EMPLOYMENT TRIBUNALS

Claimant: Mr C Godfrey

Respondent: Ensinger Limited

Heard at: Cardiff **On:** 20, 21, 22, 23, 24, 27 & 28 November 2023

Before: Employment Judge S Jenkins
Mr P Bradney
Ms J Kaye

Representation:
Claimant: Mr D Godfrey
Respondent: Mr D Green (Counsel)

JUDGMENT having been sent to the parties on 29 November 2023, and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to consider the Claimant's claims of; constructive unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments, and victimisation; brought by way of a claim form issued on 14 October 2022.

2. We heard evidence from the Claimant on his own behalf, and from Carl Morgan, Head of Operations, and Michael Jacob, Warehouse Manager, on behalf of the Respondent.

3. We considered the documents in a hearing bundle spanning 496 pages to which our attention was drawn, together with six photographs of the Claimant's work station produced to us during the course of the hearing.

4. We received written opening submissions from both parties, which we read at the start of the hearing. We also took into account both parties' oral closing submissions.

Issues

5. An agreed list of the issues we had to determine had been set out following an earlier preliminary hearing, on 9 November 2023, and is set out below:

1 Jurisdiction

1.1 In respect of any alleged acts of discrimination which occurred on or before 9 May 2022, does the Tribunal have jurisdiction to hear claims in relation to those acts or were those claims presented out of time? The Claimant relies on allegations dating back to March 2021.

1.2 To the extent that any alleged act of discrimination is out of time, does it form part of a continuing act under section 123(3)(a) Equality Act 2010 ("EqA")?

1.3 In respect of any alleged act of discrimination which is out of time, would it be just and equitable for the Tribunal to extend time pursuant to section 123(1)(b) EqA?

2 Constructive unfair dismissal pursuant to section 95(1)(c) Employment Rights Act 1996 ("ERA")

2.1 Was the reason for the Claimant's resignation on 14 July 2022, constructive (unfair) dismissal within the meaning of section 95(1)(c) ERA, specifically applying the following common law tests:

2.2 Did the following alleged actions of the Respondent take place:

(a) Failing to take reasonable steps to investigate the Claimant's need for reasonable adjustments between March 2021 and September 2021;

(b) Failing to implement the adjustments recommended by the Occupational Health report dated 12 October 2021 following receipt of the report on 26 October 2021;

(c) Requiring the Claimant to take a pay-cut in order to be medically redeployed in February 2022;

(d) Failing to implement the adjustments recommended by the Occupational Health report dated 12 October 2021 following the meeting on 21 February 2022;

(e) Pressuring the Claimant in relation to his capability without assessing the Claimant's capability with adjustments in the meeting on 21 February 2022;

(f) Failing to implement the adjustments recommended by the Occupational Health report dated 8 March 2022;

(g) Failing to conduct an impartial and genuine risk assessment in April 2022 and assessing tasks that caused the Claimant pain and injury as 'low risk';

(h) Pressuring the Claimant in the meeting on 28 April 2022 to agree the risk assessment and to continue to carry out tasks in his role that worsened his condition;

(i) Pressurising the Claimant in the meeting on 23 June 2022 in relation to his capability, dismissing the Claimant's health concerns and suggesting that it was the Claimant's fault for not having accepted the administrative role in February 2022; and

(j) Failing to properly and proactively consider medical redeployment for the Claimant between February 2022 and July 2022.

2.3 Were the above actions or inactions of the Respondent actual or anticipatory, repudiatory breach(s) of a contractual term, express or implied (including the implied term of trust and confidence), by the Respondent?

2.4 Did the above actions or inactions of the Respondent form part of a series of acts, the cumulative effect of which amounted to a fundamental breach of a contractual term?

2.5 Did the Claimant resign in response to those breach(s)?

2.6 Did the Claimant do anything to waive those breach(s) or affirm the contract, for example:

(a) expressly, in writing or otherwise informing the Respondent; or

(b) impliedly, either by calling on the Respondent for the performance of the contract;

or

(c) acting in a way that showed they were treating the contract as ongoing?

2.7 If the Employment Tribunal finds that the Claimant was constructively dismissed, did the Respondent act reasonably in treating that reason as a sufficient reason for dismissing the Claimant, applying section 98(4) ERA? In the event the Tribunal finds that the Claimant was dismissed, the Respondent will rely on capability as a fair reason for the dismissal in the alternative.

3 Disability

3.1 It is accepted that the Claimant was disabled at the relevant times by reference to primary stabbing headaches.

3.2 Did the Claimant have an additional 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:

3.2.1 Did he have a physical impairment: syringomyelia or other spinal cord condition?

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

3.2.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.2.4 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?

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

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

3.2.5.1.2 if not, were they likely to recur?

4 Discrimination Arising from Disability pursuant to section 15 EqA

4.1 Did the Respondent treat the Claimant unfavourably by:

4.1.1 Pressuring the Claimant in relation to his capability in the meeting on 21 February 2022;

4.1.2 Telling the Claimant in a meeting on 27th April 2022 that further sickness occurrence may lead to a disciplinary process.

4.1.3 Pressurising the Claimant in the meeting on 23 June 2022 in relation to his capability.

4.2 Did the following things arise in consequence of the Claimant's disability:

4.2.1 Sickness absence.

4.2.2 Need to take on lighter duties/require modified working.

4.3 Was the unfavourable treatment because of any of those things?

4.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

4.4.1 Manage sickness absence

4.4.2 Manage staffing levels

4.4.3 Ensure business needs were met

4.5 The Tribunal will decide in particular:

4.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2 Could something less discriminatory have been done instead?

4.5.3 How should the needs of the Claimant and the Respondent be balanced?

4.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

5 Failure to make reasonable adjustments pursuant to sections 20 and 21 EqA

5.1 Did the Respondent know, or could it reasonably have been expected to know, about the Claimant's disability?

5.2 Did the Respondent operate the following practices and apply them to the Claimant?

(a) The requirement to provide a consistent level of attendance;

(b) The practice for employees in the Claimant's role to operate more than one machine simultaneously;

(c) The practice for employees in the Claimant's role to remain standing during shift work; and

(d) The practice for employees in the Claimant's role to perform heavy-lifting tasks.

5.3 If the Respondent did apply any of the practices listed above at 5.1, do they constitute a provision, criterion, or practice ("PCP"), for the purposes of section 20(3) EqA?

5.4 If so, did the PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant relies on the following substantial disadvantages:

5.4.1 Being subject to capability and sickness absence procedures.

5.4.2 Being pressured in relation to his capability in the meetings on 21 February 2022, 27 April 2022 and 23 June 2022 in relation to capability.

5.4.3 Being required to carry out work that exacerbated his condition.

5.4.4 Being required to carry out work in such a manner so as to exacerbate his condition.

5.4.5 Exacerbating the Claimant's condition

5.4.6 Further sickness absences.

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

5.6 If so, did the Respondent take such steps as it was reasonable to take to avoid the disadvantage? The Claimant relies on the following as reasonable steps the Respondent should have taken:

(a) *Formally adjust the triggers of absence so that the Claimant was aware of what level of absence would trigger formal capability proceedings;*

(b) *Instruct other staff to assist or to take over from the Claimant when conducting tasks that required heavy lifting;*

(c) *Consider re-allocating tasks with the Claimant's department so that the Claimant was not required to perform heavy-lifting tasks;*

(d) *Provide the Claimant with a stool in a timely manner;*

(e) *Formally provide the Claimant with allocated hourly rest-breaks; and*

(f) *Redeploy the Claimant into a less physically demanding role.*

5.7 *If the Respondent failed to take any of the steps listed in 5.6, would these steps have:*

(a) *removed any substantial disadvantage suffered by the Claimant; and*

(b) *been proportionate in the circumstances?*

5.8 *If so, did the Respondent fail to make any reasonable adjustments and accordingly breach its duty to the Claimant under sections 20 and 21 EqA?*

6 Victimisation pursuant to section 27 EqA

6.1 *Did the Claimant's act on 14 July 2022 of submitting a written resignation alleging that the Respondent had failed in its duty to make reasonable adjustments, constitute a protected act pursuant to section 27(2) EqA in that, it is an example of the Claimant either:*

(a) *Doing any other thing for the purposes of or in connection with EqA; or*

(b) *Making an allegation (whether or not express) that the Respondent or another person had contravened the EqA.*

6.2 *Did the detriment asserted by the Claimant take place, and does it amount to a detriment within the meaning of section 27 EqA?*

The Claimant relies upon being called into a meeting by Chris Jones and Michael Jacob on 14 July 2022 and being treated unfavourably during that meeting.

6.3 *If so, was the Claimant subject to the detriment because of the protected act?*

7 Remedy

7.1 *If successful in relation to any of the above claims, is the Claimant entitled to compensation?*

7.2 *If so, should any award for compensation be reduced for any reason, for example (including but not limited to):*

(a) *the fact that the Claimant would have been dismissed in any event (in reliance on Polkey v AE Dayton Services Ltd [1987]);*

(b) *any contributory conduct on the part of the Claimant; and/or*

(c) *any failure by the Claimant to mitigate his losses.*

7.3 *Should any award to the Claimant be reduced or increased having regard to the provisions of the ACAS Code? If so, by how much?*

7.4 *Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?*

7.5 *What financial losses has the discrimination caused the Claimant?*

7.6 *Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*

7.7 *If not, for what period of loss should the Claimant be compensated?*

7.8 *What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?*

7.9 *Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?*

7.10 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

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

7.12 Did the Respondent or the Claimant unreasonably fail to comply with it?

7.13 If so is it just and equitable to increase or decrease any award payable to the Claimant?

7.13.1 By what proportion, up to 25%?

7.14 Should interest be awarded? How much?

6. A slight adjustment was made at the start of the hearing to the order of paragraphs 4.1.1 to 4.1.3, and an amendment of a date which was in paragraph 4.1.1 (now 4.1.2). The same adjustment also led to a slight amendment to paragraph 5.4.2.

Law

7. The legal principles underpinning the issues we had to determine were as follows.

Jurisdiction – Time Limits

8. With regard to the time limits, Section 123 of the Equality Act 2010 provides as follows:

"***123 Time limits***

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

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

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

…

(3) For the purposes of this section—

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

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

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

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

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

9. With regard to conduct extending over a period, the Court of Appeal in ***Commissioner of Police of the Metropolis v Hendricks*** **[2003] ICR 530**, noted that the Tribunal must look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer and thus linked to each other.

10. A course of conduct where individual acts are linked, either by reference to the application of a policy or practice or in another way, and where the last such connected act falls within time, will mean that all such acts will fall within time. The Employment Appeal Tribunal ("EAT") recently confirmed however, in ***South Western Ambulance Service NHS Trust -v- King*** **[2020] IRLR 168**, that reliance is not to be placed on "*some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time*".

11. With regard to the question of whether a failure to make reasonable adjustments arises from a continuing act or an omission, and if the latter, when it was decided upon for the purposes of section 123, has been considered by the appellate courts on several occasions. The Court of Appeal considered the question in ***Kingston upon Hull City Council v Matuszowicz*** **[2009] ICR 1170**. There, the Court noted that, in claims where the employer was not deliberately failing to comply with the duty, and the omission was due to any reason other than conscious refusal, the employer is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point. The first of these, which is when the person does an act inconsistent with doing the omitted act, is fairly self-explanatory. The second option, however, requires an inquiry that is by no means straightforward. It presupposes that the person in question has carried on

for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time. Lord Justices Lloyd and Sedley both acknowledged that imposing an artificial date from which time starts to run is not entirely satisfactory, but they pointed out that the uncertainty and even injustice which may be caused could be alleviated, to a certain extent, by the tribunal's discretion to extend the time limit where it is just and equitable to do so

12. With regard to the potential just and equitable extension of time, the Court of Appeal, in ***Robertson -v- Bexley Community Centre*** **[2003] IRLR 434**, noted that there is no presumption in favour of extending time in discrimination claims, and it is for the Claimant to convince the Tribunal that it is indeed just and equitable to extend time.

13. The EAT in ***British Coal Corporation -v- Keeble*** **[1997] IRLR 336**, noted that the provisions of Section 33 of the Limitation Act 1980, which applies to civil claims, should also be applied in relation to Tribunal claims. That involves an assessment of the prejudice to each party and an assessment of all the circumstances of the case, which includes; the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected, the extent to which the party sued has cooperated with the requests for information, the promptness with which the Claimant acted once they knew of the facts, and the steps taken by the Claimant to obtain advice. It is clear however that an assessment of all the circumstances is to be undertaken.

14. Recent further guidance on this issue was provided by the Court of Appeal in ***Adedeji -v- University Hospitals Birmingham NHS Foundation Trust*** **[2021] EWCA Civ 23**, that the guidance provided in the ***Keeble*** case should not be treated as a checklist, as that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The Court of Appeal guidance was that the best approach for a Tribunal, in considering the exercise of its discretion, is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including, in particular, the length of, and the reasons for, the delay.

Constructive Unfair Dismissal

15. In a constructive unfair dismissal case such as this, the touchstone authority remains ***Western Excavating (ECC) Limited -v- Sharp*** **[1978] ICR 221,** which noted that three matters fall to be considered:

    (i) Was there a repudiatory breach of contract?
    (ii) If so, did the Claimant resign in response to that breach and not for another reason?
    (iii) If so, did the Claimant nevertheless affirm the contract, whether by delaying too long in resigning, or by words or actions which demonstrated that they chose to keep the contract alive?

16. The principal breach in this case was asserted to be a breach of the implied term of mutual trust and confidence. Whilst the ability to pursue a constructive dismissal claim based on that implied term had been established by the Employment Appeal Tribunal as far back as 1981 in the case of ***Woods -v- WM Car Services (Peterborough) Limited*** **[1981] ICR 666**, it was expressly approved by the House of Lords in ***Malik -v- BCCI SA (in compulsory liquidation)*** **[1997] ICR 606**, where Lord Steyn confirmed that it imposed an obligation that the employer shall not, "*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".

17. It has been clear, since ***Woods*** in 1981, that any breach of the implied term of mutual trust and confidence will be a repudiatory breach. However, as noted in ***Malik***, the conduct has to be such that it is likely to "destroy or seriously damage" the relationship of trust and confidence.

18. The prevailing law of constructive dismissal has been more recently summarised by the Court of Appeal in ***Omilaju -v- Waltham Forest London Borough Council*** **[2005] ICR 481**, where Dyson LJ explained it, at paragraph 14, as follows:

    "*1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.*

    2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce

International SA [1998] AC 20, 34H—35D (Lord Nicholls) and 45C—46E (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.

3. *Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to* destroy or seriously damage *the relationship (emphasis added).*

4. *The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik, at p 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at* objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).*

5. *A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para DI [480] in Harvey on Industrial Relations and Employment Law:*
"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship.""

19. Dyson LJ continued at paragraph 15:

"*The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1986] ICR 157. Neill LJ said (p167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p169F:*
"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a

breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?" *(See Woods v W.M. Car Services (Peterborough) Ltd. [1981] ICR 666.) This is the "last straw" situation.*"

20. With particular reference to the "last straw", Dyson LJ went on to say, at paragraphs 19 and 20:

"*…A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred."

21. In this case, the Claimant's contention, as noted in his resignation letter, was that the Respondent's failure to make reasonable adjustments for him was the final straw.

22. The approach to be taken in last straw cases was considered further by the Court of Appeal in ***Kaur -v- Leeds Teaching Hospitals NHS Trust*** **[2019] ICR 1**, where Underhill LJ stated, at paragraphs 45 to 46:

"*If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the Omilaju test), it should not normally matter whether it had crossed the Malik threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so.*

"Fourthly, the "last straw" image may in some cases not be wholly apt. At the risk of labouring the obvious, the point made by the proverb is that the additional weight that renders the load too heavy may be quite small in itself. Although that point is valuable in the legal context, and is the particular point discussed in Omilaju, it will not arise in every cumulative breach case. There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)."

23. Underhill LJ then set out, at paragraph 55, a number of questions that the Tribunal should ask itself in a constructive dismissal claim:

"*I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic though of course answering them in the circumstances of a particular case may not be easy."

Disability

24. In this case, the Respondent had accepted that the Claimant was disabled at the relevant times by reference to "primary stabbing headaches" but not by reference to "syringomyelia" or a spinal cord condition generally. At a preliminary hearing just before the hearing, the Judge had refused permission for the parties to adduce expert medical evidence in relation to the disputed condition. We were therefore left to assess whether the Claimant was so disabled by reference to the evidence available to us, applying the following principles.

25. Section 6(1) EqA 2010 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.*"

26. Section 6(6) EqA notes that Schedule 1 (disability: supplementary provision) has effect, and Paragraph 2 of Schedule 1 provides, in relation to long-term effects, that, "*the effect of an impairment is long-term if-*

(a) It has lasted for at least 12 months,
(b) It is likely to last for at least 12 months, or
(c) It is likely to last for the rest of the life of the person affected".

27. Section 212(1) of the Act notes that substantial means "*more than minor or trivial*".

28. Although it is necessary for the tribunal to make a finding on the existence of a physical or mental impairment, it is not always essential to identify a specific "impairment", if the existence of one can be inferred from the evidence of an adverse effect on the claimant's abilities. Underhill J (as he then was) noted, in ***J v DLA Piper UK LLP UKEAT/0263/09***), at paragraph 38:

> *"There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is*

suffering from a condition which has produced that adverse effect – in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred."

29. The question of what are "normal day-to-day activities" must be assessed by reference to the ordinary meaning of those words. The Government Guidance on matters to be taken into account in determining questions relating to the definition of disability notes that they are things that people do on a regular or daily basis, and can include work related activities.

30. That was confirmed by the EAT in ***Cruickshank v VAW Motorcast [2002] IRLR 24***), and it was confirmed, in ***Aderemi v London and South Eastern Railway Ltd UKEAT/0316/12***, that that can include standing for long periods, and, in ***Banaszczyk v Booker Ltd UKEAT/0132/15***, that that can include lifting and moving heavy goods of up to 25kg in weight.

Discrimination arising from disability

31. Section 15(1) of the EqA, which is headed 'Discrimination arising from disability', provides that 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.

32. Section 15(2) goes on to state that '[S.15(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.' In other words, if the employer can establish that it was unaware — and could not reasonably have been expected to know — that the claimant was disabled, it cannot be held liable for discrimination arising from disability.

33. "*Unfavourably*" is not defined in the EqA, but the Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') states, at paragraph 5.7, that it means that the disabled person 'must have been put at a disadvantage'. The Supreme Court, in (Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] ICR 230, approved the guidance provided at the EAT by Langstaff J, that it involved "*an objective sense of that which is adverse as compared with that which is beneficial*".

34. In ***Pnaiser v NHS England and anor*** **[2016] IRLR 170**, the EAT summarised the proper approach to establishing causation under S.15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It 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. The tribunal 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.

35. With regard to legitimate aims, the Respondent contended that its aims were the management of sickness absence and staffing levels, and ensuring business needs were met. noted that the protection of patients can be a legitimate aim.

36. With regard to proportionality, in ***Gray v University of Portsmouth*** **(UKEAT/0242/20)**, the EAT made it clear that, in the context of a S.15 claim, a tribunal must carry out a critical evaluation on the question of objective justification, entailing a weighing of the needs of the employer against the discriminatory impact on the employee.

Reasonable adjustments

37. Section 20 EqA provides as follows:

> "***20 Duty to make adjustments***
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…*"

38. The "*applicable Schedule*" is Schedule 8, and that provides, at paragraph 20, that a respondent is "*not subject to a duty to make reasonable adjustments if [it] does not know, and could not reasonably be expected to*

know -… that [the claimant] has a disability and is likely to be placed at the disadvantage…".

39. Our focus here would be, as identified by the EAT in ***Environment Agency -v- Rowan*** **[2008] IRLR 20**, on identifying:

    (i) The provision criterion or practice applied by or on behalf of an employer;

    (ii) The identity of non-disabled comparators, where appropriate; and

    (iii) The nature and extent of the substantial disadvantage suffered by the Claimant, in comparison to the non-disabled comparators.

40. In this regard, the Claimant was relying on a hypothetical non-disabled comparator. As noted by the Court of Appeal in ***Smith v Churchills Stairlifts plc*** **[2006] ICR 524**, is an objective one and it is ultimately the employment tribunal's view of what is reasonable that matters. The focus is on assessing whether a PCP had indeed been applied, whether the employee was, as a result, placed at a substantial disadvantage, and then whether the employer had taken such steps as were reasonable to avoid any disadvantage caused.

41. A claim of a failure to make reasonable adjustments may therefore require a tribunal to take the unusual step of substituting its own view for that of the employer, in marked contrast to the approach taken in respect of unfair dismissal, where such an approach amounts to an error of law.

42. The EAT noted, in ***Salford NHS Primary Care Trust v Smith UKEAT/0507/10***, that the reasonable adjustment duty is "primarily concerned with enabling the disabled person to remain in or return to work with the employer".

43. There must be a causative connection between the disability relied on and the "substantial disadvantage". The EAT in ***Project Management Institute -v Latif [2007] IRLR 579*** noted that the Tribunal should look at the "overall picture" when considering the effects of any disability, and that there must be evidence of some apparently reasonable adjustment which could be made.

44. In assessing the reasonableness of any step, regard should be had to its likely efficacy, practicability and cost. So far as the efficacy of any step is concerned, it is only necessary to establish that there was a real prospect of the step avoiding or reducing the relevant disadvantage.

45. The EAT, in ***G4S Cash Solutions (UK) Ltd v Powell*** **(UKEAT/0243/15)**, noted that whether it is a reasonable adjustment to protect an employee's pay when offering an alternative role is a matter of fact for the tribunal to determine taking all relevant factors into account.

Victimisation

46. Section 27 Equality Act 2010 provides as follows:

> "*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*"

47. It was accepted in this case, that the Claimant's resignation letter amounted to a protected act.

48. With regard to detriment, the House of Lords noted, in ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**, that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage; an unjustified sense of grievance cannot amount to a detriment, but the Court did emphasise that whether a Claimant has been disadvantaged is to be viewed subjectively.

49. The Equality and Human Rights Commission Code of Practice on Employment 2020 also gives some guidance on the definition of detriment as follows: "*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage*."

50. The test of causation in a victimisation complaint ("*because*") is the same as that in relation direct discrimination under section 13 ("*because* of"). It is whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did. In ***West Yorkshire Police v Khan*** **[2001] IRLR 830**, the House of Lords noted that a Tribunal must identify "*the real reason, the core reason, the causa causans, the motive*".

Findings

51. Our findings, reached on the balance of probability where there was any dispute, are set out below. In fact, there was very little fundamental dispute between the parties over the events that gave rise to the claims in this case. The only appreciable difference of view was over the weight of materials the Claimant had to lift or manoeuvre in his job, and, even there, there was broad agreement from the Respondent that the Claimant's work did involve regular lifting of reasonably heavy materials, even if they were not as heavy as the Claimant made out.

52. The recollection of all witnesses was not always clear. All three, particularly the Claimant and Mr Jacob, regularly noted that they could not recall specific issues. In that regard the Claimant had covertly recorded several of his conversations with his managers, and transcripts of those conversations were in the hearing bundle. Whilst the Respondent may have had justifiable criticisms of the Claimant's actions in making those recordings, we, and we considered ultimately the Respondent itself, were assisted by them, as they formed an accurate record of discussions between the parties, in a case where much of the interaction took place verbally rather than in writing. That was particularly the case when one of the main participants, Mr Chris Jones, the Respondent's then HR Manager, who has since left the Respondent's employment, was not present to give evidence before us.

53. The background to the case is that the Respondent is a UK subsidiary of a German company. Its focus is on engineering plastics which are used across a wide range of industries.

54. The Respondent is based in Tonyrefail, South Wales, and the Claimant was employed there as a Grinding Operator. He commenced that employment in September 2006, and worked in that role up to his resignation in July 2022.

55. The role of a Grinding Operator is to set and operate machinery to produce plastic rods of various dimensions, generally to fulfil specific customer orders. The core of the role involves obtaining plastic material and taking it to the machine, setting the machine, and then lifting and guiding the material into and through the machine in order to produce the required rods. The completed product is then removed from the end of the machine, with each piece of material taking approximately a minute to go through the machine.

56. The plastic raw material is collected from shelving within the warehouse, generally some 20 metres or so away from the machine, but occasionally it may need to be collected from a further distance. It is usually placed on a

trolley to be moved to the machine, but occasionally, if a trolley is not available, the material is carried to the machine by hand.

57. Each rod is typically 3 metres in length and weighs approximately 2.5kg, although some rods can be as heavy as 15kg. As well as occasionally carrying the rods to the machine to be worked on, the Grinding Operator is required to lift them into the machine. The Operator then has a role, depending on the length of the rod, in guiding it through the machine and then lifting the finished product from the other end.

58. The Grinding Operator role also has other lifting requirements. These include removing metal casings weighing 12.5kg to set up the machine, and emptying filter bags. Those are bags used to collect waste material and coolant liquid at least once a day, and sometimes more often. The Claimant contended that the bags could weigh in excess of 50kg, but, bearing in mind that they were cylinders of some 80cm in height and 18cm in diameter, we preferred the Respondent's evidence that they were generally between 10 and 15kg when full, and doubted that they would be likely to exceed 25kg in total.

59. In recent times, the Claimant was one of three Grinding Operators working shifts. One would work a regular shift between 9am and 6pm whilst the other two, the Claimant and one other, would work alternating shifts of 6am to 2pm or 2pm to 10pm. Three machines were then able to be operated at any one time, with one Operator being able to operate two machines at one time by placing one rod in one machine, then moving to place another rod in the second machine, and then collecting the first and then the second, and repeating that process.

60. Relevantly for the discussions that subsequently ensued over pay, the other variable shift working Grinding Operator had transferred in from the Respondent's Cutting Department, where he had been a Leading Hand and thus had enjoyed slightly higher pay than an Operator. Although the individual was not a Leading Hand in the Grinding Department, his Leading Hand pay was retained, such that he was paid more than the Claimant even though they were doing the same work.

61. The Claimant was generally considered a good performer in his role. He appeared generally to enjoy a reasonable relationship with his colleagues and managers, although he did occasionally have what he himself described as "run-ins" with others. He described incidents in 2008, 2014 and 2018, with the last giving rise to the imposition of a written warning for a refusal to undertake regular work on a stock-taking weekend when directed to do so.

62. The Respondent, for obvious reasons, is keen to maintain productivity, and it has a Sickness and Absence Policy which explains how it handles sickness absences. The Policy provides for employees to complete a sickness and absence form following each absence, and for a return to work interview to be undertaken with the employee's supervisor or another manager.

63. The Policy also provides that the Respondent will use the "Bradford Factor", i.e. a process of considering not only the length of absences, but also the frequency of them, in assessing whether disciplinary action needs to be taken and whether company sick pay will be paid. A Bradford Factor score of 65 or more in any rolling 12 month period would require a Director to approve the payment of company sick pay, which is discretionary, with statutory sick pay otherwise being paid.

64. The Policy goes on to say that, in the event of chronic or long term sickness, where a return to the employee's job is unlikely in the foreseeable future, a discussion about the availability and suitability of alternative employment will take place, with the Respondent reserving the right to amend salary to a lower rate if any alternative role will bring with it a lower rate of pay.

65. In relation to the Claimant's health, he experienced neck and shoulder pain in September 2020, having had pins and needles intermittently in his left shoulder a few months previously. That complaint was diagnosed as a trapped nerve which resolved itself in subsequent weeks. The intermittent pins and needles however remained, and the Claimant was referred for nerve conduction studies. He saw a Consultant Orthopedic and Hand Surgeon on 12 March 2021, and she noted the Claimant's symptoms and described his presentation as a "*very confusion [*sic*] picture*". She recommended an MRI scan and nerve conduction studies. The Claimant remained in work during this period.

66. Towards the end of March 2021 however, the Claimant began to experience head pain and fatigue. He sought medical assistance on 26 March 2021, and was absent from work for four days between 23 and 29 March 2021.

67. Mr Morgan undertook the Claimant's return to work interview on 29 March 2021. It was not usual for a return to work interview to be undertaken by someone of Mr Morgan's seniority, but the Claimant's absence had fallen over a stock-taking weekend, and that was the second such weekend that the Claimant had missed. Mr Morgan had therefore felt it appropriate that he undertake the return to work interview on that occasion.

68. The sickness absence form recorded that the reason for the absence had been cluster headaches, and that the Claimant had also been concerned that he had had Covid 19. The Form also recorded that the Claimant did not feel that any work factors had caused or contributed towards the absence.

69. By May 2021, although not absent from work, the Claimant continued to suffer head pain. He sought further medical assistance, and was sent for a CT scan. That took place on 18 June 2021, and the proposed MRI scan took place on 9 July 2021. The result of the latter showed a syrinx (a fluid-filled cyst) in the Claimant's spine.

70. The Claimant was absent for two days between 3 and 7 September 2021, and, on his return, the return to work interview was undertaken by the Respondent's then HR Officer. The sickness absence form recorded the absence as being due to "*leg, back, neck and head pain, dizziness and pins and needles in the arm, head and shoulders*". It also recorded that the Claimant felt that work factors had caused or contributed to the absence, noting that standing was causing him bother, and that impact (presumably from his role) was causing repercussions for his pain in his lower back, hip and knee. The HR Manager referred the Claimant to the Respondent's Occupational Health advisers.

71. The Claimant attended the Occupational Health assessment by video on 12 October 2021, with a report being produced shortly after that. The Occupational Health Adviser noted the Claimant's symptoms of pins and needles and stabbing headaches. He also noted that a form of cyst had been detected in the Claimant's upper spine, which possibly caused pressure on nerves. He commented that it seemed likely that the abnormality, i.e. the cyst or syrinx, would prove to be the cause of the Claimant's neurological symptoms. He noted that increased physical demands, heavy lifting or awkward manual handling could potentially exacerbate the Claimant's symptoms.

72. The Claimant was reported as being, "*Fit with Adjustments*", those adjustments were:

    - that some allowances be made for reduced targets and productivity;
    - that operating two machines at the same time be avoided until the Claimant's condition had been treated;
    - that the Claimant would be helped by allowing regular brief breaks; and
    - that it may be necessary for a higher than average level of sickness absence to be accommodated if the Claimant's symptoms escalated.

73. Although the Occupational Health report was sent to a central HR email address of the Respondent, it was not picked up at the time. The HR Manager who had made the referral had left by this time, and the other, more senior, HR Manager, who also had access to the email address, had left shortly before. Her successor, Mr Chris Jones, who also had access to the email address, had taken up his position, but was not aware that the Occupational Health report had been received.

74. Unconnected to the Claimant's health and sickness absence, the Claimant and Mr Morgan had a discussion, on 13 October 2021, about the Claimant moving to a role in the Respondent's Despatch office, an office role rather than a manual role. There was no indication that the discussion was driven by the Claimant's state of health. Rather, it appears to have arisen due to concerns about errors that one of the persons working in Despatch had made. It was thought that he could move to a Grinding Operator role, and that, instead, the Claimant could move to his Despatch role, the thought being that the Claimant was capable of undertaking it.

75. At this stage the position was put as something that the Claimant could initially do on a relief basis, as the Respondent did not want to lose the Claimant's Grinding expertise and experience. He later undertook Despatch work as something of a "taster", and further Despatch training was suggested in the Claimant's appraisal with Mr Jacob on 10 January 2022. In that, Mr Jacob also recorded that it was acknowledged that the Claimant could work to reduced targets and machine operation.

76. The Claimant was absent again in February 2022, for three days between 8 and 11 February. Mr Jacob undertook the return to work interview on 11 February 2022. By this stage, the Claimant's Bradford Factor was recorded as 99, i.e. above 65, but Mr Jacob recorded that the absence should nevertheless be paid.

77. The sickness absence form recorded, "*head, back, neck and leg pain, dizziness and sickness*" as the reasons for the absence. It also recorded that standing all day could cause pain and discomfort.

78. During the return to work interview the Claimant mentioned the Occupational Health report about which Mr Jacob had no knowledge. He then took that up with Mr Morgan, who took it up with Mr Jones, and the report was discovered and was forwarded to Mr Morgan and Mr Jacob. A meeting was then arranged between the Claimant, Mr Jones and Mr Jacob on 21 February 2022, which the Claimant covertly recorded.

79. The transcript of the meeting showed that Mr Jones noted that the Occupational Health report from October had been discovered, and asked the Claimant to clarify his current situation. He noted that he was on waiting

lists to see a neurologist and a spinal surgeon, with a particularly long wait anticipated in relation to the latter. He noted that the advice he had received was that, unless things got worse, when he should go to A&E, he was not being given any active treatment.

80. Mr Jones noted that, because of the time that had elapsed, the Respondent would re-refer the Claimant to Occupational Health. He discussed the prospect of treatment and recovery with a period of light duties, but also outlined what he described as a "*worst case scenario*", of the health situation not improving, which could lead to dismissal on ill health grounds. He stated that that would be difficult for the Claimant to hear, but that he would rather tell the Claimant at the outset rather than bring it up right at the end of a process. He observed that, hopefully, being in that situation could be avoided, but that the Claimant's health had to come first.

81. Mr Jones noted that Mr Jacob had informed him that the Claimant was currently on light duties, i.e. was doing less than might otherwise be asked of him, which he described as the right thing to do. He went on to say however that there may come a point when a time limit would have to be put on those lighter duties.

82. Mr Jones advised the Claimant to press his GP to make progress with his referrals, suggesting that he use the Respondent as "the bad guys", i.e. by saying that they were putting pressure on him, to try to get earlier treatment.

83. Mr Jones then went on to discuss possible alternative roles which might need to be looked at to avoid the worst case scenario he had described. He commented that, from what he had been told, the Claimant had previously been offered an alternative role, i.e. the Despatch role, but had refused it because he did not want to take the reduced pay that went with it.

84. At this point, the Claimant raised the point that the former leading hand from the Cutting department was still getting paid his former salary, and Mr Jacob replied by saying that there was nothing he could do about that. The Claimant then commented that he would not feel right moving into Despatch and being paid more than the other person working there. He also noted that he could not really take the pay cut as it felt like a "*big step backwards*". The difference in salary was approximately £1,000 per annum.

85. Mr Jones concluded the meeting by noting that the Respondent would just start the process and see where it took them over the following few weeks, and then make decisions at that point. He commented that, "*irrespective of what happens in the long term a job is better than no job. If it is £1,000 it is not great, I know, does it mean that you may look for a job somewhere else. That's a disaster for us. But I'm saying these are the bad case scenarios.*

We want you to be able to stay, but we can only offer you what we've got. Please think about it".

86. Mr Jones then wrote to the Claimant, on 22 February 2022, noting the discussion that had taken place. He recorded that the October Occupational Health report had been discussed, and that the Claimant had not needed to perform at the full level of the Grinding Operator role since then, and nor would he be asked to do so whilst suffering from his current condition. He also recorded that the administrative role within the Despatch department had been offered, but that the Claimant had confirmed he could not afford to take the reduction in pay of some £900 per annum. He concluded that a further Occupational Health appointment would be made, with specific questions being asked.

87. That Occupational Health appointment took place over the telephone on 8 March 2022, with a different adviser. The report from that appointment recorded the Claimant's symptoms, noting that he had been diagnosed with an inherited condition in his spine which was causing various symptoms.

88. It was noted that the Claimant struggled to be in one position for prolonged periods of time, including standing up, and that the Claimant was not able to do any heavy manual handling or activities requiring heavy straining. The adviser reported that the Claimant appeared fit for his role, but would require long term adjustments to help him remain in it. Those adjustments were:

    - a workplace risk assessment, with the Claimant needing to demonstrate what he could do safely;
    - avoiding heavy manual handling, awkward positions of his neck, and being in one position for prolonged periods, perhaps allowing him to have a short break every hour and to sit down if possible could be helpful;
    - avoiding heavy physical work and a fast pace of work, particularly standing up quickly from a sitting position;
    - considering redeployment;
    - regular meetings with his line manager to monitor progress; and
    - considering adjusting absence triggers, allowing absence for health care appointments if necessary.

89. Following the receipt of the report, Mr Jacob and the Claimant discussed it, and it was agreed that the Claimant might benefit from the provision of a stool, which might allow him to sit at times whilst operating the machine. The Claimant provided some options for the stool on 18 March 2022, and one was delivered on 27 April 2022.

90. In terms of the references in the report to avoiding heavy manual handling and lifting, Mr Jacob noted that grinding operators were very much the "authors of their own destiny" when it came to weights, noting that they determine how many rods to lift at any one time. Mr Jacob also noted that he had primed the supervisors in the Grinding department to expect the Claimant to ask for assistance from time to time if anything was too heavy for him. In view of the usual weights of rods and filter bags already noted, and the absence of any evidence from the Claimant that he had any specific difficulties, we saw no reason to doubt that evidence.

91. On 7 April 2022 the Claimant emailed Mr Jones, referring to the March Occupational Health report, and asking if there was any information on what happened next. Mr Jones replied the same day, noting that the report was similar to the previous one, and that the Respondent would try to accommodate the position for as long as possible in the Claimant's current role. The Claimant then noted, on 11 April 2022, that a risk assessment had been mentioned, which could possibly help with adjustments. Mr Jones then contacted John Sullivan, the Respondent's Compliance Manager, about the risk assessment on the following day.

92. The risk assessment was undertaken by Mr Sullivan on 22 April 2022. It involved a 30-minute discussion, followed by Mr Sullivan observing the Claimant carrying out those elements of his role which he considered involved lifting. Following that a detailed risk assessment was produced.

93. In that, it was noted that the Claimant could be required to lift heavy and/or bulky loads of up to 15kg per rod. It was also noted that it was not felt that there was insufficient rest or recovery within the Claimant's daily workload, or that a fast work rate was imposed by the process.

94. With regard to the grinding process, Mr Sullivan noted that the changing of filter bags and the removal of metal casings (with a weight of some 12.5kg) could add to the Claimant's condition and cause symptoms but that the risk level of those was assessed as "*Low*". It was noted that the Claimant was able to run more than one machine at a time at a reduced output rate.

95. The risk assessment was discussed at a meeting between the Claimant, Mr Jones and Mr Jacob on 27 April 2022, which the Claimant again covertly recorded. The Claimant had not seen a copy of the risk assessment by this stage, and was asked to sign it.

96. It was noted that the Claimant would be able to take short breaks whilst sitting on a stool, which would hopefully take some pressure off him, and potentially that he could operate two machines at a reduced rate. The Claimant confirmed that he had, in fact, done that the night before, and that

as long as it was a “long runner”, i.e. did not need to be supervised all the time, it could be done. Mr Jacob observed that he had no problem with that.

97. The Claimant noted that, at the moment, he was no worse off with regard to levels of pain than he had been over the previous week, and that he had ups and downs which he put down to fatigue.

98. Mr Jacob suggested that he could look into the way the filter bags were set up to make it easier for them to be manoeuvred, and the Claimant concluded by saying, “*everything is ok so far*”, and that if there was anything out of the ordinary he would let Mr Jones and Mr Jacob know.

99. The Claimant was then absent between 7 and 22 June 2022, this time for a longer period of eleven working days. A Fit Note was produced by his GP on 8 June 2022, recording the reasons for his absence as “*Nervous system symptoms*”. The Claimant emailed Mr Jones on 8 June 2022, noting that he had an appointment with his neurologist on 16 June. He then emailed Mr Jones again on 20 June 2022, noting that the appointment had in fact been with his brain/spinal surgeon who had referred him to a neurologist and had ordered further MRI scans. He commented that he had felt a lot better in the last few days and was hoping to return to work on 22 June 2022.

100. The Claimant and Mr Jones had a telephone conversation on 20 June 2022, which Mr Jones summarised in an email to Occupational Health. He noted that the Claimant had asked if the office role in Despatch, which had been discussed in February, was still available, but that Mr Jones had replied that it was not. He also noted that there were no other non-manual roles available.

101. The Claimant, in his evidence regarding this call, noted that Mr Jones had asked him if he was applying for other jobs, which we did not consider surprising in the context of the Claimant raising the Despatch job and being told that it was not available. Mr Jones, in his email to the Occupational Health provider, noted that reduced duties were in place and that there were concerns that the Claimant, whilst awaiting the diagnosis, could fall ill again whilst working, with such illness possibly having been caused by the work. Mr Jones stated that he had told the Claimant that any decision regarding his ability to continue working would be based on medical advice and he asked for a further Occupational Health review.

102. With regard to the Despatch role, Mr Jacob’s oral evidence during the hearing confirmed that the Despatch employee whom the Respondent had wanted to move in to the Grinding department, had, in fact, moved there in January 2022, but had moved back to Despatch as he had been unhappy about receiving only a training salary in the Grinding department as opposed to the usual salary. At the time of the discussions with the

Claimant in June 2022, that employee was back in the Despatch department. However, following the Claimant's resignation in July, the Despatch employee moved again into the Grinding department where he had remained.

103. Mr Jacob confirmed, in his evidence, that a swap of the two employees would have been possible, but it had not been discussed, even when the Claimant had confirmed that he was prepared to move to Despatch at the lower salary.

104. The Claimant and Mr Jacob then met for the Claimant's return to work meeting on 23 June 2022. The Claimant again covertly recorded the meeting. The sickness absence form recorded that the Claimant felt that being stooped or bent over feeding rods into the machine could contribute to him feeling ill, and it was discussed that the Claimant would make more use of the stool and minimise his stooping. It was noted that he was to be referred again to Occupational Health, and that his Bradford Factor score was 64, which would mean that any increase on that would lead to the need for approval by senior management, and that company sick pay might not be paid. Mr Jacob confirmed that company sick pay would be paid in respect of the Claimant's recent absence.

105. The transcript of the discussion demonstrated that the Claimant was rather pessimistic about the impact of his condition on him at the time. He referred to feeling like everything was going downhill, and noted that he was 34 and should not be feeling like he was "*ready to go to the glue factory*". Mr Jacob asked if there was anything else the Respondent could do to help the Claimant, apart from taking him off the job, to which the Claimant, seemingly in jest, again referred to being taken to the glue factory and being put out of his misery. He observed that he did not know if there was anything else the Respondent could do to help him. He was working at a reduced rate and trying to take things calmly and did not know why he had been impacted over the previous two weeks.

106. Mr Jacob referred to there being no other opportunities available other than two, an Inspector and an Accounts Clerk, for neither of which the Claimant was qualified. The Claimant commented that he was not really that worried about salary any more, as he could not afford to be with his condition. The Claimant then noted that the situation was frustrating for him because he wanted to be back to where he was. He had come into work the day before "*feeling amazing*", and still felt really good, realising that he had not been like that for a long time, which, for him, was not right.

107. Mr Jacob commented that hindsight was a great thing, but the Claimant should have taken the Despatch job when offered it, with which the Claimant agreed.

108. The Claimant described the meeting in his evidence as “the last straw” feeling that it was clear to him that the Respondent was not going to make adjustments or actively consider further redeployment. He then started to look at external options. He applied for a role at a financial services company on 30 June 2022, which, although less well paid was desk based. He attended two interviews, and was then offered the job, first informally and then formally.

109. Within that period the Claimant attended a further Occupational Health appointment, on 11 July 2022, by telephone. The report produced following it noted that adjustments were already in place and should continue. It was also noted that the Claimant identified two tasks as causing particular difficulty; the lifting and movement of larger rods and the lifting of filter bags. It was suggested that the use of a trolley be looked into for the former, and that a modification to the latter, or assistance from a colleague, should be looked into. It was noted that the long term prognosis remained unclear, and that until further specialist input had been produced it was difficult to advise when, or if, the Claimant might regain full fitness for his role.

110. On 14 July 2022 the Claimant went to see Mr Jones in his office. Again, the Claimant covertly recorded the meeting. He noted that he had been offered a position elsewhere and had accepted it. Mr Jones congratulated the Claimant, noting that it was probably the best thing for him healthwise. The Claimant noted that that was why he had looked for another role, noting that he had felt so much better after having been absent for two weeks, but, since then, had been going down bit by bit with his pain returning.

111. The Claimant indicated that his new employer wanted him to start on 25 July 2022. At this point, Mr Jones called Mr Jacob into the meeting, and it was agreed that the Claimant would be allowed to leave early, i.e. without working out his full notice obligation, Mr Jones commenting that the Claimant’s health came first.

112. Mr Jones observed that they would obviously need the Claimant’s resignation in writing, so that it did not look as though the Respondent was pushing the Claimant out. The meeting then ended very amicably.

113. The Claimant produced his resignation letter as a PDF attachment to an email at 12.53pm on the same day. During the hearing, the Claimant was questioned on when the document was produced and it seemed to us most likely that it had initially been prepared in draft prior to the day or earlier in the day, possibly with some input from the Claimant’s brother. In the letter, after confirming his formal notice, with the last day of employment of 22 July 2022, the Claimant stated that he had been forced to seek alternative employment, “*due to the failure on the part of the company to make*

reasonable adjustments for me in light of repeated requests for adjustments from Occupational Health". He referred to the Occupational Health reports having recommended allowances in relation to productivity, avoiding heavy manual handling, consideration of redeployment, regular meetings to monitor progress, and the adjustment of absence triggers, commenting that none of that had been put in place.

114. Following receipt of the resignation letter, Mr Jones called the Claimant into his office. Mr Jacob was also present, and again the Claimant covertly recorded the meeting.

115. Mr Jones commenced by indicating that the Claimant could obviously write what he wanted. but that he took issue with the Claimant's comment that adjustments had not been made. He referred to the confusion over the receipt of the Occupational Health report when the HR Officer had left, and the Claimant interjected saying that he felt that he had been failed on that. Mr Jones responded by asking the Claimant to let him finish, noting that the Claimant had "*had his say*". Mr Jones then went on, at some length, to set out his view that the Claimant's comments about adjustments not having been put in place were completely wrong.

116. The Claimant described the meeting as having been "*extremely uncomfortable*", and Mr Jacob, in his oral evidence, agreed that when the Claimant had tried to explain himself Mr Jones had shut him down and that it had been uncomfortable to see Mr Jones behave in the way that he had. Ultimately the Claimant's employment ended on Friday 22 July 2022 and he commenced his new role on Monday 25 July 2022.

Conclusions

117. Considering the issues we had to address, in light of our findings and the applicable legal principles, our conclusions were as follows.

Jurisdiction

118. The Claimant's unfair dismissal claim arose from the termination of his employment on 22 July 2022, and his victimisation claim arose from an event on 14 July 2022, so both of those claims had clearly been brought in time. However, as noted in the List of Issues, any act or omission on or before 9 May 2022 was, on the face of it, out of time for the purposes of the Claimant's claims of discrimination arising from disability and failure to make reasonable adjustments. Some of the acts or failures asserted by the Claimant to give rise to those claims did occur prior to 9 May 2022 and therefore they would only be able to be considered if they were considered to be part of a course of conduct extending over a period with the end of

that period falling in time, or if it was considered just and equitable to extend time.

119. We noted, with regard to the discrimination arising from disability claim, that the contended acts of unfavourable treatment involved three meetings between the Claimant and his managers, on 21 February 2022, 27 April 2022 and 23 June 2022, only the last of which fell in time. However, the allegation raised in respect of each of them was broadly the same, that the Claimant was "pressured" by being told that a possible outcome of his sickness absence policy was dismissal on grounds of incapacity. Applying the Court of Appeal's guidance in ***Hendricks***, it seemed to us that the substance of the acts complained of was the same in each case, such that they should be considered to be part of one continuing act. We therefore considered that the Claimant's claim of discrimination arising from disability had been brought in time and we had jurisdiction to consider it.

120. Turning to the reasonable adjustments claim, we noted that the asserted PCPs were ones which applied throughout the period at issue, i.e. broadly from September 2021 through to June 2022. The prospect of removing any disadvantage arising from them also applied throughout that period, as the Claimant's condition, and his consequent ability to undertake his duties, deteriorated over it.

121. Similarly, the adjustments contended by the Claimant to have been reasonable were also ones which applied on an ongoing basis throughout the period, particularly in the context of the Claimant's difficulties in undertaking the physical elements of his role, e.g. standing, lifting and stooping, which became more apparent over time and were noted as developing issues in the various Occupational Health reports. In that context, we considered that adjustments (a), (b), (c), (e) and (f) were ones which arose throughout the period at issue, or at least were ones which needed to be reassessed at different points throughout the period. Therefore, applying ***King***, they were specific complaints of discrimination which anchored an overarching state of affairs which was contended to be discriminatory.

122. We formed a different view with regard to adjustment (d), as a stool was provided in April 2022, and the question of whether there was a failure to provide it in a timely manner crystallised at that point.

123. We considered in particular adjustment (f), as that was the one which we ultimately concluded the Respondent had failed to implement when it had been reasonable to do so. In that regard, we noted that the Respondent had addressed, or failed to address, the prospect of redeployment on two occasions. The first, in February 2022, when it had only offered the role in Despatch subject to a pay cut, and the second, in June 2022, when it did

not consider exploring a swap between the Claimant and the Despatch employee at a point where the Claimant was saying that he would welcome a move regardless of the pay position.

124. We considered that it could be said that the Respondent had reached a concluded decision on the redeployment issue in February 2022, when it consciously only offered the role subject to a pay cut. It could then be said that the second occasion, when the issue arose again in June 2022 when the Claimant expressly asked if the option was available regardless of pay and was told that it was not, was again a discrete act or omission. However, we felt that the potential adjustment, being of the same character on both occasions, could also be argued to be an ongoing failure thus linking the two.

125. Overall therefore, applying the guidance from ***Hendricks*** and ***King***, we felt that the two occasions on which redeployment fell to be considered, involving as they did very much the same question, were linked to each other and were part of one continuing act. As the second occasion fell within time both fell to be considered.

126. In case however we were wrong about that, we went on to consider whether we would, in any event, have considered it just and equitable to extend time in respect of the first occasion. We noted the Court of Appeal's guidance in ***Robertson*** that there is no presumption to extend time, and also noted that Court's guidance in ***Adedeji*** that our approach should be to assess all the factors including, in particular, the length of and reasons for the delay. We also noted what was effectively the starting point of the analysis from ***Keeble***, that a consideration of the discretion involves an assessment of the prejudice to each party.

127. In undertaking our assessment, we noted that the reason advanced by the Claimant for not pursuing his claims at an earlier date was that he remained in work and feared that the Respondent would act negatively as a result. We also noted that the Claimant, at the time of the meeting in February 2022, appeared to be coping with his role, or at least was willing to see if he could cope with his role at the time. Consequently, the pursuit of a Tribunal claim would not have been likely to be in the forefront of his mind at that time.

128. Ultimately. in terms of prejudice to the parties the Respondent was always going to have to deal with concerns about the February discussion as part of its defence of the constructive unfair dismissal claim, and we considered that it would not therefore be put to any material prejudice as far as the cogency of its evidence was concerned. That only then left the inherent prejudice to either party, of the Claimant not being able to pursue a claim he felt to be valid on the one hand, or of the Respondent having to defend a

claim which would otherwise not have to be dealt with on the other. On balance we felt that the relative prejudice would have pointed to the extension of time had we needed to consider that.

(Constructive) Unfair dismissal

129. We first considered the ten acts or omissions asserted by the Claimant to have contributed to the breach of the mutual duty of trust and confidence. We noted the Claimant had also referred to breaches of the Equality Act and health and safety, but we did not think that they materially added anything to the analysis of the trust and confidence duty.

130. We considered whether the events or omissions had happened in fact, and, if so, whether they amounted to repudiatory breaches, or could be said to have contributed to an overall repudiatory breach. We considered each in turn.

    (a) We did not consider that, as a matter of fact, the Respondent failed to make reasonable adjustments between March 2021 and September 2021. The Claimant was absent for four days in March 2021, by reason of cluster headaches and possible Covid. He confirmed that he did not consider that any work factors had caused or contributed to his absence. His report to Mr Morgan of his discussion with his GP was that he had been advised to rest and take aspirin, and had been told that if the headaches had not cleared up by the middle of the following week he should go to see them again.

    At this stage therefore, the Claimant's symptoms were minor, and it appears that the condition and its impact on the Claimant's health was at an early stage in its progress. The Claimant then had no further absences until September 2021. We did not therefore consider that there should have been any reasonable expectation on the Respondent's part that it would need to investigate the need for any adjustments in that period.

    (b) Whilst no formal record of adjustments made following the Occupational Health referral was ever put together, and indeed the report did not actually come to the attention of the Claimant's managers until February 2022, it appeared to us that the suggested amendments had nevertheless been made. The adjustments suggested were:

        - that some allowances be made for reduced targets and productivity;
        - that operating two machines be avoided;

- that the Claimant would be helped by being allowed regular brief breaks; and
- that it may be necessary for a higher than average level of sickness absences to be accommodated if the Claimant's symptoms escalated.

In our view, all those recommendations were implemented, regardless of the fact that the Occupational Health report was not, in fact, considered. Allowances were made for reduced productivity, as recorded in the Claimant's appraisal with Mr Jacob in January 2022. The Claimant only operated two machines at a reduced rate in circumstances where he himself described feeling comfortable. The Claimant accepted in his evidence that he was able to take regular breaks in the canteen a short distance away from his workstation, and higher levels of sickness absence were accommodated. The Claimant did not suffer any reduction in pay during his absences, even where his absence led to a higher than acceptable Bradford factor score, and nor were the sickness absence disciplinary procedures implemented.

(c) As a matter of fact, the Respondent did require the Claimant to take a pay cut if he was to move to the Despatch role in February 2022. That was in line with how the Respondent interpreted its Sickness Absence Policy, where the right to reduce pay in such circumstances was expressly reserved. We did note that the Claimant's colleague. who had moved into the Grinding department from the Cutting department, had had his pay maintained, albeit that the Respondent contended that that was a move which had been from a different department rather than within the one department.

However, most relevantly for us when considering this from the perspective of whether it amounted to a breach of trust and confidence, was the Claimant's reaction at the time. In addition to noting that he was not prepared to undergo the required pay cut, the Claimant himself expressed disquiet about the prospect of him otherwise being paid more than the other Despatch employee if he moved on his existing pay, pointing out the unfairness that would arise from that.

Overall therefore, we did not consider that requiring the Claimant to take a pay cut as a condition of being redeployed in February 2022 involved a breach of the implied term.

(d) This effectively repeated (b). As we have noted, we were satisfied that the Respondent had already implemented the adjustments recommended in the Occupational Health report.

(e) We did not consider that the Claimant was pressured in relation to capability during the meeting on 21 February 2022. Mr Jones did outline that one possible outcome of the Claimant's ill health was that the Respondent would not be able to retain him in his role. However he did so very much as a "worst case scenario", which would arise only where it was clear that the Claimant's health was being adversely affected by his job. Even there, alternative roles would be pursued before any definitive step was taken.

Mr Jones might have waited to raise the possible prospect of a capability dismissal until subsequent meetings once, as it transpired, the Claimant's health continued to be impacted by his role. However, he could then have faced criticism for not having provided that information at an earlier stage. Overall we did not consider the discussion involved pressurising the Claimant, and did not consider that it could reasonably be said to be, or to contribute to, a repudiatory breach.

(f) As with the adjustments suggested in the Occupational Health report in October 2021, we did not consider that the Respondent failed to implement the adjustments recommended in the report of 8 March 2022. Those adjustments were:

- a workplace risk assessment;
- avoiding heavy manual handling and being in one position for prolonged periods, perhaps allowing a short break every hour;
- avoiding heavy physical work and a fast pace of work;
- considering redeployment;
- regular meetings with the Claimant's line manager to monitor progress; and
- considering the adjustments of absence triggers.

Most of these were already in place following the October Occupational Health report. A workplace risk assessment was then undertaken in April 2022, with the full involvement of the Claimant, and we were satisfied that the Claimant and Mr Jacob discussed his condition albeit not in formally scheduled meetings.

(g) We did not consider that the risk assessment undertaken by Mr Sullivan in April 2022 had been anything other than impartial and genuine. Whilst the Claimant referred to having had a "run in" with Mr Sullivan, his then Manager, in 2014, nothing in the preparation of the assessment or its content suggested that that had had any bearing on Mr Sullivan's actions. The Claimant had input into the assessment in line with the Occupational Health Adviser's recommendation that he should demonstrate what he could do safely. The report then

addressed certain aspects of the Claimant's role which impacted on him due to his condition. Whilst those were identified as low risk, we did not think that that reflected any lack of consideration for the Claimant.

(h) We did not consider that there was any pressure placed on the Claimant to agree the risk assessment in the meeting on 28 April 2022; he was simply asked to sign it. No discussion took place regarding whether or not he agreed it, and the Claimant would have been perfectly capable, whether at the meeting or subsequently when he had had more time to consider the assessment in detail, to raise any matter of concern he had about it, but did not do so.

Similarly, we did not consider that the Claimant was pressured to continue to carry out tasks that worsened his condition. He confirmed that he was capable of operating two machines in a limited manner, and Mr Jacob confirmed that he was happy with that.

(i) Again, we did not consider that the Respondent pressured the Claimant in relation to his capability in the meeting on 23 June 2022. As we have noted, it was the Claimant himself who was pessimistic about the prospect of being able to continue in his role. We saw nothing to suggest that Mr Jacob dismissed the Claimant's health concerns, it was simply the case that he did not see any way around the problems that the Claimant was experiencing. Even there, Mr Jacob did not specifically raise the prospect of a capability dismissal. We did not consider that Mr Jacob's comment that, with hindsight, the Claimant should have taken the Despatch job in February 2022 involved any suggestion that that was any form of fault on the Claimant's part. It was simply a statement of his view of the position.

(j) The prospect of redeployment into a Despatch role was discussed in February 2022. Apart from that option, there was no evidence to suggest that any other redeployment options could have been explored.

However, the Despatch role re-surfaced as a discussion point in June 2022, with the Claimant confirming that the salary issue was no longer the issue he had first considered it to be, on the basis that his health was deteriorating, and he was, by this stage, accepting that he was not likely to be able to stay in his role for much longer.

By this stage, the Respondent noted that the Despatch role was not available. However, as we have noted, Mr Jacob, in his evidence, confirmed that the swap which had been described as a "perfect fit" in February, could have been discussed but was not. Whilst the

Despatch employee had gone back into that department from the Grinding department on the basis that he was not satisfied with the pay he was receiving whilst training in the Grinding role, he nevertheless moved back into Grinding consequent upon the Claimant's resignation in July 2022.

In our view, although the Despatch employee's answer could not have been predicted, a reasonable employer would at least have asked the question of him in circumstances where the Claimant was willing to take the Despatch role at the going salary, and where the alternative was that there might otherwise be no role for him. Overall therefore, we felt that that matter did potentially impact on the duty of trust and confidence.

131. We then moved to ask ourselves the five questions posed by Lord Justice Underhill in ***Kaur*** and our answers were as follows.

(1) The most recent act or omission which the Claimant said caused or triggered his resignation was his meeting with Mr Jacob on 23 June 2022, and what he described as his realisation that the Respondent was not going to make adjustments or consider further redeployment.

(2) We did not consider however, that the Claimant had affirmed the contract since that date. Whilst Mr Green, on behalf of the Respondent made valiant submissions that the Claimant's actions in attending the Occupational Health appointment on 11 July 2022 and in negotiating an agreement on 14 July 2022 that he leave on short notice, amounted to affirmation of any breach, we could not agree that that was the case. In our view, the Claimant's actions were simply ones of an employee trying to extricate himself from what he perceived to be an unsatisfactory employment relationship with the minimum of fuss, and with the optimal convenience for him. We did not consider that those steps amounted to affirmation.

(3) Was that act by itself a repudiatory breach? As we have noted we concluded that discussing the prospect of resurrecting the swap with the Despatch employee was something that a reasonable employer would have done. However, the implied term of mutual trust and confidence does not involve a requirement for an employer to act reasonably, only for it not, without proper cause, to conduct itself so as to be likely to seriously damage the relationship of trust and confidence.

In that regard, we noted the content of the Claimant's discussion with Mr Jacob on 23 June 2022, and that he was pessimistic about the prospect of being able to continue in his role. We also noted that the

Claimant would have been well aware of the Despatch employee's move into Grinding and back into Despatch, and raised no issue, whether at the time, or indeed in his evidence before us, about what the Respondent was telling him, i.e. that a move to Despatch was no longer available. It did not therefore seem to us that the act we were concerned about, i.e. the failure to further investigate the possible Despatch move, amounted to a repudiatory breach of contract.

Furthermore, moving to question (5), we did not consider that the Claimant resigned in response to the concern we had identified, whether or not it amounted to a repudiatory breach. He was either unaware of the concern we have subsequently identified, or was unconcerned by it.

With regard to question (4), as we have noted, we did not identify any course of conduct which, viewed cumulatively, amounted to a breach of the implied term. It was only the Respondent's act in failing to investigate the possibility of a move into Despatch that we felt was of any material concern.

132. Overall therefore, we were not satisfied that the Claimant had been constructively unfairly dismissed, and his unfair dismissal claim therefore failed.

Disability

133. We noted the guidance provided in ***J -v- DLA Piper***, that it is sometimes easier, and entirely legitimate, to park the question of the particular condition from which a claimant may be suffering, and instead to focus on their ability to carry out normal day to day activities.

134. In that regard, we noted the Claimant's evidence of a gradual deterioration of his health, and his increased inability to undertake aspects of his role, or to do those aspects with increasing difficulty. That started in the form of stabbing headaches, but deteriorated into difficulties with lifting, standing and stooping. The deterioration was noted in the three Occupational Health reports produced between October 2021 and July 2022, the second and third of which recorded that the Adviser was of the view that the Claimant was likely to be considered to be disabled for the purposes of the Equality Act, although in both reports it was noted correctly that that is a legal decision.

135. In our view, the workplace activities that the Claimant was unable to do, or was only able to do less well, fell within the scope of normal day-to-day activities. It also appeared to us that the impact on those activities was

more likely to have been caused by the Claimant's physical spinal condition than his stabbing headaches.

136. That impact had, by June 2022, lasted for more than twelve months, the Claimant having sought medical assistance in March 2021. If the consideration of the Claimant's physical impairments alone arose only in September 2021, when the Claimant sought medical assistance relating to leg, back and neck pain, his physical state of health had deteriorated by June 2022, and we considered that, assessed as at that time, it would have been likely that the impact of the Claimant's impairments would have been likely to have lasted for at least twelve months.

137. Ultimately therefore, we were satisfied that the Claimant was disabled by reference to such a condition in addition to the accepted disability of primary stabbing headaches.

Discrimination arising from disability

138. We noted the three asserted acts of unfavourable treatment said to have occurred because of something arising in consequence of the Claimant's disability, and considered whether the Claimant had been treated unfavourably as contended, applying the first stage of the test recommended by the EAT in ***Pnaiser***.

139. All three asserted acts involved similar contentions, that the Claimant had been pressured by the Respondent in three meetings, on 21 February 2022, 27 April 2022 and 23 June 2022, by the raising of the prospect of a capability dismissal. These were all advanced by the Claimant as being matters which amounted to or contributed to breaches of trust and confidence for the purposes of his constructive unfair dismissal claim.

140. In relation to that claim, we did not see anything to give rise to a concern that the Respondent had acted inappropriately in the ways asserted, such that no breaches of the implied term had arisen. Similarly, we did not consider that the Claimant had been treated unfavourably, in the sense identified by the Supreme Court in ***Williams***, of being put at a disadvantage. The discussion about a possible capability dismissal was always put forward as a "worst case scenario", and no step was taken at any time by the Respondent to implement any incapability processes. Furthermore, by the time of the 23 June 2022 meeting, it was the Claimant who was taking the lead in referring to his perception that he might not be able to continue in his role.

141. Overall therefore, we did not consider that the Claimant had been treated unfavourably. We did not then need to consider whether the contended treatment had been because of something arising in consequence of the

Claimant's disability, or whether any such treatment could be objectively justified as a proportionate means of achieving a legitimate aim.

142. The Claimant's claim under Section 15 EqA, of discrimination arising from disability therefore failed.

Reasonable adjustments

143. We were satisfied that the Respondent did have knowledge, both of the Claimant's disabilities, both the stabbing headaches and the spinal cord condition, and also that those disabilities placed him at a disadvantage. That occurred at the latest in February 2022 when the Claimant's managers became aware of the content of the October 2021 Occupational Health report.

144. The Respondent accepted that the four asserted provisions criteria or practices ("PCPs") were PCPs for the purposes of Section 20 EqA, which were applied in the workplace. That was subject of the caveat that the PCP asserted at (d), the practice for employees in the Claimant's role to perform heavy lifting tasks, was limited to items weighing up to 15kg. We accepted that that was broadly the case, and did not consider that the Claimant would generally be required to lift items weighing more than that, or certainly more than approximately 20 – 25kg, allowing for the uncertainty over the weight of a full filter bag. In our view that still merited the description of heavy lifting.

145. We then moved to consider whether the PCPs had put the Claimant at a substantial disadvantage in comparison with persons who were not disabled. Six disadvantages were contended, and we considered each in turn.

    1. The Claimant was never actually subjected to capability and sickness absence procedures, although the prospect of them being implemented was discussed. Whilst therefore, the PCPs could potentially have placed the Claimant at a disadvantage due to his disabilities, they did not in fact do so.

    2. As we have already noted in relation to the unfair dismissal and discrimination arising from disability claims, we did not consider that the Claimant had been pressured in relation to his capability in the three specified meetings. Similarly therefore, we did not consider that he was placed at any disadvantage in this respect by the operation of the PCPs.

    3–6. The Respondent accepted that being required to remain standing, being required to operate two full-speed machines at once, and being

required to meet production requirements, were capable of exacerbating the Claimant's symptoms and of causing further sickness absences, and we considered that the knowledge of those matters arose from February 2022 when the content of the October 2021 Occupational Health Report became known.

146. We then moved to consider whether the Respondent had taken reasonable steps to avoid those disadvantages. Six steps were contented by the Claimant to have been reasonable, and we considered each in turn. We did so from the perspectives of assessing whether the contended adjustments were reasonable ones for the Respondent to have taken and, if so, whether they were in fact taken.

    (a) We considered that adjusting absence triggers would have been a reasonable adjustment to have taken to have avoided, or at least reduced, the disadvantages. We were however satisfied that the Respondent had taken reasonable steps to make that adjustment. The Claimant was told that the Respondent would be more flexible, he was paid company sick pay in relation to all his absences, even when they had exceeded the Bradford Factor level, and capability procedures were not implemented at any time.

    Whilst we noted that the Claimant was not formally told of any adjusted triggers, we saw nothing to suggest that he went to work whilst unwell, and we did not therefore consider that he was materially impacted by any lack of formality.

    (b) We were satisfied that enabling other staff to assist or take over from the Claimant when conducting heavy lifting was a reasonable adjustment for the Respondent to have made. However we did not consider that instructing other staff to do that would have been a reasonable adjustment.

    The Claimant was well aware that he could ask for assistance with any of his tasks, and Mr Jacob had made the department supervisors aware that assistance would need to be provided if asked for.

    Mr Jacob also confirmed that employees are largely "masters of their own destiny" whilst undertaking lifting tasks, and the Claimant confirmed in some of the recorded meetings that he was at times able to undertake his tasks without assistance.

    We considered that the system implemented, of the Claimant asking for assistance when required, was a reasonable one and was sufficient to avoid any disadvantage.

(c) This was very much an extension of (b), and for the same reasons we did not consider that the reallocation of tasks was an adjustment that the Respondent should have been reasonably expected to have made. We were satisfied that the process of the Claimant asking for help when required was a reasonably sufficient step to avoid any disadvantage.

(d) A stool was, in fact, provided for the Claimant to use whilst undertaking his duties, and the only element of the contended PCP that was therefore relevant for us was whether it should have been provided in a timely manner, and, if so, whether it had been.

We noted that the Occupational Health Report of 8 March 2023 made no reference to the provision of a stool, and whilst it did say that allowing the Claimant to sit down if possible may be helpful, that followed a reference to "*perhaps allowing [the Claimant] to have a short break every hour*", so could perhaps have been interpreted as applying to the break rather than the work.

Regardless of that, the Claimant did discuss the procurement of a stool with Mr Jacob, and emailed him with two options on 18 March 2022. The stool was then delivered just over a month later.

We heard no evidence about the delivery times of the stool at the time, but did consider that it was likely, bearing in mind that one option was available from Amazon, that it could have been obtained slightly more quickly. However the Claimant did not appear to have experienced any particular difficulties with not having the stool available in late March or early April. He was not then absent again until early June 2022, and did not raise any concerns about the absence of a stool. We did not therefore consider that providing the stool more promptly would have made a material difference or would have been a specifically required reasonable adjustment.

(e) As with (a), the Claimant accepted in his evidence that he was permitted to take regular breaks, and the only issue therefore was that the breaks were not formally allocated. However, as with (a), we did not consider that the Claimant was materially impacted by any lack of formality, or that any formal allocation of breaks would have had any greater impact in terms of avoiding the disadvantage than the informal allocation that was put in place.

(f) Redeployment into a less physically demanding role would clearly have been an adjustment which would have avoided the disadvantages; indeed it would have completely removed them.

Redeployment arose in practice on two occasions. The first was in February 2022, when the prospect of the Claimant moving to a role in Despatch was put to him. He did not take up the proposal because he was concerned about the impact the reduced salary, a sum of some £1,000, would have on him. The Respondent was clear at the time that the Claimant would only be paid the going rate for the Despatch job.

147. The question for us therefore was whether the adjustment the Respondent had proposed, i.e. of a move into a less physically demanding role with a pay cut, had been a reasonable one.

148. We noted that HHJ Richardson, in ***G4S Cash Solutions -v- Powell***, had made clear that the earlier EAT decision of ***O'Hanlon*** provided no support for excluding pay protection in principle from the ambit of Section 20(3)3 of the EqA. The Judge went on to say, at paragraph 60, that he did "*not expect that it will be an everyday event for an Employment Tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent*", but that he could, "*envisage where this may be a reasonable adjustment for an employer to have to make as part of a package of reasonable adjustments to get an employee back to work or keep an employee in work*". He went on to say that such cases "*will be single claims turning on their own facts*".

149. We noted, from the facts in this case, that the difference in pay was put at around £1,000 per annum, or 50p per hour. We also noted that the Respondent had been willing to maintain the leading hand pay of the employee who had moved from the Cutting department to the Grinding department. We also noted that, whilst the Respondent's Sickness and Absence Policy referred to reserving the right to amend pay when an alternative role would normally attract a lower rate of pay, it did not expressly say that that would automatically happen.

150. In our view, in the circumstances that prevailed, it would have been a reasonable step for the Respondent to have taken to have allowed the Claimant to have moved into the Despatch role at his then Grinding Operator salary. That may not necessarily have prevailed long term, as the Claimant's salary could perhaps have been "red-circled" or "grandfathered" such that, over time the differential would have been eroded and the pay equalised. Bearing in mind the relatively small sum involved, equalisation would have been likely to have been achieved within a short period, probably within a year or two.

151. We heard no evidence that the Respondent would have been materially impacted by having to pay £1,000 or so more for an employee to fulfil the Despatch role for a relatively short period, and doubted that an argument

that there had been any material impact on the Respondent could have been maintained.

152. We therefore concluded that there had been a failure to make a reasonable adjustment by the Respondent not redeploying the Claimant into a less physically demanding role in February 2022 by allowing him to keep his slightly higher level of pay.

153. We then moved on to consider the second occasion when redeployment was discussed, in June 2022. On that occasion the Claimant made clear that his concerns about salary had been overtaken by his state of health, such that he was prepared to take the Despatch role at the lower salary. However, he was told that that option was no longer available.

154. Whilst that might, literally, have been the case, as the Despatch employee with whom a swap had been envisaged had moved into Grinding and then back into Despatch, no attempt was made to discuss whether the proposed swap could then be implemented. Mr Jacob, in his oral evidence, confirmed that a swap could have been possible, but that no consideration was given to discussing it.

155. Whilst the Respondent may not have been able to foresee that the Despatch employee would have seized on the opportunity to move back to Grinding with some alacrity following the Claimant's resignation, that move suggested that the door to such a move was not permanently closed. We considered that, in circumstances where the Claimant was clearly willing to move to Despatch at the reduced salary, and where, as evidenced by his words in his meeting with Mr Jacob on 23 June, his ability to stay in the Grinding role was clearly in question, it would have been incumbent on the Respondent to have explored the redeployment of the Claimant into the Despatch department at that time.

156. If the Despatch employee had said no to the move, the Respondent would not have been able to enforce it. However, there was at least the possibility that, as transpired, the Despatch employee would have been willing to move, in which case the Claimant could easily have been moved into Despatch, thus allowing him to remain employed.

157. We again therefore concluded that the Respondent failed to make an appropriate reasonable adjustment by not fully exploring the possibility of redeployment of the Claimant in June 2022.

158. The Claimant's claim of failure to make reasonable adjustment therefore succeeded to the extent we have noted.

Victimisation

159. The Respondent accepted that the Claimant's resignation letter, sent to Mr Jones on 14 July 2022, was a protected act for the purposes of Section 27 EqA. The question for us to consider therefore was whether the Claimant had been treated to his detriment, and, if so, whether that had been because of the protected act.

160. The Respondent contended that Mr Jones' comments, in the meeting he called the Claimant into immediately following receipt of the resignation letter, simply involved an expression of disagreement with the Claimant's contentions that there had been failures to make reasonable adjustments. Mr Jones noted that the Claimant was entitled to his view, but that he felt that the facts as he saw them demonstrated that he was mistaken. The Respondent contended further that Mr Jones' comment about the company "fighting" anything simply reiterated his view that the Respondent had done nothing wrong.

161. At face value, we would agree that a mere expression of a contrary view, even encompassing an indication of a proposed stance in relation to possible litigation, would not amount to a detriment to the recipient of that view. We did not consider however that Mr Jones' behaviour amounted to a mere expression of a contrary view.

162. Mr Jones was not present to give evidence and to answer for his comments and actions in the meeting. However, the transcript does make clear that Mr Jones did talk over the Claimant and did prevent him from responding. Furthermore, Mr Jacob, who was present, confirmed in his oral evidence that he was uncomfortable in seeing Mr Jones behave in the way that he did.

163. We were mindful of the House of Lords guidance in ***Shamoon*** that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to their disadvantage. We also noted that the EHRC Code of Practice made a similar point.

164. In this case, the Claimant was called into a meeting by the Respondent's HR Manager, at which his Warehouse Manager was also present, and was spoken to, without much ability to respond, in a manner which the Warehouse Manager described as uncomfortable. In our view, whilst Mr Jones' behaviour probably did not amount to the most detrimental treatment an Employment Tribunal is likely to encounter, it nevertheless did cross the threshold of leaving the Claimant in a position where he could reasonably have felt disadvantaged.

165. In terms of causation, the meeting, and Mr Jones' behaviour at it, was immediately consequent upon his receipt of the Claimant's resignation letter. In our view therefore, the detrimental treatment was very clearly materially influenced by the Claimant's protected act.

166. Our conclusion therefore was that the Claimant's claim of victimisation also succeeded.

Remedy

167. With regard to remedy, the parties confirmed that they had reached agreement on the compensation for financial loss which was put at £4,454.77 to which interest would need to be added.

168. In terms of injury to feelings, we noted the direction provided by the EAT in ***Prison Service and others -v- Johnson*** **[1997] ICR 275** that awards for injury to feelings are designed to compensate the injured party fully, but not to punish the guilty party, and that awards should not be so low as to diminish respect for the policy of the discrimination legislation, but, on the other hand, should not be so excessive that they may be regarded as untaxed riches.

169. We took into account, as urged by the Claimant's representative, the guidance provided by the EAT in ***Al Jumard -v- Clwyd Leisure Limited*** **[2008] IRLR 345***,* that, whilst compensation for injury to feelings is usually encompassed within a single award, where different forms of discrimination arise out of the same facts, a Tribunal can separately assess awards in relation to separate findings of discrimination where acts fall into specific categories. The Court made clear that, in such circumstances, the Tribunal should still look at the total amount of the award to ensure that it is proportionate and does not involve double counting.

170. In that case, the Appeal Tribunal expressly said that they felt that the Tribunal was obliged to have regard to the victimisation claim and to consider whether it justified any separate head of loss. In this case we felt that the circumstances giving rise to the victimisation claim were completely distinct from the circumstances giving rise to the reasonable adjustments claim, and we therefore felt that it was appropriate to assess injury to feelings separately in respect of both of them.

171. With regard to the injury to the Claimant's feelings, the evidence in his witness statement was not indicative of significant psychological hurt. Indeed the focus of the particular section of the Claimant's witness statement was on the impact of his deteriorating condition, and the lack of any diagnosis and treatment, which was not down to the Respondent. Clearly however, there was an indication in the Claimant's witness

statement, which was not challenged under cross-examination, that his feelings had been hurt by the events that transpired.

172. With regard to the victimisation complaint we noted that this was a one-off situation where Mr Jones, in our view, "vented" his objection to the contention the Claimant had made that he felt that there had been failures to make reasonable adjustments. Mr Jones was putting forward his personal opinion, and, whilst he did so forcefully, he did not do so in any form of personal attack on the Claimant or his character.

173. The Claimant was undoubtedly taken aback by Mr Jones' behaviour, but we did not consider that any hurt arising from that would have been significant or long-lasting. In the circumstances, we felt that the injury to feelings award in respect of this claim would be very much at the bottom end of the applicable Vento band, at the time £990 - £9,900, and we put the award of injury to feelings in relation to the victimisation claim at £1,000.

174. With regard to the reasonable adjustments claim, we noted that the treatment of the Claimant in this regard had been relatively neutral. As we have found, the Respondent simply "got it wrong" by not making adjustments that we felt it could, and should, reasonably have made. We did not however consider that the Respondent had acted out of any form of malign intent or in an off-hand manner. On the contrary, there were many elements of the way the Claimant was treated by the Respondent in the workplace which were favourable to him, and we did not find that most of the Claimant's reasonable adjustments claim succeeded.

175. Nevertheless, the Respondent did fail to make reasonable adjustments in respect of redeployment on two separate occasions, and, had it acted as we considered it should have at the initial stage, the Claimant would have been likely to have been in a significantly better physical state, and consequently to have been in a better frame of mind. We considered that the Claimant's feelings had undoubtedly been hurt to a degree, and, assessing that as best we could, we put the injury to feelings award in respect of the reasonable adjustments claim at £4,000.

176. Stepping back and considering the proportionality of the overall award, we considered that a total injury to feelings award of £5,000 was appropriate in the circumstances.

177. With regard to the calculation of interest, we took into account the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The position with regard to interest on the injury to feelings award was clear, in that we had to apply interest from the date of the act of discrimination complained of up to the day of calculation. That was the period from 21 February 2022 to 28 November 2023, a total of 646

days which led to a calculation of interest of £707.95, and a total award in respect of injury to feelings of £5,707.95.

178. With regard to the calculation of interest on the financial losses, the Regulations provide that interest should be calculated for the period beginning on the mid-point date, and ending on the day of calculation, with the mid-point date being the day which fell half way through the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. The Regulations make clear however, that where any payment has been made by the Respondent to the Claimant before the day of calculation in respect of the subject matter of the award then interest in respect of that part of the award shall be calculated as if the reference to the day of calculation were to the date on which the payment was made.

179. The Regulations also provide that where the Tribunal considers that, in the circumstances, serious injustice will be caused if interest were to be awarded as set out in the Regulations, then it has discretion to calculate interest in a different manner.

180. In this case the Claimant contended that the calculation in respect of interest on financial losses should run from the date of discrimination, 21 February 2022, whereas the Respondent contended that the Claimant had not suffered financial loss from that date, and had received full salary up to 24 July 2022.

181. We took into account the Regulations, and considered that, whether by reference to the Regulations or by exercising our discretion, to apply interest in the way outlined by the Claimant's representative would cause a serious injustice. We considered therefore, that it would be appropriate to apply interest for the period from the date on which the Claimant ceased to receive salary payments up to the calculation date, i.e. the date of this decision. That was the period of 24 July 2022 to 28 November 2023, a total of 492 days, with a mid-point leading to a calculation covering 246 days. That led to an interest calculation of £240.19, leading to a total sum in respect of compensatory losses of £4,694.96 and a total award of £10,402.91.

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Employment Judge S Jenkins
Dated: 22 January 2024

REASONS SENT TO THE PARTIES ON 23 January 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche