# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Birtwistle

**Respondent:** Phillip Ellis Properties Limited

**Heard at:** Manchester (by CVP) **On:** 20-23 February 2023 and (in chambers) on 10 March 2023

**Before:** Employment Judge Leach, Dr Tirohl, Mrs Linney.

**Representatives**
For the claimant: Ms L Hayworth, Claimant's Partner
For the respondent: Mr Hoyle, Litigation Consultant, Croner.

# JUDGMENT

The unanimous decision of the Tribunal is as follows:-

1. The claimant was unfairly dismissed. It is just and equitable to apply a 20% reduction to a compensatory award.

2. The respondent discriminated against the claimant for a reason related to his disability, contrary to section 15 Equality Act 2010

3. The respondent failed in its duty to make reasonable adjustments, contrary to sections 20/21 Equality Act 2010.

# REASONS

**Introduction**

1. The claimant claims that the decision to dismiss him from his employment with the respondent was unfair and discriminatory.

2. The claimant also complains that the respondent failed in its obligation to make reasonable adjustments which would have enabled the claimant's employment to continue.

## The issues

3. These were identified at a preliminary hearing on 5 January 2022. The parties confirmed to us that they remined the issues for determination. They are set out below.

1. ***Unfair dismissal***

*Reason*

*1.1 Has the respondent shown the reason or principal reason for dismissal? The respondent relies on capability.*

*1.2 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide in particular order:*

*1.2.1 The respondent genuinely believed the claimant was no longer capable of performing his duties;*

*1.2.2 The respondent adequately consulted the claimant;*

*1.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;*

*1.2.4 The respondent could reasonably be expected to wait longer before dismissing the claimant;*

*1.2.5 Dismissal was within the range of reasonable responses of a reasonable employer.*

2. ***Remedy for unfair dismissal***

*2.1 What basic award is payable to the claimant, if any?*

*2.2 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?*

*2.3 If there is a compensatory award, how much should it be? The Tribunal will decide:*

*2.3.1 What financial losses has the dismissal caused the claimant?*

*2.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

*2.3.3 If not, for what period of loss should the claimant be compensated?*

*2.3.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

*2.3.5 If so, should the claimant's compensation be reduced? By how much?*

*2.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

*2.3.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?*

*2.3.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*

*2.3.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?*

*2.3.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*

*2.3.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?*

3. ***Disability***

*3.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:*

*3.1.1 Did he have a physical impairment?*

*3.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?*

*3.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*

*3.1.4 If so, would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?*

*3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:*

*3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?*

*3.1.5.2 if not, were they likely to recur?*

4. ***Discrimination arising from disability (Equality Act 2010 section 15)***

*4.1 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?*

*4.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:*

*4.2.1 Dismissing the claimant;*

*4.2.2 Did not permit the claimant to return to work in November 2020 with adjustments, but required him to remain on sick leave;*

*4.2.3 At a meeting in January 2021 required the claimant to return to work in the office.*

*4.3 Did the following things arise in consequence of the claimant's disability?*

*4.3.1 The claimant says his sickness absence from work was the "something" relied upon in allegation 1, and his absence from work was related to his disability.*

*4.3.2 In relation to allegation 2, the "something" was the respondent said he required information from a medical expert (not the claimant's GP). Did it arise in consequence of disability?*

*4.3.3 With regard to the third allegation, what is the "something"? Did it arise in consequence of disability?*

*4.4 Has the claimant proven facts from which the Tribunal could conclude that the claimant was unfavourably treated because of "something", and in turn that the "something" arose in consequence of disability?*

*4.5 If yes, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? What is the legitimate aim?*

*4.6 The Tribunal will decide in particular:*

*4.6.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;*

*4.6.2 could something less discriminatory have been done instead;*

*4.6.3 how should the needs of the claimant and the respondent be balanced?*

5. ***Reasonable Adjustments (Equality Act 2010 sections 20 & 21)***

*5.1 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?*

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

***5.2.1 The requirement for the claimant, a Lettings Manager, to work in the office from November 2020 onwards..***

*5.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability? The claimant said that it did. Firstly the claimant's disability of diabetes complications and stroke meant he was advised to shield and returning to work in the office put him at increased risk of developing COVID-19 which, because of his disabilities, put him at increased risk of serious illness and/or death. Also the PCP also put the claimant at a substantial disadvantage because his disability meant circulation issues were causing him difficulty with postural hypertension and the ability to walk. The claimant was also unable to drive.*

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

*5.5 If yes, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says the adjustment was to work from home, which he had done successfully in the past.*

*5.6 **The second PCP was the requirement to work from the office and to attend properties and viewings from November 2020 onwards**. Did the respondent have this PCP?*

*5.7 The claimant says this put him at a substantial disadvantage both because of his requirement to shield (see above).*

*5.8 The claimant says the reasonable adjustment was no face-to-face contact with anyone outside his bubble, i.e. to work from home.*

*5.9 **The third PCP was a requirement to return to work immediately in November 2020.** Did the respondent have this PCP?*

*5.10 The claimant says that put him at a substantial disadvantage in relation to a relevant matter because his lengthy absence from work and ongoing symptoms would make an immediate return to full-time work exhausting and difficult and cause aggravation of his symptoms.*

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

*5.12 Did the respondent fail to take such steps as would have been reasonable to take to avoid the disadvantage? The claimant says the respondent should have permitted him a phased return to work over four weeks.*

*5.13 **The fourth PCP was non-payment of discretionary company sick pay from August 2020**. Did the respondent have this PCP?*

*5.14 The claimant says that put him as a disabled person at a substantial disadvantage because it placed him in financial hardship.*

*5.15 Did the respondent have knowledge of the disadvantage?*

*5.16 Did the respondent fail in its duty to take such steps as would have been reasonable to rake to avoid the disadvantage? The claimant says the reasonable adjustment would have been to place him on the furlough scheme.*

4. We discussed and agreed at the beginning of this hearing that we would focus first on the liability issues (whether the claimant had been unfairly dismissed and whether there had been a breach of the Equality Act 2010.) However we would also make findings of fact that would enable us to deal with the following issues potentially relevant to remedy:-

a. Whether, if the claimant had been unfairly dismissed, there is a chance that the claimant would have been dismissed anyway (issue 2.3.4 and 2.3.5 above)
b. Whether there had been a failure to follow the ACAS Code of Practice and, if so, whether there should be a reduction in any compensation awarded.

**The Hearing**

5. The hearing was conducted by CVP over 4 days. Generally connections were good and we were able to conduct a fair hearing over CVP.

6. We spent the morning of day one reading in to the case. We then heard from the claimant in the afternoon of day one and the morning of day 2.

7. On day 2 we also heard from a witness called by the claimant, Lauren McHugh (LM) who had been employed by the respondent for 6 weeks or so in late 2020.

8. On day 3 ( and on the morning of day 4) we heard from the respondent's witnesses, Eli Weider (EW) the respondent's owner/main shareholder and Clare Griffiths, lettings manager employed by the respondent.

9. At various stages of the hearing, new documents were introduced. The respondent's applications to add documents were not met with any objection from the claimant.

10. A document introduced on day 2 was a fuller version of a message exchange between Lauren McHugh (LM) ( witness called by the claimant) and Miss Hayworth. This correspondence related to the proceedings and a request for Ms McHugh to provide assistance. Litigation privilege applied. The claimant and Miss Hayworth were not aware of litigation privilege. Mr Hoyle applied for an order requiring the claimant's to disclose the document on the basis that, in disclosing part of the exchange, the claimant's had waived privilege.

11. As it was, and having provided the claimant and Miss Hayworth with a brief explanation about litigation privilege, the claimant agreed to disclose the whole of the relevant message exchange (which took place on WhatsApp).

