EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Leckey	**v**	Thorntons Limited

Heard: in Nottingham

On: 30 & 31 January, 1 and 2 February 2023

Before: Employment Judge Ayre sitting with members
Mr G Edmonson
Mr C Goldson

Representatives:

Claimant: In person
Respondent: Mr G Alliott, counsel

JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant was constructively unfairly dismissed.

2. There was a 75% chance that the claimant would have been dismissed.

3. The claimant did not contribute towards his dismissal.

4. The respondent discriminated against the claimant for a reason related to his disability by issuing him with a final written warning on 11 August 2021. The remaining claim for discrimination arising from disability fails and is dismissed.

5. The claim that the respondent failed to make reasonable adjustments fails and is dismissed.

6. The respondent is ordered to pay the sum of £12,271.11 to the claimant.

REASONS

Background

1. The claimant was employed by the respondent as Website Content Manager from 4 September 2017 until 19 December 2021 when his employment terminated by reason of his resignation.

2. The claimant began early conciliation on 26 September 2021 and the early conciliation certificate was issued on 4 November 2021. The claimant presented his claim to the Tribunal on 4 December 2021.

3. The claim is for disability discrimination and unfair dismissal. On 25 August 2022 the respondent admitted that the claimant was, at the relevant time, disabled by reason of cluster headaches and depression, but not by reason of double vision. The allegations of discrimination relate solely to the cluster headaches and depression.

The Proceedings

4. At the final hearing there was an agreed bundle of documents running to 238 pages. At the start of the hearing the respondent sought to introduce another 3 pages of evidence, namely extracts from the claimant's medical records. The claimant did not object and the additional documents were added to the bundle by agreement. Further documents were added to the bundle at the request of the respondent, and with the agreement of the claimant, at the start of the second day of the hearing.

5. The claimant told us that he had disclosed to the respondent's solicitors images of adjustments made for a colleague. He did not have copies with him on the first day of the hearing and was encouraged to bring copies on the second day. Mr Alliott was also encouraged to take instructions from his instructing solicitors on the question of the images.

6. Mr Alliott told us that his instructing solicitors had not been able to find the images. The claimant showed us one image on his mobile telephone, of equipment in boxes that he said had been provided to a colleague in response to her Display Screen Equipment ("**DSE**") assessment.

7. We heard evidence during the hearing from the claimant and, on behalf of the respondent, from John Rowley, Head of D2C Ecommerce for UK and Ireland and Rebecca Housden, former HR Business Partner.

8. Adjustments were made during the hearing to assist the claimant. The lights in the Tribunal room were turned off at all times and the blinds closed. The claimant wore sunglasses and a hat and was encouraged to ask if he needed a break at any time.

9. Judgment was delivered on day four of the hearing. We then went on to consider remedy. The claimant gave evidence on remedy and both parties made submissions.

The Issues

10. In advance of the hearing the parties submitted a List of Issues. We spent some time at the start of the hearing discussing the issues and the final list of issues to be decided is as follows:

Constructive Unfair dismissal

11. Did the respondent do the following things:

    a. Subject the claimant to discrimination; and/or

    b. Fail to provide the claimant with the necessary support and / or equipment to enable him to do his job?

12. Did either of the above breach the implied term of trust and confidence? The Tribunal will need to decide:

    a. Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

    b. Whether it had reasonable and proper cause for doing so.

13. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

14. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that he chose to keep the contract alive even after the breach.

15. If the claimant was dismissed, what was the reason for the dismissal and was it a potentially fair reason? The respondent relies upon capability as the reason for dismissal.

16. Was the claimant fairly dismissed?

17. If the claimant was unfairly dismissed, should there be any reduction to compensation to reflect the possibility that he would have been dismissed anyway on the ground of his incapability to do the role?

Time limits

18. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 25 June 2021 may not have been brought in time.

19. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

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

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

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

   i. Why were the complaints not made to the Tribunal in time?
   ii. In any event, is it just and equitable in all the circumstances to extend time?

Discrimination arising from disability (Equality Act 2010 section 15)

20. Did the respondent know, or could it reasonably have been expected to know, that the claimant was disabled by reason of cluster headaches and/or depression at the relevant time?

21. Did the respondent treat the claimant unfavourably by:

   i. Issuing him with a warning on 11 August 2021?

   ii. Failing to provide him with adequate equipment to work following the generic online DSE form?

b. Did the following things arise in consequence of the claimant's disability of cluster headaches or depression:

   i. Performance issues with his work;
   ii. Avoidance of light including internal soft light;
   iii. Being unsteady on his feet;
   iv. Being reliant on medication to exist; and/or
   v. His sickness absence?

c. Was the unfavourable treatment because of any of those things? The respondent accepts that issuing the claimant with a warning on 11 August 2021 amounted to unfavourable treatment.

d. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were the need for employees to render regular attendance and/or undertake work to a reasonable standard.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

22. Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability?

23. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

    a. A requirement to use a computer screen / monitor?

24. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

    a. He was unable to view the screen / work with the equipment;
    b. He was unable to do his work and/or to concentrate?

25. Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

26. What steps could have been taken to avoid the disadvantage? The claimant suggests:

    a. Providing him with the correct screen that did not affect his condition or hinder his work; and/or
    b. Conducting a specific DSE risk assessment when requested by occupational health.

27. Was it reasonable for the respondent to have to take those steps and when?

28. Did the respondent fail to take those steps?

Statutory defence

29. If there was any discrimination, did the respondent take all reasonable steps to prevent the discrimination from taking place?

Remedy

30. At the end of the hearing on merits, we went on to consider the question of remedy. The parties agreed that the basic award for the claimant, based upon his age, length of service and gross weekly pay, was £3,199.26. The parties also agreed that an award of £500 (before deductions) was appropriate for loss of statutory rights.

31. The remedy questions that fell to be determined by the Tribunal therefore were:

    a. What should the respondent be ordered to pay to the claimant by way of unfair dismissal compensatory award?

    b. What sum is the claimant entitled to by way of compensation for injury to feelings?

Findings of Fact

32. The claimant was employed by the respondent from 4 September 2017 until 19 December 2021 when his employment terminated after he resigned on 20 September 2021 giving three months' notice.

33. The claimant was employed as the respondent's Website Content Manager and was the only employee working in this role. He was based in the respondent's offices in Alfreton in Derbyshire and reported to Chris Garbutt, Website Manager. Chris Garbutt in turn reported at the material time to John Rowley, Head of Ecommerce.

34. The claimant's role involved website merchandising, making changes to the respondent's website and getting involved in campaigns that the company was running. The claimant's role was desk based in front of digital screens, and more than 95% of his working time was spent in front of computer / digital screens.

35. The claimant has suffered from migraines since he was a child, but has managed the migraines well and, until recently, his headaches were well managed and did not cause him to have any time off work.

36. On 27 February 2020 the claimant became unwell at work when he experienced a haemorrhage in his left eye. A colleague drove him to A&E. The claimant was off sick on 27 and 28 February, but then returned to work.

37. On 16 March 2020 the claimant and his colleagues began working from home due to the Covid 19 pandemic. The claimant remained working from home through to the termination of his employment the following year.

38. Chris Garbutt and the claimant had discussions about the claimant's health after he returned to work and consideration was given to referring the claimant to occupational health. The claimant was still waiting to see an eye specialist, and the appointment was delayed due to Covid.

