an email to the Respondent in which he informed them about the Claimant returning home for his medication and expressed frustration that he had had to provide cover personally as the Respondent did not revert to the Claimant's request for cover. He stated that he was concerned about the Claimant's health, he understood that the Claimant had complained that he felt he was being discriminated against and stated that: "*This illness and insecurity isn't helping him or* [the Client company]*, he does need some support from Securitas*" (page 199).

38. Further to this event, on 24 January 2018, Mr Gilliland attended the Client site and he met with the Claimant.

39. During this meeting, the parties agreed that Mr Gilliland discussed the Claimant's welfare and health with him. He asked the Claimant about his health and if he could help in any way.

40. Mr Gilliland's evidence was that he believed that the adjustments agreed by Mr Hall had been carried out: he saw the "sun visor" in the gatehouse and believed the filters ordered by Mr Hall had been put onto the computer screens. Mr Gilliland stated that the Claimant never told him that the adjustments discussed with Mr Hall had not been implemented or that he needed further, or any, adjustments at all to be made and he did not request that adjustments be made. Mr Gilliland stated that he would have acted had the Claimant done so.

41. The Claimant's oral evidence was that he agreed Mr Gilliland asked him about his health and welfare and if he could help in any way. The Claimant stated however during their discussions, Mr Gilliland changed the subject and began discussing religion and this prevented the Claimant from raising the issue of adjustments with him.

42. The Claimant's oral evidence was that he believed it was for the Respondent to make investigations and it was not his duty to tell them whether he required adjustments.

43. The Claimant confirmed in his oral evidence that his claim that his dismissal was unfair because the Respondent failed to adequately investigate his health was a reference to the period of time before his removal from site in April 2018. His claim was that the light exposure caused his eye condition and the continued

exposure to light caused the deterioration of his condition. His position was that had the Respondent undertaken investigations into his health prior to 2018 and made reasonable adjustments, his eye condition would not have deteriorated.

44. Mr Gilliland initially did some rudimentary Google searches about the Claimant's eye condition in an attempt to understand his issues. On 1 February 2018, Mr Gilliland emailed the Claimant and asked that he provide his doctor's report regarding his eye condition (page 200). The Claimant confirmed he obtained everything he was able to find about his eye condition, photocopied the documents, and provided them to Mr Gilliland.

45. On 3 April 2018, the Claimant was absent from work with the agreement of Mr Gilliland to attend a medical appointment for fortnightly blood tests. On this day, Mr King contacted the Claimant regarding a piece of land owned by the client company, asking whether the Claimant had locked it and retained the key. The Claimant explained he had been asked to secure it. The Claimant was informed by a colleague that Mr King was unhappy that he had done so as he required immediate access to the area.

46. The Respondent's evidence was that, later that day, Mr Gilliland sent a letter to the Claimant inviting him to a welfare meeting to take place on 10 April 2018 to "*discuss* [his] *recent absence*" with Mr Gilliland (page 223). Mr Gilliland explained this was in keeping with protocol for employees further to having taken a number of days of sickness absence from work. This letter was sent by an email of the same date and a copy appeared at page 222. The email also enclosed a consent form asking the Claimant to agree to attend an occupational health assessment along with a covering message from Mr Gilliland asking that the Claimant complete the form and bring it to the meeting, as this was to enable him to look into how the Respondent could help him through his illness.

47. On 5 April 2018 during his shift the Claimant's eyes became inflamed and red with the morning sunlight from his photophobia. The Claimant stated he had attempted to contact the Respondent to obtain cover so that he could leave work however he had no response and as a result he spoke instead to Mr King to request to leave his shift.

48. Further to this on 5 April 2018, Mr King emailed the Respondent to request the Claimant's removal from site.

49. The Respondent wrote to the Claimant by a letter of 5 April 2018 (page 162), which was erroneously dated 5 April 2017. The letter informed the Claimant of the Client's request to remove him from site stating this was because of his "*inability to carry out required duties on site*"; also it explained that the Claimant was suspended from site while this was further investigated and the Respondent would attempt to look for a suitable alternative work, and invited him to a meeting

to discuss the same on 10 April 2018 to take place at the Claimant's home with Mr Gilliland.

50. The Claimant's evidence was that he received the letters of 3 April 2018 and 5 April 2018 at the same time. He highlighted the error in date on the 5 April 2018 letter which had raised his suspicions and stated he did not believe that first email and letter of 3 April 2018 had been sent to him before the second letter. He believed that the 3 April 2018 letter was manufactured after the event in an attempt to make the Respondent appear to be taking action in respect of his welfare. The Tribunal made no finding of fact on this point as it was not necessary to do so in order to determine the issues in dispute.

51. On 9 April 2018, the Claimant submitted a fit note from 9 April 2018 until 2 July 2018 declaring him unfit to work. The Claimant thereafter provided concurrent sick notes confirming that he remained unfit to work from that date until his employment was terminated on 30 July 2021.

52. On 10 April 2018, Mr Gilliland, accompanied by Mr Stubbs who took notes of the meeting, attended the Claimant in his home for the proposed meeting, the notes of which were at pages 228 – 229 of the bundle. During this meeting Mr Gilliland asked the Claimant questions about his condition and prognosis. He asked the Claimant for his assessment of his likelihood of continuing to work for the Respondent in his current condition and the Claimant explained at that time he did not know as this would depend on how his condition was affecting him each day. Mr Gilliland asked the Claimant if he anticipated any problems he would have in returning to work and the Claimant explained he could not predict this until his condition stabilised.