12. On day 3 the claimant applied to introduce another document. This was an email which, we were told, had just been provided to the claimant by LM. It was a copy of an email which indicated that the respondent was not, as at the date of the email (October 2020) carrying out *"in person"* property viewings. Mr Hoyle objected in strong terms. He made submissions that the document had been illegally obtained and that a criminal act had been committed, contrary to Data protection legislation.

13. We decided to allow the claimant to admit the document. We noted that we were not an Information Tribunal, that the respondent had rights under data protection should it wish to pursue them. We also noted that the document had some relevance to the issues and was arguably a disclosable document that had been in the respondent's possession. We also asked both parties to maintain a sense of proportionality. It was of some relevance but not crucial to either party's case. Further, Mr Weider would have an opportunity to comment on the document which he did.

14. We heard the parties submissions in the afternoon of day 4.

**Findings of Fact**

15. The claimant was employed by the respondent between March 2018 and his dismissal in February 2021.

16. The respondent is a small employer. It operates an Estate and Lettings agency, based in North Manchester.

17. The claimant started work for the respondent on a part time, ad hoc basis whilst also working elsewhere.

18. Following an initial period of working on something of an ad hoc basis the claimant became employed on a full-time basis, as a lettings manager.

19. EW's evidence is that the claimant was a good employee when he was fit enough to carry out his duties. The claimant's evidence is that he enjoyed his job with the respondent. We find that for the majority of the time that the claimant worked there, there were good working relations between claimant and respondent.

The claimant's role

20. As a lettings manager the claimant was required to carry out the following tasks:-

Arranging for builders and other trades to visit properties and undertake repairs and upgrades.
Invoicing
Managing rent arrears
Administering Payment systems
Updating details – for examples of landlords and tenants.
Arranging viewing appointments
Placing rental properties on the market
Answering email/phone call enquiries
Developing online social media
Attending properties to show people around
Attending properties to take photographs
Property inspections

21. These tasks were listed by an Occupational Therapist in September 2020. In his evidence to the Tribunal, EW agreed that the list broadly summed up the claimant's role although emphasised that the tasks could not be compartmentalised. We comment on this further below

The claimant's physical and mental impairments.

22. The claimant has multiple physical impairments as we detail below. The claimant links a number of these to his longstanding type 2 diabetes condition and we refer to this first.

23. Diabetes. The claimant has been diagnosed as diabetic since 1998, when the claimant was 18. His diabetes was at the relevant time controlled by medication, Linagliptin, Glimepiride and Metformin. Without the benefit of this medication, the claimant would suffer from high blood sugar and become hyperglycaemic.

24. Alongside the medication, the claimant is (and was at the relevant time) required to check blood sugars every day and eat a balanced diet.

25. We accept the claimant's evidence that without the medication, more nerve and organ damage would be caused than has been caused already.

26. Diabetic stage 3 retinopathy. We accept that this is linked to and arises from the claimant's long-standing Type 2 diabetes. The diabetes related medication reduces the impact of this related condition. We accept the claimant's evidence that he has scar tissue on both retinas that cause bleeding in his eyes and affects his vision. The claimant has undergone laser surgery to remove some blood vessels that grow in his eyes. In 2019 he had 4 or 5 operations. These required some absence from work and also prevented him from driving for short periods. The operations were successful but the condition is ongoing. New blood vessels grow requiring laser surgery on an ongoing basis. The condition has also caused permanent scar tissue. This restricts vision in one eye. That restricted vision cannot be corrected by spectacles although it does not affect the claimants eyesight to such an extent that it stops his from driving. However his driving licence is subject to regular review. The claimant had this condition at the relevant time.

27. Vitreous haemorrhage in both eyes. We accept the claimant's evidence that this condition is linked to his diabetes. The condition was diagnosed in 2019. He underwent surgery in May 2020 to correct this. He was absent from work for a few days in early May 2020. When the claimant returned to work on 6 May 2020, he was unable to drive although at that state the country was in lockdown and the claimant was working from home. His sight recovered sufficiently for his driving licence to be returned to him in late July 2020.

28. Diabetic neuropathy. This is also linked with the diabetes. The claimant has (and had at the relevant time) circulation problems in his legs and feet. The resulting tingling and pain causes or contributes to sleep loss.

29. Hypertension or high blood pressure. Again this is linked to the claimant's diabetes. At the relevant time, it was controlled by medication, Ramipril and Amlodipine. Without the benefit of that medication his blood pressure would have been significantly raised.

30. Kidney Issues. The claimant has problems with his kidneys. Again this is linked to hie type 2 diabetes. As at the date of the Tribunal hearing, the claimant was on dialysis, requiring him to attend hospital multiple times a week. However that was not the position at the relevant time. His kidney function was reduced but not to the extent that it is now. At the relevant time, his kidney functions were being assisted by the diabetes medication.

31. Heart condition and stroke. On 8 August 2020 the claimant suffered a stroke. Initially the effects of the stroke were very debilitating. The claimant was not able to stand up and therefore not able to walk. He was placed under the care of a stroke team based at Salford Royal Hospital and thankfully he quickly started to improve. Through the stroke team, the claimant was able to access physiotherapy services and the services of an occupational therapist. By October 2020, the claimant was able to stand for short periods of time and walk a few steps.

32. A result of the stroke was that the claimant suffered from a condition called postural drop. This arose from difficulties in managing the claimant's medication, particularly medication that he was placed on to control his blood pressure. Standing up would cause a drop in the blood pressure which resulted in dizziness. this started to improve in November 2020 although at that stage the claimant remined unable to walk more than a short distance for which he required a walking aid. By this stage the claimant was comfortable sitting down. By December the condition had improved further and the claimant could stand for longer periods and walk short distances including up and downstairs.

33. Improvements continued over the following months. The claimant remained under the care of the stroke team until October 2021. We note that the terms of a letter from Dr Sen, consultant in stroke medicine, to the claimant's GP dated 19 October 2021 and particularly the following:-

a. That concerns remained about the condition of a vertebral artery.

b. The vertebral artery in question was "non dominant" and therefore it was decided that no intervention was necessary.

c. That the claimant had conventional risk factors of hypertension and diabetes and was to continue on medication – being Clopidogrel.

34. We find that whilst it was not certain what the cause of the stroke was, the claimant's diabetes and high blood pressure were possible causes or contributory factors and without the control of these long-term conditions through medication, the claimant was at an increased risk of suffering from another stroke.

35. The claimant's evidence about longer term effects from the stroke is as follows:-

a. That he did not leave the house until about April 2021 because he was shielding from the Coronavirus up to that point.

b. Ongoing dizziness when bending over or sometimes when moving too quickly;

c. Occasional loss of balance;

d. Restrictions in movement – the claimant does not run, skip, hop and jump.

e. Some impact to his vision ( although as noted the claimant has other conditions affected vision).

f. Some additional fatigue

36. The claimant was at the relevant time (and continues to be) prescribed medication – Clopidogrel – in order to prevent (or reduce the chance of) a recurrence of the stroke.

37. The respondent's position put forward by Mr Hoyle at this hearing is that the stroke and its effects were short term (or that it was not likely at the relevant time they would be long term). It is important, when we consider and decide whether the impairment arising from the stroke amounted to a disability, that we make findings of fact on the prognosis.