39. In late April / early May the claimant told Mr Garbutt that he thought now would be a good time for the occupational health referral to take place to see if any additional support could be identified. Mr Garbutt contacted HR who arranged for an occupational health assessment to take place.

40. The claimant told us that in March 2020 he had told Chris Garbutt that he was experiencing cluster headaches and that he needed adjustments to his screen or new / different screens as a result. We do not accept the claimant's evidence on that issue. It is not supported by any of the contemporaneous documents, and there is no mention of cluster headaches until the July 2021 occupational health report. The claimant's evidence to the Tribunal was at times inconsistent, which caused us to have some doubts that he was recalling accurately what happened some time ago.

41. On 19 May 2020 the claimant had a telephone occupational health assessment with an Occupational Health Nurse. The report produced after that assessment records the following:

"*Mr Lecky has had a torn retina and haemorrhage in his left eye and this has resulted in him experiencing initially poor peripheral vision, headaches and migraines on an almost daily basis…*

Thankfully at the moment the eye appears to be healing and has not becoming worse. However, he has been advised to limit his computer usage to 30 minutes then rest for 30 minutes and for 4 hours a day. This has been a bit difficult for him as his work largely involves computer work for long intense periods…"

42. In response to the question "what adjustments or modifications might need to be considered to facilitate the worker continuing in work?" the nurse wrote: "*What would help Mr Leckey is being able to go to work physically in the office when the Covid-19 lockdown is lifted, as he much prefers to be in the workplace environment…."*

43. The nurse also said that the claimant should rest his eyes, avoid bright light wherever possible and limit his screen time as a temporary measure. She advised that a DSE risk assessment should be carried out to check if he required any further IT equipment whilst he was working from home, and provided a link to the Posturite website. There is no mention of cluster headaches or screens in the report.

44. After the occupational health assessment, a meeting took place between Alison Holder in HR, the claimant and Chris Garbutt. Alison Holder sent an email to the claimant and Mr Garbutt on 3 June 2020 summarising what had been discussed.

45. The claimant said that he agreed with the occupational health report and advised that the issue with his eye was worse under certain conditions, particularly when using spreadsheets or Microsoft Word for prolonged periods because of the stark contrast of the white background.

46. It was agreed that he would spend no more than 30 minutes at a time looking at a screen and he was allowed to take breaks of 30 minutes per hour. It was also agreed that the DSE workplace assessment would take place once the claimant returned to the office. No assessment was arranged for the claimant's home, where he was working at the time.

47. The claimant and Mr Garbutt also discussed reviewing the desk situation as quickly as possible so that if any additional equipment were required, it would be ready for a potential return to the office in July 2020.

48. It was agreed that the claimant's workload would be reduced to reflect reduced capacity, and the claimant's responsibilities in the 'Retail end to end campaign process' were removed from him. It was anticipated that this would remove one day's work from the claimant every week.

49. In July 2020 a second occupational health assessment was carried out by a different occupational health nurse. The report produced following that assessment records that the claimant was experiencing ongoing issues with his left eye, problems with his peripheral vision, ongoing migraines and anxiety and depression. The nurse commented that the claimant was waiting for a DSE assessment to assist with reducing visual strain.

50. The underlying medical condition is recorded as being "*ongoing left eye problem and depression".* In response to the question 'are there any duties that he should not undertake, the nurse commented that as long as the claimant had adequate support, he should be able to undertake his full role.

51. On the question of adjustments, the nurse commenced: " *I understand Mr Leckey has adjustments being arranged for him following the last OH consultation which include a DSE assessment, regular breaks off screen and EAP counselling…*" There was no mention of cluster headaches or screens in the report.

52. No DSE assessment had taken place, nor was one arranged following the second occupational health report.

53. In September 2019 the claimant was assessed by an occupational health nurse for the third time. The report produced following that assessment describes the claimant's current health status as vision impairment and a bereavement reaction. The nurse commented that:

"*When I spoke to Mr Lecky today he was sounding much more positive. He told me that he was feeling a lot happier and I certainly could detect this today… He does still find bright lights hurts his eyes and had avoided driving at night., His headaches have responded well to medication and his GP thinks it was Migraines that has been the cause, although he is not entirely convinced…he is experiencing some breakthrough headaches."*

54. The nurse also wrote that the claimant was able to manage his own work time independently and was looking forward to going into the office later that month. The claimant told the nurse that he would undertake a DSE assessment at his workstation to help identify if he needed any further equipment. No further adjustments or modifications were recommended.

55. Although discussions took place about the claimant returning to the office, ultimately that did not take place and he remained working at home.

56. During 2020 the claimant had very little sickness absence. He was off on 27-28 February due to the haemorrhage, on 25 and 26 March, the 14 July and 17-18 August. He had just seven days' sickness absence in total that year.

57. In October 2020 Chris Garbutt carried out the claimant's performance evaluation. The claimant had previously been considered to be a solid performer, who had been given performance ratings of '2' or 'contributor'.

58. During 2020 the claimant's performance began to dip as a result of the health issues that he was experiencing and the medication that he was taking which made him confused and dizzy at time. It also made him forgetful, prone to make mistakes and have difficulty communicating. In addition the claimant was working fewer hours by agreement with Chris Garbutt as an adjustment for his ill health.

59. During the performance review in October the claimant was rated as a contributor in two areas (ie given a score of 2) and as unsatisfactory in one area (with a score of 1). In giving him these scores, Chris Garbutt and John Rowley were being generous to the claimant, as they knew he would lose his entitlement to a bonus if he was scored as a 1 overall, and they did not want that to happen.

60. The claimant wrote in his comments on the review form that: "*I have had to face quite a lot of personal issues that at times have affected my output, however, I feel at last that I am on the road to recovery and will hopefully be back to my old self soon."*

61. In December 2020 the respondent asked employees who were working from home to carry out an online DSE for Home Workers Assessment. The claimant completed his on 14 December. In the report the claimant wrote that he was experiencing headaches / neck or backache often, often experienced eye problems when working at his computer and that he found the white pages in Microsoft programs caused him headaches. He also commented that he would like help with screens and possibly a new eye exam, looking into photophobia.

62. The claimant also wrote in the DSE Assessment that he did not consider himself to have a disability, that the lighting area in his work area was 'just right', that there were no light sources that caused him problems within his field of view, and that his screen was suitable for its intended use.

63. In late 2020 / early 2021 the respondent decided to close all of its retail stores. This involved a very large redundancy programme which also affected HR.

64. In early March 2021 the claimant was asked to consent to the respondent obtaining a report from his GP, and he provided that consent on 11 March.

65. On 15 March 2021 when driving home from a friend's house the claimant saw a sudden bright white light when the sun reflected off a car. This triggered a very painful headache causing the claimant to pull over. The claimant considered taking his own life, the pain was so bad, but fortunately decided not to.

66. Over the next few weeks the claimant suffered from terrible cluster headaches which lasted for approximately two months. During that time he found it difficult to leave his bedroom, and spent much of the time in the room with the curtains closed.

67. The claimant was signed off work by his GP on 17 March 2021 and remained off work until 2 August 2021. All of his absence was certified by his GP as being due to severe migraines and low mood, with the exception of one week in April that the claimant took off as pre-arranged holiday.

68. Mr Rowley told us in evidence that the claimant had made 'repeated failed attempts' to return to work between March and August. He could not tell us when the claimant had attempted to return to work however, and we find that he did not try to come back to work until 2 August.

