EMPLOYMENT TRIBUNALS

Claimant: Mr Christopher Peacock

Respondent: Teleperformance Ltd

Heard at: Manchester **On:** 24-27 July 2023

Before: Employment Judge Cookson
Ms C Gallagher
Mrs A Eyre

REPRESENTATION:

Claimant: In person
Respondent: Miss Usher (Solicitor)

Judgment having been sent to the parties on 11 August 2023 and written reasons having been requested at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, the following reasons are provided.

REASONS

Introduction

1. The claimant is 41 years of age. He worked for Teleperformance Ltd (referred to Teleperformance or the respondent in this document) from 7th June 2021 to 8th October 2021 as a Customer Services Advisor. The respondent provides contact centre services throughout the UK and abroad. Mr Peacock was employed to work answering queries from customers of the student loan company which administers the government's student loan provision.

2. On 28 October 2021 Mr Peacock lodged a Tribunal claim. He claimed unfair dismissal, disability discrimination, notice pay, arrears of pay and other payments. The respondent disputed all of his claims. Mr Peacock did not have two years' service to claim unfair dismissal and he did not suggest he was claiming automatically unfair dismissal so that claim was dismissed at an early stage. There was a preliminary hearing on 17 February 2022 before Employment Judge Feeney which briefly identified some matters but identified that Mr Peacock needed to provide more information about his claims. At that hearing the claimant was asked to provide information to the Tribunal of any adjustments that he needs.

Reasonable adjustments

3. On 26 April 2022 there was a further preliminary hearing this time before Employment Judge K Ross. At that hearing EJ Ross was able to assist the claimant to identify his disability claims and she prepared a schedule setting out what she understood to be his claims.

4. There was a further hearing on 30 June 2022. At this hearing the respondent agreed that Mr Peacock was disabled by reason of his autism and dyslexia. This identified that as a reasonable adjustment Mr Peacock would require regular breaks but it was possible that further adjustments would be required.

5. After this Mr Peacock wrote to the Tribunal to explain the adjustments he would require. There was a further hearing on 15 November 2022. After considering Mr Peacock's request for adjustments EJ Ross ordered that an Intermediary should be appointed to carry out an assessment of Mr Peacock's needs.

6. On 18 April 2023 the final preliminary hearing in this case took place before EJ Ross. The report obtained from an Intermediary was discussed and as a result of that it was agreed that a number of adjustments would be put into place which are set out in her order.

7. At this hearing the Tribunal has sought to take into account the terms of the Intermediary's report. We were provided with a copy of that but it does not form part of the bundle of documents in this case.

8. When the claimant came to make his final submissions he thanked the Tribunal for the adjustments which had been put in place and said that he felt that these had allowed him to present his case to the best of his ability. The Tribunal panel are pleased that the claimant felt that way. We do not doubt the challenges he faced presenting his claim. The Tribunal found the claimant to be an articulate and thoughtful claimant who presented his case well.

List of Issues

9. Some time was spent at the start of the hearing reviewing the list of issues. Mr Peacock explained that he finds it easier to deal with matters chronologically. As a result the list of issues was re-ordered slightly. The issues decided by this panel reflect the list of issues discussed and agreed at the hearing.

Documents considered in reaching our judgment

10. In reaching our judgment we considered the following:

a. Bundle of document which runs to some 257 pages. An additional document was added to this on the application of the respondent showing a comparison in the performance of between the claimant and others who started at the same time as him.

b. The evidence contained in the witness statement from the claimant together with his oral evidence.

c. The evidence contained in the witness statement from the respondent from Ms McEvoy (Assistant Contact Centre Manager) and her oral evidence

d. Written and oral submissions from Teleperformance's solicitor, Ms Usher. We also took into account a brief oral statement from Mr Peacock.

Findings

11. We have made our findings of fact based on all the information that we had before us. We took into account contemporaneous documents where they exist

because they help to tell us what people said, did and thought at the time. If there was a conflict of evidence between what Mr Peacock told us and what Ms McEvoy told us we decided what had happened based on the balance of probabilities, that is what is more likely to have happened, based on our assessment of the credibility of the evidence and the consistency of evidence with the contemporaneous documents.

12. We did not make findings of fact about everything that had been raised in the witness statements and in the documents. We only made findings of fact about those things we needed to decide to enable us to determine the legal issues in the case.

13. In the first section of these written reasons I have set out a summary of the chronology of events which we considered and we made findings about. In the section that follows there is an explanation of the law and in the final section an explanation of how we applied the law to the factual findings, a discussion about some of the things we thought were important and the conclusions we drew about the complaints.

14. Mr Peacock began working for Teleperformance on the Student Finance England campaign from 7 June 2021. He was based at home and throughout his employment he worked remotely.

15. The first two weeks of his employment was a training period. Mr Peacock had to pass some tests to continue and like many of new employees, he had to take the tests more than once. This reflects the fact it is demanding role. Ms McEvoy explained to us that the student loan company is required to comply with various strict financial rules which in turn means Teleperformance must require with the same rules. This is because as a loan company it is regulated by the Financial Conduct Authority. The way the company is run also has to take into account the fact that it is sometimes targeted by criminals seeking to commit identity fraud. This is known as phishing. This means there are various strict rules in place about how someone's identity is to be checked. The Student Loan company also have various requirements for how the service is delivered which Teleperformance must comply with or face financial penalties.

16. After Mr Peacock had passed the exam at the end of his training period, he contacted the company's human resources department to tell them that he had disabilities, in particular that he has atypical autism and dyslexia. Mr Peacock did that

because he had an expectation the company would send him to Occupational Health so that reasonable adjustments could be put in place for him. We understand that before he had passed his exams Mr Peacock was cautious about revealing his disabilities.

17. On 29 June 2021 a meeting was held between Mr Peacock, his team leader Molly Dobbins and Ms McEvoy who managed the team leaders. Mr Peacock and Ms McEvoy agree that as a result of the meeting an adjustment for his disability was put into place but there was a disagreement about exactly what that adjustment was. Mr Peacock told us that the adjustment that was put in place for him was that he would be given three minutes of hold time instead of two. This referred to the amount of time he would be allowed to put a customer on hold while he reviewed their customer account. Customer service advisors are usually allowed to put customers on hold for up to two minutes at a time. They can put a customer on hold as many times as they need to, but they need to return to the call every two minutes to reassure the customer that they are still there. Customers can be put on hold as many times as is necessary and because of that Mr Peacock told us that he did not think this was a very helpful adjustment.

18. Ms McEvoy told us that a different adjustment had been put in place. At the end of each call customer service advisors are given time for after call work which is referred to as "ACW". This gives time for the customer services advisors to type up any notes from the call that they have with customers. Ms McEvoy told us that the adjustment that was put into place was that Mr Peacock could have an extra minute of ACW time.

19. The Tribunal preferred Mrs McEvoy's evidence about this. As Mr Peacock had pointed out the adjustment to hold time would not be very helpful to him and it might not be very helpful for a customer. As an adjustment we thought it was more plausible that an adjustment be made to time at the end of calls. We took into account that is more consistent with the documents in the file and in particular the record of the meeting. This record was not prepared at the same time as the meeting, but it was prepared within a short time of the meeting and before the legal dispute in this case. We have no reason to think that when that record was prepared that it was not accurate.