38. On this we note the following:-

a. In giving his evidence EW told us, when questioned about why he did not allow the claimant to return to some of his duties, and therefore did not accept the terms of an occupational therapists report that it would not have been possible to rely on the report to return to light duties on the basis of such a life changing event.

b. the comments in a report compiled during the claimant's appeal against his dismissal (on which we comment further in due course)

> *Nigel has stated more than once that he has been told he can expect to make a full recovery. I have dealt with a number of stroke/brain injury patients over the years and without exception, they have all been told this, even those who remained severely disabled months later. A statement by a doctor at the start of a recovery process is not a medical prognosis. As the GP stated on 2"d December, "no condition follows a perfect course" and it depends on "how the residual effects of the stroke affect him long term". My experience is that even those who made a good recovery all had long term changes to either their mental or physical faculties, or both. While the NHS does not like to put figures on it, they say (https:I/www.nhs.uk/conditions/stroke/recovery!) :*
>
> > *The injury to the brain caused by a stroke can lead to widespread and long-lasting problems.*
> >
> > *Although some people may recover quickly, many people who have a stroke need long-term support to help them regain as much independence as possible.*
>
> *I have every sympathy with Nigel's situation, particularly because he is clearly*

*not getting access to medical facilities he needs due to the NHS focus on Covid-19. However the fact remains that his prognosis for recovery is currently unclear and indeed is still progressing, as he himself admits. This means that under the terms of the fit notes supplied by the GP, he is currently still sick.*

c. The claimant's own evidence. He continued to improve from the immediate impact of the stroke. We note that by April 2021 the claimant was able to have his driving licence returned to him, although this was what the claimant described as a restricted licence (a licence for a specific short period of time and therefore subject to regular review) due to his ongoing medical conditions (including vision). The claimant's mobility also improved although he continued to use a walking stick when required and continued to sometimes experience episodes of dizziness and loss of balance when walking. .

The claimant's requirement to Shield during the pandemic.

39. We accept the claimant's evidence that he had been told by the stroke team that he should be shielding in the aftermath of the stroke, particularly when he left hospital in August 2020.

40. The claimant informed EW in writing about his on 2 occasions. The first was by email dated 10 September 2020 (page 113) when he told the respondent "With the current COVID 19 situation I also need to shield" The second was on 2 November 2020 (page 122) when he wrote:-

*"I discussed returning to work with my GP and he is happy to sign me back to work with the following provisions:*

- *A phased return over 4 weeks to build my stamina*
- *Working from home only as I am unable to walk any distance or drive*
- *No face-to-face contact with anyone outside my bubble due to shielding from COVID-19."*

41. The claimant's assertions that he needed to shield were not questioned by the respondent.

42. On 18 February 2021 ( by coincidence, the date of the claimant's appeal against dismissal) the claimant received correspondence from the NHS confirming him as at high risk and advising him to shield and stay at home as much as possible until 31 March 2021; also noting priority for vaccinations. This letter merely confirmed what the claimant had been told by the stroke team prior to then.

The claimant's absences – prior to his stroke.

43. For periods in the 12 months before the stroke, the claimant had been absent from work particularly due to having to various eye operations. The requirement for these was linked to the claimant's diabetes. The claimant kept the respondent (EW)

informed of his medical circumstances and expected absences. We are clear that the claimant will have discussed these circumstances in the context of his diabetes. EW knew the claimant had diabetes and also that he had various medical complications arising from the diabetes.

Stroke and absences

44. The stroke occurred on 8 August 2020. As already noted, the claimant's recovery was managed/assisted by a stroke team. Shelley Radcliffe (SR), an Occupational therapist, was a member of this team and therefore was one of the professionals providing assistance to the claimant. On 14 September 2020, SR wrote to the respondent with helpful information focussed particularly on the claimant returning to work. The letter is at pages 129-132. It includes the following:-

a. A comment telling the reader that the claimant informed SR that it was possible for him to carry out his work role *"from any location with access to a computer and telephone."*

b. A list of duties that the claimant could return to *"with immediate effect"* – which are listed below.

c. A list of those duties *"requiring additional support whilst awaiting further medical investigations"* being duties where attendance at properties was required.

d. A recommendation for a *"graded return to work."*

45. The duties that SR told the respondent the claimant could carry out with immediate effect:

Administrative tasks
Maintenance side of things, arranging builders/repairs etc.
Invoicing
Managing rent arrears
Payment systems
Updating details
Arranging viewing appointments
Placing property on the market
Getting on systems
Answering email/phone call enquiries
Developing online social media

46. The claimant provided the respondent with fit notes from his GP, on a monthly basis. We have not been provided with all relevant fit notes. From the information we have, we find as follows:-

a. the fit note covering September stated he was not fit to work.

b. The fit note issued in early October was consistent with SR's letter. He could return to some duties.

c. This was repeated in the fit note of 9 November 2020 (a copy of which we do have – page 133) which noted that the claimant could undertake "amended duties" being "work from home only and light duties only due to postural drop in blood pressure.

d. The same advice was given in December 2020 and January 2021. We have a copy of the January 2021 fit note (page 150).

Respondent's actions/investigations prior to dismissal

47. On or around 18 August 2020 ( about 10 days after the claimant suffered a stroke) EW asked the claimant for permission to write to his doctor. By email dated 20 August 2020, the claimant gave his consent, contact details of his GP and of the stroke team (page 111).

48. EW wrote to the claimant's GP requesting a report ( letter dated 25 August 2020, page 109). He asked for the following specific information:

- *Please outline current condition and treatment*
- *If Nigel is on medication for his condition, whether there are any side effects that could affect his ability to perform at work*
- *Please describe the effect of the condition on his ability to carry out:*
  *His work duties*
  *His normal day to day activities*
- *An outline of the prognosis of Nigel's condition and whether it will impact on their ability to do their role in the future. If you cannot give a prognosis or predict a date of return, please say so.*
- *Whether there are any modifications we could make that will help support him in the workplace, and ensure good attendance at work. For example, we can consider changing the days worked, reducing hours, changing the times of work in addition to modifying the content and intensity of the work.*
- *Whether any element of his work could aggravate their condition, so that we can steps to rectify it.*
- *Any other relevant information you feel would assist us.*

49. Unfortunately the claimant's GP did not respond to this letter until 11 November 2020. On this delay, we note:-

a. That this was at a difficult stage of the Covid pandemic and we are sure the GP practice was very busy indeed.

b. In the meantime, EW had received information from the stroke team and the fit notes (see above).

50. On 10 September 2020 the claimant emailed EW (pages 112 and 113) to tell him that he had seen the occupational therapist and she was satisfied that the claimant could carry out tasks from home (page 113). EW responded on 11 September 2020 (page 112) stating as follows:

*Hi Nigel.*

*I hope things are improving.*

*Thanks for sending the sick note.*

*I appreciate that you feel that there are some parts of your role that you feel that you are capable of doing, however at present the Doctor has signed you off as unfit to work. so I really need a medical assessment of what you are capable of doing both physically and mentally whilst you are recovering. I do not want to take the risk of bringing you back to work too early and then the stress of work delaying your recovery.*

*If the doctor's response is not satisfactory then I intend to instruct an independent occupational health expert to assess your ability to work.*

51. Over the following weeks the claimant was contacted by the respondent, with the occasional work-related query. Examples we have seen are at pages 114 -117.

52. On 2 November 2020 the claimant again emailed the respondent (EW) asking to be allowed to return to work, noting that his GP had talked about a phased return over 4 weeks (121-122)

"*I discussed returning to work with my GP and he is happy to sign me back to work with the following provisions*

- *A phased return over four weeks to build my stamina*
- *working from home only as I am unable to walk any distance or drive*
- *no face-to-face contact with anyone outside my bubble due to shielding from COVID-19*

*This would mean light administration duties would be the best solution starting at 10 hours spread over several days in week one and adding ten hours each week to eventually achieve 40 hours over 5 days.*

*I did ask the GP about the response you are waiting for but he had no definitive answer and I got the feeling it was a "how long is a piece of string" scenario during this pandemic.*

*The GP has advised me to discuss the return with you and confirm with him what the plan is so he can write the fit to return to work note."*

53. The respondent's position was firm. It would not entertain any return-to-work plans until it had received a response from the GP, even though the fit notes by that stage stated that the claimant was fit to return to work with adjustments.

