EMPLOYMENT TRIBUNALS

Claimant: Mr A Johnson

Respondent: Augscape Automotives Ltd

Heard by: Remote Video Link - CVP **On:** 5, 6, 7, 8 and 9 February 2024

Before: Employment Judge Jones
Mrs J Lee
Mrs P Pepper

REPRESENTATION:

Claimant: In person
Respondent: Mr K Robinson, Managing Director

JUDGMENT having been sent to the parties on 12 February 2024 and a request having been made by the respondent in accordance with paragraph 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following:

REASONS

Introduction

1. These are claims for disability discrimination by way of harassment, breach of the duty to make adjustments and discrimination arising from disability and a complaint that the respondent refused the claimant permission to take rest breaks contrary to his entitlement under the Working Time Regulations 1998.

The Issues

2. The parties agreed that the claims and issues were as included in a table and list of issues which was prepared by the former legal representatives of the respondent following a preliminary hearing before Employment Judge Brain on 9 November 2023. There had been an earlier preliminary hearing before Employment Judge Tegerdine at which there had been a summary of the claims, as they were understood, and a requirement for the claimant to provide further information before the second preliminary hearing.

3. There were eight matters about which legal complaints of disability discrimination are pursued, some of more than one type of discrimination.

The claimant withdrew the allegation in respect of WhatsApp messages being sent at night which had been part of the third complaint, either as a breach of the duty to make adjustments or a harassment claim and so it is not included below.

The first complaint

3 .1 *Failure to ensure the claimant was able to take regular breaks, a practice relating only to the claimant, not other staff members* – breach of the duty to make adjustments.

The issues

Breach of the duty to make adjustments

3.1.1 Was there a practice of requiring the claimant to work long hours with few breaks?

3.1.2 If so, did the PCP put the claimant at a disadvantage in comparison to people who were not disabled - the claimant says the PCP put him at the disadvantage that he was less able to manage his condition, including by eating and injecting insulin?

3.1.3 Did the respondent know, or could it have been reasonably have been expected to know the PCP put the claimant at the particular disadvantage?

3.1.2 If so, did the respondent fail to take reasonable steps to avoid the disadvantage by ensuring he took regular breaks?

The second complaint

3.2 *Questioning why the claimant took so long on a break* – discrimination arising from disability and harassment.

The Issues

Discrimination arising from disability

3.2.1 Did the respondent, by Kane Robinson, on a date unknown, question why the claimant took so long on a break?

3.2.2 If so, was that because of something which arose from the claimant's disability, namely

3.2.2.1 The use of sunbeds during breaks;

3.2.2.2 The claimant's request to reduce his hours and/or work from home;

3.2.2.3 The claimant having time off sick shortly before his dismissal/and or the claimant's request to reduce his hours and work from home?

3.2.3 Was the treatment a proportionate means of achieving a legitimate aim.

3.2.3.1 Managing staff time;

3.2.3.2 Ensuring that sufficient/appropriate work was being carried out by staff.

3.2.3.4 Ensuring that performance concerns were addressed.

3.2.3.5 Ensuring that maintained staff who wanted to work at the company.

Harassment

3.2.4 *Did the respondent, by Kane Robinson, on a date unknown, question why the claimant took so long on a break*?

3.2.5 If so, was that unwanted conduct?

3.2.6 Did it relate to disability?
3.2.7 Did the conduct have the purpose of violating the claimant's dignity of creating an intimidation, hostile, degrading, humiliating or offensive environment?
3.2.8 If not, did it have that effect?

The third complaint

3.3 *Requiring the claimant to work excessive hours, over and above his contractual hours*– breach of the duty to make adjustments.

The issues
Breach of the duty to make adjustments
3.3.1 Was the above complaint a PCP?
3.3.2 If so, did it place the claimant at a disadvantage in comparison to people who were not disabled - the claimant says the PCP put him at the disadvantage that he was less able to manage his condition, including by eating and injecting insulin?
3.3.3 Did the respondent know, or could it reasonably have been expected to know the PCP put the claimant at the particular disadvantage?
3.3.4 If so, did the respondent fail to take reasonable steps to avoid the disadvantage by ensuring he did not work excessive hours or contact him by WhatsApp and at night?

The fourth complaint

3.4 *Expecting the claimant to work overtime* – breach of the duty to make adjustments.

The issues
Breach of the duty to make adjustments
3.4.1 Did the respondent have the above PCP?
3.4.2 If so, did it place the claimant at a disadvantage in comparison to people who were not disabled? The claimant says the PCP put him at the disadvantage because he was more likely to become unwell.
3.4.3 Did the respondent know, or could it reasonably have been expected to know the PCP put the claimant at the particular disadvantage?
3.4.4 If so, did the respondent fail to take reasonable steps to avoid the disadvantage by ensuring he did not work overtime?

The fifth complaint

3.5 *Requiring the claimant to work in an environment which was cold, had artificial lighting, was poorly ventilated and did not have fully functioning air conditioning* – breach of the duty to make adjustments.

The issues
Breach of the duty to make adjustments
3.5.1 Was there a physical feature that the only place available for the claimant to inject insulin were the toilets and did this put the claimant at a disadvantage in comparison with non-disabled people? (The claimant says it was unhygienic).

3.5.2 Did the respondent know, or could it reasonably have been expected to know the physical feature put the claimant at the particular disadvantage?
3.5.3 Did the respondent fail to make reasonable adjustments to remove the disadvantage by provided a suitable room for injecting insulin and fixing the air conditioning/heating?

The sixth complaint

3.6 *Threatening the claimant that he would lose his job if he could reduce his working hours and/or work from home* – discrimination arising from disability.

The Issues
Discrimination arising from disability
3.6.1 Did the respondent, by Kane Robinson, act as alleged in the complaint?
3.6.2 If so, was that because of something which arose from the claimant's disability, namely:
3.6.2.1 The use of sunbeds during breaks;
3.6.2.2 The claimant's request to reduce his hours and/or work from home;
3.6.2.3 The claimant having time off sick shortly before his dismissal/and or the claimant's request to reduce his hours and work from home?
3.6.3 Was the treatment a proportionate means of achieving a legitimate aim.
3.6.3.1 Managing staff time;
3.6.3.2 Ensuring that sufficient/appropriate work was being carried out by staff.
3.6.3.4 Ensuring that performance concerns were addressed.
3.6.3.5 Ensuring that maintained staff who wanted to work at the company.

The seventh complaint

3.7 *Failing to provide a suitable private room in which to inject insulin* – breach of the duty to make adjustments.

The Issues
Breach of the duty to make adjustments
3.7.1 Was there a physical feature that there was no private room for the claimant to inject insulin?
3.7.2 Did the respondent know, or could it reasonably have been expected to know the physical feature put the claimant at the particular disadvantage?
3.7.3 Did the respondent fail to make reasonable adjustments to remove the disadvantage by provided a suitable room for injecting insulin?

The eighth complaint

3.8 *Dismissal* – breach of the duty to make adjustments and discrimination arising from disability.

The Issues
Breach of the duty to make adjustments

3.8.1 Did the respondent have a PCP in the form of its attendance policy?
3.8.2 If so, did it place the claimant at a disadvantage in comparison to people who were not disabled?
3.8.3 Did the respondent know, or could it reasonably have been expected to know the PCP put the claimant at the particular disadvantage?
3.8.4 If so, did the respondent fail to take reasonable steps to avoid the disadvantage by not dismissing the claimant?

Discrimination arising from disability
3.8.5 The claimant having been dismissed, was that because of something which arose from the claimant's disability, namely:
3.8.5.1 The use of sunbeds during breaks;
3.8.5.2 The claimant's request to reduce his hours and/or work from home;
3.8.5.3 The claimant having time off sick shortly before his dismissal/and or the claimant's request to reduce his hours and work from home?
3.8.3 Was the treatment a proportionate means of achieving a legitimate aim.
3.8.5.1 Managing staff time;
3.8.5.2 Ensuring that sufficient/appropriate work was being carried out by staff.
3.8.5.4 Ensuring that performance concerns were addressed.
3.8.5.5 Ensuring that maintained staff who wanted to work at the company.

4. In addition to the disability discrimination complaints there is a claim that the respondent refused to provide the claimant with uninterrupted rest breaks of 20 minutes away from the workstation. The issue is whether there was such a refusal. That does not have to be an active response to a positive request, but a denial of the right through the arrangement of the working day.

The Evidence

5. The claimant gave evidence. The respondent called Mr Kane Robinson, Managing Director and part owner of the respondent and Ms Poppy Robinson, employee and part owner.

6. The parties submitted 3 files of documents of 427 pages, 46 pages and 36 pages.

7. The respondent did not call Natalie Woodbridge, the accountant of the respondent who was on holiday or Ms Julie Dickinson who Mr Robinson said had difficulty arranging time for when her evidence could be heard. Their witness statements carried no weight.

8. The claimant had not submitted a witness statement in accordance with the directions. He said that he was unable to understand the case management order. The Tribunal agreed to accept a number of emails he had sent to the Tribunal as his witness statement. We shall refer to the emails as the claimant's statement in these reasons. The Tribunal recognised that the complexity of cases of this type are not easy to negotiate for a party who is unfamiliar with our procedures, the complexities of disability discrimination

law and the additional matters specific to the claimant to which we refer below in consideration of adjustments generally.

Application to convert hearing

9. By an email dated 10 January 2024 the claimant requested that there be an attended hearing. That was because he believed "*face to face interactions provided a greater challenge for dishonesty to prevail*". The claimant made a phone call on 1 February 2024 to ask about the application and whether it had been dealt with. A number of emails were exchanged the following day, the working day before the hearing, and the claimant made further phone calls. The claimant stated he had repeatedly requested attended hearings in numerous emails over 9 months and at the two case management hearings. On checking the file, the only requests for such a hearing were as mentioned above. There is a record of the call of 1 February which states the claimant had said he would not be able to carry the bundles or his laptop to the Tribunal and all the information was in his head.

10. The Employment Judge with conduct of this hearing and the Regional Employment Judge both ordered that the application be considered on the first day of the hearing which would be by CVP. There was no hearing room available on that day as all were occupied by other cases.

11. The claimant renewed the application but on the ground that he thought he would be better able to manage the case if he attended the Tribunal. He had stated in one of his emails that he was not concerned about the respondent's choice to attend by webcam, even if they chose to do it from the middle of the sea and confirmed that he was asking to attend the Tribunal himself. We took that to be that the application included the possibility of a hybrid hearing.

12. The Tribunal considered the previous Case Management Orders of Employment Judge Tegerdine and Brain. Both had considered this issue and ordered a remote hearing. The notes of the Judge of the first hearing make no reference to any request for an attended hearing. In fact, Judge Tegerdine explained in her Order that the choice of a remote hearing would be more helpful to the claimant to administer insulin in the safety of his home as and when appropriate.

13. The Tribunal did not consider there had been a material change in circumstances to justify varying the order. There were disadvantages to an attended hearing. Some of the facilities in the Tribunal premises could have given rise to problems, given the content of some of the complaints about the reasonable adjustments claims, such as lack of natural light and unsatisfactory temperature levels in the new building to which we have recently moved. The Tribunal did not consider it was disadvantageous to evaluate the evidence by a remote hearing, having conducted many such cases over the last three years. Nor did it consider an attended hearing would be a benefit to the claimant having regard to all the circumstances we have outlined. Although he said he could not negotiate the bundles and some were not paginated, he was able to find each document to which reference was made in the hearing.

Adjustments for the hearing

14. The Tribunal asked the parties if any adjustments were required for the hearing. The claimant stated that he would need breaks to take insulin. The Tribunal agreed to this and stated that at any stage of the hearing the claimant should raise a request for a break and it would be granted. He was asked if he required any other type of adjustment and he said he did not. In his statement the claimant drew attention to a significant matter: "*Firstly, it is essential to understand the impact of inadequate sugar or glucose intake on the human body, particularly on brain function. The brain relies heavily on sugar (glucose) for energy, and when it is deprived of this vital fuel, cognitive functions, including concentration, are significantly impaired. As such, managing blood sugar levels becomes paramount, especially for individuals like me who live with diabetes. The absence of compassionate consideration for this condition can result in a phenomenon commonly known as "brain fog," characterized by decreased cognitive performance*". The Tribunal bore this in mind.

15. The Tribunal repeated to the parties each day that breaks would be allowed whenever requested. There was a break during each morning and afternoon session. On occasion the Tribunal initiated an enquiry as to whether the claimant would like a break, but he preferred to continue. He had a device which monitored his blood sugar levels and could let the Tribunal know if they were reaching a level which required insulin.

16. The claimant said he had a number of medical conditions in addition to Type 1 Diabetes. He thought if he were assessed he would be diagnosed as having a neuro-diversity disorder but he did not specify which type. In the hearing he explained that he had a difficulty understanding information in particular written form in such things as tables and the Tribunal's previous orders. He stated he had dyslexia, although it was not a condition which had ever been diagnosed or mentioned before in these proceedings.

17. The Tribunal stated that it would make any adjustments requested in so far as they could be accommodated. The claimant made no requests other than as set out above. The Tribunal emphasised to all parties that, at all stages of the proceedings, if there was any need for assistance in respect of understanding the claims and issues or a lack of clarity in respect of any questions or the procedure adopted, they should not hesitate to ask.

18. An additional adjustment the Tribunal made was the admission of a number of emails the claimant sent as his witness statement, as addressed above. The claimant did not ask more than a couple of questions of Mr Robinson. The Tribunal ruled that a question as to Mr Robinson's own contract was not relevant to the issues we had to decide and this appeared to put the claimant off his stride. The Tribunal tried to encourage the claimant to ask further questions and repeated what had been explained previously about the putting of a party's case. The claimant did not wish to ask more questions. The Judge therefore took each allegation in turn and put it to Mr Robinson with a succinct summary of the claimant's account for him to respond.

19. The claimant tended to give extensive answers to questions, often talked over others, including the Judge and Mr Robinson when he questioned him and used some profane language. He was assertive, to the point of being confrontational at times and argumentative. The claimant attributed this to his condition. We raise this under the discussion about adjustments, because the claimant's manner in this regard had no influence on our consideration of the evidence and our findings.

The Law

<u>Discrimination</u>
<u>Unlawful conduct</u>

20. By section 39(2) of the Equality Act 2010 (EqA):

An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

21. In **Ministry of Defence v Jeremiah [1980] QB 87**, the Court of Appeal held that a detriment would exist if a reasonable worker would or might take the view that the treatment was in all the circumstances to his disadvantage. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** the House of Lords held that an unjustified sense of grievance would not amount to a detriment.

22. By section 39(5) of the Equality Act 2010 (EqA) a duty to make adjustments applies to an employer and by section 21 of the EQA failure to comply with the duty in section 20 (below) is a failure to comply with a duty to make reasonable adjustments which is discrimination against a disabled person.

23. By section 40 of the EQA an employer must not harass an employee.

24. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

<u>Definitions of discrimination</u>
<u>Discrimination arising from disability</u>

25. Section 15 of the Equality Act 2010 (EqA) provides:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

The duty to make adjustments

26. By section 39 (5) of the Equality Act 2010 (EqA) a duty to make adjustments applies to an employer and by section 21 of the EQA failure to comply with the duty in section 20 is a failure to comply with a duty to make reasonable adjustments which is discrimination against a disabled person.

27. Section 20 of the EqA provides:
(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.
(4) The second requirement is a requirement, where a physical feature 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.

28. By paragraph 2 of Schedule 8 of the EqA, *A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement*.

Harassment

29. By section 26 of the EqA,
(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

Rest breaks – Working Time Regulations

30. By regulation 12 of the Working Time Regulations 1998:
    (1) Where a worker's daily working time is more than six hours, he is entitled to a rest break.
    (2) The details of the rest break to which [a worker] is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.
    (3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.
    (4) Where a young worker's daily working time is more than four and a half hours, he is entitled to a rest break of at least 30 minutes, which shall be consecutive if possible, and he is entitled to spend it away from his workstation if he has one.

31. By regulation 30 a worker may present a complaint to an Employment Tribunal when an employer has refused to permit him to exercise that right.

32. In ***Grange v Abellio London Limited [2017] ICR 287*** Eady J explained that it was not only if an employee requested and was refused the right, that gave rise to a claim. Adopting a purposive approach, she said "*the employer has an obligation ("duty") to afford the worker the entitlement to take a rest break (para 32, Truslove). That entitlement will be "refused" by the employer if it puts into place working arrangements that fail to allow the taking of 20-minute rest breaks (MacCartney v Oversley House Management). If, however, the employer has taken active steps to ensure working arrangements that enable the worker to take the requisite rest break, it will have met the obligation upon it: workers cannot be forced to take the rest breaks but they are to be positively enabled to do so*".

Burden of proof

33. Section 136(1) of the EqA concerns the burden of proof: *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.* Section 136(2) provides that does not apply if A shows that A did not contravene that provision.

34. In **Laing v Manchester City Council and another [2006] ICR 1519**, the Employment Appeal Tribunal stated that if a tribunal was satisfied on the evidence that the respondent had provided a reason which, on a balance of probabilities, had eliminated any discriminatory cause, it was not necessary for the tribunal to trouble about whether the burden of proof had shifted in the first instance. In **Hewage v Grampian Health Board [2012] ICR 1054,** as later endorsed in **Efobi v Royal Mail Group Limited [2021] UKSC 33,** the Supreme Court stated that it was important not to make too much of the role of the burden of proof provisions: "*They will require careful attention where*

there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other", per Lord Hope in **Hewage**.

Findings and Analysis

35. The respondent is a company which provides security repairs such as spare keys to the automotive industry. It has three employees, Mr and Miss Robinson and Ms Woodbridge. Between November 2021 and May 2023, the fourth employee was the claimant. He was initially engaged as a Trainee Operations Manager on 21 November 2021. After a four-month review, he was appointed to the post of Operations Manager on 28 March 2022. There was a fifth employee for a brief period, Ms Evans, between May and August 2022.

36. We address each complaint separately below with findings of fact which are material to the claims and an analysis of the relevant legal issues which flow from those findings. That is not to say that because we have expressed our reasons in this way that the Tribunal considered each claim and the evidence about it in isolation. It is important and necessary to consider all of the evidence, not only because many of the allegations overlap, but because the broader picture is informative and provides a better context for making our findings.

Disability and knowledge

37. It is accepted that the claimant has a disability in the form of Type 1 Diabetes.

38. The question whether the respondent knew this was a disability had been conceded by the second preliminary hearing. At this hearing, however, Mr Robinson stated that had been mistaken and he had made the concession on the advice of his lawyers. He stated that although he knew that the claimant had Type I Diabetes, which had been mentioned at his job interview, he was not aware that it constituted a disability. He knew the claimant administered insulin. He stated that it was only after the claimant issued proceedings that he investigated the provisions of the Equality Act and discovered that Type I Diabetes was a disability.

39. The issue of whether an employer knew, or ought reasonably to have known, that a person is disabled applies to a number of the legal complaints. The claimant correctly drew attention to the fact that the respondent, as an employer, has duties with respect to disabled people. The duty in respect of making adjustments falls squarely on the employer. That is clear from the wording of section 20 of the EqA and the Commission for Equality and Human Rights' Code of Practice on Employment, particularly paragraph 6.2 which emphasises that this is a duty on the employer to take positive steps. This involves making suitable enquiries about whether the employee's medical condition is a disability.

40. Mr Robinson was not familiar with the law and did not know that this condition was a disability at the time of the claimant's employment. However, he ought reasonably to have known that having been put on notice that the claimant had this significant medical condition at the outset. Although this was a very small employer with only 4 employees and it had no human resources' function, it is incumbent upon all employers to obtain sufficient information by way of research or the taking of advice to discharge its legal duties.

41. Good practice will involve a discussion with the employee about the condition and what is required in the workplace to assist, if necessary, by way of an adjustment. Although there was a discussion about diabetes, there was no assessment made of this type.

42. We therefore find that knowledge, which includes constructive knowledge, of the disability is established.

<u>The first complaint</u>

Failure to ensure the claimant was able to take regular breaks, a practice relating only to the claimant, not other staff members.

43. There is a fundamental dispute between the parties about how work was undertaken. Mr and Miss Robinson state that this was a small family firm at which the staff could, and did, take time out at any stage. There was a contractual right to a one-hour lunch break which was paid. It was entirely a matter for the member of staff to choose how they occupied themselves during that time in or out of the premises. Miss Robinson said that she and the claimant would often spend time at their desks during the lunch break where they would eat their food and use the time as they chose. She stated that the claimant would often search the Internet or use his mobile phone during this time.

44. At other times Miss Robinson said that the claimant would take breaks by visiting adjoining premises where the claimant would use a sunbed or visiting the shops. There was no recording of break times, but she said there was freedom to come and go which the claimant took advantage of. In respect of when he worked from home, there are copies of WhatsApp messages in which the claimant has informed Mr Robinson that he was to take a break, which were acknowledged.

45. The claimant says that he was not allowed to take any breaks and worked long hours, including throughout lunch. In the claim form he stated that he had not taken one break, a day's holiday or sick day in the first year, working an average of 47 to 50 hours per week including overtime. In his statement he said, *"Perhaps one of the most critical aspects of this case revolves around the denial of essential breaks that were vital for managing my blood sugar levels and adhering to meal planning requirements. It is imperative to note that these requested breaks were not only reasonable but were also executed without any disruption to the workflow. The refusal to accommodate these medically necessary breaks underscores a failure to acknowledge and respect the needs of an employee with a medical condition. The onus lies*

with Car Key Network to ensure that its workforce is well-informed about diabetes, encompassing the provision of adequate support and the appropriate response to emergencies involving employees with diabetes. However, this pivotal responsibility was neglected, resulting in a situation where my colleagues were ill-equipped with the necessary knowledge to provide effective assistance".

46. To repeat what we stated earlier, the claimant is correct to state that it was the respondent which had a duty to make adjustments. If that were not the case disabled employees may not, in reality, be able to access and remain in the workplace. The relationship of employer and employee is not an equal one, the former exerting control over the latter. A disabled employee may not wish to appear to be making demands and may prefer to fit in whilst suffering in silence and so it is important that the onus is on the employer to create the proper and suitable environment for the employee and not wait to be asked. The law therefore places the duty on the employer to put in place the adjustments and to put itself in a position to be able to do so. It is necessary for the employee to explain his needs, because each medical condition will vary and employers are not medical experts. Moreover a person's medical circumstances are confidential and the employee will have to share the relevant details with the employer for the appropriate measures to be taken.

47. We accept the evidence of Mr and Miss Robinson about the informality of the arrangements in respect to work and breaks. Insofar as there is any written record to assist on this, it favours that impression. Dozens of WhatsApp messages exchanged between the claimant and Mr Robinson in 2023 reflect that relaxed arrangement and evidence the notification of breaks being taken by the claimant. They run against the grain of the claimant's case that Mr Robinson was oppressive, overworked him and openly took advantage of his disability.

48. The claimant does not say he had any difficulty taking time out to take insulin injections. His criticism about that concerns the suitability of the private space to do it. If there had been any restriction on his freedom to inject insulin, this would have been a significant breach of the duty with potential serious ramifications for the claimant's health.

49. In his statement he explained symptoms of his Diabetes which arose at work

" 1.) Frequent urination,
2.) Persistent thirst
3.) Unexplained fatigue, without the respite of breaks or holidays
4.) Unintentional weight loss I notably lost 5 stone during my employment at Augscape Automotive, trading as Car Key Network
5.) Slower wound healing, making me more susceptible to infections.
6.) Blurred vision, which was further aggravated by prolonged computer screen usage without adequate breaks".

50. Whilst these are well known symptoms of diabetes, there is nothing by way of a contemporaneous note or record to confirm that the claimant had these

problems at work at the time. The medical evidence in this case was very limited, comprising a two-page extract from his GP records which confirmed diabetes and a letter from the hospital of October 2023 recording some changes to the retina as a result of diabetes. In his evidence the claimant agreed in cross examination that he was in the top 1% of health because of his careful diet and exercise regime which he maintained throughout his time at the respondent.

51. We are left to resolve the dispute between the evidence of the claimant on the one hand and Mr and Miss Robinson on the other, with little in the form of documents or records to assist. As we stated, insofar as they do, they support the respondent. Taken as a whole, the evidence of Mr and Miss Robinson was consistent and clear whereas the claimant's was often contradictory. An example is his concession in cross examination that work had been great and friendly for the first few months but it was only a few months down the line that it turned negative. This does not square either with the claim form which talks of the very poor situation for the first year including no breaks, or his statement which portrays a working environment without any breaks or holidays.

52. It would be a little odd for the respondent to allow the claimant to take his insulin injection but adopt a completely different approach to a break for another medical reason. Mr Robinson has pointed to the history of this litigation and the absence of an adjustments claim at the beginning. We consider this further below, but we prefer the evidence of the respondent that, although this was not designed to assist the claimant's diabetes, the informal arrangements in the office were such that employees could and did take frequent and significant breaks throughout the day when they chose.

53. This is a complaint of a breach of the duty to make adjustments, based upon a provision criterion or practice of requiring the claimant to work long hours with few breaks. Our findings are that there was no such provision, criterion or practice.

<u>The second complaint</u>

Questioning why the claimant took so long on a break.

54. Although this allegation is contained in the table of complaints, it is not specifically addressed in any of the claimant's emails which constitute his statement. The incident may be part of the more general reference in the emails that Mr Robinson openly "*made derogatory comments related to diabetes and, alarmingly, utilised my medical condition as a pretext for issuing unfavourable performance assessments and instigating disciplinary actions*".

55. When asked to provide details of when Mr Robinson asked the claimant why he took so long on a break after the first case management hearing, the claimant stated it was at the end of 2022, when another member of staff, Liberty Evans, worked at the company. In fact, that member of staff left in August 2022. In his evidence the claimant therefore revised the date to

approximately July 2022. He could not be precise. He said that Mr Robinson would often ask him about the length of his breaks.

56. This allegation is denied by Mr Robinson. This claim is about a verbal remark which was said to be made many months before the claim was issued and in respect of which there is no documentary record to assist. There is an inconsistency about when this happened and whether it was once or many times. In the light of the above uncertainties, we are not satisfied this disputed comment was ever made.

57. This is a complaint of discrimination arising from disability and harassment. Because we have found that no such comment was made there was no unfavourable treatment or unwanted conduct, the first essential element of each claim. Neither succeeds.

The third complaint

Requiring the claimant to work excessive hours, over and above his contractual hours.

58. The claimant says he worked 47 to 50 hours per week. That is denied. There are no working time sheets to assist, save for some overtime sheets which we shall consider below. The claimant says he took no holidays.

59. The claimant's written contracts required him to work Monday, Wednesday and Friday, 8am to 4pm and Tuesdays and Thursdays 10am to 6pm, each with an hour's paid lunch break. That is a requirement for a 7-hour working day or 35 hour working week, excluding the hour for lunch. There is a provision about flexibility that working hours may change to meet business need. In respect of holidays the claimant was entitled to 28 days holiday plus an additional holiday for his birthday. There is a requirement to book more than 3 days, with more than 4 weeks' notice. All holidays were to be submitted to Miss Robinson and a response would be provided within 48 hours. The implication of this is that more than 48 hours' notice was required for periods of less than 3 days of leave.

60. The respondent contends that there was an agreement that the holiday entitlement for the year 2022 would be paid in lieu of leave. Mr Robinson said the claimant requested to work rather than take his leave because he wanted the earnings to purchase a house, which completed in December 2022. The wage slips confirm a lump sum payment for holiday was made for that year. The claimant says was he was denied requests for leave.

61. An email dated 20 March 2022 from Mr Robinson to Miss Robinson states that the claimant wished to take holiday as pay and that they would review that by June. That supports the respondent's case. This was at a time there was no dispute or foresight of likely litigation. Although the claimant says this was a decision imposed upon him, it is unlikely Mr Robinson would feel the need to make a paper trail to protect himself in this way from some future unforeseen complaint. This is a reply to an email from Miss Robinson who was notifying Mr Robinson of a change in the holiday entitlement such that it

would not include Bank holidays which were to be additional. She emphasised in the email that the claimant needed to distribute his holidays as he had not taken any. This indicates it was the claimant who was choosing not to take leave but the respondent was anxious he should take it.

62. In an email dated 10 November 2022 to all employees Miss Robinson stated that due to a government policy change all holiday had to be taken in the holiday year commencing 2023, but this would not affect 2022. She recorded that the claimant had 25 days leave remaining.

63. On 4 May 2022 the claimant sent an email requesting 2 to 5 August 2022 as leave which was approved, but on 17 May 2022 he emailed Miss Robinson to cancel them. He requested 27 October 2022 as leave which was approved. On 18 December 2022 the claimant requested 2 days leave for 20 and 21 December 2022. It was treated as unpaid leave because of the short notice. The claimant was paid for bank holidays which he took off.

64. In 2023 the claimant requested a day's leave for 9 May 2023 which was granted. On 20 February 2023 Miss Robinson sent an email to Mr Robinson to state she would remind all employees to take leave, include a specific reminder to the claimant which was sent on 6 March 2023. On 13 April 2023 the claimant booked 2 days leave for 27 and 28 April 2023.

65. Having regard to these emails, we do not accept the claimant's evidence that Mr Robinson imposed upon him the duty to work his holidays. It is clear that there was concern that he was not taking his holidays and the respondent wished him to take them and authorised each leave request.

66. In respect of overtime the claimant was required to submit hours worked on a form. That is included in the bundle. Overtime claims varied between 30 minutes and 2.5 hours in those records but not for every working day. On no week did the hours reach more than 40, and certainly all were below 47 to 50 per week. In July 2022 only 3 hours of overtime are recorded. There is no record for overtime after January 2023.

67. In cross examination the claimant gave a variety of explanations for why he said he had worked many hours but not claimed for them. He repeatedly said this meant absolutely nothing to him, he did not need it and money meant nothing to him. He said that there would be no incentive to work extra because he would be taxed at a higher rate, but when challenged about this by the respondent that this was not correct, he said that money did not bring him happiness, he could not care less. He said he would rather spend the time at the gym or socialise with friends and family, although later in the hearing he said he lived an isolated life and saw nobody, that no family member had crossed his threshold.

68. We did not find this evidence at all convincing. There was no reason the claimant would claim some overtime, if it meant nothing to him, but not the rest. It undermined his evidence that he worked an average of 47 to 50 hours.

69. We therefore reject the claim that the claimant was required to work excessive hours over his contract. We should add that this claim had included an allegation that he had been contacted by Mr Robinson on WhatsApp out of hours many times, but as a discrimination complaint this was not pursued. On analysis of those messages, it was apparent that they were friendly and the claimant responded without any hostility or inclination to the effect they were not welcome. Mr Robinson offered to provide support when the claimant was ill, such as by visiting his home to deliver testing kits. The claimant took up an offer from Mr Robinson of a car valeting ticket. Mr Robinson demonstrated sympathy when the claimant was unwell in April and May 2023. The messages contained social discourse demonstrating a friendly relationship which extended beyond that of employer and employee. In mischaracterising these communications as unwanted and oppressive, the claimant's credibility was compromised.

<u>The fourth complaint</u>

Expecting the claimant to work overtime

70. The claim is not established for the reasons set out above.

<u>The fifth complaint</u>

Requiring the claimant to work in an environment which was cold, had artificial lighting, was poorly ventilated and did not have fully functioning air conditioning.

71. This is another issue on which there is a flat contradiction between the evidence of the claimant and the respondent.

72. In his email statement the claimant states, *"Directing our attention to the physical structure recognized as the "office," its architectural layout was characterised by a chalet-style design, notable for its lack of insulation. This configuration comprised a singular, expansive room, with its front segment defined by a pair of windows and a door. Supplementary elements of this structure encompassed a compact kitchen/shower cubicle, a toilet, and a solitary storage cupboard. Notably, the absence of natural daylight was conspicuous, with artificial lighting serving as the primary source of illumination. Moreover, my workstation was positioned with my back to the window, rendering me susceptible to the unpredictable fluctuations of an air conditioning unit. Due to the inadequate insulation of the room, I often found it necessary to layer up, wearing two t-shirts, a jumper, and a hoodie*". One peculiarity was that in the claim form the claimant raised his concern about these premises for the first year, but the further information in the table stated this was an ongoing issue up until the end of his employment. The claimant was not sure why he had expressed himself in this way in the claim form.

73. The respondent says that the business park on which it is situated is a suitable and secure place to conduct administrative business, that the photographs supplied as evidence show that the office is a suitable place for administrative work and that the staff had all the necessary facilities including, lighting, heating, cooling, relaxing, bathroom and food preparation.

74. The respondent provided photographs and a plan of the interior of the building. Whilst the Tribunal cannot evaluate the temperature of the premises from a photograph, the appearance is of a spacious and well-lit unit with considerable natural light. The main working area is 8m x 6.5m. There is a workstation for 6 computer users and a separate break away table with six chairs. The front reception is 8m x 2m and has floor to ceiling glass which throws light into the main working areas through a partition, more than half of which is glass. It has the appearance a pleasant, modern working environment.

75. When questioned about the air conditioning the claimant said it did not work, he tried to turn it on 5 times a day but with no success. Mr Robinson said that it might be cold on arrival in the morning but any member of staff would then activate the heating/air conditioning. He said there was a discussion on one occasion when the claimant suggested it be changed, but that was for aesthetic reasons and he was not prepared to pay for that. He said the claimant had never raised an issue about its functioning or adequacy. Mr Robinson said there was space for the claimant to move away from the air conditioning unit above his head if that was making him cold as he was saying.

76. We do not accept the claimant's account about the heating and air conditioning. His account about the premises is undermined in the other respects we have addressed, and we prefer the evidence of Mr and Miss Robinson.

77. There was no physical feature of the premises in this respect which placed the claimant as a disabled person at a disadvantage.

<u>The sixth complaint</u>

Threatening the claimant that he would lose his job when he requested to reduce his working hours and/or work from home.

78. In respect of reduced hours, Mr Robinson said that he had a discussion with the claimant about a reduction in his performance on 17 January 2023. He said the claimant's response was that the job could be done in half a day. Mr Robinson said that if the claimant addressed his concerns about performance he might consider the request to work part time later in the year, whereupon he might take up the rest of the claimant's work himself or appoint someone else to do it. He said the job could not be done part time, because field engineers would require to make contact throughout the day. Mr Robinson denied he had ever threatened to reduce the claimant's working hours.

79. In the first year the claimant generally worked in the office but there is evidence he did work from home occasionally, such as in an email dated 19 May 2022. At some time, although no-one could say when, the claimant spoke to Miss Robinson and said he would like to work from home and she said he could. In January 2023 it was agreed the claimant could work from home when he requested this. This usually included Wednesdays and on

average he worked from home 2 days per week, but this could sometimes be a half day at home and half in the office.

80. In his email statements, there was no evidence about this allegation. In cross examination the claimant denied that he began working from home when he requested it and said that on the days he did work from home Mr Robinson orchestrated meetings which required him to go in. When Mr Robinson cited the numerous communications over WhatsApp in 2023 which demonstrated he had frequently been at home the claimant said he was not disputing 2023, but it should have been offered earlier. This tailoring of his case, when confronted with records, undermined it.

81. We are not satisfied Mr Robinson threatened the claimant that he would lose his job. The WhatsApp messages demonstrated no pressure at all from Mr Robinson about the working home arrangement but suggested the contrary that he was content with it. We accepted Mr Robinson's evidence about the discussion concerning part time work. The unfavourable treatment and detriment for this complaint, under sections 15 and 39(2)(d) of the EqA, is not established.

The seventh complaint

Failing to provide a suitable private room in which to inject insulin.

82. This allegation is not contained in the claim form. It was allowed as an amendment by Employment Judge Brain.

83. Miss Robinson said from the first day of his employment the claimant went to the toilet to administer his insulin. It was kept in a small bag. The claimant demonstrated to the Tribunal how he would remove the cover of the vial in which the insulin was stored and inject it in his arm after which the needle from the vial would be removed and disposed of.

84. Mr and Miss Robinson said that the claimant had never raised any issue about the facilities. There was no suggestion from the claimant that where he had chosen to undertake this task was unsuitable. They say he had never made any request for adjustments in respect of his diabetes at all. Mr Robinson highlighted that there is no reference to reasonable adjustments at all in the claim form, which was presented 2 days after the end of the claimant's employment. He drew attention to the claimant's further particulars for the first preliminary hearing, dated 10 August 2023. An exact copy of guidance from a publication of the Juvenile Diabetes Research Foundation (JDRF), a Leeds based charity, is reproduced in the further particulars. The respondent submits that the claimant has constructed the reasonable adjustments case from this document after the event to fit his disability when in reality there were no concerns at the time.

85. We accept that submission and that the claimant raised no issues about breaks, the facilities or the suitability of a private place to administer insulin whilst at work. In his email statement in respect of this matter, the claimant said, "*Regrettably, the layout resulted in the absence of a suitable private*

area for administering injections (with the exception of the dirty toilet). This carries heightened significance as I administered injections approximately 5 to 6 times daily. Unfortunately, the workplace neglected to provide a designated 'sharps1 container, a vital safety measure that was glaringly absent".

86. This criticism overlooks the availability of other rooms in the premises where the claimant could have asked for privacy for a short period to administer insulin. They are a kitchenette, which was next to the toilet and 2m x 2.5 m. Although there was a sink unit at one end, the plan demonstrates adequate space away from the sink and away from any door which might accidentally be opened causing someone to bump into the claimant. The claimant said there was no chair or table in the room and the sink would be dirty. The other facilities were a shower room which was unused, the dimensions of which were 2m x 1.5m. In cross examination the claimant said there was no window, it would be unventilated and there was no chair. The claimant conceded a window was not required. As to the storeroom, which was 2m x 2.5 m the claimant said the light was not working and it was not usable as it was a dark environment.

87. We do not accept that the layout resulted in there being no suitable environment in which to administer insulin. It is clear an employer should provide a private space for this purpose. The shower room which was unused could have accommodated one or more chairs, and was not unhygienic. The ventilation was not unsuitable for the purpose. In his cross examination the claimant said Mr Robinson should have asked others to leave the main work room for him to administer the insulin. This would not have been a practicable arrangement six times a day when the claimant could have used use the private shower room where no-one would have disturbed him. Adaptions could also have been made to the storeroom or kitchenette by placing a chair there had the matter been of any concern and raised with Mr Robinson.

88. The reality is that the claimant chose the place to self-administer insulin. After the loss of his employment he has fixed on that venue and its unsuitability by reference to a passage in the JDRF publication. We are not satisfied this was of any concern to the claimant prior to this point in time.

89. The Tribunal is not qualified to evaluate the health risks to a user of hypodermic needles in a toilet facility, although self-evidently one would expect medical procedures to eliminate risks of bacterial infection. The demonstration of the injection, however, did not appear to involve any handling of the needle itself and none of the guidance we were shown suggested the need for facilities to wash in the procedure. Whilst we can understand why a toilet may be regarded as unsatisfactory as with any unhygienic place, we would have to speculate about risks in the absence of some further evidence about accidental bacterial transmission during this procedure. We do not know how people with diabetes regularly administer insulin in a variety of places either at home or when out. The claimant chose the washroom, where there is a toilet and wash basin, even though other suitable rooms were available. He, more than the respondent, would have

knowledge of this clinical procedure and he repeatedly chose the WC, with knowledge of its state of cleanliness and general appropriateness. Had he raised any concern with Mr Robinson we have no doubt he would have made alternative arrangements. It is remarkable there is no reference to the specific issue of the unsuitability of the toilet in the claim form if this was a significant matter as the clamant now says.

90. We do not find there was a physical feature of the premises which placed the claimant as a disabled person at a substantial disadvantage by reason of there being no adequate facility where he could inject insulin. There were several suitable places for that.

<u>The eighth complaint</u>

Dismissal

91. There is a dispute about how the employment came to an end. The claimant returned from sick leave on 2 May 2023 and worked from home for the rest of the week. On 9 May 2023 he said he went in to the office and was shown the door. This led to the presentation of a complaint for unfair dismissal and disability discrimination.

92. The respondent says that the employment ended by mutual agreement. Mr Robinson said when he arrived at work the claimant was already there. He informed him he wished to have a formal discussion about the performance log. In the meeting he said the claimant was evasive and raised complaints about a lack of a canteen, nowhere to exercise and no shops. He said that performance had been raised informally in January 2023 and he had provided the claimant with a document, the performance log, with a list of issues to discuss. He says the claimant refused to discuss performance and so he gave him a choice, whether to discuss his performance or resign. He said the claimant accepted the latter, they shook hands and he agreed to give two weeks' notice.

93. The dismissal letter is contradictory. It speaks of the respondent terminating the claimant's employment but also of a mutual agreement to terminate having regard to issues of performance, errors and attitude.

94. We find that this was a dismissal. We accept that the claimant did not wish to discuss performance and was evasive. That reflected an approach to answering issues which we witnessed in the case. Nevertheless, there was no formal notice of this meeting, the claimant was taken by surprise and presented with an ultimatum. Although he said he would resign that was very much in the heat of the moment. It is what is sometimes referred to as a forced dismissal. There was no opportunity for the claimant to reflect on such a momentous decision. We must ask who, on those facts, an independent employer or employee would have considered to have brought the employment to an end. We are satisfied the answer would be Mr Robinson.

95. The claim is not about whether such a dismissal was unfair, because the claimant did not have two years' service, but whether it was discriminatory.

96. The first complaint is of breach of the duty to make adjustments to the respondent's attendance policy. This complaint faces the difficulty that the respondent had no policy. There was no provision or criterion or practice concerning attendance. This was a small employer who had no written procedure and no practice had evolved. Even a first or one-off instance of dealing with such matters must carry with it an indication it would be done again in the future if a hypothetical similar case arose, ***Ishola v Transport for London [2020] ICR 1204***. No such inference could be drawn.

97. Even had there been such a policy, it was not applied to the claimant. His dismissal had nothing to do with attendance, but was for the reasons we set out below in paragraph 105.

98. The second claim is for discrimination arising from disability. The first issue is whether there was unfavourable treatment. There plainly was. It is unfavourable to be dismissed and it is a detriment.

99. The next question is whether that dismissal was because of something arising from the claimant's disability. In this respect three reasons are put forward: - The use of sunbeds during breaks, the claimant's request to reduce his hours and/or work from home and the claimant having time off sick shortly before his dismissal.

100. There was no evidence given about the reason being because that the claimant used sunbeds in breaks or he believed that was the reason. That was not a matter to be found in the list of performance or attitude concerns. The proposition itself seems to undermine the claim that the claimant was not allowed rest breaks. We are satisfied this had nothing whatsoever to do with the dismissal.

101. With respect to working from home, we have set out the history of that above. From January 2023 the claimant had worked from home and it had not presented as a problem, either for him or the respondent. Other worked from home on Wednesdays. The emails in 2023 and the WhatsApp messages reflect approval of this arrangement. We can find no evidence from which we could infer the dismissal had anything to do with any request to work from home.

102. The only request to work reduce hours was the discussion in January 2023 when Mr Robinson first raised the performance concerns. The claimant said in evidence that he could not remember this meeting but thought that at some time there was a discussion about performance, possibly in April.

103. We accept Mr Robinson's account that when the claimant was challenged about these matters in January 2023 his reaction was to say he had come into an inheritance and did not need the job. He said the job was pointless and he could do it in half a day. This reflected evidence the claimant gave to the Tribunal that he found it a very easy job, easier than going to the toilet. This was another aspect to the claimant's case which was contradictory. On the one hand he said that he worked 47 to 50 hours because Mr Robinson

was oppressive and overworked him, leading to significant health issues. On the other hand he said the job was the easiest he had ever held and could be done in half a day. It made it difficult to take the claimant's evidence seriously.

104. Mr Robinson's response was to say the possibility of part-time work could be reviewed down the line if performance was improved. We accept there were genuine concerns about performance as summarised in the log. We do not consider that Mr Robinson would have contrived these and taken up his own time in raising them with the claimant, if all was running well.

105. We are not satisfied that a discussion about the potential for reducing working hours 6 months previously had any influence on the decision to dismiss. The dismissal of the claimant was because Mr Robinson had concerns about the claimant's performance and the claimant refused to acknowledge or discuss them. He was evasive both in January and May, refusing to recognise that his work was not exemplary. The procedure which Mr Robinson took to end the employment was somewhat bungled, but the reason for it is clear from the evidence.

106. We do not consider the claimant's absence between 22 April 2023 and 2 May 2023 had anything to do with this dismissal. The claimant had a viral infection. He had visited hospital where the diagnosis was given. The WhatsApp messages demonstrated a very supportive employer.

107. In these circumstances we reject the claim that the dismissal was for any of the reasons advanced by the claimant which he says arose from his disability. Even had it been for the sickness absence, which we reject, the evidence did not establish that this was attributable to or more problematic because of the claimant's Diabetes. There was no medical evidence to that effect.

108. The claim that there was a discriminatory dismissal is therefore not established.

<u>Rest breaks</u>

109. The claimant was entitled to 20 minutes of uninterrupted rest breaks away from his workstation during the working day. He says he was not permitted to take any.

110. We set out our findings about rest breaks above. In the context of the WTR, we are satisfied that the respondent took active steps to ensure working arrangements that enabled the claimant to take the requisite breaks by reason of the right to a lunch break of one hour. He agreed that he had signed and was aware of the two contractual employment particulars. He agreed he was aware he was entitled to an hour's paid lunch. He could have left his workstation or the premises during this time. He usually chose not to. That is not a breach of the WTR.

Employment Judge D N Jones

Date: 10 March 2024

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/