53. Mr Gilliland then asked the Claimant if he felt he had received help and support from his manager. The Claimant responded "*From you, Yes. From others I didn't not* [sic] *receive any support. Nothing was followed through*". Mr Gilliland asked if there was anything else he could do for the Claimant, and the Claimant stated "*not at this time*".

54. In his oral evidence the Claimant confirmed that during this meeting he did not raise an issue that adjustments had not been made for his role or that he required additional adjustments. He stated that by that stage he believed the Respondent did not intend to make adjustments.

55. Mr Gilliland also confirmed to the Claimant in this meeting that he was going to refer him to Occupational Health ('**OH**').

56. The Claimant was referred to OH, and the OH report of 12 July 2018 (page 257) stated that the Claimant remained unfit for work and until the Claimant's position stabilised a return to work date could not be predicted. The report suggested a further report be obtained closer in time to any proposed return to work date.

57. On 17 July 2018, Mr Gilliland sent the Claimant a letter inviting him to a meeting at the Claimant's home on 25 July 2018 with a note taker present, as well as Mr Sparks, the Claimant's Trade Union Representative. A form titled "Checklist for Welfare Meeting" was completed at this meeting (page 263 – 264). This form included a section asking "*Can the employee anticipate any problems on their return? (If yes, please detail including any reasonable adjustments that may be necessary)*" in which the written response stated "*No*". During this meeting the Claimant confirmed he was not fit to return to work at this time. This document was signed by the Claimant however the Claimant stated that he would not have read this as his eye condition would have prevented this at the time. The Claimant did not state that the information contained in the meeting notes was incorrect.

58. After this meeting the Claimant saw Mr Sparks speaking to Mr Gilliland in a car, leading the Claimant to distrust Mr Spark and to cancel his Trade Union membership.

59. The Claimant's evidence was that he raised a grievance with the Respondent HR in 2018 however the Respondent failed to revert to him. He confirmed that in August 2018 he spoke with ACAS and had advice from ACAS and Citizen's advice again in 2019. The Claimant confirmed ACAS spoke to him about the time limits of bringing a claim to the Tribunal.

60. In October 2018 the Claimant and Mr Gilliland emailed back and forth about the Claimant's condition and the Claimant informed Mr Gilliland he had been diagnosed with anxiety (page 268). Mr Gilliland emailed the Claimant expressing his sympathy.

61. On 24 March 2019, the Claimant submitted a grievance to the Respondent regarding his disability, stating the Respondent had failed to investigate or understand his illness (page 301). The Claimant stated in oral evidence that this is grievance did not include a complaint that the Respondent had failed to make adjustments. The Claimant spoke to ACAS on 25 March 2019.

62. On 1 July 2019, the Claimant attended a second OH appointment and the report was provided to the Respondent (pages 297 - 300). The report stated that the Claimant's specialists and GP were unable to provide a long term prognosis and that the Claimant had been made aware that his condition could easily deteriorate, and that there was a very real possibility that he may lose his sight. The report concluded the Claimant was, at that time, unfit for work, and given the uncertainty from the Claimant's medical team, the healthcare professional was unable to give an estimated timescale as to when the Claimant might be fit to return to work, save as to say any form of return to work, even in a modified or restricted capacity, would be highly unlikely to occur within the next 6 – 8 months.

63. Further to this report Mr Gilliland's evidence was that he kept in contact with the Claimant regularly by phone to enquire about his welfare. The Claimant agreed that Mr Gilliland had spoken to him throughout this period, although he felt often this was precipitated by complaints he was making at the time regarding his holiday pay.

64. On 12 August 2019, Mr Gilliland emailed HR regarding the OH report and asking about the next steps, explaining he was concerned about the Claimant's welfare and would like to finalise the matter as soon as possible to alleviate the Claimant's stress (page 301). Mr Gilliland chased this again on 13 September 2019 (page 302) and on the same day he emailed the Claimant stating that after their conversation that day, he was attaching a leaflet regarding speaking to someone in confidence about the way he had been feeling and stating, "*I will always be here for you no matter what*" (page 303).

65. In September 2019, the Claimant queried his holiday payment and internal discussions began concerning how holiday pay should be calculated while the Claimant was on long term sick leave.

66. On 3 October 2019, the Claimant submitted a further fit note confirming he was unfit to work due to uveitis from 20 September 2019 to 13 December 2019 (page 317) and a further fit note for a further 12 weeks from 13 December 2019 (page 318).

67. On 31 December 2019 Mr Gilliland sent an email to HR stating that he was worried about the Claimant, that he had been in regular contact and during the last conversation he Claimant had told him he was feeling very low as his condition had deteriorated and that he was genuinely concerned for the Claimant's well-being. He enquired about whether the Claimant could be medically retired (page 319).

68. In January 2020 the discussions concerning the Claimant's pay query were still ongoing. On 15 January 2020 the Claimant sent a message through the Respondent's internal messaging system regarding his pay query, stating he had contacted ACAS to discuss the issue, detailing the advice he had been given, and requesting an explanation (page 331).

69. Various meetings, emails, and texts were sent from Mr Gilliland checking on the Claimant's welfare. The Claimant expressed frustration that he was not receiving any follow up on his OH.

70. On 30 January 2020, Mr Gilliland emailed the Claimant inviting him to a further meeting, asking his thoughts on whether he would prefer to have the meeting at home or in the office as a change of scene to lift his spirits, and he would arrange a lift (page 336).

71. On 3 February 2020, the Claimant was invited to a meeting on 17 February 2020. During this meeting they discussed sending the Claimant to another OH in order to get an up-to-date picture of his condition.

72. In March 2020, further to the announcement of the UK national lockdown as a result of the coronavirus pandemic, the Claimant sent a copy of his shielding letter from the Sunderland Eye Infirmary with advice he had received regarding keeping safe from the coronavirus, as he was classified as being at increased risk during the COVID-19 pandemic, confirming the safest course of action for the Claimant would be to stay at home and shield.

73. On 26 March 2020, the Claimant submitted a further fit note confirming he was not fit for work due to uveitis from 12 March 2020 – 11 August 2020 (pages 339 – 340).

74. Mr Gilliland's evidence was that he had continued to contact the Claimant periodically to keep in touch and check in on him. On 9 September 2020 he sent an email asking the Claimant how he and his partner were, stating, "*Hope you are ok, want to let you know still don't want to pester you but still thinking about you, take care stay safe.*"

75. On 16 February 2021, the Claimant send a text message to Mr Gilliland stating Universal Credit had said he was fit to return to work, and that he had cancelled his medications as he was unable to work while taking them, therefore he wanted to return to work (page 337).

76. On 24 February 2021, the Claimant provided the Respondent with a photograph for his SIA licence ID. Mr Gilliland emailed the Claimant stating that if OH confirmed he was able to return to work he would require his ID card but if not it could simply be destroyed.

77. On 7 April 2021, the Claimant emailed Mr Gilliland asking about a time frame regarding his return to work, stating he wanted his complaints to be dealt with and requesting a change in manager stating that he had lost trust in his employer (page 345). Mr Gilliland responded to confirm the change in manager would be actioned, and that as soon as he was medically cleared he would be able to return to work.

78. On 8 April 2021 the Claimant sent two emails to Mr Gilliland (pages 346 and 347) which included a list of issues including, amongst other things, statements about the client having installed new over-head street lights, the sunlight always beaming into the gatehouse, a reference to Mr Hall asking about his illness and talking about changes that could be made but not about his actual welfare, the Claimant's belief that he was being watched via CCTV whilst at work at the client site, racist comments being made to him, that he had been told to cover computer screens, prejudice, bullying, that he had trained his replacement, that others

were aware he would be removed from the client site before he was, and that his good deeds were not mentioned but other officers were recognised. Mr Gilliland sent the same on to HR.

79. Further to the Claimant's request for a change of manager, Mr Snowden was appointed as the Claimant's manager and to deal with the issues raised in the Claimant's emails. Mr Snowden's evidence was that he initially called the Claimant for an informal discussion to obtain further details about the background and the concerns he had raised. Further to this Mr Snowden set up a formal grievance investigation call with the Claimant by Microsoft Teams on 28 April 2021.

80. The Claimant approached ACAS and on 12 April 2021, early conciliation with ACAS began, precipitating the Claimant's claim to the Tribunal.

81. On 21 April 2021, the Claimant submitted an email to ACAS with further details of his grievances which outlined his feeling that the Respondent's client had been trying to get rid of him, and that he felt bullied and harassed and discriminated against regarding race, religion, and disability (pages 352 – 353). This email did not include a complaint that the Respondent had failed to make adjustments. In his oral evidence the Claimant sated that this was because that failure was over a year old and "had been and gone".

82. On 22 April 2021, Mr Snowden referred the Claimant for a further OH appointment and emailed the Claimant inviting him to attend a grievance meeting (page 357).

83. On 28 April 2021, Mr Snowden had a grievance meeting with the Claimant by Microsoft Teams; notes of this meeting were taken (pages 361 – 366). During this meeting the Claimant stated that he wanted to be medically retired from working for the Respondent and to be compensated for what had happened. Further to this call Mr Snowden undertook investigations of the complaints raised by the Claimant.

84. On 24 May 2021, the ACAS early conciliation certificate was issued.

85. On 27 May 2021, the Claimant attended a further OH assessment. The resulting OH report concluded that the Claimant remained unfit to carry out his role and could not predict when he would be fit to work again. The report stated that given his condition and the requirements of his role as Security Officer, it was likely this would be difficult for him in the future, however as the Claimant was young in employment terms, they should consider rehabilitation into an alternative role with support from the Respondent and less focus on visual demands (page 374 – 376).

86. On 10 June 2021, Mr Snowden wrote to the Claimant confirming that his grievance was not upheld. (page 380 – 382) and the Claimant submitted an appeal of this decision on 16 June 2021.

87. On 20 June 2021, the Claimant submitted his ET1 to the Tribunal.

88. On 29 June 2021, the Claimant had an appeal meeting with Mr Hillier regarding his grievance. During the appeal Mr Hillier asked the Claimant what he felt would be the best outcome for him; the Claimant stated he wanted his contract terminated and he wanted to be compensated as he did not want to work for the Respondent anymore, his illness prevented his return, and working at the client site had caused his eye condition. Mr Hiller explained he would look into that issue and arrange a separate meeting regarding his OH.

89. On 5 July 2021, the Respondent sent a letter to the Claimant inviting him to an OH review meeting on 8 July 2021 by Microsoft Teams. It stated that the purpose of this meeting was to discuss his latest OH report, possible adjustments that could be made to the Claimant's role, as well as any suitable alternative roles. It warned that a possible outcome of the meeting would be dismissal on the grounds of medical incapability (page 406).

90. On 8 July 2021 the Claimant attended a OH review meeting with Mr Hillier (notes of this meeting appear at pages 408 – 415). During this meeting Mr Hillier asked if there were adjustments the Claimant felt could be made to allow the Claimant to return back to work with the Respondent; the Claimant stated there were not, and that he felt adjustments should have been made before his condition deteriorated, then he would not then have had to be removed from the client's site. The Claimant believed Mr Gilliland had chosen not to carry out the adjustments set up by Mr Hall and instead colluded with the client to have him removed from the client site.

91. In a letter dated 5 July 2021 but not sent to the Claimant until after 8 July 2021, Mr Hillier wrote to the Claimant to confirm his appeal was not upheld (pages 401 – 403).

92. On 20 July 2021, the Claimant emailed Mr Hiller expressing, amongst other things, that he was unhappy with Mr Hiller, indicating that he did not believe Mr Hiller's decision in the appeal was correct, and requesting a new manager.

93. Mr Austin, the Respondent's HR business partner, was appointed to deal with the Claimant's final OH review meeting which was held on 30 July 2021; notes of that meeting appeared at pages 420 – 427. During this meeting Mr Austin told the Claimant that his role was entirely separate from the Claimant's grievance, and that he was not involved in the grievance, which was a self-contained process.

94. Mr Austin discussed the latest OH report with the Claimant. He discussed his condition, his treatment, and his prognosis. The Claimant confirmed he agreed with the report, and that he did not believe the issue with his vision was likely to be cured unless there were developments in technology. Mr Austin spoke to the Claimant about what the Claimant would be able to do and how much he could do using a computer, and asked if the Claimant felt he could return to his security role. The Claimant told Mr Austin he did not wish to return to his security role as he had no trust for his managers and also due to the pain on the client site with the sun exposure.

95. Mr Austin highlighted that the OH report suggested a less visual-based role as an alternative. Mr Austin offered the Claimant an alternative role which had just arisen with the Respondent further to a resignation. It was an administrative support role and would involve checking expense forms, working with computers, and taking calls. Mr Austin explained that adjustments could be made and that whilst this was an office-based job he believed he could look to making adjustments so that it could be carried out from home. It would mean being with a different management team, training would be provided, and regular breaks could be arranged. The Claimant stated that he did not wish to accept the role because he had been treated too badly both by his management team and by HR, and that he did not want to work with the Respondent.

96. Mr Austin explained that was the only other alternative role, however he asked the Claimant if there were any other adjustments that could be made in order that he might either take up the alternative role or continue in his security role. The Claimant intimated that there were not, and Mr Austin explained that unfortunately this meant that dismissal on the ground of ill health was the only option.

97. On 4 August 2021 Mr Austin emailed the Claimant with the outcome of his meeting, confirming he was dismissed on the ground of ill health (pages 429 – 430).

98. On 5 August 2021, the Claimant sent an email to Mr Austin confirming he wished to appeal against the decision to dismiss and sent 5 further emails containing a large number of attached documents.

99. The Claimant's appeal email mostly made reference to the issues he had raised in his grievance. With respect to his unfair dismissal, the email indicated that the Claimant did not believe the alternative role offered by the Claimant was suitable because it involved working with computers, he did not have the relevant training or skills, it would involve working from home when he had been isolated for a long time due to the pandemic, and it was based in Scotland (pages 439 – 441).

100. The Claimant's oral evidence was that he did not disagree with Mr Austin's decision to dismiss him, he agreed he was medically unfit to return to his security

role and he did not want to work for the Respondent. He stated that he no longer wanted to work for the Respondent as he had completely lost trust in the management and HR. The Claimant confirmed the reason he appealed Mr Austin's decision to dismiss was because he felt his previous grievances had not been properly dealt with and wanted that to be reviewed. He felt that the Respondent should have acted sooner and criticised them for taking so long to dismiss him.

101. The appeal was referred to Mrs Pearsall who wrote to the Claimant on 11 August 2021 to confirm that she would consider the points raised in his email that related to the decision to terminate his employment on the ground of ill health (page 443).

102. Mrs Pearsall was one of the Respondent's regional HR officers; she was responsible for the central region. She had never acted as regional HR manager for the Claimant's region and had not been part of the processes relating to any of the Claimant's grievances. She confirmed that whilst she had been aware that the Claimant had made a grievance, she did not play any role in any of his grievance procedures and was not aware of the details of his grievance.

103. The appeal hearing was held on 26 August 2021 and notes of this meeting were at pages 445 – 453. The notes indicate that Mrs Pearsall asked the Claimant why he was appealing the decision to dismiss if he agreed with the OH report, and he had confirmed he no longer wished to work for the Respondent; the Claimant responded stating: "*the reason I am appealing is because I want to be compensated as the injured started at the client's place of work*".

104. Mrs Pearsall's evidence was that during her meeting with the Claimant, she discussed the final OH report with him and he confirmed it was correct. She discussed any potential adjustments that could be made to the security guard role that could enable the Claimant to return; these potential adjustments included working at a different location, working on a multi-man site, and halving his shifts to six hours. The Claimant told Mrs Pearsall that he was not physically fit to return to work as a security guard.

105. Mrs Pearsall spoke with the Claimant about the only alternative job role that had become available in the company, and about the possible adjustments that could be made to that role to accommodate the Claimant. Mr Pearsall's evidence was that had the Claimant chosen to accept the alternative role this would have been provided, and that it was a genuine offer to the Claimant which she sought to adapt for him.

106. The Claimant informed Mrs Pearsall he would not accept this role because it was not suitable. Mrs Pearsall's evidence was that she discussed adjustments that could be made to the role to assist the Claimant: he would be trained, she understood a lot of the role involved speaking on the phone reducing the screen

time, regular screen breaks could be provided alongside appropriate equipment to filter light, and he would have been permitted to work from home or from a local office.