54. The GP's letter was received on 11 November 2020 (pages 136-7) This letter explains the stroke and effects of the stroke that the claimant was suffering at that time. It also confirms to the employer the claimant's long standing medical conditions of diabetes and associated complications. It also addresses a return to work:-

*"Therefore it would seem reasonable if possible that working from home would be ideal for him. He could then take his time with position changes and be in an environment where he is less likely to injure himself should he fall (rather than being out and about).If the workload could be reduced so he could take more time initially and then built up as time goes by would be ideal.*

*I would hope that Nigel would continue to improve and that hopefully the Postural Hypotension symptoms will resolve completely' It is difficult to give an exact time-frame on this but hopefully this will be over the coming weeks to months maximum. If he manages to work from home safely then it is reasonable that he might be able to resume activity in the office. Again it would probably be wise to start with reduced hours and reduced intensity of work and definitely to be all office based to start with.*

*Currently having to rush around would not be an option for him but I would be hopeful that at some point in the future he would be able to get back to a normal working life."*

55. EW was not satisfied with the response and wrote again. That letter has not been disclosed by the respondent and is not in the bundle. We do however have the response from the GP dated 2 December 2020. It is evident from that response that one of the questions asked by EW was whether the claimant could assist with sales work as required in the office. The response to this question is

*I am not privy to exactly what 'assisting with some sales work as required in the office' entails but again you will be able to assess whether any of this would require Nigel to be up and down off his chair running around the office then he would not be able to do this currently. if it means he will have the opportunity for breaks if he is fatigued or feeling light-headed and can be given a longer time to complete tasks then this is something that you could consider especially as his condition improves. This would be a reasonable first step rather than attending for viewings in my opinion to see how he manages. If his postural hypotension and residual fatigue are manageable then being able to go out to attend properties would be possible at some point in the future.*

56. The doctor also wrote

*"It is unlikely that any aspects of his work would aggravate his condition in the long term but you will find that his condition especially at the moment will affect his current working. Therefore we are currently adjusting his medication to minimise any problems that this is causing him. I have highlighted adjustments that could be made to enable Nigel to get back to work safely in the original report but hope you find the above useful too."*

57. The claimant's fit note of 9 November 2020 was for 28 days, therefore to 7 December 2020. On 10 December the respondent wrote to the claimant:-

*Following your fit note dated the 09/11/2020 which was valid for 28 days, the company has heard nothing from you since you were due to return to work on the USN 32020 when your fit note ran out. At this moment in time, you have been AWOL and in fundamental breach of your employment contract for the last 3 days by failing to follow the company absence reporting procedure, or to fulfil your contractual obligations and attend work.*

*I require you to let me know no later than noon on the 11/12/2020 why the above breaches have occurred and update me with your situation before deciding how the situation should be handled.*

58. The claimant was surprised at the tone of this communication, as are we, bearing in mind that:-

a. The claimant had been trying to return to work for some time on initial reduced duties.

b. There had been contact between claimant and respondent when claimant had assisted with some work-related matters.

c. The respondent had by then received communication from the GP sanctioning an adjusted and phased return to work.

d. The respondent had also been told by the claimant that the GP wanted him and the respondent to discuss the terms of a phased return and to feed back to the GP for the purposes of the next fit note.

59. The claimant wrote to the respondent that same day (10 December 2020) expressing confusion at his letter, and how he could think that the claimant was AWOL. He noted the lack of any contact from the respondent and that EW knew full well that he was ready to return to work. He also noted his full cooperation and that under the circumstances then in existence, he was left without pay. He told the respondent that he felt discriminated against. He also said *"If I can't get a resolve will have to take further action which I'm sure we would both prefer to avoid."*

60. The respondent's reply is dated 11 December 2020 (page 125) and it is relevant that we note the following extracts:

*Regardless of your views that I should be chasing employees when they don't appear for work or are radio silent on me, the facts are that you were due to return to full duties on the 8th December, and failed to provide any documentation to the contrary.*

*……..*

*It's not discrimination to expect an employee to either fulfil their contractual obligations, or in your situation where you are unable to due to your current sickness, to let me know and not be AWOL for several days.*

*……..*

*It is my view that you are required in the office due to your job role as a Lettings Manager. To be clear, the key roles of your job are winning lettings business, attending valuations when required, attending viewings. Take ons, inspections, organising maintenance and being on-hand for contractors and tenants as well as other ad-hoc requirements. The role is full-on and demanding as you know. I do not employ you as an administrator which is the roles you are describing that you can potentially perform from home. Once you are able to return to work in the office and be able to perform your full duties then you will be welcomed back*

61. That this represents a significant change in the respondent's position. By 11 December 2020 the respondent was telling the claimant he could only return to work by coming back to the office and performing his full duties. This is a marked contrast to the respondent's position as of 25 August 2020 when EW wrote to the claimant's GP in the terms noted above, including the sentence "*For example, we can consider changing the days worked, reducing hours, changing the times of work in addition to modifying the content and intensity of the work."* (see earlier- para 48)

62. On 4 January 2021 the claimant provided a further fit note – noting again that he was able to return to work on adjusted duties.

63. On 5 January 2021 the claimant received a letter acknowledging receipt and stating a wish to "discuss this matter" (page 150). This letter went on to tell the claimant that his future employment with the respondent would be considered at the meeting and that "*we will also consider making any reasonable adjustments to your job or workstation to support a return to your duties."*

64. The letter also noted that in the event that nothing could be done to assist in a return to work then the claimant may be dismissed.

65. The meeting was not with EW or any other employee at the respondent. It was chaired by an HR and employment law consultant called Jason Govindji-Bruce (JGB). The claimant was accompanied by a trade union representative called Kevin Flanagan.

66. The respondent has not disclosed any notes of this hearing. We were told that the meeting was recorded but no transcript has been provided either. The respondent has not disclosed any documentation to inform us of the instructions provided to JGB, his terms of reference, documents and other information he was given to consider before his meeting with the claimant.

67. The only evidence that we have about what was covered in the meeting is from the claimant himself, as well as the outcome report which we refer to next.

68. In this Tribunal hearing, the claimant was questioned by Mr Haynes about other employment that he commenced in December 2020. The claimant provided open truthful responses to the questions. He managed to secure work through an agency, dealing with COVID related appointments. It was work that he was able to undertake from home. His evidence (which we accept) was that he was pretty sure that he discussed this with JGB as he could demonstrate an ability to undertake work, albeit from home. We also note that at this stage he had no income from the respondent ( other than a statutory sick pay entitlement) and he needed an income.