20. At the meeting on 29 June there was also a discussion about breaks. Mr Peacock told the company managers that he would benefit from additional breaks. The company has set breaks for customer service advisors. A 15-minute break is allowed in the morning, a 30-minute break for lunch and a 15-minute break in the afternoon. All those breaks are unpaid. Ms McEvoy suggested that Mr Peacock take an additional 15-minute break each day which he could take when he wanted and then he would work an extra 15 minutes at the end of his shift. He would be paid the same amount. Mr Peacock told the managers that he did not want to do that as he did not want to extend his shift. At this hearing Mr Peacock told us that he needed time at the end of his shift to decompress before the next working day and that it is why he did not want that adjustment. However Mr Peacock did not tell the managers that at the time.

21. Mr Peacock also asked about the possibility of excluding any absence caused by his autism from absence triggers for the sickness absence policy but the managers told him that any absence would be managed on a case-by-case basis. We accept that Ms McEvoy felt it was too early to understand if Mr Peacock would need to take more time off work because of his disabilities.

22. After customer service agents have finished their training, there is another two-week period which is referred to as “nesting”. During the nesting period, employees spend part of their day taking live calls from customers which are supervised by team leaders and they will spend some time participating in further training. During this time we were told that all customer service advisors will receive a lot of feedback. There are a lot of different rules which they have to follow and the feedback is given to help advisors learn all those rules.

23. Like other employees, after Mr Peacock completed the nesting process from 21 June 2021 to 2 July 2021, he was subject to ongoing monitoring to ensure that his calls met the needs of the customer, the standards imposed by the student loan company and the regulatory requirements, for example of the Financial Conduct Authority.

24. When calls are monitored, they are given scores which are referred to as outcomes. There are four potential scores – “achieved”, “met with development” which

means that the customer services advisor has done well but needs to work on some minor points, “met with action” which means that the customer services agent has done well but had used one of the systems incorrectly and “risk” which means that the call is regarded as “failed”. That score will be applied if the customer services advisor has failed to access the client systems, has failed to verify someone’s identity or given account information that belongs to someone else.

25. Ms McEvoy told us that when someone is given a risk rating they have to be given feedback as soon as possible. That is to try and ensure whatever the cause of concern is, it will not happen again. This is to make sure that the company is meeting customer requirements and complying with the financial regulations.

26. The records show that during the nesting process Mr Peacock was given a risk rating on three occasions because he had not accessed or attempted to access the customer account. The reason why this was regarded as a serious matter was that meant if the same customer phoned back at a later date there would be no record of what had happened during their call with Mr Peacock.

27. On a further four occasions Mr Peacock was given a risk rating for calls because he had not accessed the company’s knowledge base. The knowledge base system contains information and answers for customer service advisors. This was a serious concern because it meant that the customer services advisor might not be able to answer questions that were being asked and might not give the correct answers. It is likely that students and prospective students will make very important decisions based on the answers given by the customer service advisors and we accept that it is reasonable for the Student Loan Company and Teleperformance to have strict rules in place to try and ensure accuracy.

28. Part of Mr Peacock’s claim to the Employment Tribunal was about receiving negative feedback about which he said had a particular impact on him because of his autism and dyslexia. The negative feedback he is referring to is the feedback on the calls. We have set out below in the discussion and conclusion section what we have concluded about that.

29. Mr Peacock told us he had an adverse reaction to receiving this feedback and he reported sick for work because of that reaction on 19 July 2021.

30. He returned to work on 23 July 2021. He messaged Ms McEvoy on his return and asked if he would be able to swap to earlier shifts in the following week. Mr Peacock wanted to work from 8 am to 4pm instead of working from 11 am to 8pm.

31. Ms McEvoy told us that the respondent has an electronic system called IEX which enables employees to arrange shift swaps because this is a common request. Schedules are created for shifts six weeks in advance based on the demands of the business. Employees can post on IEX to ask colleagues to swap shifts with them. They post a message on the system and that goes to all the other customer service advisors. Ms McEvoy told us that if someone still has a problem arranging a shift in this way she can step in and see if she can find someone to volunteer to change, but the system is put in place this way because given the number of customer service advisors and the number of requests that are received for shift swaps, without the system she would spend a very significant amount of her time dealing with shift swap requests and nothing else. When Mr Peacock asked to change his shift, Ms McEvoy told him to request a shift swap using IEX.

32. Mr Peacock told us that it was unreasonable for Ms McEvoy to expect him to arrange the shift swap. He suggested that the system would require him to approach customer service advisors one by one and it would be difficult for him to cope if he kept being turned down. Mr Peacock told this would be impact on him more significantly because of his autism. However, we accept that that is not what he was asked to do, he would simply make one request in a fairly anonymous way which would be sent to everyone. We are also satisfied that Mr Peacock did not explain to Ms McEvoy the particular difficulties that he felt the system would cause to him.

33. Mr Peacock replied to Ms McEvoy in response to her instruction to seek to make arrangements to swap his shifts to say he wanted to raise a grievance. Ms McEvoy told us she did not realise that when he did that, he had intended Ms McEvoy to progress the grievance on his behalf. That was because the grievance was about her so she thought he would complain to HR. Ms McEvoy thought Mr Peacock would look at the online procedure to see what to do. At that time Mr Peacock and other employees could not access the online staff handbook because of a technical fault but Ms McEvoy was unaware of the fault.

34. Mr Peacock was signed off sick again from 29 July 2021. As things turned out, he would not return to work again.

35. Mr Peacock was invited to attend a welfare meeting with his team leader Ms Dobbins on 23 August 2021. He was emailed a letter which told him "this is an informal meeting to discuss your current absence from work, understand any advice provided to you by your GP or specialist and consider what adjustments, if any, we can implement to support you to return to work".

36. Mr Peacock replied to that letter by saying "I am afraid we are at impasse of this now" and told her that he had contacted ACAS to begin the early conciliation process.

37. Mr Peacock was invited to a second welfare meeting on 14 September by Ms Dobbin by a letter dated 9 September 2021. This was also sent by email. This letter said "this is an informal meeting to allow us to discuss your current absence from work, understand any updated advice provided to you by your GP or specialist, and consider what adjustments, if any we can implement to support you to return to work. At this meeting we may also discuss whether obtaining a medical report from your GP or specialist, or referring you to occupational health, may be appropriate to provide additional support".

38. Mr Peacock did not respond to that invitation so Ms Dobbin followed it up with another email on 14 September to ask if he would be attending the meeting. Mr Peacock replied to that to say that "it looks like I will be off next month as well, so if there is to be a welfare meeting with a view to me returning to work, it would make sense for this to take place next month after I have reassessed my health". Ms Dobbin replied to that email on 27 September to explain the purpose of the meeting was to discuss the absence as a whole, to discuss welfare and to talk about how he might be supported to return to work. Mr Peacock did not attend the meeting.

39. Ms McEvoy explained to us that if an employee fails to attend two welfare meetings the respondent will normally proceed to organise a capability hearing. In this case however Mr Peacock was given another opportunity to attend a welfare meeting on 30 September 2021 but again Mr Peacock did not attend.

40. As Mr Peacock had not attended any of the welfare meetings, he was invited to attend a formal capability meeting on 8 October 2021 by a letter sent by email dated 6 October 2021. That is a very short notice period. Ms McEvoy explained that many of the contact centre is one of high turnover. It is not uncommon for employees to go off sick, not keep the employer up to date and look for other employment. She explained a number of employees "simply go AWOL". In consequence the respondent has quite robust procedures in place to deal with sickness absence, especially in the cases of new employees.

41. The invitation letter explained that Mr Peacock was being invited to the capability meeting because he had not attended any of the three welfare meetings. The meeting was to be held online. Mr Peacock was told that he had a right to be accompanied at the meeting, and he was warned that one possible outcome of the hearing could be dismissal. Mr Peacock was also told that if he failed to attend the meeting it would be held in his absence.

42. Mr Peacock did not attend the meeting, and he did not contact Ms McEvoy to inform her that he was unable to attend or to ask for the meeting to be rearranged. When he did not attend on time Ms McEvoy emailed Mr Peacock to ask if he was having difficulty in joining but Mr Peacock did not reply. Mr Peacock told us that this was because he had not seen the email inviting him to the meeting as he only checks his emails occasionally and y the time he logged onto his emails the meeting had taken place. Ms McEvoy decided to proceed with the hearing in Mr Peacock's absence because he had not attended any of the welfare meetings. We accept that Teleperformance did not know that Mr Peacock had a practice of only reading emails occasionally because he had previously responded to emails from Ms Dobbin. We do not see why they could be expected to know that. We also accepted that in light of Mr Peacock's previous comment about reaching an impasse and contacting ACAS, when coupled with the lack of contact, it was reasonable for the respondent to conclude that it was unlikely that Mr Peacock wished to continue in employment.

43. Ms McEvoy decided to terminate Mr Peacock's employment. She told us her main reasons were

a. Mr Peacock had been absent for 11 weeks after only a few weeks of being in work and there was no indication of when he might be able to return to work. Mr Peacock had still been in his probationary period and did not meet the criteria to pass probation as a result.

b. Mr Peacock had failed to attend welfare meetings on 16 August, 9 September and 27 September 2021, and had failed to attend the capability hearing on 8 October 2021. Teleperformance had decided that they should refer him to occupational health but were not able to do that because he had not attended any of the welfare meetings.

c. Mr Peacock had failed to maintain contact with his line manager during his absence and because of his lack of engagement it was not possible for Teleperformance to try to support him with a return to work, and to manage his absence effectively.

44. Mr Peacock was told that he was dismissed with effect from 8 October 2021. He was paid for one weeks' notice together with outstanding holiday pay.

45. Mr Peacock was also told that he had a right of appeal against his dismissal but he decided not to appeal because he felt he had been treated so unfairly.

The Law

Meaning of Disability

46. Section 4 EqA identifies “disability” as a protected characteristic. Section 6(1) defines disability:

> 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.

47. In this case it was conceded that the claimant was disabled by reason of his a-typical autism and dyslexia.

The burden of proof

48. s136 Equality Act states that

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred*
>
> *(3)But subsection (2) does not apply if A shows that A did not contravene the provision."*

49. This section reflects what is often called the shifting burden of proof. The law recognises that direct evidence of discrimination is rare and employment tribunals frequently have to infer discrimination from their findings of material facts. The law requires the claimant to show facts which *could* suggest that there was discriminatory reason for the treatment, but the claimant does not have to prove discrimination.

50. However to shift the burden of proof, it is not enough that the alleged discriminator and the alleged victim do not share a protected characteristic. Justice Mummery explained this in *Madarassy v Nomura International plc* 2007 ICR 867, CA as follows '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.'

51. It is only if the claimant shows facts which would, if unexplained justify a conclusion that discrimination had occurred, that the burden shifts to the employer to explain why it acted as it did. The explanation must satisfy the Tribunal that the reason had nothing to do with the protected characteristic.

Direct Discrimination

52. s13 Equality Act 2010 states that

"(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

53. In assessing whether treatment in less favourable, the test is an objective one — the fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment. However the claimant's perception is still relevant. The approach we must adopt is helpfully explained in the EHRC Code of Practice as follows *'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated — or would have treated — another person'.*

54. Whether less favourable treatment has occurred is assessed by comparing what has happened to the claimant with a how a real or hypothetical comparator was treated. The legislation requires that must be no material differences between the circumstances relating to the claimant and their comparator.

Discrimination arising from disability

55. Section 15 EqA defines discrimination arising from a 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 a disability."

56. Section 15 EqA is particular to people with disabilities. It recognises that the reason for discriminatory treatment might not be the disability itself (that would be direct discrimination) but because of the way the disability impacts on the disabled

person, for example because they had to take a lot of time off due to sickness absence caused or related to their disability.

57. The treatment is unlawful if it is "unfavourable" rather than "less favourable" which means that no comparator is required for this form of alleged discrimination.

58. In terms of proving causation, it is sufficient for a claimant to show facts from which the tribunal could reasonably conclude that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. The employer's motivation is irrelevant.

59. s15 EqA requires unfavourable treatment to be because of something arising in consequence of the disabled person's disability. If the something is an effective cause – an influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously), the causal test will be satisfied.

60. Even if a claimant succeeds in establishing unfavourable treatment arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

61. There is guidance for tribunals about how to approach s15 claims in the case of Pnaiser v NHS England and anor 2016 IRLR 170, EAT. Mrs Justice Simler summarised the proper approach to establishing causation under S.15 is as follows:

a. First, we must identify whether the claimant was treated unfavourably and by whom.

b. Next we must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.

c. We must then establish whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range

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

Failure to make reasonable adjustments

62. The Equality Act (EqA) imposes a duty on employers to make reasonable adjustments for disabled people. The duty comprises three requirements. In this case we were concerned with the first requirement. This is set out in sub-section 20(3) and references to A are to an employer.

> *"(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."*

63. Paragraph 20(1)(b) of Part 3 of Schedule 8 of the Equality Act says that the duty to make reasonable adjustments does not arise if the employer: "does not know and could not reasonably be expected to know – *"(b) …that an interested person has a disability and is likely to be placed at the disadvantage referred to…"*

64. S21 of the Equality Act provides

> *"Failure to comply with duty*
>
> *(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 that duty in relation to that person.*
>
> *(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."*

65. It is for the claimant to show what "provision, criterion or practice" it is alleged they have been subject to. The term is not defined in the EqA. However, the EHRC's Employment Code, explains how we should approach this as follows the term '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 [PCP] 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' (para 4.5).

66. Where a disabled person claims that a practice (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the alleged practice must have an element of repetition about it and be applicable to both the disabled person and his or her non-disabled comparators.

67. In terms of how we should assess whether an adjustment is reasonable or not the Code of Practice says this,

> *"What is meant by 'reasonable steps'?*
>
> *6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.*
>
> *6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.*
>
> *6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example,*

compared with the costs of recruiting and training a new member of staff –and so may still be a reasonable adjustment to have to make.

…..

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

• whether taking any particular steps would be effective in preventing the substantial disadvantage;

• the practicability of the step;

• the financial and other costs of making the adjustment and the extent of any disruption caused;

• the extent of the employer's financial or other resources;

• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

• the type and size of the employer.

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

Can failure to make a reasonable adjustment ever be justified?

6.30 The Act does not permit an employer to justify a failure to comply with a duty to make a reasonable adjustment. However, an employer will only breach such a duty if the adjustment in question is one which it is reasonable for the employer to have to make. So, where the duty applies, it is the question of 'reasonableness' which alone determines whether the adjustment has to be made."

ADDITIONAL FINDINGS, DISCUSSION AND CONCLUSIONS

68. We received written and oral submissions from Miss Usher about the approach we should adopt in applying the law. We have taken those submissions into account and where relevant we have explained what we concluded that them. We gave Mr Peacock time to decide if he wanted to respond to the respondent's submissions. In the end he chose to read us a short statement about he felt but he did not make any specific submissions about the law. We do not criticise him in any way for that.

69. We did not have to decide if Mr Peacock was disabled at the time he says he was discriminated against because disability was conceded. However, Teleperformance did not accept that it knew he was disabled. This was the first thing we looked at. We had to decide if Teleperformance knew or ought to have known that Mr Peacock was disabled by reason of dyslexia and autism and from when.

70. Mr Peacock told us that he had entered details of both his atypical autism and dyslexia onto the online system to notify HR of his disability at the end of the initial training period. We did not have any documentary evidence of that because Teleperformance told us that was because the online system was no longer available. We also did not have evidence from anybody in HR about the information which had been provided to them. Although Teleperformance disputes it knew about Mr Peacock's dyslexia at all, we had no evidence from the respondent's HR team about that. We accepted Mr Peacock's evidence that he had informed HR that he had atypical autism and dyslexia at the end of the training period, and so we found that the respondent had knowledge of Mr Peacock's disability from 21 June 2021.

71. We then went on to consider each of the grounds of complaint under each heading of discrimination as set out in the list of issues[1]

Direct Discrimination

Allegation 1 During regular performance review meetings with team leader Molly Dobbins and the other team leader Paul, the claimant received negative performance feedback"

[1] I have not referred to the numbering in the list of issues because at the start of hearing we agreed that some allegations should be numbered.

72. The first complaint that we had to look at was whether Mr Peacock had been subject to less favourable treatment because of his disability when, during regular performance reviews with the team leaders, Ms Dobbins and Mr Bloomfield, he had received negative performance feedback.

73. The first thing we had to ask ourselves was whether this had amounted to less favourable treatment, so we started by asking ourselves whether there had been a detriment to the claimant?

74. In deciding whether Mr Peacock has been subject to less favourable treatment we took into account what he told about his perception, but we also had to ask ourselves if that perception was reasonable. The fact that somebody believes he or she has been treated less favourably that does not itself establish that that there has been less favourable treatment.

75. We accepted that Mr Peacock had been given negative feedback in the sense that he had been given feedback that he had not met the standards required and that some of his calls had been in the lowest category and were regarded as being “risk calls” (so his performance was being criticised). Mr Peacock was working in an environment which was regulated because there is legislation which applies to the organisation, including in relation to financial regulation, and information had to be kept by the company in relation to what contact there had been with students so that they had records to show what people had been told. Mr Peacock had received training and he knew that the calls were being monitored and would be assessed. In that context we could not accept that Mr Peacock could have a reasonable expectation that he would not be told when he was not meeting the required standard. We considered that if somebody is being told they are not meeting the required standard that means they are going to have to be provided with negative feedback. However, it is only if employees are told when they are not meeting the required standards that they will know they need to change what they are doing. We would criticise an employer who did not give feedback because if performance is not satisfactory it is very likely to lead to dismissal.

76. Mr Peacock did not tell us about anything specific which he said was targeted at his disability or was only said to him because he was disabled, rather it was that he

found being criticised to be very damaging to his self-esteem and confidence. He felt it was unfair because no adjustments had been made for his disabilities.

77. We could not accept that Mr Peacock could have a reasonable perception that the negative feedback was a detriment. All employees must expect to be told if they are not meeting the required standards. That will be uncomfortable, but it is a necessary part of learning to do a job to know if they are doing it wrong. Even if we are wrong about whether or not there was a detriment, we decided that a customer services adviser without a disability would have been treated in exactly the same way in the same circumstances. In other words they would have been give negative feedback if they did not check a caller's identity or check the knowledge database. That meant negative feedback to Mr Peacock was not direct disability discrimination.

78. This complaint is not well-founded which means it does not succeed.

Allegation 2 On 29 June 2021 at a welfare meeting between the claimant, his team leader Molly Dobbins and her manager, Aine McEvoy, the respondent put in place only minor reasonable adjustment such as an extra minute of "hold" time to be given to the claimant when speaking with customers.

79. The next complaint we had to look related to what happened on 29 June 2021. At the welfare meeting, Mr Peacock says that he was told that only minor reasonable adjustments would be put into place. He says that this was direct disability discrimination.

80. In order to amount to direct disability discrimination, Mr Peacock had to show us that he had been treated less favourably than a non-disabled person or less favourably than a non-disabled person would be treated (somebody without his disability).

81. Teleperformance would not have put in place any adjustments for a non-disabled person or somebody without the claimant's disability so the fact that the claimant felt the adjustments put in place were only minor cannot be direct disability discrimination because there was no less favourable treatment compared to an employee in similar circumstances who was not disabled.

82. We concluded that what the claimant was complaining about was a failure by Teleperformance to take sufficient positive steps to adjust the effect of his disability on him in the workplace. That is a complaint about making reasonable adjustments and we have considered that below.

83. This complaint is not well-founded.

A*llegation 3 On 13 July 2021 the claimant received a reply from a request he had made regarding a date for the Occupational Health appointment, from Aine McEvoy stating, "we haven't determined yet if we are needing to send you to OH". This response was distressing to the claimant given he had been waiting and enduring work with minimal or ineffective reasonable adjustments in place. Occupational Health referral*

84. We had to consider how someone without a disability or without Mr Peacock's disability would have been treated. No evidence was presented to us to suggest that Teleperformance would have referred a non-disabled person to Occupational Health because the employee expected or requested it at very early stage of their employment.

85. This complaint is not well-founded.

Allegation 4 On 23 July 2021 after a lengthy written conversation on Microsoft Teams, Aine McEvoy quoted client performance targets as a defence for offering minimal and effective reasonable adjustments which were not suited to the claimant's conditions and requirements.

86. As the employment judge had tried to explain to Mr Peacock at the beginning of the hearing when his list of issues was discussed, in essence this appeared to be a complaint about Teleperformance failing to take sufficient positive steps for Mr Peacock in relation to his disability, and in particular about its reasons for not taking positive steps.

87. That is not a complaint that the claimant was treated less favourably compared to a non-disabled person but on Mr Peacock's own account a complaint about positive action not being taken.

88. There is no evidence to suggest that Teleperformance would have made any adjustments for a person without a disability.

89. This complaint is not well-founded.

Allegation 5 The claimant was not able to access the respondent's employee handbook at any time during his employment (due to a technical fault with TP's system).

90. The next complaint (which is repeated in the list of direct discrimination complaints) is that the claimant was not able to access the respondent's employee handbook at any time during his employment due to a technical fault with the company's systems.

91. It is accepted by the company that the claimant could not access the handbook – it is not precisely clear to us if that was for the whole of his employment or just a period of it, but it is clear that there was a significant period of time when the claimant was unable to access the staff handbook, but Mr Peacock does not dispute that this was a fault which applied to everyone.

92. Mr Peacock was not subject to less favourable treatment compared to someone without his disability in relation to access to the handbook. We can understand why Mr Peacock felt aggrieved that he could not access the staff handbook, especially when company procedures were being applied to him, but because it applied to everybody in the same way it was not direct discrimination.

93. This complaint is not well-founded.

Allegation 6 After the claimant raised a grievance on 23 July 2021 with the respondent via Aine McEvoy, the respondent failed to reply.

94. The next issue we considered was that after Mr Peacock raised a grievance on 23 July 2021, Ms McEvoy had failed to reply.

95. It was not disputed that Mr Peacock had told Ms McEvoy that he wanted to raise a grievance about her failing to put in place the adjustments which he felt were required for his disabilities. We accept that it was reasonable for Mr Peacock to expect

that when he said "I want to raise a grievance about these matters" that that would have been dealt with by the company, and that Ms McEvoy would have taken action. We accept that it was reasonable for Mr Peacock to perceive that he had been subject to a detriment when his grievance was not considered.

96. However, the fact that somebody with a protected characteristic has been subject to a detriment is not enough for it to amount to direct discrimination. The protected characteristic in this case (Mr Peacok's disability) has to be the reason (consciously or subconsciously) for the detriment in question, and the burden rests on him to show the Tribunal evidence from which we *could* conclude that that was the case.

97. Mr Peacock has not shown us any evidence to suggest that the reason why Ms McEvoy did not do anything with his grievance was because he is disabled. The fact that the grievance was related to his disability is not relevant to that – what we were looking at is why the grievance was not handed on to somebody else.

98. In the absence of that evidence to suggest the reason could be disability, under the Equality Act 2010 Teleperformance did not have to show the Tribunal what its reason was, but we considered the reasons given by Ms McEvoy anyway. We considered Mr McEvoy's evidence carefully. She told us that when she had received the Teams message and the email when she was going into a client meeting, and she had not paid very much attention to them. Ms McEvoy told us that she knew that Mr Peacock was making a complaint about her, but she thought he would be in contact with HR to pursue that grievance because she would not be able to consider the grievance herself because it was a grievance about her. She had assumed that Mr Peacock would be in direct contact with HR. That reflected the procedure set out in the staff handbook.

99. Ms McEvoy accepted that she had made a mistake and she should have directed Mr Peacock to the right process or contacted HR herself.

100. We accept that Mr Peacock had perfectly good reasons for not knowing what he needed to do because he could not access the staff handbook at the time, so it was not his fault that he had not raised the grievance in the right way, but in order to decide

this complaint we had to look at the reasons for what Ms McEvoy did. Were her reasons, conscious or unconscious, because of Mr Peacock's disability?

101. We considered what the evidence suggested would have happened if a non-disabled person had written to Ms McEvoy to say they wanted to raise a grievance about her. There was no evidence to suggest that she would have behaved any differently. We accept that in those circumstances Ms McEvoy would not have contacted HR or given that employee any further instructions either. We therefore accepted Miss Usher's submission that this was not direct disability discrimination.

102. This complaint is not well-founded.

Allegation 7 The claimant's dismissal

103. The last complaint of direct discrimination is about Mr Peacock's dismissal.

104. As Miss Usher accepted, dismissal is clearly a detriment, but Mr Peacock's dismissal would only amount to direct disability discrimination if somebody who was not disabled but was in otherwise similar circumstances would not have been dismissed.

105. We considered that the comparator we had to look at was a customer services adviser who had gone off sick during their probation period and who had not attended welfare meetings and who then did not attend the hearing to consider their dismissal. We accept Ms McEvoy's evidence that in light of the high turnover of employees in the business and the fact that some people simply go off sick and never intend to return. This is an employer who takes a strict approach, especially while employees are in their probationary period. It is immaterial in this case whether that is fair or unfair, we are only concerned with whether Mr Peacock was treated less favourably because of his disability.

106. We did not consider that Mr Peacock had shown us any evidence to suggest that the reason for his dismissal *could* be his disability, but in any event we were satisfied that the reason why he was dismissed was that he had not engaged with the welfare meeting process and he had not attended the capability hearing. We were satisfied that a non- disabled employee who began sickness absence during their

probationary period, had not engaged with the welfare process and did not attend the capability hearing to consider their dismissal would also have been dismissed.

107. For this reason we found Mr Peacock's dismissal was not direct disability discrimination. This complaint is not well-founded.

Discrimination because of something arising in consequence of disability

108. The next head of claim which we had to look at was whether Mr Peacock had been subject to discrimination arising from disability under section 15 of the Equality Act 2010.

109. As I have already explained we found that Teleperformance knew that Mr Peacock had atypical autism and was dyslexic from 21 June 2021.

110. In terms of what the "something arising" the list of issues says that the "something" arising in consequence of disability was because of Teleperformance's failure to provide reasonable adjustments but that is something which the company had done or not done. We clarified at the start of this hearing that what Mr Peacock was relying on was the impact of the sensory overload that he can experience because of his atypical autism. In essence he says this was the root cause of everything that happened.

The allegations of unfavourable treatment under s15 (not in the same order as the list of issues):

Allegation 8: The claimant suffered increasingly intolerable working conditions, namely the negative symptoms of autism; feeling angry, overwhelmed, tired, gastrointestinal problems and insomnia due to the lack of reasonable adjustments identified by the claimant in the reasonable adjustments part of this document, namely extended comfort or other breaks, additional time for reading and writing, flexible shift patterns, a reduction of the volume of incoming information to the claimant and a prompt referral to Occupational Health.

111. We accepted Miss Usher's submissions that what Mr Peacock was complaining about as unfavourable treatment was not "treatment" by Teleperformance at all. We accept that what Mr Peacock described were the symptoms that he said he

experienced because Teleperformance had not made reasonable adjustments. Those are things that could be relevant to determine that amount of compensation we might award if that complaint about the failure to make reasonable adjustments was upheld.

112. We were satisfied that Mr Peacock had misunderstood how s15 applies. This complaint is not well-founded.

Allegation 9: Negative performance feedback during regular performance review meetings with team leaders Molly Dobbins and Paul Bloomfield. These meetings occurred approximately weekly and there were approximately 3-5 meetings.

113. The second complaint we had to consider was the negative performance feedback. In relation to that complaint, the findings already explained in relation to the direct discrimination complaint about the feedback are also relevant. We found that the claimant could not reasonably regard the performance feedback as being unfavourable treatment because the company had to tell him he was not answering the calls in the way he was expected to. It was something which Teleperformance had to do so that Mr Peacock could do things correctly in the future.

114. We also considered what our decision would be if we are wrong about that. If the feedback was unfavourable treatment was it because of the sensory overload the claimant experienced because of his disability?

115. We understand Mr Peacock's case to be that the reason why he made mistakes was because of sensory overload. It was quite difficult for us to make findings about that from the evidence but in the circumstances we accepted on balance what Mr Peacock told us about that. The reason for the negative feedback was the mistakes Mr Peacock had made and we accepted that it was likely that the mistakes were caused, at least to some extent by something arising from his disability.

116. This meant if feedback was unfavourable treatment (despite our main finding), it was because of something arising in consequence of disability so we went on and considered the potential defence for Teleperformance that they had a legitimate aim and had used proportionate means to achieve it.

117. The reason for monitoring calls and telling employees if they were not meeting the required standards was to try to ensure that its customer service advisers took

steps to protect customers from ID theft, to ensure that employees complied with financial regulations and provided the correct advice to customers. The customers being dealt with are students, potential students and other stakeholders. The consequences of those individuals being given incorrect advice or having their identity "phished" are potentially very serious. Financial regulation is applied to loan providers because consumers are vulnerable. If mistakes and errors are made in advice or if identities are not properly checked which allowed phishing, vulnerable consumers may be subject to significant harm and we accept that preventing that is a legitimate aim. We also accept a proportionate way to check advice and compliance is through monitoring calls and telling employees if they are making mistakes.

118. We accept that Mr Peacock found that feedback about mistakes he was making very difficult. He said it was damaging to his self-esteem and we have no reason to doubt at all what he told us about that, but we accept that the company had to provide the feedback to him. When we looked at the notes of the feedback provided it appeared that Mr Peacock's managers were trying to direct him to ways to avoid the same mistakes again. We are satisfied that Teleperformance acted in a proportionate way in providing the feedback.

119. Our conclusion was that the main reason this claim does not succeed because the feedback was not unfavourable treatment. If we are wrong about that the claim does not succeed because the feedback justified as a proportionate means to achieve a legitimate aim.

120. This complaint is not well-founded.

Allegation 10: Failure to progress the claimant's grievance

121. The next complaint was in relation to the failure to progress the claimant's grievance. I have already explained that we accepted Ms McEvoy's evidence that she had not progressed the grievance because it had been made about her, and so she did not think that it was her role to progress the grievance. Ms McEvoy thought that the claimant would be in direct contact with the HR department about that.

122. We accepted that failing to progress the grievance was unfavourable treatment but the reason why it was not progressed was not connected to the impact of the

sensory overload. The reason why the grievance was not progressed was that Ms McEvoy thought that somebody else would be dealing with that under the separate procedures. That was not unfavourable treatment because of something arising from disability and this complaint does not succeed.

123. This complaint is not well-founded.

Allegation 11: The claimant's dismissal

124. The last complaint under s15 that we considered was about Mr Peacock's dismissal. Miss Usher had argued to us that Mr Peacock was not dismissed because he was experiencing sensory overload. That is true in the sense that it was not the direct reason for his dismissal, but that does not mean that dismissal could not be unfavourable treatment for something arising from Mr Peacock's disability. We had to look at what the reason for the absence was.

125. Mr Peacock's absence had been triggered by the fact that Ms McEvoy did not find him an alternative shift during the hot weather and he was unhappy because reasonable adjustments had not been put in place to help him manage the sensory overload he said he experienced.

126. In terms of a medical diagnosis for Mr Peacock's absence, the evidence we had was the claimant's fit notes that said the reason for absence was atypical autism. We accepted that suggests that there is at least some material connection between the sensory overload caused by the atypical autism and Mr Peacock's absence from work.

127. The decision to terminate Mr Peacock's employment was taken because he absent from work and did not attend the welfare and capability hearings. We accepted therefore that Mr Peacock's dismissal was unfavourable treatment because of something arising in consequence of his disability.

128. Teleperformance was aware that Mr Peacock was disabled at the time Ms McEvoy took the decision to dismiss him. We therefore went on and considered if Teleperformance had shown us that it was justified in dismissing him because it had a legitimate aim and took proportionate steps to achieve that aim.

129. We accepted Miss Usher's submissions that Teleperformance had a legitimate aim, that is "*the requirement to have employees that are able to attend work to discharge their duties in order to meet client requirements*." It follows from that employers must be able to dismiss employees who are absent from work for sickness-related reasons (even if the reason for that sickness absence is disability) in order that they can operate the employer's business. We accepted that this was a legitimate aim but then went to consider if Teleperformance had shown their means of achieving that aim were proportionate.

130. We accepted that this was an employer who has a large workforce with a high turnover of employees and absence levels can be high, reflecting common patterns seen in call centre settings. We also accepted the evidence of Ms McEvoy that within this particular industry of providing call centre services, it is not unusual for employees who are absent from work for sickness reasons to disengage from the employer and for people to simply work somewhere else and not tell Teleperformance about that until they start the new job.

131. In relation to the issue of proportionality Ms Usher drew our attention to the decision in In ***Allonby v Accrington and Rossendale College and others*** [2001] EWCA Civ 529, it was held that in assessing proportionality Tribunals must carry out a "balancing exercise" between the reasonable needs of the employer and the impact on the claimant.

132. She highlighted the following matters in support of her submission that Teleperformance had acted proportionally:

a. "Ms McEvoy has given evidence that it is a key responsibility of an employee to attend welfare meetings and provide updates on how they are. The Respondent invited the Claimant to attend 3 meetings, which he declined to attend. It is submitted that the Respondent used its best endeavours to support the Claimant to return to work.

b. The Respondent followed its absence management procedures, in line with absence triggers. The Respondent operates an attendance management policy, and provides clear guidelines for when employees

should be invited to attend formal capability meetings (page 161). The Claimant was absent for work from work for 11 weeks.

c. The Respondent was unable to backfill the Claimant's role while he was absent from work, which meant that his shifts had to be covered by other employees, which created gaps in the Respondent's rota that had to be dealt with by way of overtime.

d. Ms McEvoy said during cross-examination that it appeared that the Claimant did not aim to return to work. It is submitted that this view is supported by the following: -

    i. Reference is made to the Claimant's response to the first welfare meeting, in which he noted (by email sent to Ms Dobbin on 17 August 2021) – in response to the Respondent's offer to meet to discuss adjustments - that: "*I am afraid we are a little passed this now*" (page 191).

    ii. Despite assertions made by the Claimant during cross examination, it is submitted that it was – or should have been – clear that the Respondent expected him to attend welfare meetings.

    iii. After the Claimant declined to attend the second welfare meeting, Ms Dobbin clarified that the purpose of the welfare meetings was "*to discuss your absence as a whole*". It is also noted that: "*we are keen to catch up to see how you are, discuss your welfare and perhaps talk through how we might be able to support your return to work*." (page 221)

    iv. In the invitation to the third welfare meeting (page 215), it is expressly stated that: -

    "*It is important that you attend this meeting so that we have the opportunity to discuss these matters, and ensure that both you and the Company are doing what we reasonably can to support a speedy return to work, if at all possible.*

If you are unable to attend this meeting, for any reason, you should let me know as soon as possible and it may then be appropriate for us to schedule a more formal meeting under the Company's Capability Policy."

v. It is submitted that this letter was sufficiently explicit to give the Claimant an indication that this matter would be escalated to a formal process if he failed to attend the meetings.

vi. Ms McEvoy's made the point during cross-examination that if an employee had to be fit to return to work to attend a welfare meeting, there would be no requirement to hold welfare meetings. It is submitted that is a reasonable position to adopt, particularly given the email that was sent from Ms Dobbin to the Claimant explain that the purpose of the meeting is not to require the Claimant to return, but to ensure that both the employer and the employee are doing everything they can to facilitate a return to work.

vii. The Claimant did not appeal against his dismissal. While the Claimant asserts that he would have attended the capability meeting had he received the invite letter – it is submitted that if that were true, it is likely that he would have written to the Respondent to ask them to re-run the hearing (so that he could attend) or he would have submitted an appeal."

133. After careful reflection, we accepted that the company had acted proportionately. We accept that it was propionate for the company to take into account that Mr Peacock had only worked for the company for a short period of time when his sickness absence began, and was still in his probationary period when his sickness absence began. We accepted the submissions above.

134. We considered that it was significant that before reaching the stage of inviting the claimant to a capability hearing Ms McEvoy and Ms Dobbins had tried three times to get the claimant to attend a welfare meeting to discuss his absence and to see if there was anything they could do to get him to come back to work sooner, perhaps

with some reasonable adjustments in place. They had made clear they wanted advice from occupational health.

135. Mr Peacock told us that he felt he had a good reason for not attending the welfare meetings, and he had not understood from the information he received that the welfare meetings were something he was expected to attend. However we accepted that the company had taken reasonable steps to encourage Mr Peacock to attend the welfare meetings. The letters explained what they wanted to discuss and why and he was told it was important that he attend the welfare meetings. Mr Peacock was also told that if he did not attend the welfare meetings the company might apply the capability procedure. We accept that Mr Peacock had not appreciated the significance of what he was told in the letters, but we find the company was acting in a reasonable way.

136. We also accepted that Ms McEvoy had a good reason in this case to think that the claimant might be one of those employees who had no intention of returning to work. That was because in an email on 17 August after Ms Dobbins had invited him to a welfare meeting Mr Peacock had written to her to say, “I am afraid we are a little past this now” and he told her that he had raised the issue with ACAS and he was waiting to hear back from an ACAS conciliator. In light of that when Ms Dobbins made three unsuccessful attempts to get Mr Peacock to attend a welfare meeting (which for his own reasons he had decided not to attend), it was proportionate for the company to invite him to a capability meeting to consider the possible termination of his employment.

137. The tribunal panel understand why Mr Peacock feels that it was unfair that he was only given short notice for that meeting, and we understand that he thinks it was unfair that he was only invited by email and nobody checked that he had received that email. Those are issues which be relevant in an unfair dismissal case, but we also accept that Ms McEvoy and Ms Dobbins had no reason to think Mr Peacock was not looking at his emails. The meeting was arranged at relatively short notice and the decision to terminate employment was taken in Mr Peacock’s but there was a safeguard though the right of appeal which Mr Peacock chose not to exercise. A different approach could have been taken but that does not mean that what the

company did was not proportionate. On balance we accepted that the company had acted proportionately

138. In the circumstances we concluded that this complaint is not well-founded.

Failure to make reasonable adjustments

139. The last set of complaints we had to look at was in relation to an alleged failure to make reasonable adjustments to mitigate the impact of Mr Peacock's disability.

140. It is significant that for these complaints to succeed we had to have evidence that not only did the company know that the claimant was disabled, but also that it knew, or ought to have known that he had been subject to a substantial disadvantage in relation to each of the alleged practices, criteria and provisions (PCPS).

141. Our findings on knowledge of disability are set out above but our conclusions about substantial disadvantage are explained here.

The PCPs

142. **PCP 1: A break of two short breaks in the morning and a half hour lunch break for CSAs*.***

143. It was clear to us that this PCP had not been correctly formulated. The company did not have a practice of requiring employees to take two short breaks in the morning with a lunch break – the working pattern that we were told about was a break in the morning and a break in the afternoon with a lunch break.

144. We think the correct way of looking at this was that Mr Peacock had brought a claim that he was subject to a disadvantage by the break pattern that the company imposed. However, Mr Peacock did not provide us with evidence of how the break pattern caused him substantial disadvantage compared to someone who is not disabled or does not have his disability. He told us that he needed breaks from work, but of course that is the case for all employees – everybody needs breaks from work from time to time. We did not have enough evidence to understand how that particular work pattern placed the claimant at a substantial disadvantage. In essence Mr

Peacock simply suggested that it did. We were not satisfied that Mr Peacock had met the burden of proof in relation to this aspect of this claim for it to succeed.

145. Even if we are wrong about that and there was some substantial disadvantage for Mr Peacock, we accepted that Ms McEvoy had offered Mr Peacock an additional break which he could take over the course of the day. Mr Peacock told us that this was not a reasonable adjustment because he needed time at the end of the day "to decompress" (his expression). However, Mr Peacock did not explain to us why an additional 15 minutes' working time at the end of the day would have prevented him from decompressing before his next shift.

146. In addition Mr Peacock made no attempt to explain to McEvoy why her suggested adjustment would not help and in light of the lack of explanation from Mr Peacock we concluded that Ms McEvoy did not have the requisite knowledge of the disadvantage the PCP caused to Mr Peacock because of his autism nor could she reasonably be expected to have had that knowledge of any particular disadvantage so that the duty to make adjustments was not triggered.

147. This complaint is not well-founded.

PCP 2: Allow the usual time for Customer Service Operators to read, write, note take and system update in the course of their employment.

148. We accept that Teleperformance had a practice of requiring the customer service operators to take calls and input information onto the system within specific target times and this was applied to Mr Peacock. The target times were not strictly imposed during the probationary period, but we accept that there was a PCP which essentially required employees to carry out certain tasks during and immediately after a call within target time scales.

149. A document was admitted into evidence at the start of the hearing which showed how Mr Peacock's performance compared to that of his colleagues. This showed that by some measures Mr Peacock was outperforming a significant number of his peers. There is nothing in the data which suggests that he was struggling with the amount of time he had for calls and note taking etc.

150. When Mr Peacock requested to change his shifts and said he wanted to raise grievance, the only specific concern about working arrangements that is referred to is an adverse reaction to the heat. He did not raise concerns about the time to read, write, note take and so on. We accept that there was no reason for Ms McEvoy to think at that point that the claimant was being subjected to any particular disadvantage from the working arrangements as he seemed to suggest. Rather the information provided suggested what was a temporary and short term issue about temperatures during an unusually hot period of weather.

151. Mr Peacock says that this PCP caused him a substantial disadvantage, but he did not provide us with any evidence about the extent of that disadvantage and why it was a disadvantage which put him at a disadvantage compared to people who are not disabled. The performance data suggested that he was not out at a disadvantage with his peers.

152. In the circumstances we found that Ms McEvoy and Ms Dobbins did not have the knowledge of the disadvantage caused to Mr Peacock by the working arrangements nor could they reasonably be expected to have had that knowledge of any particular disadvantage caused to Peacock from the working arrangements.

153. On balance we found that Mr Peacock had not shown that the duty to make reasonable adjustments as not triggered in relation to this PCP.

154. In any event the adjustment which Mr Peacock said was required was "additional time for reading and writing". In fact we accept that an adjustment had been made by Ms McEvoy to allow the claimant some additional after call time. Although we did not find that adjustment was made because Teleperformance had been told about a specific disadvantage, we accepted that was a reasonable adjustment to make.

155. This complaint is not well-founded.

PCP 3: The requirement for a Customer Services adviser to work a standard shift pattern of 9am to 6pm, Monday to Friday

156. It was clear that this PCP has not been formulated correctly because at the relevant point in time (which is the point at Mr Peacock went off ill during the hot

weather) he was working 11.00am to 8.00pm and he wanted to work a shift of 8.00am until 4.00pm. We considered that the correct way to reflect the claimant's compliant was to consider the PCP of requiring the claimant to work a fixed shift pattern.

157. Mr Peacock's case was that this caused him a substantial disadvantage because "in the middle of summer when the heat is at its peak his ability to work without discomfort was effectively reduced".

158. The difficulty we had was with understanding the substantial disadvantage to somebody with autism from working in hot weather. We had no medical evidence to support what the claimant's case that this disadvantage was linked to his autism. The claimant told us that that was a disadvantage to him because it increased the sensory overload, but we had no further evidence in relation to that.

159. We found that the claimant has not met the burden of proof to show that he had been subject to a substantial disadvantage compared to someone without his disability in this regard and Ms McEvoy and Ms Dobbins did not have any knowledge of that substantial disadvantage either. Mr Peacock had done no more than say he was finding it difficult to work in the hot weather. It is difficult for most people to work in hot weather. There was not the necessary evidence to show why that was a substantial disadvantage to the claimant because of his atypical autism compared to people without that condition.

160. In relation to this PCP in any event, the company did have an adjustment in place. It was not a specific adjustment for Mr Peacock, but it was still a reasonable adjustment which was available to him which could have addressed any disadvantage. He had access to a system which would enable him to swap shifts. When Mr Peacock gave evidence about this in cross examination, he said that he had not tried to swap shifts himself. This was because with autism it would be difficult for him to approach individuals to ask them to swap shifts with him and then to move on to the next person. However, that was not the system which he was told to use. Mr Peacock was asked to post a request on a system to request a shift change. He had received training on that during his induction. He would not have to approach anyone individually and we were satisfied that the arrangements the company had put in place offered flexibility which would remove or mitigate any disadvantage to Mr Peacock from the shift pattern.

161. In the circumstances Teleperformance had not failed to meet its duty to make reasonable adjustments This complaint is not well-founded.

PCP 4: A CSA was subject to incoming information from a variety of different sources, including Microsoft Teams, notifications, emails and tasks, telephone calls from members of the public, instant messaging requests and the requirement to access different job systems.

162. Teleperformance accepted that it applied that PCP to Mr Peacock and it conceded that it placed him at a substantial disadvantage compared to someone with his disability because of sensory overload. It was not suggested that there was a lack of knowledge about the disability and the disadvantage. Teleperformance accepted that the duty to make adjustments was triggered.

163. The fact that the duty to make adjustments has been triggered does not mean that it is always possible to make adjustments. Mr Peacock suggested that the adjustment which should have been made was to "reduce the volume of incoming information to the claimant during worktime".

164. We accept Ms Ushers' submission that Molly Dobbins had made a reasonable adjustment by changing the one thing that she was able to so. She had removed contact from the other team leaders for Mr Peacock. Mr Peacock himself acknowledged to us that that had made a significant difference to the sensory overload that he was experiencing.

165. We accept that the other systems which were left running on Mr Peacock's computer and the other information which was incoming were things which the company could not change. The other inputs which the claimant was being subject to (being required to access certain information, having Microsoft Teams running, and so on) were all necessary parts of the job because Mr Peacock's job was to speak to members of the public and to answer those incoming calls. Mr Peacock had to be able access the company systems to access customer account information. It was necessary for information to be inputted for record keeping and there were statutory and contractual requirements about call monitoring because that is needed to protect customers. Mr Peacock had to be able to access the knowledge bank so that he could answer queries correctly.

166. We accept that Microsoft Teams had to be running because Mr Peacock is working at home and that was how contact is maintained between workers and the managers. We accept that there had to be some system in place to enable that contact to take place. We accept that access to emails was essential. We concluded that the company had done what it could. As Mc McEvoy accepted, what could be done was very limited because of the nature of the job. Ms Dobbins had done what was possible.

167. We found that the duty to make reasonable adjustments had been triggered, but we accepted that the company had not failed to meet that duty. This complaint is not well-founded.

168. **PCP 6 [*sic there is typographical error in the list of issues*]: No access to Occupational Health for the Claimant**

169. The respondent did have a practice of referring employees to occupational health. We received evidence that this would be in done when it was felt to be appropriate by the manager. Mr Peacock had requested at it a very early stage in his employment, at the meeting with Ms McEvoy and Ms Dobbins when he first requested reasonable adjustments and Ms McEvoy had not thought it appropriate at that stage. Ms McEvoy told us that she had not thought a referral was required – adjustments had been requested and some measures had been agreed. She wanted to wait and see if those worked improve before she considered a referral to occupational health. Mr Peacock had not initially been referred to occupational health because he requested it, but when there was a reason for a referral because Mr Peacock had been absent from work, it was something the company wanted to do. The referral was not made because Mr Peacock would not engage with the welfare process.

170. Mr Peacock says that the alleged PCP caused him a substantial disadvantage because "not having such a professional assessment was disadvantageous to the claimant because it ultimately led to him going absent from work and being dismissed."

171. The respondent disputed that the PCP had been applied to Mr Peacock at all but the main thrust of Ms Usher's submissions was that carrying out an occupational health assessment cannot, in of itself, be a reasonable adjustment and she highlighted cases about that to us, in particular two cases. The first was *Smith v Salford NHS Primary Care Trust* UKEAT 0507/10/JOJ where the EAT had held that:

"Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage… are not reasonable adjustments within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify".

172. The second case was *Rider v Leeds City Council* UKEAT/0243/11/LA where the EAT held that the carrying out of an assessment as to what reasonable adjustments might be made in respect of a disabled employee was not, of itself, capable of amounting to a reasonable adjustment.

173. The employment judge had highlighted to Mr Peacock in discussion about his list of issues that usually seeking occupational health advice is about getting advice on what adjustments can be made to mitigate the impact of something in the workplace. It does not itself actually reduce the disadvantage of whatever it is in the workplace is causing the difficulty. Mr Peacock has a legal diploma and the judge had suggested that he look at another case, *Tarbuck v Sainsburys Supermarket* which has a discussion about the principles in relation to this, in that case looking at a similar point in relation to consulting with an employee about adjustments.

174. The tribunal accepted Ms Usher's submissions about this issue. A referral to occupational health may be a sensible step for an employer to understand a disability and the impact of matters in the workplace on an employee, but it is a step in the process of making adjustments rather than something which makes a change to the workplace itself.

175. Mr Peacock was not subjected to a disadvantage through not being referred to occupational health. The disadvantage he says that he was subject was based in an assumption that if he had been to see occupational health adviser they would have recommended that adjustments would have been made to particular practices, criteria or provisions. However, the employer would only be legally obliged to make adjustments to those practices, criteria or provisions if they caused Mr Peacock a substantial disadvantage and an adjustment could be made. His complaint to this tribunal must be about the practice, criterion or provision which requires adjustment.

176. This complaint is not well-founded.

PCP 7: Negative performance feedback given to the Claimant in regular performance review meetings by Molly Dobbins and Paul Bloomfield

177. Mr Peacock says that this PCP caused him a substantial disadvantage because "negative feedback about his performance was unfair because there were no adjustments in place".

178. Miss Ushers argued that the PCP had not been applied because “feedback provided was intended to be constructive, and to help the Claimant improve in his role”

179. The tribunal accepted that there was a practice of providing customer service advisers with feedback when they had not met the required standards if that was the outcome of the monitoring.

180. We were not satisfied that Mr Peacock had shown us that this placed him at a substantial disadvantage because of his atypical autism and dyslexia compared to someone without his disability. We have no reason to doubt that Mr Peacock found it difficult to receive negative feedback. However, most people find negative performance feedback uncomfortable and some will find it damaging to their self-esteem and their self-confidence. In any event in this case the complaint does not really seem to be about the negative feedback as such, but about the fact the claimant thought it was unfair because he thought it was a consequence of adjustments not having been put in place.

181. In addition, we did not find that the respondent had any knowledge that the feedback was caused the claimant any substantial disadvantage because of his disability. When we looked at the notes of the monitoring it appears that Mr Peacock acknowledged his mistakes, at least to some extent. There is nothing recorded which suggests anything about the managers should have realised it was having a disproportionate impact on him.

182. We found that the duty to make reasonable adjustment had not been triggered in relation to the feedback. Even if we are wrong about that, when we looked at the notes of the feedback, we could see that Mr Peacock was not simply being told what he had not done, he was being reminded what he needed to do. It is clear that attempts were being made to encourage Mr Peacock in terms of what he needed to

do in the future, and we could not see what adjustment could have been made to that. If something was not being done correctly the person had to be told that they were not doing it correctly, unfortunately, and we did not accept that the company had breached its legal obligations in relation to that.

183. This complaint is not well-founded.

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Employment Judge Cookson
Date: 10 October 2023

WRITTEN REASONS SENT TO THE PARTIES ON
19 October 2023

FOR THE TRIBUNAL OFFICE