107. The Claimant told Mrs Pearsall that he did not wish to work for the Respondent and he had lost trust with the Respondent. The Claimant's evidence was that he was unhappy because he felt the Respondent had waited too long to dismiss him and he should instead have been dismissed following the first OH report.

108. On 30 September 2021, Mrs Pearsall sent a letter to the Claimant confirming that the appeal was partly upheld in relation to the Claimant's complaint regarding annual leave payment from 2020, otherwise the appeal against the decision to dismiss was not upheld (page 454 – 455).

109. The Claimant's oral evidence with respect to why he was unable to bring his claim for unreasonable adjustments to the Tribunal within the time limit was due to his illness; The Claimant stated that he was on medication with steroids and felt he could not face drafting lengthy statements.

Relevant Law

Time limit - Reasonable adjustments:

110. Section 123 of the Equality Act 2010 (EA) states:

"*(1) Proceedings on a complaint within section 120 may not be brought after the end of—*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

111. Under section 123(1)(a) the Tribunal has jurisdiction if the claim is presented within three months of the act to which a complaint relates.

112. Section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of that period. Subsections 123(1) and 3(a) have to be read with subsections 123(3)(b) and (4) which deal with a failure to act and when this is deemed to take place.

113. In *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640*, the Court of Appeal held that where the employer's breach is a failure to act, time begins to run from the end of the period in which the employer might reasonably have been expected to comply with the relevant duty, and that period should be assessed from the employee's point of view.

114. In accordance with section 123(1)(b), the Tribunal may still have jurisdiction to consider a claim if the claim was brought within such other period as the Tribunal thinks just and equitable. Guidance was given to the Tribunal when exercising this discretion in para 18 – 19 by Leggatt LJ in Abertawe:

"*18. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800…*

… 19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (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)."

115. In Robertson v Bexley Community Centre [2003] IRLR 434, Auld LJ stated:

"*25. It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the*

applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

Discrimination arising from disability

116. Section 15 EA provides:

"(1) Discrimination arising from disability (1) 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.

(2) 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."

117. Section 15(1)(b) provide a potential defence for a Respondent if it can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. Legitimate aims are not limited to what was in the mind of the employer at the time it carried out the unfavourable treatment.

118. When considering this defence under section 15(1)(b), the Tribunal must objectively balance whether the conduct in question is both an appropriate and reasonably necessary means of achieving the legitimate aim. In Birtenshaw v Oldfield [2019] IRLR 946, the EAT held that the Tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly.

Unfair dismissal – capability

119. Section 98(1) of the Employment Rights Act 1996 (ERA) states:

"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it— (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do"

120. First, the employer must show that it had a potentially fair reason for the dismissal within s.98(2). Thereafter, Section 98(4) ERA states:

> "*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*"

121. Where the Respondent could show that the reason for dismissal was capability, section 98(4) ERA directs that the Tribunal must decide if the employer acted reasonably or not in dismissing for that reason.

122. In DB Schenker Rail (UK) Limited v Doolan (2010) UKEAT-0053-09, the EAT observed that in respect of ill health capability dismissals the Respondent must show:

122.1. It had a genuine belief that ill health capability was the reason for dismissal;
122.2. It had reasonable grounds for its belief;
122.3. It carried out a reasonable investigation.

123. Where an employee has been absent long term, the Tribunal must also consider whether the employer can be expected to wait longer for the employee to return (Spencer v Paragon Wallpapers Limited (1977) ICR301), and in BS v. Dundee City Council [2014] IRLR 131, the Court of Session stated that this involved evaluating whether the Respondent could have reasonably been expected to wait longer before dismissing, the steps taken by the respondent to discover the Claimant's medical position, and the extent to which it consulted with the Claimant about their position.

Conclusions

124. The Tribunal was tasked with applying the legal tests to 3 claims brought by the Claimant at the hearing.

125. We were impressed by the professionalism the Claimant showed in preparing and presenting his claim and thereafter adapting his position further to guidance

from the Tribunal regarding the points upon which we could and could not make decisions.

126. Whilst discussions were made surrounding the causation of the Claimant's disability, we did not make any findings on this point as there is no jurisdiction in the Employment Tribunal to do so: this is reserved for an action in the Civil courts.

127. The legal tests that we had to apply to the facts of the case largely concern how the Respondent acted after the Claimant's problems with his eyes began.

128. Further to Tribunal's guidance, the Claimant made a conscious effort to maintain his focus away from points upon which we had no jurisdiction. We were aware that this will have been difficult and appreciated the Claimant's considerable efforts in doing so.

129. The Claimant brought claims of failure to make reasonable adjustments under section 20 EA, discrimination arising from his disability under section 15 EA, and ordinary unfair dismissal pursuant to section 98 ERA.

130. Taking each in turn the Tribunal applied the facts to the relevant legal tests.

131. With respect to the Claimant's reasonable adjustments claim, the Respondent asked that we consider if the claim had been presented within the relevant time limits.

Time limit for Reasonable Adjustments

132. Section 123 EA confirms that a discrimination claim must normally be submitted to the Employment Tribunal before "*the end of the period of three months starting with the date of the act to which the complaint relates*" (*section 123(1), EA*).

133. The first question for the Tribunal was to determine when the time started to run in order to determine the deadline for submitting the claim. We did not find that the Respondent made an act inconsistent with making reasonable adjustments or made a positive decision not to make reasonable adjustments from which we could determine that time started to run.

134. Where the discriminatory act in dispute, as it is in this case, is an omission rather than an act, section 123(4) confirms that:

"the time starts to run from on the expiry of the period in which it might reasonably have been expected to do it (section 123(4))."

135. Following this, the Tribunal needed to determine the end of the period in which the employer might reasonably have been expected to comply with the relevant duty, with that period being assessed from the employee's point of view.

136. In the Claimant's oral evidence he said he believed that Mr Gilliland was not going to make adjustments because the physical problem was with the client's premises. In his meeting with Mr Gilliland on 10 April 2018, the Claimant stated that his managers had not followed anything through and in his oral evidence he confirmed that at this stage he believed the Respondent had not made reasonable adjustments and did not intend to make any.

137. The Tribunal determined that at least by 10 April 2018, further to having been removed from the client site, the Claimant was then aware that the Respondent would not make adjustments and the Tribunal found that time began to run 3 months from 10 April 2018, making the deadline to make an application to the Tribunal 9 July 2018.

138. The Claim was not submitted until May 2021 which is a significant delay close to 3 years.

139. The evidence did not indicate that the failure to make reasonable adjustments was a continuing act; the Claimant indicated the adjustments required were tinting the windows, placing filters of the computer screens, and fixing the gatehouse heating to prevent the gatehouse drying out. The Claimant was however removed from site in April 2018 and was not physically fit enough to return to his security role from this point in line with his medical evidence.

140. The claim is on the face of it out of time. The Tribunal has a wide discretion to extend the time period within which the Claimant is permitted to bring his claim and considered it accordingly but did not find that it would be just and equitable to do so.

141. In considering whether it would be just and equitable to do so the Tribunal took note of all of the circumstances and in particular considered the following things:

142. The Claimant explained he had not been able to bring his claim within time as he was unwell, he was on medication with steroids and could not face drafting lengthy statements.

143. The Tribunal noted that the Claimant confirmed he had the benefit of advice from ACAS in 2018 and 2019 and raised grievances against the Respondent in 2018, and he had raised complaints regarding his pay in 2019 and 2020, speaking to ACAS again in 2020. He stated in oral evidence he had also received advice from Citizen's Advice. The Claimant was aware of the time limits of bringing a claim or would likely have been informed of those by ACAS and could have received help from the law centres he approached to assist him with bringing the claim on time, or much sooner than he did. The Tribunal considered this demonstrated that there were periods throughout 2018 and 2019 in which the Claimant was able to organise his thoughts, obtain advice, and contact the Respondent to raise complaints.

144. The Tribunal found that the Respondent had suffered prejudice as a result of the delay in this matter and that was apparent in the hearing. Key witnesses whose evidence would have been useful were not available and other witnesses were

left to provide evidence after the event in their place. It is more likely that had a claim been brought earlier evidence from these witnesses could have been explored. Investigations into the events to determine the claims, which would have assisted the parties at the time, could not now be made and that information was also not available to the Tribunal to consider. Information from Mr Hall regarding his reasonable adjustment plan is likely to have been crucial to this element of the Claimant's claim.

145. As part of the exercise on its discretion to extend time, the Tribunal also considered the merits of the reasonable adjustment claim and found that it faced some challenges.

146. The Respondent had accepted the Claimant fell within section 6 of the Equality Act, and that he suffered a substantial disadvantage as a result of his disability due to the physical features of the working environment.

147. The Claimant accepted that the sun visor within the gatehouse was an adjustment that had been made to assist by blocking the glare of the lights into the gatehouse. The Claimant felt this could not be considered a reasonable adjustment because it had been initiated by Mr Weldon and not another person within the Respondent's employment, however the Claimant acknowledged that this was an adjustment that had been made to the site by a person working for the Respondent.

148. The Claimant's oral evidence was that the broken heating within the building was rectified by around 2017.

149. The Tribunal found Mr Gilliland to be a credible witness, faced with the difficult task of providing evidence where there were gaps in knowledge due to the departure of Mr Hall. The evidence indicated he did express genuine care about the Claimant's welfare as was apparent from the tone of his emails and text messages to the Claimant.

150. We found that upon becoming the Claimant's manager, Mr Gilliland asked the Claimant how he was, and how his health was, and if he could help in any way.

151. Mr Gilliland's evidence was that he asked the Claimant what he could do to alleviate his issue, and that the Claimant did not tell Mr Gilliland that he needed further adjustments to be made.

152. The Claimant's position was that he tried to tell Mr Gilliland he required further adjustments and Mr Gilliland changed the subject.

153. Considering the evidence on balance, we found that the Claimant did not tell Mr Gilliland that he required any further adjustments to be made notwithstanding Mr Gilliland's enquiries. There was no compelling evidence before the Tribunal to suggest Mr Gilliland would have any motivation to prevent the Claimant raising the issue of adjustments, on the contrary it appeared that Mr Gilliland had invited the Claimant to discuss his condition to determine if there was something he

could do to alleviate his condition. The Claimant did not suggest he attempted to raise the issue of adjustments with Mr Gilliland more than on the one occasion, the Claimant explained he felt it was the Respondent's duty to carry out its own investigations and it was not his duty to tell them to do so. The Tribunal found that despite being invited to discuss adjustments, and explain that he required further changes, the Claimant did not do so, leaving Mr Gilliland to continue to believe the changes made were adequate and nothing further could be done.

154. We found Mr Gilliland believed adjustments were made and that no further adjustments were needed. The Tribunal accepted Mr Gilliland's evidence that he had assumed Mr Hall had purchased computer screen filters and had installed them as Mr Snowden also gave evidence that the filters had been ordered. Mr Gilliland did not work near to the Claimant in the sense that they were not physically located in the same space to do their work and accordingly it would not have been the case that Mr Gilliland would have noticed in his every day passing whether the computer screen filters were in place, and in that sense he relied upon the Claimant to discuss this matter with him. Mr Gilliland would have, and did, see the sun visor in the gatehouse to assist with bocking the light.

155. On balance, the Tribunal found the evidence indicated that the Respondent believed adjustments had been made and further to enquiring with the Claimant about the efficacy of those adjustments, the Claimant chose not to tell the Respondent that further adjustments were required or that he was still facing difficulties as a result of the environment and required the Respondent to consider other changes for him. The Claimant was intimating the adjustments that were made were adequate.

156. Considering these issues the Tribunal found the Claimant's claim for reasonable adjustments would have faced challenges and was not therefore certain to succeed.

157. Having taken all of these matters into account, the Tribunal did not decide to exercise its discretion to extend the time limit. Accordingly, the Reasonable adjustments claim was dismissed because the Tribunal did not have jurisdiction to hear it.

<u>Discrimination arising from disability claim</u>

158. The Respondent had conceded a number of issues in relation to the Claimant's discrimination arising from his disability claim under section 15 EA, which left the Tribunal to look at only the remaining elements of that claim and apply the remaining legal tests.

159. The Claimant's complaint was that his dismissal was unfavourable treatment – the Respondent conceded it was.

160. The Claimant said the dismissal was for capability – long term absence – and that arose as a consequence of his eye condition. The Respondent conceded this.

161. The Tribunal therefore had to decide whether the dismissal was a proportionate means of achieving a legitimate aim.

162. The Respondent claimed it was not sustainable to the Respondent to have employees remain on long term absence for such a long time. The Claimant's evidence was that he agreed with this point: he had criticised the Respondent for waiting so long to dismiss him.

163. The Tribunal's role is to balance to reasonable needs of the Respondent's business against the discriminatory effect of the dismissal and to determine if there were any other steps that would have been less discriminatory that the Respondent should have taken, or whether the Respondent should have waited longer before dismissing the Claimant.

164. As to the latter question, the Tribunal found the Respondent had waited a long period of time, so much so that the Claimant in fact complained that it was simply too long. The Claimant repeatedly informed the Respondent that he did not want to work for the Respondent, and did not wish to return, it appeared that the length of delay in dismissing the Claimant was causing distress to him. The Tribunal did not find that the Respondent should have waited a longer period of time in these circumstances.

<u>With respect to exhausting alternative options that would have been less discriminatory:</u>

165. The Tribunal found that the Respondent, in the form of Mr Austin and Mrs Pearsall, had properly evaluated the options and investigated alternatives, discussing this with the Claimant during their meetings.

166. The last OH report came to the conclusion that the Claimant would not be fit to return to a security guard role, but that given his age, he may be rehabilitated to an alternative role with suitable adjustments.

167. Mrs Pearsall investigated these findings with the Claimant to try to determine if there were any adjustments that could be made to the security guard role that could enable the Claimant to return, however the Claimant informed Mrs Pearsall that he was not physically fit to return to work as a security guard.

168. Mrs Pearsall therefore offered the Claimant the only other available role that could be adapted to attempt to suit the Claimant's requirements. This was an admin role, located in Scotland. The Respondent confirmed the role was adapted so that the Claimant could carry out the role remotely, the Claimant could have worked from home, or he could have attended local office and carried out the work there if he wished. The Claimant would have been permitted to take regular breaks, and the Respondent confirmed whilst the Claimant would be using a computer screen, there would be a lot of work on the telephone, and regular breaks away from the screen to assist where required.

169. The Claimant turned down this role and argued that it was not suitable. Importantly, the Claimant also told Mrs Pearsall that he did not wish to work for the Respondent and wanted to be medically retired as he had lost trust in the Respondent.

170. The Respondent was not legally required to *create* a role. Had no other role been available, the Respondent may have chosen to dismiss the Claimant without having offered another role. This was not the case and the Respondent offered the Claimant a role with adjustments that it found might be suitable. Whilst the Claimant does not accept it was suitable, the Respondent cannot be criticised for offering it when the alternative faced by the Claimant was dismissal.

171. Notwithstanding that, the Claimant did not want to continue to work with the Respondent and told Mrs Pearsall the same. He suggested in his evidence that waiting as long as they had was distressing for him, indicating that his continuing in employment was causing further problems.

172. In those circumstances it is clear that the Respondent exhausted other avenues available. In balancing the needs of the Respondent and discriminatory effect of the dismissal on the Claimant in the circumstances as we found them to be, the Tribunal concluded that dismissal was a proportionate means of achieving a legitimate aim.

173. Accordingly, the Claimant's claim for discrimination arising from disability under section 15 EA is not well founded and is dismissed.

<u>Ordinary unfair dismissal Section 98 ERA</u>

174. The Tribunal had to determine whether the Respondent acted reasonably in treating long term sickness/capability as the reason for dismissal and whether it was fair to do so both in terms of substantive fairness and in terms of procedural fairness.

175. The Tribunal had to determine whether the action taken by the Respondent was within the band of reasonable responses, i.e. that other reasonable employers could have acted as the Respondent did.

176. The Claimant asserted that the dismissal was unfair because:

176.1. the Respondent had not adequately investigated his health condition;
176.2. the Respondent did not offer him suitable alternative employment; and,
176.3. the procedure followed was unfair, in that his dismissal was a foregone conclusion and the procedure was not therefore meaningful.

177. Taking each in turn:

<u>The Respondent had not investigated his health condition</u>

178. The Claimant confirmed in oral evidence that this complaint was not directed at his dismissal by the Respondent but related to his dismissal from the client site. Essentially, his position was that the Respondent's failure to investigate his health condition prior to April 2018 resulted in his eye condition deteriorating and his removal from site at the request of the client. The removal from the client site was not, however, the point at which the Claimant was dismissed. The legal test required the Tribunal to consider whether, when considering dismissing the Claimant on grounds of capability, the Respondent had adequately investigated his health condition.

179. The Respondent obtained three OH reports from 2018 onwards, with the final report being issued shortly before the dismissal discussions.

180. At the dismissal and appeal meetings with Mr Austin and Mrs Pearsall, the conclusions of the OH report were discussed, thereby allowing the Respondent to take into account the expert evidence on the issue, and to give his perspective on the same. The Claimant confirmed the conclusions in the report, agreeing he was physically unfit for work.

181. The Tribunal did not find that when taking the decision to dismiss the Claimant, the Respondent failed to properly investigate the Claimant's health condition. The Tribunal found that the actions taken by the Respondent were within the band of reasonable responses.

<u>The Respondent did not offer suitable alternative employment</u>

182. The Tribunal found that the Respondent investigated the position of alternative employment with the Claimant.

183. Mrs Pearsall spoke to the Claimant about whether there were adjustments that could have been made that would have enabled him to carry out any security guard role, including working at a different location, working on a multi-man site, and halving his shifts to six hours.

184. The Claimant informed Mrs Pearsall he was not physically fit to carry out a security guard role. The Claimant's evidence was that he did not wish to work for the Respondent and he told Mrs Pearsall that.

185. Mrs Pearsall confirmed that the only other suitable role within the Respondent company at that time was an administrative role. Mrs Pearsall therefore offered the Claimant the remote administration role. The Claimant did not accept that this was suitable as it involved looking at computer screens and working from home when he had been isolated for such a long time. In her evidence, Mrs Pearsall gave examples of how adjustments were discussed with the Claimant to overcome these issues.

186. Mrs Pearsall confirmed there were no other suitable roles available to offer the Claimant within the Respondent organisation.

187. The law does not impose a duty on a Respondent to create a role where no such role exists.

188. The Tribunal found Mrs Pearsall to be a genuine and credible witness. She confirmed that whilst she had been made aware of the fact that the Claimant had made a grievance, she was not party to the details. Her role was outside of the grievance process and she was tasked with the separate capability long term sickness process. Mrs Pearsall had not been the HR manager for the region covering the Claimant at the relevant time, she had covered the central region. The Tribunal found that she was sufficiently removed from the events of the Claimant's grievances to operate as an independent appeal officer for the purposes of examining the long terms sickness dismissal.

189. The Tribunal found that Mrs Pearsall was not therefore persuaded to find a way to dismiss the Claimant by the fact that he had made grievances against the Respondent. The Tribunal found that the offers of employment made to the Claimant were genuine and, had the Claimant chosen to trial them or agree to accept them, they would have been provided.

190. Accordingly, the Tribunal did not find that the dismissal was unfair on account of failing to offer alternative employment. The Tribunal found the efforts made by the Respondent did not fall outside of the band of reasonable responses.

<u>The process was not genuine</u>

191. The Claimant argued that the Respondent's decision was predetermined and the procedure adopted was simply that of a "tick box" exercise, going through the motions only, which had been instigated as a result of his grievances.

192. The Claimant did not indicate that he believed Mr Austin to have been tasked with dismissing him for raising grievances. The Claimant had understood Mr Austin was removed from the grievance process and had been disappointed that Mr Austin had not dealt with it. This had led the Claimant to appeal Mr Austin's decision as the Claimant felt this would give him to opportunity to have his grievances reviewed further with the Respondent.

193. If Mr Austin were tainted by the grievance process, however, the Tribunal would have found that error to be rectified by the appeals process because the Tribunal found, as detailed, that Mrs Pearsall was independent from the grievance procedure and the fact that the Claimant had raised grievances did not operate on her as she went through the process of the long term sickness dismissal with the Claimant.

194. Accordingly, the Tribunal did not find that Mrs Pearsall or Mr Austin, in their respective roles as dismissing officer and appeals officer, were motivated by external factors. The Tribunal found that they were sufficiently removed from the grievances so as to allow them to carry out a meaningful process. The Tribunal found Mrs Pearsall to be a credible witness, who carried out her role diligently, and accepted her evidence that the offers of alternative employment were genuine, and that the decision to dismiss was not predetermined.

195. The Tribunal found the reason for dismissal to be long term sickness, and that the Respondent acted reasonably in treating this as the reason for dismissal. Medical evidence was obtained and discussed with the Claimant, and the Claimant was given the opportunity to discuss the OH report and any adjustments that could be made to his security role. The Claimant was given the opportunity to discuss an alternate role and adjustments to that role, and he was given the opportunity to appeal the decision to dismiss him to an independent person within the Respondent company. The Tribunal felt the Respondent dismissed the Claimant fairly and adopted a fair procedure in doing so, that fell within the band of reasonable responses.

196. Having applied the appropriate legal tests, the Tribunal did not find the dismissal to have been unfair and the Claimant's claim for ordinary unfair dismissal was dismissed.

Summary

197. In summary, the Tribunal found that:

    197.1. the Claimant's complaint of failure to make reasonable adjustments under section 20 EA was not brought within the relevant time limit and it was not just and equitable to extend that period;
    197.2. the Claimant's complaint of discrimination arising from disability under section 15 EA was not well founded; and,
    197.3. the Claimant's complaint of unfair dismissal was not well founded.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 14 FEBRUARY 2023