Outcome report

69. This is at pages 151-156 and is headed “medical capability recommendation.” We note as follows:-

a. JGB referred to the GP reports of 11 November and 2 December and that the GP was then “hopeful” of improvement over the coming weeks and months. He appears to conclude that there is no improvement in the condition as (1) the most recent fit note indicated a return to adjusted duties only (2) the claimant told him that he did not know when he could return to physical duties as he did not know when he would get assessed to drive. JGB did not appear to take any account of the claimant’s requirement to shield.

b. A page 2 of the report, JGB noted “The company is currently of the mindset that the duties that are required from NB can’t be compartmentalised.” We do not know what JGB was told in the instructions to him as these have not been disclosed. It appears clear that a stance was taken in those instructions but the issue of “compartmentalising” was never discussed with the claimant.

c. JGB notes ( also at page 2) that the claimants offering at the time – to work from home - does not allow flexibility if something came up at the last minute requiring a physical appointment. There is nothing to indicate whether JGB had any knowledge of how busy the respondent was at the time, whether and to what extent face-to-face appointments were taking place at this stage of the pandemic. We note here the evidence from EW that the claimant was not replaced.

d. the report notes an attached list of duties that the respondent provided to JGB. No such list was attached.

e. JGB's report sets out 2 case studies – 2 other estate agents and the extent to which they could or could not "compartmentalise" tasks/roles. There was no consultation with the claimant about these. JGB's report of both of these case studies was that a small estate agency business would not be able to compartmentalise the duties of a lettings manager, that they require staff working fully as a team *"which means from time to time jumping on to other people's tasks and supporting where required."*

f. JGB made his conclusions and "recommendations" but with no first-hand experience of the respondent's business or the businesses discussed in his 2 case studies.

g. Whilst JGB termed his report a "recommendation" the respondent regarded it as making the decision he needed to make. This is what the respondent says in his evidence (he refers to both the and the recommendation by a different external consultant, on appeal

> "*I followed the advice from two separate HR companies to ensure a fair hearing and impartiality and they both concluded the same outcome and found that Nigel was not able to work and the adjustments requested were not reasonable. I would also like to highlight that had the HR companies recommended that Nigel is to continue as an employee of the business I would have continued to follow their advice."*

h. EW's evidence therefore is that, effectively, it was not the respondent that made the decision to dismiss, but the consultant. Whatever outcome they recommended; he would have accepted it.

70. Regarding compartmentalising; as well as noting our finding that the respondent did not engage in any discussion with the claimant about this, we also note that is not what the claimant was seeking by way of a temporary solution/reasonable adjustment at all; quite the opposite. He was willing to jump on to other people's tasks and support where necessary as long as they were tasks he could do remotely. In turn, he was asking for some support in relation to tasks such as face to face viewings. As JGB's report noted (see e above) that was expected.

Appeal

71. The claimant appealed against his dismissal. The respondent instructed a different external HR consultant to meet with the claimant at appeal stage and to submit a report to the respondent. As with the dismissal stage, we have not seen any instructions or terms of reference. We do not know what information was provided and considered by the consultant. The consultant did not attend as a witness at the Tribunal hearing.

72. One point raised by the claimant in his appeal, was that it should be conducted by EW. EW declined.

73. The HR consultant (Ruth Seddon) chaired the appeal hearing on 18 February 2021 via the Zoom platform. She provided a report to the respondent dated 24 February 2021. It recommended the decision to dismiss be upheld. That recommendation appeared to have been based partly on RSs own views about strokes and the long-term impact, without due consideration (or acceptance) of the medical information provided. It also concluded that adjusting the role in the way proposed by the claimant was not reasonable *"given so much about his current medical state, recovery and prognosis is unknown."*

Respondent's attempt to obtain Occupational Health report.

74. On day one of the final hearing, the respondent disclosed email exchanges showing the attempts made by him to obtain an occupational health physician's assessment of the claimant. He engaged with a business called Pall Mall medical. H was provided with details of Pall Mall by his external HR advisers.

75. EW contacted Pall Mall on 15 September. There were various communications between EW and Pall Mall. By email dated 15 October 2020, EW told Pall Mall that *"they don't know the cause of the stroke but he is still having mobility issues due to blood pressure. I would like to nip it in the bud with a consultation but it may be that the examiner should have reference to medical records and the NHS Occupational health worker that has been seeing him as his medical history is quite complex."*

76. The correspondence culminated in Pall Mall's stated position on 23 October 2020 that the claimant would need to complete all of the ongoing medical conditions in to his stroke and *"whilst current conditions of pandemic are taken into consideration, due to the nature of his employment and travel involved we need to know a robust evidence that control of his symptoms have become established - by looking at his most recent heart investigations and ideally a report from his cardiologist before we will likely to be able to opine on his medical fitness."*

77. After EW had received this final response from Pall Mall, he sent an email to his HR Adviser and said:-

> *We don't seem to be making any headway with the OH. They only want to assess him when the investigations are all complete. Due to COVID he has not had all the investigations he needs and this will drag on for months. He's signed off until end of October and then having a further review with the GP. I don't think there is any major improvement in his condition but I do get the feeling from speaking to Laura that he wants to come back to work next month which I can't see happening. Still no response from GP which I have asked Nigel to chase up.*

Evidence from Lauren McHugh (LM)

78. LM was employed by the claimant for a short period at the end of 2020. She became employed having responded to an advertisement for an administrator placed on a recruitment website called Indeed in late August 2020.

79. Whilst EW denies that he recruited an administrator, we conclude (from the wording of the advertisement itself) that was his intention. That was also understood by the successful candidate, LM who began her employment with the respondent on 7 September 2020.

80. LM provided some screenshots of WhatsApp messages from her short period of employment. One, dated 23 September 2020, noted that the respondent's employees would be working from home although one person (LM) would be based in the office.

81. LM gave evidence that,

a. she understood from her recruitment interview that she was told about the claimant and she was his cover.

b. In her time with the respondent, property viewings were minimal, that it appeared to her that the respondent was quiet and that she carried out a lot of administrative tasks.

c. One of the respondent's employees – Claire Griffiths – would complain to LM about the claimant, criticising his work and also noting his health issues and absence. This made LM feel uncomfortable and she was pleased that she did not remain in employment with the respondent for very long.

d. She found better paid employment ( she recalled that she had part time hours with the respondent) and so told EW that she was handing in her notice. EW tried to persuade the claimant to stay. He offered her more money and told her that the claimant probably wouldn't be coming back.

82. LM was cross examined extensively by Mr Hoyle, including whether she had personal relationships/connections with the claimant and his wife. This included cross examination about contacts showing on LMs Facebook page. We are satisfied that (1) there is no close connection between this witness and the claimant or anyone close to him; (2) LM is ( and was) an impartial observer, able to provide evidence which has some relevance to this case. We believe her account.

83. LM was also questioned about her evidence that not many face to face appointments were taking place during her time there. The respondent provided a list of various diary entries ( including appointments) in June, July and August 2020. This showed that appointments were taking place with some frequency. However (1) it was not always clear whether an appointment was a face to face one (2) surprisingly the respondent did not provide diary entries for the time that LM referred to. 2020 was a difficult and unusual year for many businesses. Lockdowns occurred again from about August 2020 until 31 March 2021. We believe LM's evidence that there were very few viewings during the 6 week period that LM was employed by the respondent.

<u>Evidence from Claire Griffith</u>

84. CG was employed by the respondent at the time of the claimant's absence and dismissal and she remains the respondent's employee. We have taken that into account when considering her evidence. We also accept LM's evidence that CG appeared to have little regard for the claimant.

85. We accept CG's evidence that

a. she worked hard during the claimant's absence.

b. That there are crossovers between sales and lettings and when in a small business, everyone needs to support each other.

86. We do not accept her evidence that she could only have covered for the claimant on a short-term basis; that is not consistent with the respondent not recruiting a replacement for the claimant.

87. CG did not provide evidence that assistance with various administration type tasks would have been of no use to her. If the workload was as significant as CG says it was, then an employee in CG's position would have benefitted from the claimant's assistance.

<u>The respondent's decision to dismiss the claimant</u>

88. We find that by the end of 2020 latest, the respondent had decided that he needed to end the claimant's employment. We make this findings after consideration of the following:

a. Evidence of LM.

b. EW's failure/refusal to meet the claimant and engage in discussion with him.

c. EW's decision to outsource the dismissal and appeal process.

d. Comments made that to Pall Mall and then to his HR adviser indicating that by late October 2020, EW was resistant to much more delay and to the claimant returning to work (even though he had by then been told by the claimant's doctor and the stroke team that a return to amended duties was possible. See para 74-77 above.

e. An unwillingness to accept or at least action the occupational therapy report and subsequent fit notes.

f. A lack of transparency on the part of the respondent; incomplete disclosure of email correspondence. No disclosure of instructions, no disclosure of transcript.

g. The respondent did not recruit ( or try to recruit) a replacement for the claimant.

h. The change in respondent's position between 25 August and 11 December 2020 (see para 61 above)

89. We also find that the reason for dismissal was about the claimant's capability (health) and absence as a whole, not the stroke in isolation. The respondent wrote to the claimant very soon after the stroke, to seek an up-to-date medical condition. Had the claimant not had a series of absences from work, dur to various eye operations, in the months before the stroke, the respondent would not have sought a prognosis so quickly.

90. As for the recommendations of the HR consultants, we are satisfied, on balance, that they were instructed to ensure the claimant's dismissal. If the respondent did not provide such direct instructions to them, his instructions were such that he made clear that was his desired outcome. The respondent was in control of the information provided to the consultants. We have not been provided with any information given to the consultants and we conclude, from the evidence we have, that it was heavily weighted in favour of dismissal.

**The Law**

Disability

91. Section 6 Equality Act 2010 (EQA) provides as follows:-

*(1) A person (P) has a disability if-*

*a. P has a physical or mental impairment, and*

*b. The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.*

92. Section 212(1) of the EQA defines "substantial" as meaning *"more than minor or trivial."*

93. We have also considered:-

(i) part one of schedule one to the EQA regarding the definition of disability.

(ii) The Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability. (Guidance)

(iii) The EHRC Employment Code

94. We note from the materials above and from relevant case law:-

a. That we are to apply this definition at around the time that the alleged discrimination took place; **Cruickshank v. VAW Motorcast Limited [2002] ICR 729;** (which I have referred to as the relevant time).

b. That we should apply a sequential decision-making approach to the test (see for example **J v. DLA Piper [2010] WL 2131720 (J v. DLA)**, addressing the following in order:-

- did the claimant have a mental and/or physical impairment? (the 'impairment condition')
- did the impairment affect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition')
- was the adverse condition substantial? (the 'substantial condition'), and
- was the adverse condition long term? (the 'long-term condition').

c. The term "impairment" had to be given its ordinary and natural meaning (**McNicol v. Balfour Beatty Rail Maintenance Limited [2002] EWCA Civ 1074**).

d. Where a person has more than one impairment, account must be taken whether the impairments together have a substantial adverse effect overall on the person's ability to carry out normal day to day activities. (Guidance at Section B6).

e. Section B12 of the Guidance refers to effects of treatment: "*The Act provides that where an impairment is subject to treatment or correction, the impairment is likely to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, likely should be interpreted as meaning "could well happen."*

f. The Guidance includes guidance on what "long term" means – see section C of the Guidance, the meaning of "likely" (C3 and C4) and recurring or fluctuating effects (C5-C8) and likelihood of recurrence (C9) and a requirement to take into account the cumulative effect of related impairments (C2).

g. The term likely means that is a real possibility, that it could well happen rather than something that is probable or more likely than not ( **Boyle v. SCA Packaging Limited 2009 ICR 1056 (HL)** – and now reflected in the wording at paragraph C3 of the Guidance).

h. The EQA does not define what is meant by "*normal day to day activities."* Section D of the Guidance provides guidance on this term. The appendix to the Guidance provides "*illustrative and non-exhaustive*" lists of factors which it would and would not be reasonable to regard as having a substantial and adverse effect on normal day to day activities.

i. An Employment Tribunal must look at the question of whether an impairment was likely to have lasted 12 months, from the position at the date of the alleged discrimination, not from the date of the hearing/decision. (**All Answers Limited v. W and another [2021] IRLR 612**) *("All Answers").*

74. s.15 EqA 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.*

75. In **Secretary of State for Justice and another v Dunn EAT 0234/16** the Employment Appeal Tribunal ("EAT") noted 4 findings to be made, for the claimant to succeed in a section 15 claim:-

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* (i.e. caused by) the something that arises in consequence of the disability; and

d. the alleged discriminator cannot show that the unfavourable treatment is *a* proportionate *means of achieving a legitimate aim*.

76. In **Paisner v.NHS England (UKEAT/0137/15/LA)** the EAT provided guidance to Employment Tribunals when considering these claims which we summarise below.

a. The Tribunal should decide what caused the treatment complained of – or what the reason for that treatment was.

b. There may be more than one cause. The "something" might not be the sole or main cause but it must have a significant impact.

c. Motives are irrelevant.

d. The Tribunal should decide whether the/a cause is "*something arising in consequence of"* the claimant's disability. There could be a range of causal links under the expression *"something arising in consequence of…"*

77. When deciding whether a measure is proportionate in the context of the legitimate aim being pursued (s15(1)(b) EqA above) a tribunal must weigh the real needs of the employer against the discriminatory effect of the proposal. (see **DWP v. Boyers UKEAT/0282/19).**

Objective justification

78. There is a potential defence to a claim under s15 EQA (discrimination arising) – where the employer can show that the application of the PCP was a proportionate means of achieving a legitimate aim.

79. The EHRC Code of Practice on Employment 2011 (Code) provides guidance and comment. In short, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration (see para 4.28 of the Code).

80. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (para 4.29).

81. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not have been achieved by less discriminatory means — para 4.31.

82. The following is stated at paragraph 4.30 of the Code

> *'Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts'*

83. A PCP will not be proportionate if it is not an appropriate means of achieving the legitimate aim.

Duty to Make Reasonable Adjustments

84. The claimant raises claims under s20(3) EqA. This imposes a duty on an employer *"where a provision* criterion *or practice of [the employer] 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."*

85. We note that, for the duty to make reasonable adjustments to apply, a claimant needs to show that s/he has been put to a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled.

PCPs

86. For a provision criterion or practice to be a valid PCP for the purposes of s19 and 20 of the EQA, it must be more widely applied ( or would be more widely applied).

87. Chapter 4 of the EHRC Code of Practice on Employment 2011 concerns indirect discrimination. Paragraph 4.5 says this in relation to PCPs:-

> *"The first stage in establishing indirect discrimination is to identify the relevant provision criterion or practice. The phrase provision criterion or practice is not defined by the Act but it should be construed widely so as to include for example any formal or informal policies rules practices arrangements criteria conditions prerequisites qualifications or provisions. A provision criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a one off or discretionary decision."*

88. Whilst PCPs should be construed widely, there are limits. The word "practice" indicates some degree of repetition and where a PCP was identified from what happened on a single occasion, there must be some evidence of a more general practice. Paragraph 59 of the judgment in **Gan Menachem Hendon Limited v Ms Zelda De Groen UKEAT/0059/18:-**

> *So, while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred.*

Payments During Sickness Absence

89. We note the judgment in **O'Hanlon v. HMRC [2007] EWCA 283** ("O Hanlon") and particularly paragraphs 67-69 of the judgment. Paragraph 67 of the judgment includes the following:

> *67. In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances."*

Burden of Proof

90. We are required to apply the burden of proof provisions under section 136 EqA when considering complaints raised under the EqA.

91. Section 136 states:

> *This section applies to any proceedings relating to a contravention of this Act.*

> *(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection 2 does not apply if A shows that A did not contravene the provision."*

92. We have also considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. The annex to the judgment sets out guidance. (the amended Barton guidance)

93. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassey v. Nomura International [2007] ICR 867,** where the following was noted in the judgment:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

ACAS Code of Practice

94. Section 207A of the trade Union and Labour Relations (Consolidation) Act 1992provides that, in discrimination complaints, tribunals have the power to increase or decrease awards by up to 25% where there has been an unreasonable failure, by either party, to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Unfair dismissal, capability

95. Section 98 (1), (2) and (3) of the Employment Rights Act 1996 (ERA) provides that capability (including where ill health adversely impacts on an employee's capability) is a potentially fair reason for dismissal.