69. There was no evidence before us of any welfare meetings taking place with the claimant whilst he was off sick. However, the GP notes before us showed that the claimant repeatedly told his GP that work was being very supportive of him.

70. For example, in a consultation with his GP on 16 November 2020 the claimant said that work was being very supportive.

71. In a consultation on 1 April 2021, he said that he was :"*Feeling very low in mood again at the moment Light really bothering his eyes. Needing sunglasses to watch TV at the moment."*

72. On 15 April 2021 the claimant told the GP that he "*Seems to be worsening with headaches. Struggling to look at a screen and can't make it into work. Work are being extremely supportive with him., Needing extension of sick note. Worrying he's going to have to change jobs."*

73. On 19 April He again told his GP that work was being "*extremely helpful and trying to find a way to support him financially while he's off…. Still really worried he won't be able to get back to work and loves his job."*

74. In June 2020 discussions took place between the claimant and Chris Temmink in HR during which the claimant was asked what IT equipment he may need to carry out his role. The claimant discussed this with two specialists at the hospital, who he said told him that it was the respondent's responsibility to organise this with occupational health and to carry out a risk assessment.

75. The claimant was referred for a fourth and final time to occupational health. He was assessed by an occupational health doctor on 22 July 2021. The doctor mentioned cluster headaches in his report, and wrote that they were worse with bright light, and had become worse over the last two years.

76. The doctor described the claimant as having a condition which "*is very difficult to manage"* and as having had debilitating cluster headaches

24 hours a day for two months, but that fortunately these had now resolved. The doctor assessed the claimant as fit to resume work although said that he would remain at risk of absence similar to the last 12 months.

77. In the doctor's opinion it was "*appropriate for Graham to work at home and in the office as appropriate, I do not believe the computer screen would cause his cluster headaches but may well exacerbate them. "* He recommended a phased return to work over a four week period, but no other adjustments. He described the claimant as having an underlying medical condition of migraine and episodes of debilitating cluster headaches.

78. The claimant returned to work on 2 August, but still working from home. No return to work meeting took place, and indeed Chris Garbutt did not make any contact with the claimant until two days after he returned.

79. When the claimant returned to work, a discussion took place between Chris Garbutt, John Rowley and Chris Temmink in HR about the claimant. The respondent has a sickness absence policy which includes the following provisions :

"***Return-to-work interviews***

After a period of sick leave your manager will hold a return-to-work interview with you…

Managing long-term or persistent absence

We regard long-term sickness absence as 4 weeks or more, so where that is the case, or where we have concerns about the frequency of short-term absence we will use this procedure to discuss it with you. The purpose of the procedure is to investigate and discuss the reasons for your absence, whether it is likely to continue or recur, and whether there are any measures that could improve your health and/or attendance….

Meetings will be conducted by your line manager and may be attended by HR…

If you have a disability, we will consider whether reasonable adjustments may need to be made to the sickness absence meetings procedure, or to your role or working arrangements. This may include a reduction in duties or hours, either on a short-term or long-term basis or redeployment into another suitable available job, and we will discuss these options with you….

Initial sickness absence meeting

The purpose of a sickness absence meeting or meetings will be to discuss the reasons for your absence, how long it is likely to continue, whether it is likely to recur, whether to obtain a medical report, and

whether there are any measures that could improve your health and/or attendance.

If matters do not improve

If, after a reasonable time, you have not been able to return to work or if your attendance has not improved within the agreed timescale, we will hold a further meeting or meetings. We will seek to establish whether the situation is likely to change, and may consider redeployment opportunities at that stage. If it is considered unlikely that you will return to work or that your attendance will improve within a short time, we may give you a written warning that you are at risk of dismissal. We may also set a further date for review…"

80. Chris Temmink advised John Rowley and Chris Garbutt that the claimant should be given a final written warning on ill-health and that this was appropriate due to the duration of the claimant's absence, what he described as the 'multiple failed attempts at a return', pressure on other colleagues and the 'ongoing serious harm to the business at a time with the website's performance was particularly important'.

81. On 6 August a letter was sent to the claimant inviting him to a meeting on 11 August via Microsoft Teams. The claimant was warned that a possible outcome of the meeting could be a final written warning, and told that "*In all scenarios, you will be issued a Performance Improvement Plan to show sustained and considerable improvement."* The letter is confusing and suggests that the meeting may consider both performance in the role and absence.

82. The meeting took place on 11 August and the claimant was accompanied by a colleague, Steve Abbott. Chris Garbutt and John Rowley attended without HR support. Chris Garbutt took notes of the meeting which were sent to the claimant afterwards.

83. The claimant was by that time back at work. He was asked to provide an update and said that at present he had no feeling or thoughts of self harm, that his home life was a lot easier and that he was on the mend. He said that he would suffer with headaches for the rest of his life, but that the headaches were on the mend and he saw a path to getting better.

84. He was asked what he thought were the next best steps and said that he thought a phased return was best and that he wanted to be able to sit in front of a screen as he used to. He complained that he felt he did not have reasonable kit and was told that screens were available for him to collect from the office. These screens were ones that he had been using before lockdown and were not specifically designed or adapted to take account of his health difficulties.

85. John Rowley recognised that the claimant was not to blame or at fault for his time off and also recognised that the claimant's intentions were good.

86. He said however that the claimant would be given a final written warning "*to ensure clear next steps*" and to "*protect wellbeing and business."* It is not clear to us how issuing the claimant with a final written warning was protecting the claimant's wellbeing.

87. This was the first time a health review meeting had taken place, and the first warning that was given about the claimant's absence. No DSE assessment had been carried out other than the online generic one back in December. No targets were set for improvements in attendance or performance and there was no period for review.

88. The claimant was shocked and upset by receiving a final written warning.

89. The respondent wrote to him after the meeting setting out the decision in writing. We find that the letter was drafted before the meeting had actually taken place. Mr Rowley said in his evidence that it had been drafted between 6 and 11 August 2021. The letter included the following:

"*…whilst we are certain that you have all good intentions for the business and are trying your best to provide the business with your best efforts, these have sadly fallen short of our expectation. We do not in any way believe this is deliberate, however it is necessary to move to a final step in the process in order to protect the business performance and future plans…*

Your continued sickness absence is causing significant harm to business performance and strategic aspirations, and we need to address this formally…

If you do choose to return to work, we intend to re-introduce a Performance Improvement Plan (PIP), which we will use to foremost monitor your health and wellbeing as well as to record any sustained and considerable improvement in your performance across a period of 2-3 months…"

90. Although the respondent's sickness absence policy contained a four week 'trigger' for absence management, in this case the respondent took no action until after the claimant had been off work for 98 days and then returned. There was no return to work meeting, and no welfare meetings whilst he was absent. The respondent went straight to a final written warning.

91. There was limited evidence before us of the impact that the claimant's absence was having. His work was being covered by colleagues, but by the time of the meeting in August he had returned to work.

92. At the same time as giving the claimant a final written warning, the respondent also told him that it would be introducing a Performance Improvement Plan. The outcome letter refers to both performance and absence.

93. No targets are set either in the meeting or the letter for either attendance or performance. Nor is it made clear how the claimant is considered to be underperforming, or what areas he needs to work on. There is no time period set for review and the claimant was told that his absence was affecting 'future group strategy'. The language used in the letter is harsh and it is understandable that the claimant was upset by it.