96. If the respondent does persuade the tribunal that the reason was a potentially fair reason, consideration must then be given to the general reasonableness of that dismissal, applying section 98 (4) ERA.

97. Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating capability as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

98. When considering the question as to whether the employer acted reasonably or reasonably in treating capability as a sufficient reason for dismissal, much depends on the procedure adopted by the employer.

99. A "range of reasonable responses" test applies to the decision and the procedure (see **J Sainsbury plc v. Hitt [2002] EWCA Civ. 1588** and, in the context of a long-term illness dismissal – **Pinnington v. Swansea City Council EAT 0561/03**.

100. Invariably when considering the dismissal of an employee absent on long term sickness, consideration must be given to whether the employer can reasonably be expected to wait any longer for the employee's return (**Spencer v. Paragon Wallpapers [1977] ICR 301).**

101. We note the following passage at paragraph 27 of the Court of Appeal's decision in **S v. Dundee City Council [2013] CSIH 91** (which is a summary of its analysis of 2 earlier decisions, one being Spencer noted above) .

> *"Three important themes emerged from the decisions in Spencer and Daubney. First in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly there is a need to consult the employee and take his views into account. We would emphasise however that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."*

102. Appendix 4 of the ACAS Guide on disciplinary and grievances at work is called "dealing with absence." We have considered this appendix, particularly the section under the heading *"How should long term absence through ill health be handled?* We note the opening paragraph under this section:-

> *"where absences due to medically certified illness the issue becomes one of capability rather than conduct. Employers need to take a more sympathetic and considerate approach, particularly if the employee is disabled and where reasonable adjustments at the workplace might enable them to return to work."*

103. There is nothing in the ACAS Code of practice to indicate that it applies to capability (ill health) dismissals. Paragraph 1 of the Code makes clear that its application is to disciplinary situations and to grievances.

104. In the event we make a finding of unfair dismissal, section 123(1) ERA requires us to make a compensatory award that we consider to be just and equitable. This includes consideration about whether the unfairly dismissed employee could have been dismissed anyway, had a fair procedure been followed. (**Polkey v. AE Dayton Services Limited [1988] ICR 142 HL**). The EAT's decision in the later case of **Software 2000 Limited v. Andrews and ors UKEAT/0533/06** sets out the relevant legal principles for Tribunals when considering reductions under s123(1) ERA (see para 54 particularly).

Analysis and Conclusions

***Unfair dismissal***

*Reason*

*1.1 Has the respondent shown the reason or principal reason for dismissal? The respondent relies on capability.*

105. We find the reason for dismissal was capability. The respondent decided to dismiss the claimant because of his absence record and expected ongoing inability to return to his full role without restrictions/adjustments.

*1.2 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide in particular order:*

*1.2.1 The respondent genuinely believed the claimant was no longer capable of performing his duties;*

*1.2.2 The respondent adequately consulted the claimant;*

*1.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;*

*1.2.4 The respondent could reasonably be expected to wait longer before dismissing the claimant;*

*1.2.5 Dismissal was within the range of reasonable responses of a reasonable employer.*

106. We do not find that the respondent acted reasonably in treating the reason as a sufficient reason to dismiss the claimant. These are our reasons:-

a. The respondent had made his mind up by the end of November/beginning of December 2020 that the claimant should be dismissed. He did this without any genuine consultation with the respondent.

b. The process that then followed was not a genuine process. The respondent hired others to carry out so called consultation meetings with

the claimant but knowing that the outcome would be the claimant's dismissal.

107. The 2 conclusions above, by themselves, make the dismissal unfair. However even if we are wrong in these conclusions, then we note the following:-.

a. On 11 November 2020 the respondent received information from the doctor that the postural hypotension symptoms may resolve completely in the coming weeks to months maximum. The up-to-date medical position could and should have been resolved at the dismissal and appeal stage.

b. The respondent had the benefit of various professional advisers. We do not accept that a report from an occupational physician could not have been obtained.
c. The respondent did not take seriously the claimant's claim that he had been advised to shield. If there was any doubt about the requirement, that is something that could and should have been verified.

d. The respondent did not engage in meaningful consultation with the claimant. We recognise that the respondent is a small employer and without the levels of management/seniority that a larger employer would be able to deploy in a dismissal process. However in this case the decision maker- EW did not consult with the claimant either at the dismissal or appeal stage. EW and the claimant could and should have engaged in a discussion about what might be done from home, possibly on a reduced hours basis, which would have reduced the pressure that the respondent claims the other employee (KG) was under.

*2* ***Remedy for unfair dismissal***

*2.1 What basic award is payable to the claimant, if any?*

*2.2 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?*

*2.3 If there is a compensatory award, how much should it be? The Tribunal will decide:*

*2.3.1 What financial losses has the dismissal caused the claimant?*

*2.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

*2.3.3 If not, for what period of loss should the claimant be compensated?*

*2.3.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

*2.3.5 If so, should the claimant's compensation be reduced? By how much?*

*2.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

*2.3.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?*

*2.3.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*

*2.3.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?*

*2.3.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*

*2.3.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?*

108. We have considered issues 2.3.4-2.3.10 above. These are our conclusions:-

a. The ACAS Code does not apply to capability dismissals.

b. The claimant did not contribute to his dismissal by blameworthy conduct (the respondent has not advanced any argument that he did).

c. There was some chance that, had the respondent adopted a fair procedure, the claimant would have been dismissed anyway. We put that chance at 20%.

109. We have decided that there would have been some chance that the claimant would have been dismissed anyway had a fair procedure been followed. We recognise that the respondent is a very small business and that the claimant's long term sickness absence reduced the size and capacity of the workforce significantly. A genuine consultation between the respondent ( particularly EW) and the claimant might have resulted in a fair dismissal – possibly with new employment under which the claimant worked for the respondent on a less than full time basis, at least whilst unable to attend the respondent's office. Genuine consultation between the parties might have resulted in the claimant reverting to the type of ad hoc arrangement that he started his employment with.

110. These potential alternative outcomes involve some speculation on our part but we are satisfied that speculation is well within the guidance provided in Software 2000. However, given our findings on the unfairness of the dismissal, the absence of genuine consultation and the speculative nature of the alternatives proposed above, our decision is that a percentage reduction should be very limited and that 20% is appropriate.

*3* ***Disability***

*3.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:*

*3.1.1 Did he have a physical impairment?*

*3.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?*

*3.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*

*3.1.4 If so, would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?*

*3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:*

*3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?*

*3.1.5.2 if not, were they likely to recur?*

111. We are satisfied that the claimant had at the relevant time, a disability for the purposes of section 6 EQA. These are our reasons:-

a. The claimant had various physical impairments as noted in our findings of fact.

b. Section C2 of the guidance requires us to consider the cumulative effect of related impairments. That is what we have done. The claimant suffers from diabetes. He has a range of conditions which appear to be related to this condition including conditions affecting his eyesight and kidneys.

c. He has a range of medication and interventions ( including the list of prescribed medication and operations on his eye) Were that to be taken away from the claimant then we accept that would have potentially catastrophic consequences for him in terms of organ damage and possibly death. Those consequences would make it imporssible for him to carry out normal day to day activities. For example:-

   i. Eyesight. Without ongoing interventions the claimant's sight would be so adversely affected that he would be unable to drive
   ii. Heart condition/blood pressure. Without medication, the claimant would be at increased risk of more strokes.
   iii. Diabetes. Without medication the claimant would have been hyperglycaemic with increased and worsening symptoms including quicker damage to the claimant's kidneys.

d. Mr Hoyle for the respondent, made submissions that we should consider the stroke in isolation as that is the only medical condition that is relevant to the claimant's dismissal. We disagree that is the only relevant condition. We have made findings that it is a combination of the claimant's absences (including those before the stroke) that led to the respondent deciding that the claimant needed to be dismissed (see para 88 above).

e. We also note that it is possible that the physical circumstances giving rise to the claimant's stroke were related to his existing conditions.

f. Even if they were not related:-
   i. the complication surrounding the treatment of the stroke were made more complex by the treatment surrounding the other conditions and led to longer term consequences of the stroke ( the postural drop).
   ii. The circumstances of the pandemic meant that the claimant was required to shield. The stroke therefore had a very significant adverse effect on the ability to carry out day to day activities during the pandemic itself.
   iii. The claimant was prescribed medication to prevent another stroke episode (i.e. to prevent a recurrence). The stroke had a substantial adverse effect on the claimant's ability to carry out normal day to day activities. The stroke is likely to recur. In reaching this conclusion we have applied the definition of "likely" in section C3 of the Guidance. We have also disregarded the effect of the medication the claimant was prescribed to reduce the risk of a stroke recurring.

*4* ***Discrimination arising from disability (Equality Act 2010 section 15)***

*4.1 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?*

*4.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:*

*4.2.1 Dismissing the claimant;*

*4.2.2 Did not permit the claimant to return to work in November 2020 with adjustments, but required him to remain on sick leave;*

*4.2.3 At a meeting in January 2021 required the claimant to return to work in the office.*

*4.3 Did the following things arise in consequence of the claimant's disability?*

*4.3.1 The claimant says his sickness absence from work was the "something" relied upon in allegation 1, and his absence from work was related to his disability.*

*4.3.2 In relation to allegation 2, the "something" was the respondent said he required information from a medical expert (not the claimant's GP). Did it arise in consequence of disability?*

*4.3.3 With regard to the third allegation, what is the "something"? Did it arise in consequence of disability?*

*4.4 Has the claimant proven facts from which the Tribunal could conclude that the claimant was unfavourably treated because of "something", and in turn that the "something" arose in consequence of disability?*

*4.5 If yes, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? What is the legitimate aim?*

*4.6 The Tribunal will decide in particular:*

*4.6.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;*

*4.6.2 could something less discriminatory have been done instead;*

*4.6.3 how should the needs of the claimant and the respondent be balanced?*

112. Our consultations on the various issues listed in 4 above are as follows:

a. The respondent knew that the claimant had a disability. We are satisfied that the respondent knew in good time before November 2020 ( particularly when the claimant became absent for a long time due to his eye complications and operation, and his inability to drive). However if there was any doubt that the claimant had serious medical issues, those can have been no doubt about this when the respondent received the letter from the claimant's GP dated 11 November 2020 when the respondent was told:-

*As you are aware Nigel has the longstanding type II diabetes diagnosis and associated complications namely his eyes and also more recently he has also suffered a Stroke.*

b. A dismissal is unfavourable treatment. The other 2 items (4.2.1 and 4.2.2) are more appropriately considered under sections 21/21 EQA (failure to make reasonable adjustments).

c. The claimant's sickness absence was "something arising in consequence of the claimant's disability."

d. The respondent put forward a legitimate aim of protecting the business. EWs evidence was that his employee CG was overwhelmed. Yet we have no evidence of this. The evidence we do have is that the respondent did not recruit a replacement either for LM or for the claimant. Further, if the respondent was met with too many tasks, some of these tasks could have been carried out by the claimant that is what he had wanted to do since October 2020. Whilst protection of business is a legitimate aim, the claimant's dismissal was not a proportionate means of achieving that.

*5* ***Reasonable Adjustments (Equality Act 2010 sections 20 & 21)***

*5.1 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?*

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

***5.2.1 The requirement for the claimant, a Lettings Manager, to work in the office from November 2020 onwards.***

*5.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability? The claimant said that it did. Firstly the claimant's disability of diabetes complications and stroke meant he was advised to shield and returning to work in the office put him at increased risk of developing COVID-19 which, because of his disabilities, put him at increased risk of serious illness and/or death. Also the PCP also put the claimant at a substantial disadvantage because his disability meant circulation issues were causing him difficulty with postural hypertension and the ability to walk. The claimant was also unable to drive.*

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

*5.5 If yes, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says the adjustment was to work from home, which he had done successfully in the past.*

113. The respondent did apply this requirement. We find that it was applied from the respondent's letter dated 11 December 2020 (page 125). See our findings of fact above.

114. We find that it did put the claimant at a substantial disadvantage. At that time, because of his disability, he could not attend the office to work; nor could he drive.

115. The respondent was aware that the claimant was at this disadvantage.

116. The respondent failed in its duty to make reasonable adjustments. The claimant was ready and willing to carry out a number of tasks at home. The respondent could have allowed the claimant to work from home. The respondent's systems enabled a significant amount of the claimant's role to be done from home.

*5.6 **The second PCP was the requirement to work from the office and to attend properties and viewings from November 2020 onwards**. Did the respondent have this PCP?*

*5.7 The claimant says this put him at a substantial disadvantage both because of his requirement to shield (see above).*

*5.8 The claimant says the reasonable adjustment was no face-to-face contact with anyone outside his bubble, i.e. to work from home.*

*5.9 **The third PCP was a requirement to return to work immediately in November 2020.** Did the respondent have this PCP?*

*5.10 The claimant says that put him at a substantial disadvantage in relation to a relevant matter because his lengthy absence from work and ongoing symptoms would make an immediate return to full-time work exhausting and difficult and cause aggravation of his symptoms.*

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

*5.12 Did the respondent fail to take such steps as would have been reasonable to take to avoid the disadvantage? The claimant says the respondent should have permitted him a phased return to work over four weeks.*

*5.13* ***The fourth PCP was non-payment of discretionary company sick pay from August 2020****. Did the respondent have this PCP?*

*5.14 The claimant says that put him as a disabled person at a substantial disadvantage because it placed him in financial hardship.*

*5.15 Did the respondent have knowledge of the disadvantage?*

*5.16 Did the respondent fail in its duty to take such steps as would have been reasonable to rake to avoid the disadvantage? The claimant says the reasonable adjustment would have been to place him on the furlough scheme.*

117. Our conclusions regarding the second and third PCPs are the same as with PCP one above. They are effectively different ways to describe the same PCP.

118. As for the fourth PCP, we are mindful of the judgment in O'Hanlon (see earlier). The claimant's position is that he should have been allowed to return to work had reasonable adjustments been made to PCP One ( above). We have found that the respondent failed in its duty to make reasonable adjustments to overcome the disadvantage of PCP One. It may well be that we decide that this led to a loss of income for the claimant, during his employment. However, that is a matter that needs to be considered on remedy. We do not consider that it would be a reasonable adjustment for an employer ( particularly the size of the respondent) to make full salary payments during sickness absences.

**Remedy.**

119. This case is listed for a remedy hearing on 12 July 2023.

120. We have made one finding relevant to any award for discrimination. We have decided that it would not be appropriate to either increase or decrease any award for compensation, under s207A TULR(C)A.

121. The reasons for this finding are that:-

a. whilst the claimant clearly raised concerns about discrimination in his correspondence dated 10 December 2020, he did not formally raise a grievance. His indication of further action (see para 59 above) may have been an intention to raise a grievance – and he did not do (the dismissal process somewhat overtaking this at the beginning of 2021).

b. the respondent did not treat the claimant's letter as a grievance when some employers would have done so.

122. Having regard to the actions of both parties here, our decision is that there should be neither an increase nor a decrease to any award.

Employment Judge Leach

Date: 14 March 2023

REASONS SENT TO THE PARTIES ON

15 March 2023

FOR THE TRIBUNAL OFFICE