94. John Rowley told us in evidence that one of the reasons the claimant was given a final written warning was because he had said that his condition was a permanent one. It is not clear to us why the respondent decided to go straight to a final written warning rather than issuing an oral or first written warning. The claimant did not have a history of high sickness absence and, after one lengthy absence of 98 working days off between March and August, was now back at work.

95. The day after the meeting the claimant spoke to his GP, and the GP notes of that consultation record the claimant as saying that he was potentially going to lose his job.

96. The claimant was told that he could appeal against the final written warning but chose not to. Instead, he contacted ACAS and began considering employment tribunal proceedings.

97. A follow up meeting took place on 17 August 2021.During that meeting the claimant told Mr Garbutt and Mr Rowley that he was upset with the final written warning, and that the letter contained just one sentence about his health, the rest of it being 'one sided' from the business' perspective.

98. The claimant told the respondent that he considered his situation to be a disability and 'life impeding' rather than an illness and felt disrespected by the content of the letter. He said he found the language in the final written warning harsh. He was embarrassed and let down by the comment in the final written warning that he had fallen short on his objectives.

99. The claimant also said during the meeting that Chris Garbutt had been made aware in May 2020 about the problems he was having with his health, and that no risk assessment had been carried out to help him maintain his health. He said that he didn't know whether using equipment to work had made his health worse or not, and that on many occasions he had said that the equipment was not correct for his vision or headaches.

100. At the end of the meeting John Rowley summarised the claimant's concerns as being about the IT kit and about lack of HR support by the respondent, with no risk assessments. The claimant was due to see his doctor again, and it was agreed that another meeting would then be arranged. The claimant raised a number of questions, and it was agreed that answers would be provided to those questions at the next meeting.

101. A follow up meeting was arranged for 25 August, but the claimant was signed off by his doctor as unfit to work due to stress and did not return to work until his employment terminated.

102. After the claimant went off sick, Rebecca Housden from HR contacted him and asked if they could have a call. They spoke on 7 September 2021 and Ms Housden made some notes of that call. The notes recall that the claimant told her that he had been diagnosed with cluster headaches, that the headaches started badly last year and that he could not look at a computer screen for long.

103. The claimant told Ms Housden said that the respondent should have supported him and done risk assessments to help from April 2020, and that every time he asked for support he felt like he was not being treated seriously. He also said that he felt very let down by the company, and was considering bringing an Employment Tribunal claim for constructive dismissal. He said words to the effect of 'I want to take it as far as I can and shout how crap you've been' and that he wanted to 'stand on the tallest step at tribunal and say how badly he had been treated'.

104. The claimant was clearly very angry by this stage and had lost trust and confidence in the respondent.

105. Ms Housden asked if he wanted to return to work if the respondent made the necessary adjustments and he said that he could not trust the respondent anymore. He said he was fit for work but needed different equipment.

106. Ms Housdon spoke again to the claimant on 8 September and wrote to him on 17 September providing answers to the questions that he had raised. She said that the respondent had taken additional advice from occupational health who had recommended an assessment through Posturite, and that the respondent would organise for this to take place.

107. A final meeting took place on 20 September. Present were the claimant, a colleague, Rebecca Housden and John Rowley. The purpose of the meeting was to discuss the questions raised by the claimant to Rebecca Housden. During the meeting the claimant said that he was unable to look at screens because of his condition, that he felt that no one was listening to him, and that he felt his only option was constructive dismissal.

108. After the meeting the claimant resigned. In his resignation letter he said that he felt he had no choice but to resign "*considering my experiences since February 2020 regarding:*

> *Fundamental breach of contract*
> *Breach of trust and confidence*
> *Breach of personal health and safety measures and welfare risk assessments*
> *Last straw doctrine.*"

109. Ms Housden contacted the claimant and asked him to reconsider his resignation, but he chose not to.

110. The claimant told us in evidence that he resigned because he 'could not take it anymore'. When asked what was the last straw that had prompted his resignation, he again said that he could not take it anymore. He did not identify any specific actions of the respondent that amounted to the last straw.

111. Under his contract of employment, the claimant was required to give three months' notice of termination. He was not required to work his notice but was placed on garden leave and paid his normal pay. He was therefore paid full pay during his notice period and his employment terminated on 19 December.

112. Since leaving the respondent's employment the claimant has not worked, although he is currently exploring a position as a bakery delivery driver's mate. He has not received any income from new earnings. He received Employment Support Allowance between March 2022 and September 2022, during which time he was certified as unfit to work.

113. He has not received any other income and is living on his wife's earnings and occasional gifts from his father.

114. The claimant has been too unwell to work since 25 August 2021. It is only now, in February 2023 that he feels well enough to look for work.

115. In the disability impact statement that he provided for these proceedings the claimant wrote that: "*Looking forward, I will need to change my career as I can no longer look at a digital screen without complications."*

116. The claimant does not watch television any longer. He wears sunglasses and a hat to protect his eyes from light, both inside and outside. He no longer uses a computer and has given his computer away to his son.

117. He told us that he does not do online research because of the need to use a screen. He can however look at a mobile telephone screen for periods of up to 10 or 15 minutes.

118. The claimant believes that there is equipment, such as specialized screens, filters or acetates that would enable him to use a screen, but was not able to identify any in particular. His belief is based upon what he has been told by a cluster headache charity who have said that they are aware of other people who suffer from cluster headaches who are able to work at screens with specialised equipment.

The Law

Constructive unfair dismissal

119. Where an employee resigns, as the claimant in this case did, he can still claim unfair dismissal if he can establish that his resignation falls within section 95(1)(c) of the Employment Rights Act 1996, which provides that:

"*(1) For the purposes of this Part an employee is dismissed by his employer if….*
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

120. The questions that the Tribunal needs to consider in a constructive dismissal claim in which, as in this case, the claimant alleges that the respondent breached the implied term of trust and confidence, are:

a. Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;
b. Did the respondent have reasonable and proper cause for doing so;
c. Did the claimant resign in response to the breach of contract by the respondent; and
d. Did the claimant affirm the contract before resigning?

121. It is well established that a course of conduct by an employer can, when looked at as a whole, amount to a fundamental breach of contract even if the 'last straw' incident which prompts the employee to resign is not in itself a breach of contract (***Lewis v Motorworld Garages Ltd [1986] 157 CA***).

Time limits – discrimination claims

122. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination 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…*
(a) Such other period as the employment tribunal thinks just and equitable.

123. Section 123 (3) states that:

"*(a) conduct extending over a period is to be treated as done at the end of the period;*
(a) Failure to do something is to be treated as occurring when the person in question decided on it."

124. In discrimination cases therefore, the Tribunal has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the

claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e. an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but exercising that discretion should still not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time: ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434*.**

125. Factors that are relevant when considering whether to extend time include:

a. The length of and reasons for the delay in presenting the claim;
b. The extent to which the cogency of the evidence is likely to be affected by the delay;
c. The extent to which the respondent cooperated with any requests for information;
d. How quickly the claimant acted when he knew of the facts giving rise to the claim; and
e. The steps taken by the claimant to obtain professional advice once he knew of the possibility of taking action.

126. In ***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*** the court held that in order to prove that there was a continuing act of discrimination which extended over a period of time, the claimant has to prove firstly that the acts of discrimination are linked to each other and secondly that they are evidence of a continuing discriminatory state of affairs.

Discrimination arising from disability

127. Section 15 of the Equality Act 2010 provides that:

"*(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."

128. In a claim under section 15, no comparator is required, and the claimant is merely required to show that she has suffered unfavourable treatment and that the reason for that treatment was something arising because of her disability.

129. In ***Secretary of State for Justice and another v Dunn EAT 0234/16*** the then president of the EAT, Mrs Justice Simler, identified four elements that must be made out for a claimant to succeed in a complaint under section 15:

a. There must be unfavourable treatment;

b. There must be something that arises in consequence of the claimant's disability;
c. The unfavourable treatment must be because of (ie caused by) the something that arises in consequence of the disability; and
d. The respondent must be unable to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

Reasonable adjustments

130. Section 20 of the Equality Act 2010 states as follows:-

"(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A*

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"

131. Section 21 of the Equality Act 2010 provides that:-

"*(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments…"

132. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in ***Environment Agency v Rowan [2008] ICR 218*** and in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, both approved by the Court of Appeal in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734***.

133. Part 3 of Schedule 8 to the Equality Act 2010 ("Work: Reasonable Adjustments") provides, at paragraph 20 ("Lack of knowledge of disability, etc") that:

"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage…"

134. Assuming that the claimant is a disabled person, the following are the key components which must be considered in every case:

a. What is the provision, criterion or practice ("PCP"), physical feature of premises, or missing auxiliary aid or service relied upon?

b. How does that PCP/ physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

e. Is the claim brought within time?

135. Paragraph 6.28 of the EHRC Code of Practice on Employment (2011) sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:-

a. The extent to which it is likely that the adjustment will be effective;

b. The financial and other costs of making the adjustment;

c. The extent of any disruption caused;

d. The extent of the employer's financial resources;

e. The availability of financial or other assistance such as Access to Work; and

f. The type and size of the employer.

136. There is no limit on the type of adjustments that may be required. An important consideration is the extent to which the step will prevent the disadvantage. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law.

Knowledge of disability

137. By virtue of section 15(2) and Part 3 of Schedule 8 to the Equality Act 2010 actual or constructive knowledge of disability is required in complaints of discrimination arising from disability and of failure to make reasonable adjustments. An employer will not be liable if it did not know and could not reasonably have been expected to know of the claimant's disability.

138. An employer cannot however 'turn a blind eye' to evidence of disability and the EHRC employment Code provides that employers must do all they can reasonably be expected to do to find out whether an employee is disabled. Paragraph 5.15 of the Code states that:

"*An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy…*"

139. That said, failure to enquire about a possible disability is not, in itself, sufficient to give a respondent constructive knowledge of the claimant's disability.

140. In ***A Ltd v Z [2020] ICR 199 EAT*** the claimant was dismissed for repeated sickness absences and poor timekeeping. She had put her absences down to physical impairments, rather than the true cause which was depression, schizophrenia, stress and low mood which amounted to a disability. The respondent had some knowledge that the claimant may have mental health issues but did not make any enquires about them. The EAT held that the Tribunal was wrong to find that the employer had constructive knowledge of the claimant's disability because it failed to take account of what the employer might reasonably have been expected to find out if it had made enquiries. In the tribunal's view, the claimant would have continued to hide information about her mental health difficulties and insisted that she could work normally.

141. When considering knowledge for the purposes of a reasonable adjustments claim, the Tribunal should consider:

a. Did the employer know that the employee was disabled and that her disability was liable to disadvantage her substantially; and
b. If not, ought the employer to have known both that the employee was disabled and that her disability was likely to put her at a substantial disadvantage?

Statutory defence

142. Section 109(4) of the Equality Act 2010 provides that an employer has a defence to a discrimination claim if it can show that it took all reasonable steps to prevent the discrimination taking place.

Basic Award : Unfair dismissal

143. Section 118 of the Employment Rights Act 1996 ("**the ERA**") provides that:

"*(1) Where a tribunal makes an award of compensation for unfair dismissal…the award shall consist of –*

(a) A basic award (calculated in accordance with sections 119 to 122 and 126), and
(b) A compensatory award (calculated in accordance with sections 123, 124, 124A and 126."

144. Section 119 of the ERA contains the provisions for calculating a basic award, which shall be done by:

"*(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*
(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
(c) allowing the appropriate amount for each of those years of employment…"

145. The 'appropriate amount' is "*one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one…*" (section 119(2)(a)).

Unfair dismissal compensatory award

146. Section 123 of the ERA contains the power to make a compensatory award where an employee has been unfairly dismissed, of "*such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

147. Where a Tribunal finds that a claimant has been unfairly dismissed, the respondent can be ordered to pay a basic award and a compensatory award to the claimant. Sections 119 to 122 of the ERA contain the rules governing the calculation of a basic award and include, at section 122(2) the power to reduce a basic award to take account of contributory conduct on the part of a claimant:-

> "*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*. "

148. The rules on compensatory awards are set out in sections 123 and 124 of the ERA and include, at section 123(6) the following:-

> "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*."

149. The leading case on contributory conduct is *Nelson v BBC (No.2) 1980 ICR 110* in which the Court of Appeal held that, for a Tribunal to make a finding of contributory conduct, three factors must be present:-

a. There must be conduct which is culpable or blameworthy;
b. The conduct in question must have caused or contributed to the dismissal; and
c. It must be just and equitable to reduce the award by the proportion specified.

150. In ***Polkey v AE Dayton Services Ltd 1988 ICR 142*** the House of Lords held that it is, in most cases, not open to an employer to argue where there are clear procedural failings, that following a different procedure would have made no difference to the outcome (ie the employee would still have been dismissed) and that accordingly the dismissal is fair. Their Lordships did however find that when deciding the amount of compensation to be awarded to an employee who has been unfairly dismissed, a deduction can be made if the Tribunal concludes that there is a chance that the employee would have been dismissed anyway had a fair procedure been followed.

Compensation for discrimination

151. Section 124 of the Equality Act 2010 ("**the EQA**") sets out the remedies available in a successful discrimination claim. Section 124(2) provides that the tribunal may "*order the respondent to pay compensation to the complainant*". Section 124(6) states that "*The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court…under section 119".*

152. Section 119 of the EQA contains the remedies available to the county court where it makes a finding of discrimination and includes, at section 119(4) the power to award compensation for injured feelings (whether or not it includes compensation on any other basis).

153. In determining the amount of injury to feelings, the tribunal must take account of the guidelines laid down by the Court of Appeal in ***Vento v Chief Constable of West Yorkshire Police (No. 2) 2003 ICR 318****,* as subsequently revised, and of the Presidential Guidance on Employment Tribunal awards for injury to feels and psychiatric injury, issued in September 2017 and subsequently updated.

154. The Vento guidelines, in summary, are that:

a. The top band applies in only the most serious cases, such as where there has been a lengthy campaign of harassment;
b. The middle band applies to serious cases that do not merit an award in the top band; and
c. The lower band applies in less serious cases, for example involving a one off or isolated act of discrimination.

Interest

155. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 give employment tribunals the power to award interest on awards made in discrimination cases. The

tribunal is required to consider whether to award interest, even if the claimant does not include a sum for interest in her schedule of loss.

156. Under Regulation 3 interest is calculated as simple interest that accrues from day to day, and the current rate of interest is 8%. Interest on awards of injury to feelings runs from the date of discrimination to the 'calculation date' on which the tribunal makes its decision on remedy. Interest on other awards of compensation for discrimination, such as compensation for loss of earnings, runs from the mid-point between the date of discrimination and the calculation date.

Submissions

Claimant

157. The claimant submitted that his cluster headaches caused pain in or around his eyes. Pain in his eyes were therefore part of the cluster headaches.

158. The claimant said that he first raised issues about his cluster headaches on 25 March 2020 when he told Chris Garbutt about the headaches. Chris Garbutt had therefore been aware of them from March 2020. Chris Garbutt was not here to give evidence and John Rowley's evidence was based on what Chris Garbutt told him.

159. The fit notes submitted all had reference to migraines and low mood. This was because the claimant would just ring up his GP and ask for a repeat fit note. The fit notes were provided in generic form.

160. On two occasions occupational health suggested that a specific DSE assessment should be carried out. None were ever carried out. All of the occupational health reports were sent to HR but none of the comments were actioned.

161. The respondent is, in the claimant's submission, a large corporation which should have proper rules and policies in place to protect the workforce. Issuing a first and final written warning was insensitive especially given the state of the claimant's mental health.

162. The performance rating was also insensitive in light of the claimant's health. The respondent scored the claimant poorly but then said that they wanted him back into the business as soon as possible to complete his job.

163. In summary the claimant said that it was against the law to discriminate against somebody because they are disabled or because you believe they have a disability.

Respondent

164. Mr Alliott submitted that the claimant's evidence should be treated with caution as there was a great temptation for him to rewrite history. The claim has, he says, developed over time and the starting point should be the claim form.

165. The respondent does not admit and the Tribunal has not found that the claimant was disabled by reason of double vision and that was not one of the disabilities relied upon. The equipment complaint was, he argues, directly linked to the claimant visual problems.

166. The overwhelming focus in the claimant's case was, Mr Alliott says, on the eye injury causing problems with the screen. The claimant now appears to be advancing a case that he could work at a screen with adaptations. That was not the case set out in the claim form and the disability impact statement.

167. The respondent did not and could not, in Mr Alliott's submission reasonably be expected to know that the claimant had a disability. Mr Alliott referred us to paragraphs 5.14, 5.15 and 5.17 of the EHRC Code. The respondent's primary position is that the respondent had no knowledge of disability at any time. Its secondary position was that it had knowledge only from receipt of the final occupational health report in July 2021.The duty to make reasonable adjustments was only triggered therefore in July 2021. On 7 September the respondent suggested an assessment by Posturite and a phased return to work. The claimant could not rely on any failure to make reasonable adjustments prior to July 2021.

168. Mr Alliott accepted that it is incumbent upon a respondent to make enquiries about an employee's health. The respondent in this case did just that.

169. There is, Mr Alliott submits, a conflict of evidence from the claimant. On the one hand he says that cluster headaches were diagnosed right at the outset and that he informed Chris Garbutt about those and that he was disabled. He had indicated in the online DSE assessment in December that he did not consider himself to be disabled. What people say and do contemporaneously that is recorded is more accurate than what they say years later in support of a tribunal claim.

170. The respondent had, Mr Alliott says, been supportive of the claimant. There are several references to this in the GP records. In addition, the respondent had asked the claimant for consent to obtain his medical records. The claimant was gradually realising that he would have to change jobs because he was not able to look at a screen.

171. The imposition of the final written warning for sickness absence was in the respondent's submission reasonable. It was legitimate management action in the circumstances. The decision to issue the final written warning was justified.

172. In relation to the reasonable adjustments claim Mr Alliott accepted that the respondent applied the PCP relied upon and that it put the claimant at a substantial disadvantage. The respondent did not however know about the substantial disadvantage because that depended upon the claimant's eye issues rather than his cluster headaches. In any event no steps could have been taken to remove

the disadvantage because the claimant could not work at a screen at all.

173. Mr Alliott indicated that he did not wish to make any submissions on the question of time limits or on the statutory defence.

Conclusions

174. The following conclusions are reached unanimously, after the Tribunal considered carefully the evidence before it, the legal principles summarised above and the submission of both parties.

Knowledge of disability

175. We find that the respondent had knowledge of the claimant's disability from the time of the fourth occupational health report in July 2021. The report specifically mentions cluster headaches and the impact on the claimant. By that time the claimant had three months' sickness absence due to the headaches and had consistently submitted fit notes referring to headaches. That, combined with the July occupational health report was sufficient to put the respondent on notice that the claimant had a serious health condition that met the test of disability in section 6 of the Equality Act.

176. Prior to that point there was no medical evidence to suggest that the claimant had an underlying medical condition which had a substantial adverse impact on his ability to carry out normal day to day activities. The respondent knew that he had migraine and depression related to bereavement , but he'd had migraines these since he was a child, they had previously been well managed and there was no evidence to suggest that they had a substantial adverse impact on his ability to carry out normal day to day activities.

177. His depression also seemed to be well managed previously and had not resulted in any absence from work. The claimant had limited time off work in 2020.

178. It cannot be said that this is a case in which the respondent failed to take steps to enquire about the claimant's health. It referred him to occupational health on four occasions over a period of approximately 15 months (between May 2020 and July 2021) and occupational health were specifically asked to advise on whether there were any underlying medical conditions and whether any adjustments were required.

179. Where occupational health identified adjustments, such as a phased return to work and 30 minutes away from the screen every hour, these were, on the whole implemented. The respondent also removed work from the claimant with a view to reducing his workload and the pressure on him.

180. We find that until August 2021 the respondent was generally supportive of the claimant, and that the claimant also believed that he

was being well supported. This is reflected in the comments that he made to his GP at the time.

181. Things only changed in August 2021 when he received the final written warning.

Discrimination arising from disability

182. There were two allegations of unfavourable treatment. The first relates to the failure of the respondent to provide the claimant with adequate equipment following the generic online DSE form that he completed in December 2020.

183. This allegation relates to a period before the respondent had knowledge of the claimant's disabilities. For that reason alone the allegation must fail, as a result of the provision in section 15(2) of the Equality Act 2010.

184. We would however comment that it is regrettable that the respondent did not follow up on the comments made by the claimant in the online assessment. Had it done so, it may not have found itself in the position that it does today.

185. The second allegation of unfavourable treatment relates to the issuing of the final written warning on 11 August 2021. The respondent did not seek to argue that the final written warning was not unfavourable treatment. We have no hesitation in finding that issuing a final written warning which also warns that the claimant could be dismissed in the future amounts to unfavourable treatment within the meaning of section 15 of the Equality Act.

186. The next question therefore is whether the unfavourable treatment was for a reason related to the claimant's disabilities. We find on the evidence before us that the written warning was given because of the claimant's sickness absence. That sickness absence was a result of and related to his disabilities, namely cluster headaches and depression.

187. The final written warning also referred to the claimant's performance. We also find that the dip in the claimant's performance was related to his disabilities. There was no evidence to suggest any concerns about the claimant's performance before he became unwell with what was subsequently diagnosed as cluster headaches, and with depression.

188. It is clear also that the claimant's performance was affected by his avoidance of light, and the difficulties that he had using a screen as a result of his cluster headaches.

189. Mr Alliott suggested in his submissions that the claimant's difficulties using a screen related to his eye condition of double vision (which it is not admitted amounts to a disability) rather than the cluster headaches. The claimant told us that his cluster headaches manifest as severe pain in and around the eye and can be triggered by light and

screen use. It cannot in our view be said that the difficulties using a screen are not related to the disability of cluster headaches. In our view they clearly are.

190. We therefore find that by issuing the claimant with a final written warning for absence on 11 August 2021 and by mentioning performance in that warning, the respondent treated the claimant unfavourably for reasons related to his disability, namely his sickness absence and his dip in performance.

191. We have then gone on to consider whether the action taken by the respondent was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon by the respondent were ensuring that employees render regular attendance and/or undertake work to a reasonable standard.

192. We accept that it is a legitimate aim for an employer to want to ensure that employees attend work regularly, and to manage sickness absence. We also accept that ensuring that employees perform their work to a reasonable standard is a legitimate aim. Both aims are part of good management practice.

193. Where the respondent falls down is in relation to the proportionality of the action that it took. In deciding the question of proportionality, we have to consider whether what the respondent did was an appropriate and reasonably necessary way of achieving its aims and whether something less discriminatory could have been done instead. This involves balancing the needs of the respondent and the needs of the claimant.

194. Our concerns about the way in which the respondent issued the claimant with the final written warning are as follows:

a. There did not appear to have been any contact with the claimant by his line manager during his 98-day sickness absence. The only contact was by HR towards the end of the absence;

b. In breach of the respondent's own policy, there was no return-to-work interview when the claimant came back to work on 2 August, and indeed his line manager did not even contact him for two days.

c. The decision on the final written warning was, in our view, made before the meeting with the claimant, and specifically when Chris Temmink advised John Rowley and Chris Garbutt that a final written warning was appropriate;

d. The letter issuing the final written warning was drafted before the meeting took place;

e. This was the very first absence management meeting that the claimant had attended. It is highly unusual for an employer to go straight to a final written warning;

f. At the time the final written warning was issued, the claimant was actually back at work. He had been employed by the respondent for 4 years and had only had one period of lengthy absence, lasting 98 days, from which he had now returned;

g. The respondent at that time was aware of the claimant's disability. There was no meaningful discussion about reasonable adjustments, despite the claimant saying that he felt he did not have reasonable kit;

h. There was no discussion about redeployment, which the respondent's policy says should have been considered;

i. The final written warning was based at least in part upon Mr Rowley's mistaken belief that the claimant had had several failed attempts to return to work. That was not the case;

j. The respondent also brought up the question of the claimant's performance, despite the fact that there was no evidence before us of any performance management since October 2020;

k. The language used in the letter sent to the claimant is harsh and unsympathetic. Despite the respondent apparently recognising that the claimant's absence was genuine, that he was not to blame in any way, and that his intentions were good, it is not at all clear how these mitigating factors were taken into account.

195. It is understandable that the claimant was shocked and upset by the final written warning, and that he felt he was about to lose his job. Two weeks after the meeting he was signed off by his GP as unfit to work due to stress, for the very first time. He remained off work through to the date upon which his employment terminated.

196. We find that the final written warning was not proportionate. The respondent could in our view have achieved its aims by issuing an informal or first written warning, and by dealing with the performance issues separately and in a more supportive manner. The respondent could also have discussed with the claimant the question of alternative equipment, and the possibility of redeployment.

197. The claim for discrimination arising from disability succeeds in relation to the final written warning. This claim is in time.

Statutory defence

198. No evidence was produced in support of the statutory defence and Mr Alliott made no submissions on it. It therefore fails.

Failure to make reasonable adjustments

199. The respondent admits that it applied the PCP of requiring employees to use a computer screen or monitor.

200. We have no hesitation in finding that the requirement to use a computer screen or monitor placed the claimant at a substantial disadvantage in comparison to employees who did not have cluster headaches. We accept the claimant's evidence that using a screen can trigger a cluster headache which is extremely painful and debilitating for the claimant.

201. As a result of the PCP the claimant was unable to work. He remains unable to look at computer screens or the television, with the exception of a mobile telephone screen that he can look at for short periods. He was unable to view screens and work on them, and as a result could not concentrate.

202. We find that the respondent knew from the time of the occupational health report in July 2021 that the claimant was placed at the substantial disadvantage. In that report the doctor wrote specifically that computer screens may well exacerbate the claimant's cluster headaches.

203. Although the claimant had made some comments in the DSE online assessment in December 2014 about difficulty using some Microsoft programmes and white pages, these were not sufficient in our view to put the respondent on notice that the requirement to use a screen placed him at a substantial disadvantage, because he also commented in the DSE assessment that his screen was suitable for its intended use.

204. We have then considered whether, from the date at which the respondent acquired knowledge of the claimant's disability and the fact that the PCP placed him at a substantial disadvantage as a result, there were steps that the respondent could have taken to avoid the disadvantage.

205. The claimant suggests that the respondent should have provided him with the correct screen that did not affect his condition or hinder his work and should have conducted a specific risk assessment when requested by occupational health.

206. Occupational health had recommended a specific DSE risk assessment in its first report in May 2020, and the DSE assessment was mentioned again in the second occupational health report in July 2020. Both of these reports predated the respondent's knowledge of the claimant's disability and of the substantial disadvantage. There was no mention of a DSE assessment in the occupational health report in July 2021, despite the fact that the question of adjustments was considered by the doctor, who recommended a phased return to work and no other adjustments.

207. The claim that the respondent failed to make reasonable adjustments by not following through on the occupational health assessment recommendations made in May and July 2020 therefore fails. We should however say that had the respondent had the necessary knowledge at the time our decision may well have been different.

208. It is also disappointing that the respondent did not conduct a DSE assessment specific to the claimant following the comments he made in his online DSE assessment in December 2020 and in the meeting on 11 August 2021. Although Rebecca Housden offered to refer the claimant for a specific DSE assessment with Posturite in September 2021, by this time the claimant had lost faith in the respondent and it was too late.

209. We have then considered whether providing the claimant with the correct screen that did not affect his condition or hinder his work would have removed the disadvantage. We have considered the case of ***Royal Bank of Scotland v Ashton [2011] ICR EAT*** , in which the Employment Appeal Tribunal stressed that when considering whether a particular adjustment is reasonable, the focus should be on the practical outcome of the adjustment.

210. The key question is whether the step proposed by the claimant would have removed the disadvantage. We are all concerned by the respondent's failure to investigate at all the possibility of screens, filters, or acetates. We have however reminded ourselves that the focus is not on the process followed or not followed by the respondent, but rather on the effectiveness of the proposed adjustment.

211. There was insufficient evidence before us that such equipment exists. The claimant has not identified any specific screens or other equipment that would remove the disadvantage and indeed he is still today avoiding using any type of screen with the exception of a mobile telephone. He told us that the cluster headache charity OUCH has told him that some people with cluster headaches are able to work at screens with adjustments. That evidence, which is unspecific and third hand, is insufficient evidence for us to conclude that providing a different screen would have removed the substantial disadvantage that the claimant faced. There is quite simply no evidence before us about the circumstances of those individuals or the particular equipment they use.

212. The claim for reasonable adjustment therefore fails and is dismissed.

Constructive dismissal

213. The alleged breaches of contract relied upon by the claimant are subjecting him to discrimination on 11 August 2021 and failing to provide him with the required support and equipment to enable him to do his job. The claimant says that these amount to a breach of the implied duty of trust and confidence.

214. For the reasons set out above, we find that the respondent did discriminate against the claimant on 11 August 2021 for a reason related to disability. Whilst not every act of discrimination will be a breach of the implied duty of trust and confidence we find that in this case it was.

215. The failings of the respondent on that occasion were substantial and clearly caused the claimant to lose trust in the respondent and to fear that he was going to lose his job. He went off with stress for the first time just two weeks after the final written warning. The day after getting the final written warning on the 11 August he told his GP that he was potentially going to lose his job, and was clearly upset as a result.

216. We find that on 11 August the respondent behaved in a way that was likely to destroy or seriously damage the trust and confidence between the claimant and the respondent although we accept that the respondent's behaviour was not deliberately calculated to do so. Up until then the claimant had consistently reported to his GP that his employer was being very supportive of him. The 11 August changed everything.

217. We have then considered whether the respondent had reasonable and proper cause for acting as it did on 11 August. For the reasons set out above in relation to the claim under section 15 of the Equality Act, we find that whilst the respondent had legitimate aims for taking the action that it did, its actions were disproportionate and not justified.

218. We therefore find that the respondent breached the implied duty of trust and confidence by discriminating against the claimant on 11 August. Any breach of the implied duty of trust and confidence is a fundamental breach of contract.

219. In relation to the allegation that the respondent failed to provide the claimant with the necessary support and equipment to carry out his role, we are influenced by the comments that the claimant repeatedly made to his GP, up until 12 August 2021, that he was getting good support from work. Those comments, made contemporaneously to an independent and external third party, are in our view telling.

220. We also recognise that the respondent took steps in 2020 to support the claimant by agreeing that he could take 30 minutes out of every hour to rest and take a break from his screen. They referred him four times to occupational health and asked them whether any adjustments were required. They also took some work off him to lighten the load.

221. Whilst it is regrettable that the question of screens and other equipment was not investigated, the failure of the respondent to do so does not in our view amount to a breach of trust and confidence.

222. We find that the reason for the claimant's resignation was the fundamental breach of contract by the respondent on 11 August 2021. That is consistent with his resignation letter.

223. There was no suggestion by the respondent that the claimant waived the breach by delaying in resigning. It was a big decision for him to resign from a job which he clearly enjoyed very much. He was also coming to the realisation that he may no longer be able to work in a similar role.

224. He went off sick two weeks after receiving the written warning and resigned less than four weeks later. Although some meetings did take place after the final written warning, at which the claimant asked questions and was provided with some answers, it cannot be said that these meetings or his calls with Rebeca Housden amounted to him waiving any breach of contract. On the contrary, he made clear to Ms Housden that he was considering bringing a constructive dismissal claim in the employment Tribunal.

225. We therefore find that the claimant was constructively dismissed.

226. The respondent argues that the dismissal was by reason of capability and was fair, although made no submissions on that issue.

227. We accept that the action taken by the respondent on 11 August related to the claimant's absence and performance, and therefore his capability to do the role. Capability is a potentially fair reason for dismissal.

228. Nonetheless we find that the dismissal was unfair, for the same reasons as we find that the respondent's actions were not justified and amounted to a fundamental breach of contract.

229. We therefore find that the claimant was unfairly constructively dismissed.

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230. We have considered whether there was a chance that the claimant would have been fairly dismissed anyway, but for the unfair constructive dismissal.

231. It is clear from the evidence before us that:

a. The claimant himself was coming to the realisation during 2021 that he may no longer be able to remain in his existing job;

b. The claimant still doesn't use screens even in his personal life;

c. The claimant described his cluster headaches as a lifelong condition which, although they may improve with careful management, and we hope that they do, are unlikely to ever go away;

d. He was certified as unfit to work during the first six months of 2022 and did not work following 25 August 2021; and

e. He has not applied and is not applying for any jobs which involve using a screen

232. In these circumstances we find that there is a 75% chance that the claimant would have been dismissed anyway, and the

compensatory award for unfair dismissal should therefore be reduced by 75%. We have not awarded a 100% deduction because we consider that there is a possibility that, had the respondent properly looked into the question of screens and other equipment or redployment, that a solution may have been found.

233. We therefore make a 75% reduction from the compensatory award to reflect the likelihood that the claimant would have been dismissed anyway.

Contributory conduct

234. We make no reduction in either the unfair dismissal basic or compensatory award for contributory conduct. The claimant is not in any way to blame for his dismissal. Even the respondent accepted this in the meeting on 11 August and in the final written warning letter.

235. Throughout the period of his ill health the claimant cooperated with the respondent, and with requests to see occupational health. He has engaged regularly and frequently with medical professionals and taken steps, medical advice and medication to try and manage his condition. In these circumstances, there is no blameworthy or culpable conduct by the claimant, and no reduction should be made for contributory conduct.

Remedy

236. The claimant is entitled to a basic award of £3,199.26. This figure was agreed by the parties.

237. In relation to the compensatory award, Mr Alliott argues that the claimant should not be entitled to any compensation for loss of earnings, on the basis that he is better off having been dismissed, than had he remained in employment. The reason for this is that, had the claimant remained in employment, he would have received Statutory Sick Pay ("**SSP**") only until his entitlement to SSP ran out. Given the length of his absence in 2021, Mr Alliott submits that the claimant would have exhausted his SSP entitlement before the expiry of his notice period and would then have remained on zero pay. The claimant did not suggest otherwise.

238. The claimant accepted that he had been unable to work from 25 August 2021 until the hearing, although he now feels able to look for work. He has not however applied for any jobs.

239. The reason for the claimant's inability to work is his health. Under section 123 of the Employment Rights Act 1996 the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal, insofar as that loss is attributable to action taken by the employer.

240. It cannot be said in our view that the claimant has suffered any financial loss as a result of action taken by the respondent. He

became unable to work in August 2021 and has remained unable to work through to the hearing, although he hopes now to be able to find work.

241. The financial loss that the claimant has incurred is not as a result of the respondent's actions, but rather a result of his ill health.

242. In these circumstances, it would not be just and equitable in our view to make an award for loss of earnings. We do however make an award for loss of statutory rights of £500, which is reduced by 75% to reflect the likelihood that the claimant would have been dismissed anyway.

243. We therefore make a compensatory award of £125.

244. The claimant submitted that an award of £20,000 should be made for injury to feelings. The respondent submitted that an award of £5,000 was appropriate, and that the award should be reduced to reflect the fact that the claimant would likely have been dismissed in any event.

245. We find that an award at the upper end of the lower Vento band is appropriate, and that the respondent should be ordered to pay the claimant the sum of £8,000 by way of injury to feelings. In reaching this figure we have taken account of the following:

a. Awards for injury to feelings are compensatory not punitive;

b. There was only one act of discrimination;

c. That act did however have serious consequences for the claimant, leading to him resigning from his employment. It precipitated the termination of his employment in a job that he loved.

d. No deduction should be made for future contingencies. It would be wrong to reduce an injury to feelings award to reflect the possibility that the claimant may have been fairly dismissed in the future(***O'Donoghue v Redar & Cleveland Borough Council [2001] IRLR 615 CA***);

e. Regard should be had not just to the levels of award in personal injury cases but also the overall size of the award made to the claimant. In this case no award is being made for loss of earnings.

246. The respondent is therefore ordered to pay £8,000 in respect of injury to feelings.

247. We also order that the respondent pay interest on the award of injury to feelings for the period of 540 days between the date of discrimination, namely the 11 August 2021, and the calculation date, the 2 February 2023. This is a total of 540 days. 540 x 0.08 x 1/365 x £8,000 gives a total interest payment of £946.85.

248. The respondent is therefore ordered to pay the following sums to the claimant:

a. Basic Award: 3,199.26;
b. Compensatory Award: 125
c. Injury to feelings: 8,000
d. Interest: 946

249. This gives a total award due to the claimant of **£12,271.11.**

Employment Judge Ayre

23 February 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE