EMPLOYMENT TRIBUNALS

Claimant: **Mr. A. Kent**

Respondent: **Department for Work and Pensions**

Heard at: **The Newcastle Civil and Family Courts and Tribunal Centre**

On:- **08, 09, 10, 11 April and 08 August 2024.**

Deliberations 09 August 2024.

Before: **Employment Judge T.R. Smith**
Mr. M Brain
Mr. G Gallagher

Representation

Claimant: **In person**

Respondent: **Mr. Healy (counsel)**

Reserved Judgement

1.The claimant's complaint of constructive unfair dismissal is not well founded and is dismissed.

2.The claimant's complaint of a failure to make reasonable adjustments is not well founded and is dismissed.

3.The claimant's complaint of a failure to provide itemised pay statements under section 8 Employment Rights Act 1996 is well founded. The tribunal has determined the relevant particulars were as follows:-

- The claimant's gross salary was £21,688pa

- The claimant gross salary per month was £1807.33.
- This was subject to the following deductions:
- PAYE £135.20pm
- National insurance £91.12pm
- Student loan £11pm
- Alpha pension £83.14pm
- HASSRA £2.45pm
- The net take home pay was £1322.91 per month

Written reasons

1.Abbreviations used in this judgement

ERA 96. Employment Rights Act 1996.

EQA10. Equality Act 2010.

EDS. Ehlers Danlos Syndrome.

PIP. Personal Independence Payment.

DSE. Display Screen Equipment Assessment.

KIT. Keeping in touch days.

PCS. Public and Commercial Services Union

SAR. Subject Access Request.

SGA. Skills Gap Assessment.

DWPWAT. The respondent's workplace adjustment team.

2.The evidence

2.1The tribunal had before it a bundle consisting of 2071 pages. The tribunal explained to the parties it would only have regard to the documents it was specifically taken to, either in evidence or cross referred to, in witness statements.

2.2. At the start of the hearing Mr. Healy sought leave to introduce further documents to which the claimant did not object. The tribunal therefore admitted the additional documents, which it numbered 2072 to 2077.

2.3. After the respondent's case had closed the claimant applied to admit a number of further documents into evidence.

2.4. The tribunal refused that request for the oral reasons it gave. Those reasons were principally ones of relevance and prejudice and applying the principles set out in the overriding objective. The respondent would not be able to cross examine the claimant. The respondent's witnesses had been released. Two of the witnesses with particular expertise on the matters referred to in the documents were based in Sheffield and not available that day to attend tribunal.

2.5.A reference to a number in brackets in this judgement is a reference to a page in the bundle.

2.6. The tribunal reminded the parties it would only have regard to the documents it was specifically referred too.

2.7. On behalf of the claimant the tribunal heard evidence from:

- The claimant himself.
- Mr. Russell Bennett, a PCS union representative (until January 2023).

2.8. On behalf of the respondent the tribunal heard evidence from: -

- Mr. Kris Cantle, formerly caseworker operations manager overseeing 60 PIP caseworkers.
- Ms. Michele Lake, operational manager working within the DWPWAT.
- Ms. Shelagh Ambler, formerly case manager for DWPWAT. Ms. Ambler was line managed by Ms. Lake.

2.9. It also started to hear evidence from Ms. Angela Thurlbeck. Ms. Thurlbeck was formerly the PIP team leader.

2.10. She fell ill soon after the start of her cross examination and the respondent subsequently indicated that her health was such that she would not be called to give further oral evidence. The tribunal indicated that therefore, although it had read her statement, it would give less weight to her evidence than that of other witnesses who'd

been exposed to cross examination.

3.Credibility

3.1. The tribunal considered that the claimant had very fixed perceptions on matters, which at times, undermined his credibility.

3.2. Two examples (there were others, some of which are discussed later in this judgement) illustrate this finding.

3.2.1The first was found in paragraph 200 of his witness statement. He alleged the respondent and the various suppliers of auxiliary aids, had a chair suitable for his needs, but withheld it from him under the direction of senior management because the respondent wished to dismiss him. The tribunal considered that to be inherently implausible.

3.2.2. The second was the claimant contended that his computer access was suspended whilst he was on special paid leave and this was to prevent him gathering evidence against the respondent. The tribunal found that the reason for the suspension was in line with the respondent's own policies and procedures and had nothing whatsoever to do with stopping the claimant *"gathering evidence".*

3.3.Mr. Bennett gave straightforward credible evidence in support of the claimant. The tribunal made a similar observation in respect of Mr. Cantle, Mr. Thomas, and Mesdames Lake and Ambler.

3.4. The tribunal heard insufficient evidence from Ms. Thurlbeck to make an assessment of her credibility and therefore has looked carefully at contemporaneous documents.

4.Line management structure and personalities

4.1.Ms. Lough, team leader, initially the claimant's line manager until 21 June 2021.

4.2.Ms. Mc Court, team leader, and managed by Ms. Lough. She dealt with some of the claimant's day to day management issues, as Ms. Lough did not work 5 days a week.

4.3.Ms. Thurlbeck, the claimant's line manager from 21 June 2021. Her line manager was Mr. Cantle.

5.The issues.

The parties had previously agreed with Employment Judge Pitt the issues to be determined (as amended or clarified with the parties by this tribunal, such comments are in square brackets):

Constructive unfair dismissal

5.1. Did the respondent do the following things:

- Treat the claimant unfavourably in connection with annual leave and/or flexi related issues? [The claimant clarified that in respect of annual leave this was from December 2021 to January 2023. In relation to flexi leave this was from March 2021 to June 2021]
- Force the claimant, under threat of dismissal and disciplinary action, to commit funding fraud in connection with an apprenticeship application between March 2020 to [January 2023.]
- Prevent the claimant from taking annual leave from December 2021 to January 2023 [the claimant clarified this was a repetition of the first bullet point]
- Unreasonably request the claimant to attend a meeting to discuss the outcome of a DSE assessment undertaken in April 2022 [the meeting being held on 03 May 2022]
- Having told the claimant he was advised to undertake an apprenticeship which required the claimant to partake in a skills gap assessment, being told by that manager to change one of his answers which the claimant contended amounted to an untruth and was a fraud. [The claimant accepted this was very similar to the second bullet point]

5.2. Did those things amount to a breach of the implied term of trust and confidence? The tribunal was required to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant that the respondent, and whether it had reasonable and proper cause for doing so.

5.3. Did the claimant resign in response to the breach? The tribunal was required to decide whether the breach of contract was a reason for the claimant's resignation.

5.4. Did the claimant affirm contract before resigning? The tribunal was required to

decide whether the claimant's words or actions showed that he chose to keep the contract alive even after the breach or breaches.

5.5. If the claimant was dismissed, what was the reason or principal reason for dismissal?

5.6. Was it a potentially fair reason?

5.7. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant? [Mr. Healy conceded if the claimant established dismissal the respondent no longer contended it could show dismissal was for a fair reason.]

Disability discrimination

6.Reasonable adjustments

6.1. Did the respondent know or could it have reasonably have been expected to know that the claimant had the disability of EDS before receipt of the Occupational Health report dated 19 July 2021? [The respondent's case was it accepted the claimant was a disabled person for the purposes of section 6 EQA 10 from 19 July 2021 but made no admissions prior to that date].

6.2. Did the respondent have the following PCPs

- A requirement for its staff to use standard office equipment whilst at work (PCP 1).
- A requirement to work by telephone for longer than two hours (PCP 2).
- To expect a person to work a standard office hours/day. (PCP 3).

6.3. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability. [The claimant clarified that the failure to provide him with auxiliary aids, to work for more than two hours on the telephone and to work standard office hours exacerbated his EDS resulting in pain, discomfort and difficulty in concentrating].

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

6.5. What steps could have been taken to avoid the disadvantage? The claimant relied

upon the following adjustments:

6.6. In respect of PCP 1: -

- To provide a desk suitable for someone of his height and stature. [The claimant accepted this was resolved on 10 November 2020].
- To provide a chair suitable for someone of his height and stature. [The claimant contended this was never supplied].
- To provide an ergonomic/split keyboard [the claimant contended this was never supplied].
- To provide an ergonomic mouse suitable for the claimant's hand size. [The claimant contended this was never supplied].
- To provide a wireless headset [the claimant contended that whilst a set was supplied it was not suitable].
- To provide a foot rest [the claimant contended this was supplied in October 2021]

6.7. The claimant relied upon the following in respect of PCP 2

- Breaks every 35 minutes as recommended by occupational health [on 19 July 2021].
- A display screen as recommended by occupational health [on 19 July 2021].
- A maximum of two hours telephone work per shift as recommended by occupational health [on 19 July 2021].

6.8. The claimant relied upon the following in respect of PCP 3

- Breaks every 35 minutes [as recommended on 19 July 2021].

[In respect of the above adjustments the claimant accepted that he was given breaks of 35 minutes for two or three weeks but thereafter contended it was sporadic. He contended he was never limited to working on the telephone for two hours and was not supplied with a display screen as recommended by occupational health].

6.9. Was it reasonable for the respondent to have taken those steps and when?

6.10. Did the respondent fail to take those steps?

6.11. It is appropriate to mention the tribunal raised with the parties at the start of the hearing that much of the case appeared to be one relating to an auxiliary aid or aids for which a PCP or PCPs were not required.

7.Limitation

7.1. To what extent, if at all, was the complaint of a failure to make reasonable adjustments presented outside the primary limitation period, to the extent it related to events before 27 November 2022?

7.2. If so, do all or any of the alleged acts or omissions amount to conduct extending over a period within the meaning of section 123 (3) EQA 10?

7.3. If not, should time be extended for any such period?

8.Pay slips

8.1. Did the respondent fail to provide written pay slips to the claimant in accordance with section 8 ERA 96?

8.2. If so, was the claimant entitled to a remedy under section 11 of the ERA 96, setting out the particulars that ought to have been provided? [The claimant contended he did not receive written pay slips between October 2021 and November 2022. From November 2022 he received pay slips and on 04 and 05 January 2023 he was given access to his computer to allow him to view, electronically, the pay slips from October 2021 to October 2022]

8.3. It was agreed with the parties, due to the fact that the time estimate had been grossly underestimated, that the tribunal would seek, in the available time, to address the issue of liability only and remedy, if necessary, would be dealt with on a later date.

8.4. The tribunal stressed to the parties that it would only seek to resolve the agreed list of issues. The statements contained significant factual disputes between the parties, which were not encompassed in the list of issues, and therefore the tribunal would made no findings of fact in respect of those matters.

9.Background.

9.1. The claimant commenced employment with the respondent on 28 September 2020 as a PIP case worker.

9.2. The claimant held a degree in zoology and biochemistry. 9.3. Prior to obtaining this post the claimant had been unemployed for almost 2 years. This was the first substantial office post he had obtained. The majority of his working life had been spent doing various jobs such as a butchery, agency working in the manufacturing sector, warehouse and bar work. He had only worked in an office environment for approximately three months of his working life.

9.4. He is a disabled person within the meaning of section 6 EQA 10, with an impairment of EDS.

9.5. His role as a PIP case worker was full-time, working 7.24 hours per day from Monday to Friday.

9.6. The role involved very significant interaction with members of the public, explaining their award and responding to any questions they had in respect of the benefit. Ideally it was expected 4 hours a day would be spent handling telephone enquiries with the residue of time dealing with paperwork such as obtaining information from third parties to calculate or check benefit entitlement. During Covid the telephony element substantially increased. In practice about 75% of a PIP caseworker was spent on the phone.

9.7. The claimant was initially based, on recruitment, at Wear View House in Sunderland, until it was agreed that from April 2021 that he would work from home.

9.8. The respondent was well used to making reasonable adjustments for employees with disabilities. A substantial number of the PIP case workers had some form of provision made for them. The tribunal did not find the respondent had any generalised prejudice to employees with disabilities, and in particular rejected the claimant's assertion that part of the reason that he was forced to resign was the respondent did not want to accommodate a person with a disability.

9.9. The claimant's employment ended with the respondent on 08 January 2023 when he transferred to The Home Office the following day. It is common ground that there was a termination of his employment with the respondent on that date.

9.10. The respondent is a large government department with overall responsibility for welfare, pensions and child maintenance.

9.11. The events that are set out below took place during, in part, periods of Covid. It is appropriate therefore to record the lockdown periods which were as follows: –

- the first lockdown started on 23 March 2020,
- the second on 05 November 2020 and
- the third on 04 January 2021.

9.12. The reason for the relevance of the COVID dates is that the claimant joined the respondent during the pandemic which impacted on the respondent's ability to source equipment speedily. Covid caused a sudden demand for office equipment, not only within the respondent, but globally as many employees started to work from home. Demand far exceeded supply and supply chains were severely impacted, even after the pandemic.

9.13. Covid also impacted upon workplace adjustments, for example most assessments were undertaken by telephone, rather than face-to-face.

10.The procurement procedure for auxiliary aids by the respondent

10.1. Some auxiliary aids could be ordered by local management. In more complex cases the task fell to DWPWAT.

10.2. DWPWAT provided assistance and advice about workplace adjustments for those working for the respondent with disabilities. DWPWAT would arrange the implementation of physical workplace adjustments via their nominated contractor, Wagstaff.

10.3. Wagstaff was the respondent's external specialist furniture and contractor. It in turn utilised a series of specialist third party assessors and suppliers.

10.4. DWPWAT operated from a separate location from where the claimant was based. The tribunal did not accept the claimant's assertion that there was a deliberate attempt by Ms. Thurlbeck, working with officers at DWPWAT, to deprive him of available auxiliary aids so he would be dismissed. In support of that finding the tribunal found that there was evidence that, at one stage, Ms. Thurlbeck contacted DWPWAT to ask how a complaint could be lodged against Wagstaff because of the difficulties/delays in sourcing equipment for the claimant.

10.5. Wagstaff has arrangements with approximately 75% of all specialist auxiliary aid suppliers. It works for a number of government departments.

10.6. The respondent was not limited to utilising Wagstaff, although it invariably did so, because of the preferential negotiated rates. The respondent could purchase specialist equipment if it was identified as necessary, off contract. The price was not a determining matter for the respondent in purchasing, if the equipment was essential.

10.7. An employee could purchase an auxiliary aid themselves and then seek reimbursement but any such purchase required prior approval and was subject to a financial limit.

11.Knowledge of disability

11.1. When the claimant applied for employment, he completed a health screening document (96). He was asked in that questionnaire whether he required any adjustments to assist at work to which he replied in the affirmative, stating that he was 6'10" tall and had previously shoulder surgery, although he attributed this to his physical manual roles. When asked whether he had any health issues he indicated *"yes my height".* He indicated his height would impact on performing at a computer and desk. He did not disclose any specific, or even generalised, musculo skeletal issues.

11.2. The claimant weighs in the region of 21 stone.

11.3. Following submission of the medical questionnaire the claimant received a telephone call from the respondent. The discussion centred upon his past shoulder surgery which the claimant confirmed to be historical and did not cause him any specific difficulties. It appeared to the tribunal, sensibly, the issue of the work station was left to be addressed by a work place assessment.

11.4. Soon after the claimant started his employment, he told Ms. Mc Court his work station was unsuitable and she advised him to complete a DSE (see below for further details)

11.5. By June 2021 the claimant was diagnosed with EDS. The claimant himself was not aware, until diagnosis, that he had this condition. Prior to that date there had been no periods of sickness that would have put the respondent on notice of any underlying medical condition.

11.6.EDS is a hereditary disorder that affects the connective tissues of the body which

provide strength and flexibility to the skin, bones, blood vessels and other organs. In the claimant's case part of his symptoms were an unusually large range of movements. Medical evidence before the tribunal pointed to the fact the claimant was at risk of developing neck and back problems without appropriate ergonomic equipment.

11.7. The respondent was first aware of the condition informally in late June and formerly on about 19 July 2021 when it was referred to in an Occupational Health report that it had commissioned (525/526). It was this that lead the local management to contact DWPWAT for specialist advice.

12.Time line

12.1. On 10 October 2020, pending the claimant completing a DSE assessment application, he was told he could use the sit stand desk of a disabled colleague who was working from home due to Covid. He made no subsequent complaint about the adequacy of his desk.

12.2. On 19 October 2020 (114) the claimant completed a DSE assessment. No physical problems with his screen, key board, mouse, or software were identified although advice was given as regards the technique for using a mouse. The principal adjustment that was required was to source a suitable chair for the claimant.

12.3. It was as a result of the completion of this document that on 06 November 2020 a specialist chair was ordered.

12.4. The order was placed without any individual expert assessment due to COVID, but on the basis of the information the claimant had supplied. It appeared to the tribunal, for reasons set out below, that, that order was cancelled.

12.5. On 10 November 2020 the claimant was given a specialist desk raiser stand, and a monitor platform.

12.6. The claimant completed a second DSE on 10 November 2020. The claimant identified that the chair, and now his keyboard, and mouse were not suitable for his needs.

12.7. An external assessor, Mr. Fortry, carried out an assessment by telephone on 11 November 2020 and recommended to the respondent, that same day, that a Positiv Plus chair for tall users with height adjustment arms was ordered. He asked Ms.

McCourt to check whether the claimant required a neck rest. Ms. McCourt spoke the claimant and he indicated he did not think he needed one.

12.8.Mr. Fortry's recommendation was promptly actioned and this is was why the first order was cancelled.

12.9.A chair was delivered on or about 20 November 2020, part assembled. In the claimant's view the chair was too small, and the back rest was apparently damaged.

12.10.A replacement back rest was ordered and arrived. The claimant considered it was of the wrong size.

12.11.Mr. Fortry spoke to the claimant again on 01 December 2020. In the light of the difficulties, he indicated that an external company known as Posturite Ltd ("Posturite") had been commissioned to carry out a DSE with the claimant. They were to arrange for one of their specialist assessors to contact the claimant.

12.12. Posturite undertook a DSE with the claimant on 04 December 2020 via Teams.

12.13. The assessor found the claimant's existing chair was too small.

12.14. The assessor recommended: –

- An XL ergonomic chair - Adapt 680
- For the respondent to consider a roller bar mouse and monitor arm.

12.15.A dispute exists as to when the Adapt 680 chair was delivered, the respondent considering it was on 23 February 2021 as evidenced by an email from the claimant of that date (227) whereas the claimant thought is it was probably the week commencing 18 March 2021, following his return from annual leave.

12.16. Whichever date was correct there was a delay in the delivery of the Adapt 680. The tribunal did not need to determine the evidential dispute as to the delivery date as the chair was not deemed suitable by the claimant.

12.17. The tribunal determined that the principal delay was because Ms. McCourt had not placed an order, as she thought it had been placed by the Posturite assessor. When the error came to light, she promptly ordered the chair of 28 January 2021**.** Any delay thereafter was the result of the normal backlog in awaiting the supply of specialist auxiliary aids at a time of great demand. Having regard for the fact the Christmas and New Year holidays would take about a week out of normal trading the respondent's

delay in the order, at its highest, was some six weeks.

12.18. In about February 2021 Ms. McCourt supplied the claimant with the specified mouse and a monitor arm. The claimant contended the mouse was broken and a replacement was obtained almost immediately. The claimant itself accepted this in his statement (paragraph 22) that a mouse arrived in February 2021. He rejected the monitor arm A new monitor arm arrived in March 2021 and to which he made no complaint (paragraph 32 of the claimant's statement).

12.19. From February 2021 staff were considered for home working. Initially the claimant indicated, to his credit, that he wanted to remain in the office to assist with his learning. However, from March he indicated he was interested in home working. There was a short delay, only a matter of a few weeks, whilst the respondent procured, after some funding issues, a sit/stand desk for him to take home. It will be recalled that he already had the use of this aid in the office. Thus, the short delay had no impact on the claimant's work station.

12.20. In cross-examination, the claimant accepted that, save for the issue of the chair, by the end of March 2021 he had all the equipment he required to work in the office.

12.21. From 16 April 2021 the claimant started to work from home.

12.22. The claimant contended the respondent delayed his request to work from home from 11 March to 16 April 2021 because he would not undertake an apprenticeship (details of which are set out below). The tribunal was not so persuaded. It considered the delay was because the respondent wanted to ensure that all equipment the claimant has requested was available so that working from home would be successful, in particular the sit/stand desk. The respondent was not opposed to the claimant working from home. As the tribunal have already noted working from home had been offered to the claimant at an earlier stage.

12.23.Ms. Thurlbeck first contacted DWPWAT on 22 June 2021 (452/453). She explained the claimant was working from home and had been recently diagnosed with EDS. She also said that the claimant regarded the chair (an Adapt 680) that had been supplied to him as being unsuitable. She asked for the claimant to be reassessed.

12.24. The case was taken on by DWPWAT

12.25. Recommendations were made to Ms. Thurlbeck by DWPWAT in an email of 12

July 2021 (497). It recommended a face-to-face assessment which it would arrange and also the provision of another monitor arm for the claimant's use at home. Ms. Thurlbeck was confused as regards the monitor arm given one been supplied to the claimant in March 2021. She followed the matter up with the claimant.

12.26. Reverting back to the timeline the claimant was referred for an occupational assessment, given his recent EDS diagnosis. He was assessed by an occupational health nurse on 19 July 2021 (525/526).

12.27. Relevant to these proceedings are the following recommendations: –

"[the claimant] must avoid static posture and should ensure he breaks every 35 minutes… he should not be on telephony duty for any greater than a two-hour period in a working day"

12.28. The tribunal noted this was advice and it was a matter for the respondent's management to determine the extent, if at all, these recommendations were reasonably practicable. The report did not disclose what auxiliary aids the nurse was aware the claimant was using and if she took them into account in her recommendation. It appeared she had no knowledge of the adjustments already made, given she recommended a referral to DWPWAT, a recommendation that had been actioned a month earlier.

12.29.Ms. Thurlbeck considered, and in the tribunal judgement reasonably, there was a lack of clarity in the report. She therefore contacted occupational health because she wanted to know how long the breaks were meant to be in duration, every 35 minutes. It also was not clear whether the claimant could work for more than two hours on the telephone if regular breaks were instigated. The response was that it was important that the claimant changed his position after 35 minutes such as stretching or looking into the distance. There was no requirement for a physical break. At no stage did the claimant contend he could not change his position or look into the distance.

12.30. The further advice the respondent received was the recommendation for telephone work to be limited to 2 hours was principally because the claimant considered he had more flexibility when doing case management to move around and he found focusing on one task easier than dealing with a number of telephone calls (572). Thus, the advice was principally based upon the claimant's preference in terms

of his work mix.

12.31.Ms. Thurlbeck instigated the recommendations. The tribunal reached that conclusion as she followed breaks up with the claimant and he indicated in an email of 20 July 2021 (542) "*I have everything I need, extra breaks etc"*

12.32. In any event, as the claimant was working from home, he had the autonomy to take the breaks. The respondent was reliant upon the claimant taking the breaks because it could not observe him at his work station.

12.33. As will be seen, the claimant was placed on special leave from September 2021 and was not thereafter undertaking work, let alone telephony work, so the reason for the adjustments recommended by occupational health ceased to have any relevance.

12.34. The claimant received a further monitor arm on 12 August 2021 (653).

12.35. On 16 August 2021 Ms. Thurlbeck wrote to the claimant (646) to ask how he was managing with the adjustments and whether there were any equipment issues. The claimant indicated he had had a further Posturite assessment (the assessment to which he referred had taken place three days earlier but the respondent did not receive the report until the following month) and pretty much everything other than the monitor arm and desk were incorrect for him. He said he was trying to take breaks regularly but if he was on a telephone call he couldn't take a break *"on the dot".* The claimant, in his subsequent grievances, made no specific complaint that he wasn't permitted to take the breaks recommended by occupational health. The respondent accepted that it could, on occasions, be difficult to end a call exactly after a two-hour timeframe.

12.36. The claimant accepted that until 16 August 2021 Ms. Thurlbeck was unaware that his workstation was unsuitable. He further accepted it was then reasonable for her to wait the Posturite report before taking any further action.

Posturite had carried out a DSE assessment with the claimant on 13 August 2021 with the report being received by the respondent on 03 September 2021(603/616).

12.37. The report recommended (it was amended by the assessor on 20 September 2021 following representations made by the claimant): –

- A new back for the Adapt 680 chair which included an extra high, flattened back rest, and raised lumbar pump to 270mm. (To be actioned by DWPWAT)
- A glide mat. (To be actioned by DWPWAT)

- HAQ Quickstep footrest. (To be actioned by DWPWAT)
- A large wireless mouse. (To be actioned locally)
- A Handshoe (a large right wireless mouse). (To be actioned locally). The wireless mice were in the alternative. The claimant was to see which suited him best.
- A split keyboard, Kinesis freestyle with VIP. (To be actioned locally)

12.38.Ms. Thurlbeck discussed the report with the claimant on 07 September 2021.

12.39. On the same day Ms. Thurlbeck ordered the mice and the keyboard (654) and told the claimant that she had asked DWPWAT to order the residual equipment.

12.40. On 10 September 2021 Ms. Ambler submitted an order for the equipment that DWPWAT had agreed to obtain.

12.41. On 15 September 2021 Ms. Thurlbeck met the claimant and his trade union representative, Mr. Bennett, to discuss the various reports and assessments. The claimant's position was that his levels of pain were mild outside work but aggravated at work because he still did not have the correct equipment. The parties agreed that as a temporary measure the claimant would be limited to telephony work in a morning.

12.42. By the end of September to late October the glide mat, footrest along with the mice, keyboard and headset had arrived. There was a delay with the backrest for the chair because it was a piece of bespoke equipment rather than being a stock item. The backrest was delivered on 15 October 2021.The claimant said it was inadequate, as it was smaller than the backrest that he already had on his Adapt 660 chair. A further mouse and keyboard arrived on or about 29 October 2021 but were not forwarded to the claimant given that he was on special leave and therefore was not required to work.

12.43. The claimant was informed by Ms. Thurlbeck that an adapter was needed for the headset. This was ordered and the claimant informed in early November that it could be collected from work, at his convenience when he came off special leave.

12.44. The claimant accepted that Ms. Thurlbeck took reasonable steps to chase up the delivery of the auxiliary equipment recommended for the claimant.

12.45. Whilst equipment was arriving, effective from 06 October 2021, at the

suggestion of Mr. Bennett, and agreed by Ms. Thurlbeck the claimant was put on special leave. He received full pay but was expected to undertake his normal duties although he had to be available. The purpose of special leave was to ensure that all the auxiliary aids were functioning adequately before the claimant resumed full time work so there was no risk to his health. Thus, the delay in the delivery of the headset adaptor had no impact on the claimant, as he was not working.

12.46. As soon the claimant was put on special leave, he was not allocated any new work. The tribunal would accept for a couple of weeks thereafter the claimant did some work (but not his full contractual hours) finishing off files that were then re-allocated

12.47.The parties agreed that Ms. Thurlbeck requested the claimant to log onto his account specifically to check as regards auxiliary aid deliveries. He was not expected to work. The claimant accepted in evidence that he initially used to log on every day but after about three weeks once every few days unless specifically asked to check on something. Thus, after the first couple of weeks the claimant was doing no work, just occasionally checking his mail box.

12.48. When the Posturite chair was delivered the claimant rejected it.

12.49. The respondent made enquiries to ensure whether the equipment delivered was that recommended by Posturite. Enquiries revealed the item specified by Posturite had been delivered. This was confirmed by the Posturite's own assessor in an email dated 19 October 2021 (786). She said "*Nothing will be perfect but according to his measurements the new shape should work. Has he attached it to the chair and tried it with the headrest attached. If we make the back rest any higher (it should never come up as high as the shoulders as it encourages the shoulders to protract) the headrest will be in the wrong place"*

12.50. The respondent considered the appropriate way to address the impasse, as it was relying upon expert advice, was for a further independent expert assessment to be carried out.

12.51.A new assessment was carried out on 10 November 2021 by a different Posturite assessor who appeared to support the claimant's concerns as to the adequacy of the chair. He recommended a different chair.

12.52. The tribunal is satisfied that Ms. Thurlbeck was anxious to resolve matters. She had an employee on special leave, not working, through no fault of his own, whilst

there were great demands upon her team. She had and continued to proactively chase the issue of auxiliary aids for the claimant as was evidenced by her emails of 10 and 24 November 2021 (839 and 890).

12.53. Following some delay caused by the Christmas period a new chair, a Positiv Me 400 Task Chair (extra high back) with an inflatable lumbar support was delivered to the claimant at his home on 14 January 2022, and set up for him.

12.54. The claimant rejected it because the claimant considered the seat pad was too small, the chair height too low, the lumbar support too low and there were no arm rests. Ms. Thurlbeck agreed that the lack of arm rests itself was sufficient to reject the chair as it was the respondent's policy that such items were fitted.

12.55. Having spoken to the claimant Ms. Thurlbeck then followed matters up on 17 January 2022 with Wagstaff. She explained why the chair was not suitable and the claimant was content with the previous chair supplied to him, the Adapt 680, save for the backrest.

12.56. She asked for remedial action to be taken promptly.

12.57. Wagstaff contacted Posturite setting out the claimant's concerns and on 18 January 2022 Ms. Thurbeck was told (938):-

"Having spoken to our highest-level assessors, the chair [the claimant] *has received this time was not our first choice of chair but due to the backrest and* [the claimant] *requesting a higher backrest this was the only other option we had available to us.*

Unfortunately, as this is now unsuitable, we do not have any other options that we can offer except for what we have already provided.

We can arrange a return of the chair he has now if required but the only chair options are the ones he has already tried.

In regards to the bespoke back rest, we cannot order this as there is not a backrest with those dimensions available to us. None of our suppliers are able to make this for us".

12.58. Following further pressing from Ms. Lake (to whom Ms. Ambler had escalated matters and who had never known such a problem in sourcing a chair), Wagstaff said in an email dated 31 January 2022 *"To make the back the right height brings into question the stability of the chair. The MD for Adapt chairs has confirmed this but has*

agreed to make a complete bespoke fitted chair for [the claimant]. A waiver will need to be signed off against design/stability and use and there will be no trial and return for this product…. Posturite have also said this is the last and only way left, to try and find something [the claimant] will be happy with" (1003)

12.59.Ms. Lake indicated on 02 February 2021 the respondent would not sign a waiver over the stability of the chair.

12.60. Her reasoning, which the tribunal considered to be sound, was that she would not compromise the safety of the claimant by placing him in a chair that the manufacturer said was unstable and thus unsafe. She would not do that for any employee, let alone one with a disability.

12.61. She asked whether the weight could be increased at the base so the back could be increased in length without impacting on stability. The tribunal found that Ms. Lake was genuinely applying her mind to seeking to find a solution to the claimant's difficulty. It appeared her suggestion was not feasible.

12.62. She also raised with Wagstaff the possibility of looking at other suppliers if Posturite could not supply a satisfactory chair. Again, the tribunal concluded that she was taking a proactive approach to address the central issue of a suitable chair for the claimant.

12.63. By 24 February 2022 Wagstaff suggested two further chairs, from a different supplier, namely an Opera 20-8 or an RH Logic 400. The former was their recommended option and details were sent to the claimant.

12.64. By 02 March 2022 the claimant rejected the recommended chair as being too small, with a limited maximum weight capacity.

12.65. Wagstaff contacted an alternative supplier who suggested an Opera 500.

12.66. On 22 March 2022 the claimant indicated he rejected the Opera 500 as whilst it addressed the weight issue, the seat and backrest were still too small.

12.67. At about this time the claimant was also approached to ask whether he had a particular chair in mind that he was aware of that might be suitable for his needs. The claimant stated that his current chair, the Adapt 680, was suitable apart from the backrest.

12.68. Wagstaff utilised a number of suppliers, but given they had exhausted all their

options, it was decided to contact another company of ergonomic assessors (who were off contract), Back Care Solutions.

12.69. Back Care Solutions assessed the claimant in person and reported on 21 April 2022 (1098 to 1107).

12.70. The claimant was shown the Opera chair, which he rejected.

12.71. Back Care Solutions concluded that all auxiliary aids were functioning correctly and the workstation was suitable, save for the fact the claimant said he continued to experience difficulty with his Adapt 680 chair. The assessors noted the chair was already fitted with an extension to raise the position of the backrest. The backrest fitted was higher than what any other ergonomic chair available, would offer

12.72. Back Care Solutions reported that the combination of the claimant's *"current Adapt 680 backrest (extra high back) and the extended back bar (to further raise the backrest) is quite possibly the highest, and safest, backrest height achievable across any ergonomic chair out there. We have since spoken with two reputable ergonomic chair manufacturers to enquire about potential other options, however both have come back to us stating that it is not possible have anything any higher than* [the claimant's] *current backrest set up. Increasing the backrest height any more would lead to further pressure on the plate which fixes the backrest to the mechanism, meaning if someone was to lean back with some force, it could break off, leading to further musculoskeletal problems and even injury. We therefore advise that [the claimant]'s trials one of the V-rest by Adapt neck/head supports to see if this helps to provide his neck with more substantial support, which it should give its larger size and the fact it can extend much further out and upwards than the current Neck Roll."*

12.73. Subsequently Back Care Solutions spoken to 2 assessors from different furniture suppliers who both recommended a V-rest to see if that would assist the claimant.

12.74.A V-rest was ordered on 27 April 2022. The claimant subsequently indicated that he tried the V rest but it pushed his neck and shoulders forward and he rejected it as was noted in an internal email of 31 May 2022 (1269).

12.75. Before the tribunal, the claimant contended the report from Back Care Solutions was *"full of false information"* and he believed that the DSE was set up by the respondent to only provide a report to said that no chair could be provided, so the

respondents could then dismiss him. The tribunal do not have sufficient evidence to make a judgement on the recommendation made by Back Care Solutions. It was however satisfied that there was not a scintilla of evidence that Back Care Solutions had connived with the respondent to produce a fabricated report in order to lead to the claimant's termination, especially as the report was suggesting a further option to address the claimant's concerns.

12.76. The fact the respondent was making further enquiries also reassured the tribunal it was looking at every option to try and find an appropriate auxiliary aid for the claimant and not to dismiss him or force him to resign.

12.77. The claimant accepted in cross examination that it was at this point, late April 2022 that he had *"zero trust in management"* This, coupled with what he regarded as the Back Care Solutions *"fraudulent"* report and a fear the respondents were trying to engineer his dismissal persuaded him to start actively searching the Civil Service website for alternative employment.

12.78. Further discussions took place between the claimant, Ms. Thurlbeck and Mr. Bennett, by telephone on 03 May 2022 to discuss the Back Care report.

12.79. The tribunal noted that the claimant had been on special leave with pay since October 2021 and the purpose was to examine the DSE report that specifically was aimed at trying to identify a suitable chair so the claimant could return to his duties.

12.80. Prior to the meeting there was some discussion as to whether the claimant was entitled to trade union representation at the meeting. Ms. Thurlbeck considering it was inappropriate. Whatever the rights and wrongs, however, by the time of the meeting she conceded that Mr. Bennett could be in attendance. It is this meeting that appeared in the list of issues in which the claimant considered it was an unreasonable request to require him to attend. However, he conceded in cross examination that it was a reasonable request to arrange a meeting to discuss the report.

12.81. The claimant raised a number of possibilities to progress matters.

12.82. He suggested: –

- an Excelsior chair because he knew someone who used one
- an ARC racing chair
- modifications to his existing chair

- a chair with a special high backrest that was reinforced with extra welding and support rods and a custom-made neck raiser

12.83. The claimant's suggestions were put to Wagstaff for advice. The response was that merely because an Excelsior chair was suitable for one person did not mean it was suitable for the claimant. An Arc Racing Chair was designed for domestic use for a few hours at a time, not for full-time working. An Opera 50 bespoke chair had been offered but have been rejected. It was not possible to retrofit or convert an existing chair.

12.84.Ms. Lake knew from her own knowledge of working within DWPWAT that an Excelsior chair was unlikely to be suitable as it was principally designed for those with significant weight challenges.

12.85. In June 2022 the claimant, whilst on special leave, had his access to his DWP account withdrawn. The respondent routinely withdrew access to employees absent for a lengthy period firstly because there was no work to do and secondly because there was no reason for such a person to have access to confidential information. This was in accordance with the respondent's special leave guidance (1877) which stated: –

It is important that only the right people have access to DWP's systems and data. Managers must take appropriate action for those on long-term special leave to ensure IT accounts do not remain live when they should not be and where employees are on a long-term leave, accounts are closed as if the user left the department"

12.86. From June to August 2022 there were internal communications between Ms. Heather Rawlinson, HR Business Partner and Ms. Lake. HR were concerned that the claimant remained on special leave and were anxious to know of progress as to, if and when, he could return to work. In those emails Ms. Lake did indicate that if all other options were exhausted HR might wish to consider dismissal but it would need to take legal advice. The claimant only became aware of that correspondence following a SAR after he left his employment. He did not know of it at the time and therefore it can have had no impact upon his decision to resign. In any event the tribunal was satisfied that the respondent had reasonable and proper cause to consider all eventualities, given the difficulty in obtaining a chair that the claimant found suitable.

12.87. Wagstaff were again contacted by the respondent on 30 June 2022 and asked

to confirm whether Posturite or any other supplier was able to identify a chair with a long backrest that was suitable for the claimant needs (1304). The tribunal found this was because they wanted to ensure no stone was left unturned in trying to resolve the situation. As the tribunal has already observed the respondent had never encountered a situation before when they could not source a chair for a person with a disability.

12.88. The response from Wagstaff (1303) on 01 July 2022 was as follows: – *"… Posterite initially carried out an assessment making suggestions but this wasn't deemed suitable so we then commissioned a secondary company to carry out a further detailed assessment making recommendations which factored in the specific request for extended back rest etc by offering a purely bespoke product based on [the claimants] build.*

You will also see that we offered assurances to concerns raised on the recommended product but this seemed to dis-satisfy [the claimant].

They even took samples to [the claimant] but faced resistance to every permutation possible…".

12.89.Ms. Lake further pressed Wagstaff.

12.90. Wagstaff confirmed in an email 25 July 2022 that they carried out numerous face-to-face assessments with the claimant, had contacted specialist companies who had approximately 75% of the market, had shown the claimant physical samples and explained various options but none were satisfactory to the claimant. They said that one of the options could include some of the bespoke extras but this has been ultimately declined. (1323).

12.91. In the intervening period the claimant informed Ms. Thurlbeck in that he was provisionally obtained a promotional post as an executive officer grade with the Home Office. He made a formal transfer application on 05 July 2022 (1318).

12.92. At a meeting between the claimant and Ms. Thurlbeck on 04 October 2022 the claimant was told that the respondent was unable to provide a chair that met the claimant's requirements and allowed him to work safely. It was for this reason that Ms. Thurlbeck asked the claimant for his consent for the respondent to write to his consultant/specialist physiotherapist/GP for advice in case they could recommend a suitable chair.

12.93. The claimant did not give his consent to contact his medical advisers. Before the tribunal he explained they were not experts in specialist aids. The tribunal consider his physiotherapist might well have been able to have a useful input to assist the respondents. In the tribunal's judgement this was a lost opportunity.

12.94. The claimant indicated he was waiting for a quote for a specialist care provider who could build a bespoke chair.

12.95. Thereafter there followed various emails between the claimant and Ms. Thurlbeck when she chased up the claimant for his consent and details of the bespoke chair he was suggesting.

12.96. No consent or details of the chair were forthcoming.

12.97. Before the tribunal the claimant suggested he gave oral consent on 04 October 2022 for the information to be obtained.

12.98. The tribunal considered that improbable for two reasons.

- Firstly, there was no reason for Ms. Thurlbeck to chase the matter up with him by e-mail on 12 October 2022 (1445) if consent had already been given.
- Secondly it would not explain why Ms. Thurlbeck was chasing Mr. Barrett, the claimant's trade union representative, on this very subject on 17 and 31 October (1445).

12.99. Finally, for completeness the tribunal should record the claimant raised a grievance on 13 September 2022 (1485) quickly followed by a second on 22 December 2022 (1510).

12.100. The first grievance centred on Ms. Thurlbeck failing to deal with a grievance in accordance with the respondent's policies and procedures.

12.101. The second grievances principally related to removing his system access whilst he was on special leave, GDPR issues, a lack of action in his stress management plan, the contents of the report from Back Care Solutions which the claimant regarded as fraudulent and a failure to KIT.

12.102. The tribunal noted what the grievance did not include, for example the "funding fraud" in respect of the apprenticeship, a requirement for the claimant to attend a DSE assessment on 03 May 2022, none compliance with the occupational health

recommendations. Save for the chair the other complaints made as regards the supply of equipment were not detailed. These were all matters which the claimant now says were significant in his decision to resign and/or which he contends amounted to a failure to make reasonable adjustments. The tribunal considered that the grievances were useful contemporaneous documents which showed what was in the claimant's mind. The lack of reference to key matters which he now relied upon was a factor the tribunal took into account in the overall assessment of credibility.

12.103.A grievance outcome was issued on 05 January 2023.

12.104.The day before the grievance outcome, 04 January 2023 a transfer form was completed for the claimant move from the respondent to the Home Office

12.105.The claimant was informed in writing by the respondent that his employment ended on 08 January 2023.

12.106.The claimant contended the respondent deliberately delayed the grievances to ensure that he was out of time for issuing tribunal proceedings. The tribunal had no direct evidence upon which it could make such a finding.

13.The Apprenticeship Issue

13.1. The job advertisement for the role to which the claimant applied (87/88) provided: –

"Our aim is for our colleagues in these roles to be appropriately skilled and qualified – as determined by the business. To support this aim you may be required to undertake a workplace qualification, which may be in the form of an apprenticeship, which will support you in further developing your professional knowledge and skills for this role… The qualification can be undertaken in work time, you agree to take this job on the basis that you may be required to undertake a work-based qualification; a candidate's failure to participate fully in the professional programme, once appointed, may be a breach of their employment contract"

13.2. Thus, when the claimant accepted the role, he knew that he might be required to undertake an apprenticeship and a failure to participate fully, potentially put his employment at jeopardy.

13.3. The role which the claimant accepted was subject to a probationary period.

13.4. The cohort of others PIP case workers, who started at the same time as the claimant, were all required to undertake an apprenticeship.

13.5. On 16 or 17 November 2020 Ms. McCourt asked the claimant to complete a skills analysis so he could be considered for an apprenticeship. The purpose of the specific apprenticeship was to improve upon customer service skills, a key aspect of the role of a PIP caseworker.

13.6. The respondent had commissioned an external company, Babington, to provide bespoke customer service training to better equip candidates for their role.

13.7. The apprenticeship was aimed to provide level III skills in customer service.

13.8. The tribunal considered that, given the main focus of the claimant's role was dealing with members of the public on the telephone, people who were likely to have disabilities, and could well be angry or annoyed, that training potentially provided a number of beneficial elements such as teaching de-escalation techniques and also techniques for the employees themselves to deal with the stress and strain of what were often challenging encounters. The claimant's previous work history did not suggest that he had acquired such in-depth skills.

13.9. The tribunal found, on balance, Ms. Mc Court told the claimant to score himself with a low score, a 1, because he was new to the job and therefore would not have all the skills and experience of a longer serving employee in the role. The claimant did not, and decided to award himself between 4 to 6 points for most categories.

13.10. There were two eligibility criteria for the apprenticeship.

13.11. First, a candidate needed to score 30% or less under an SGA and secondly the candidate had to indicate that the apprenticeship would allow the candidate to acquire substantial skills and knowledge required in the post.

13.12. Both eligibility criteria had to be satisfied for funding to be available for the apprenticeship.

13.13. The claimant completed the apprenticeship registration of 18 February 2021 and was told he would need to undertake an SGA with Babington.

13.14. The claimant undertook, remotely, an assessment with Babington where he self-certified where he considered his skill and competence level rested.

13.15. He claimed he was told he scored 35 but that the assessor adjusted his score to 30.

13.16. Following the assessment Babington contacted the respondent because the claimant had self-certified that he did not believe he would acquire substantive new skills and knowledge required for the job.

13.17. It appeared to the respondent that the claimant had scored 30 so Mr. Cantle arranged to meet the claimant, because, with such a low score, he considered that it was highly likely the claimant would acquire substantial skills and knowledge required for the post by undertaking the apprenticeship. He wanted to persuade him to revisit his answer.

13.18. The claimant contended that his score had been changed, and in addition he would not acquire substantial skills and knowledge in his post because he was performing well during his probationary period. He said, whilst he accepted that he was required to undertake an apprenticeship when he applied for the role, he was not willing to change his answer on the application form because he considered it would be dishonest.

13.19. The tribunal found on balance the claimant's self-assessed score probably was reduced by Babbington because it was unrealistic. However, even if the claimant had scored 30%, the apprenticeship could not proceed without his self-certification.

13.20.A meeting took place on 22 April 2021 between the claimant, Mr. Bennett, and Ms. Lough to further discuss the claimant's position in relation to the apprenticeship.

13.21. On balance the tribunal found Ms. Lough told the claimant that his probationary period would be extended for two weeks until he changed his answer to "yes" (ie that he would benefit) on the apprenticeship application form.

13.22. The tribunal also found that on 28 April 2021 the claimant was told by Ms. Lough that the request to undertake the apprenticeship was a reasonable one and that he needed to change his answer to "yes" and a failure to comply could result in disciplinary action. There is support for this finding in the documentation (464).

13.23.Mr. Cantle's evidence, which the tribunal accepted, was he looked into the *"funding fraud"* contention and found enrollment had nothing to do with funding

13.24. Following the intervention of Mr. Bennett, and liaison with the respondent's HR

Department, the advice given to local management, in essence, was that as the apprenticeship was not mentioned in the contract the claimant could not be required to undertake it and his probationary period should not have been extended, simply granted on expiration of the 6-month period.

13.25. It is fair to say local management took exception to this advice as they believed asking the claimant to undertake the apprenticeship was a reasonable management instruction(and this tribunal is sympathetic to that view).

13.26. Despite the internal differences the claimant was told on 25 June 2021 (493) that he had passed his probationary period, effective from 27 March of that year.

13.27. The respondent's position must be looked through the lens of what they knew at the time. The claimant had very limited previous customer service experience. He had applied for a job where he knew there was a requirement for an apprenticeship. It considered that simply because the claimant was doing quite well in his probation did not mean that he would not benefit from an apprenticeship. It did not believe that there was a "*funding fraud".*

13.28. Various emails were exchanged between the claimant, Mr. Cantle and his trade union over the next few months as regards the apprenticeship, including whether the claimant had sufficient skills and qualifications to be exempt (the decision was he was not)

13.29. In the intervening period the relationship between the claimant and Ms. Lough broke down to such an extent that the claimant was allocated from 21 June 2021 to a new manager Ms. Thurlbeck

13.30. Matters finally ended in terms of the apprenticeship by an email from Mr. Cantle to the claimant dated 11 May 2022 (1763).

13.31. The email stated: –

Wanted to give an update on the apprenticeship situation and where we currently stand with it

With regards to the funding query [X the respondent's apprenticeship lead] *has confirmed the department does not gain funding by you changing the answer – the funding for the apprenticeship is met from the levy which the department has already paid into. The department do not see any financial gain from you changing your*

answer.

With regard to your qualifications, [X], *stated she has provided confirmation back in 8 April 2021 that you do not have suitable alternative qualifications… they are not customer service based and therefore do not override the apprenticeship qualification*

With regard to the SGA, this was an assessment that needs to be carried out at the start of your time in the department. It gives the department an understanding of where your skills lie and the gaps you may have. When this was completed, it showed that there were gaps in your skills knowledge and you would benefit from enrolling into the apprenticeship…"

13.32. Thus, the claimant knew there was no *"fraud"*

13.33. No further action whatsoever was taken by the respondent after this e-mail. No disciplinary procedure was started. 13.34. Specifically, there were no threats of an oral warning, written warning, final written warning or dismissal.

14.Leave

14.1. The tribunal should begin this section of its judgement by noting the evidence was unclear, vague and at times contradictory in respect of annual (though not flexi) leave.

14.2. The tribunal however has to find facts and has done so to the best of its ability on the basis of the evidence before it.

14.3. In March 2021 the claimant informed Ms. Lough that he wanted to take flexi leave on the following Friday for an early finish. Ms. Lough told the claimant he could not use flexi leave on Fridays and Mondays as it was unfair on colleagues, as they were busy days. The respondent employed a number of part time staff and applying its industrial knowledge the tribunal found many part time staff preferred not to work on a Friday or to finish early on that day. No further request was made.

14.4. Even on the claimant's own case his assertion was that he did not request flexible again because he thought it might lead him to fail his probation. He was finally told on 25 June 2021 that he passed his probation backdated to March 2021. There was nothing before the tribunal that the claimant; after being told he had satisfactorily completed his probation, made a request for flexi-time and that the request was refused. The claimant himself accepted the last request was made in June 2021.

14.5. In October 2021 the claimant said he requested holiday from the day after Boxing Day until 05 January 2022 to visit his family home.

14.6. The tribunal was not taken to any documentation to show the claimant had booked leave.

14.7. The tribunal were persuaded that the claimant probably did ask Ms. Thurlbeck in October 2021 if he could have leave over the Christmas period and was told it was granted. There is some support for this finding in an undated document which appears to show the claimant was taken off special leave just before Christmas and put back on it just after the New Year (2022).

14.8. Probably just before Christmas the claimant was told that he now could not take his Christmas leave as he needed be to be at home to receive his new chair, the Positiv Me 400.

14.9. It will be recalled the chair had been on order for some time and the order chased by Ms. Thurlbeck. Various delivery dates had been given by the supplier including, 17, 22, 23 December, which were not fulfilled. The supplier then indicated there was a possibility the would be delivered between Christmas and New Year.

14.10. It was not delivered.

14.11. The claimant was told by Ms. Thurlbeck in January 2022 that he could not book holiday until all his equipment was delivered. At this point the claimant had not made a formal request for further annual leave. The chair delivery was made on 14 January 2022 but it was deemed unsatisfactory by the claimant hence the necessity for yet a further chair to be ordered.

14.12. The claimant also briefly mentioned he was not allowed to take holiday for his birthday but again the tribunal was not taken to any holiday request or refusal. Significantly, in the opinion of the tribunal, although refusals of flexi- leave and annual leave were said to be continuing acts, they did not feature, al all, in the claimant's two grievances. This led the tribunal to doubt there were any continuing acts.

15.Pay slips

15.1. The respondent supplied pay slips to employees electronically, which they could access via their work computer and print off if they so wished.

15.2. When an employee was on special leave, in addition to electronic pay slips, manual pay slips should have been sent out to each employee

15.3. The claimant raised with Ms. Thurlbeck, probably in October 2022 that he not received paper copies of his pay slips. The tribunal found on balance that the respondent had not sent paper pay slips, as they should have, when the claimant went on special leave.

15.4. Prior to the claimant's access to his account being suspended on June 2022 the claimant would have been able to access his pay slips electronically but did not do so because he regarded his workstation as unsafe. However, the tribunal did not consider that reasonable because he had the appropriate desk and computer. The principal concern he had related to a chair. He did not need a chair to use a stand-up sit-down desk to access his pay slips.

15.5. On 06 October 2022 to Ms. Thurlbeck advised the claimant he should receive paper copies and put in a service request on his behalf. The tribunal is satisfied that she did (1391). The claimant's case, however, was that Ms. Thurlbeck did nothing (paragraph 149 with the statement). That was incorrect and was a factor that impacted upon the claimant's general credibility.

15.6. The claimant received pay slips at his home address in November, December 2022 and in January 2023.

15.7. He was also given access to his computer in early January so he could access and download the missing pay slips electronically.

15.8. The tribunal found the claimants pay prior to termination was as follows.

- The claimant's gross salary was £21,688
- He received £1807.33 a month gross.
- This was subject to the following deductions:
- PAYE £135.20
- National insurance £91.12
- Student loan £11
- Alpha pension £83.14

- HASSRA £2.45
- This produced a net take-home of £1322.91 per month

16.Time

16.1. The claimant applied for an early conciliation certificate on 10 February 2023, with a certificate being issued on 24 March 2023.

16.2. The claimant presented his claim form to the tribunal on 09 April 2023.

16.3. The claimant was at all material times a member of the PCS.

16.4. He submitted a request in December 2022 to the PCS for legal assistance. He offered no explanation as to why he did not consider issuing proceedings prior to December 2022

16.5. There was no suggestion that the claimant did not know of the existence of employment tribunals or that these matters that now form the subject of his complaints were not known of by him at the time. He believed at the time he was being badly treated/ subjected to discrimination.

16.6. On 06 January 2023 Mr. Bennett indicated he was ceasing to be a union representative. The claimant contended he could not then obtain adequate PCS advice and was passed back and forth between various officials

16.7. In February 2023 the claimant was advised by the PCS to start early conciliation.

16.8. The claimant contended he was told by the PCS on 24 March 2023 that he was out of time to bring a tribunal claim.

16.9. The claimant contended the reason for any delay was he was waiting advice from his union. There was no corroborative evidence by way of documentation or from Mr. Bennett. Indeed Mr. Bennett made no reference whatsoever in respect of time or difficulties with the union.

16.10. The claimant contended there was a public interest in extending time because the respondent was a public body with an ethos of supporting disabled people into work and maintaining them in employment.

17.Submissions

Claimant

17.1. Before the tribunal the claimant succinctly put his case (paragraph 164 and 200 of his proof) that the reason he left the respondents employment was because he thought they wanted to dismiss him and used the nonavailability of a chair as an excuse. He believed an appropriate chair was available to both Posturite and Back Care Solutions but the respondent had an agenda to dismiss him. He also considered that the respondent intended to dismiss him because of his disability and the apprenticeship issue.

17.2. The claimant contended the respondent should have known of his disability from the commencement of his employment on the basis of the completion of the medical questionnaire.

17.3. He submitted if there was a time point, he should not be blamed because of difficulties with his trade union. In any event he contended the respondent deliberately delayed the grievance process in the hope that any subsequent claim would be out of time.

17.4. He described the report from Back Care Solutions as being *"full of fraud"* and said his name had been forged on it.

17.5. He submitted that the respondent had not complied his own occupational health report and he simply did not accept that a suitable chair could not have been found for him.

17.6. In terms of the apprenticeship, he said the respondent was engaged in a *"ticky box"* process to try and boost government targets for apprenticeships.

17.7. The claimant believed the respondent sought to manipulate matters to make it leave, for example in terms of his holidays. He believed he was targeted because he would not *"roll over"* as evidenced by his stand on the issue of the apprenticeship which he believed annoyed a number of senior managers within the respondent. The whole of the apprenticeship arrangement was a "funding fraud" and he should not be penalised for refusing to accept such a fraud and standing his ground.

17.8. Finally, he submitted that pay slips were not sent to him each and every month as they should have been.

Respondent

17.9.Mr. Healy relied upon a written submission which he amplified orally.

17.10. He contended the respondent only knew that the claimant was disabled in or about June July 2021.

17.11. He spent some time on the issue of time limits and reasonable adjustments and the reason why an alleged failure to make reasonable adjustments was not a continuing act. He referred to **Fernandez -v- DWP UKEAT 2023 114** at paragraph 16.

17.12. He contended the reasonable adjustment claims were out of time and it was not just and equitable to extend time.

17.13.Mr. Healy then developed his argument that there had not been a failure to make reasonable adjustments, if the tribunal was against him on the time point.

17.14. Briefly, he dealt with constructive dismissal contending that on the face of the evidence it was insufficient either individually or collectively show a breach of the implied term of trust and confidence.

17.15. He denied that the claimant had made request annual leave, and flextime had not been pursued for considerable period prior to dismissal. Whilst there was a clear dispute between the claimant and the respondent whether he would benefit from the apprenticeship he was never subjected to any form of disciplinary process.

17.16.A request to attend a meeting to discuss a DSE assessment was entirely reasonable as the claimant himself had accepted. It could not support a complaint constructive unfair dismissal

17.17. Finally, he said the missing pay slips had been supplied and, in any event, even if he was wrong, the only remedy was a declaration under section 11 ERA 96.

18.The Law.

Constructive Unfair Dismissal.

18.1. Section 95 (1) ERA96 defines dismissal as follows: –

“(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) …

(c) the employee terminated the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

18.2. For an employee to succeed in a claim of constructive dismissal the employee must satisfy the following four conditions on the balance of probabilities.

- One, there must be a breach of contract by the employer. This may be either an actual or anticipatory breach.
- Two, that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justifies the employee leaving. The Court of Appeal in **Omilaju -v- Waltham Forest London Borough Council 2005 ICR 481** explained that a relatively minor act may be sufficient to entitle the employee to resign and leave the employment if it is the last straw in a series of incidents. The final straw act need not be of the same quality as the previous acts relied upon but it must contribute something to the breach and be more than trivial.
- Three, the employee must leave in response to the breach, that is, it must have played a part in the employee's decision, and not some other unconnected reason. Where the employee has mixed reasons for resigning the resignation will constitute a constructive dismissal if the repudiatory breach relied upon was at least a substantial part of those reasons, see **United First Partners Research-v- Carreras [2018] EWCA Civ 323**
- Four, the employee must not delay too long in terminating the contract in response to the employer's breach, or have done anything else which indicated acceptance of the change to the basis of the employment ,otherwise the employee may be deemed as waived the breach and agreed to vary the contract.

18.3. The question of whether there was a constructive dismissal is determined in accordance with the terms of contractual relationship and not in accordance with the test of reasonable conduct by the employer though reasonableness may have some evidential value see **Courtaulds Northern Spinning Limited -v- Sibson 1978 ICR 329.**

18.4. There is implied into every contract of employment a term of trust and confidence, as finally affirmed by the Supreme Court in **Malik -v- Bank of Credit and Commercial International SA 1997 IRLR 62** in which the term was defined as follows: –

"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".

18.5. The correct approach to determine whether there has been a breach of the term of trust and confidence, according to the Court of Appeal in **Eminence Property Developments Ltd-v-Heaney 2010 EWCA Civ 1168,** is as follows: –

"Whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract"

18.6. The law was recently summarised by the Court of Appeal in **Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** at paragraph 55 in the following terms:

- what was the most recent act (or omission) on the part of the employer which the employee said caused, or triggered his or her resignation?
- Has he or she affirmed the contract since that act?
- If not, was that act or omission by itself a repudiate breach of contract?
- 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?
- Did the employee resign in response about (or partly in response) to the breach?

18.7. Whether an employee has waived the breach, or what is sometimes described as affirming the contract, is fact sensitive. There is no fixed time within which the employee must make up his or her mind. Factors that may be relevant include the nature of the breach, whether the employee has protested and what steps, if any, the employee has taken after the alleged breach to show an intention still to be bound by the contract.

19.Discussion

Constructive unfair dismissal

19.1. "*1. Treated the claimant unfavourably in connection with annual leave and/or*

flexi related issues? The claimant clarified that in respect of annual leave this was from December 2021 to January 2023. In relation to flexi leave this was from March 2021 to June of the same year.

3.Prevent the claimant from taking annual leave from December 2021 to January 2023."

19.2. Given the accepted overlap the tribunal dealt with allegations one and three together.

19.3. The tribunal found the claimant was told by Ms. Lough in March 2021 that he could not take a Friday or Monday as flexible leave.

19.4. An employee, save in certain limited circumstances set out in the ERA 96 has no right to choose the days he or she works. The respondent is entitled to require the claimant to work his contractual hours and, in this case, he was employed to work full-time from Monday to Friday.

19.5. The tribunal was not taken by the claimant to any application that he made for flexible working or to any form of flexible leave policy. There was nothing before the tribunal to show the respondent was in breach of contract. The claimant did not suggest in his oral evidence that there was a right to choose his working days and nor did Mr. Bennett. Given Mr. Bennett's involvement with the PCS he was in an excellent position to do so if such a contractual entitlement existed.

19.6. The reason given for refusal, that Friday and Mondays were busy days was capable of amounting to a reason for refusal. The tribunal applied its own industrial knowledge and took into account that many part-time workers prefer to finish early or not work on Friday. It also took into account that Mondays are often busy days with service users ringing in with queries as to their benefit that may not have been received over the weekend.

19.7. The respondents were entitled to balance the needs of the business against requests made for employees for flexible leave. It was not the claimant's case that he was denied accrued hours under his flexible leave policy but simply that he could not take it, on this particular occasion, when he wished.

19.8. Other than the example in March 2021 the claimant did not give any direct evidence of a further occasion when there was a request and a refusal to grant him

flexible leave.

19.9. The claimant has failed to show an express breach of contract. He has failed to show a breach of the implied duty of trust and confidence. There was no cogent evidence that the respondent was acting capriciously in its refusal. The reasons for refusal showed proper cause for the refusal.

19.10. The tribunal found the claimant was initially told informally he could have holiday for the period 27 December 2021 to New Year Eve 2022, although no documentation appears to have been completed. On balance his request probably was cancelled by the respondent. because of the likely delivery of the claimant's new chair.

19.11. The claimant accepted in cross examination he was told the reason for the change was the anticipated delivery of the Positiv Me400 chair.

19.12. An employee has no absolute contractual right to specify the dates they want to take their annual leave. A request must be made which the employer can grant or refuse. An employers' only obligation is to ensure that the employee receives, contractual or as a minimum, the statutory annual entitlement.

19.13. If leave is granted the tribunal accepted that an employer was potentially in breach of contract (although the tribunal does not say in fundamental breach) if it capriciously cancelled an employee's holiday. Here the respondent had reasonable and proper cause to cancel the request.

19.14.Ms. Thulbeck probably did tell the claimant in January 2022 that she would not grant a holiday request until his chair had been delivered. It must be remembered it was anticipated that delivery would be within a few days (as indeed proved to be the case). There was nothing to stop the claimant requesting holiday after delivery. The circumstances are everything. The respondent had an employee who was on full pay, was not working because he lacked an appropriate auxiliary aid. It was in the interests of the respondent and the claimant to ensure the claimant had the equipment as soon as possible so he could undertake productive work. No cogent evidence was before the tribunal that any further holiday request was made. For example, the tribunal was taken to any emails requesting holiday or a holiday request form or a holiday chart.

19.15. The claimant has not established a breach of the implied duty of trust and confidence in respect of holiday entitlement.

19.16*.“2. Force the claimant, under threat of dismissal and disciplinary action, to commit funding fraud in connection with an apprenticeship application between March 2020 to January 2023.*

4.Having told the claimant he was advised to undertake an apprenticeship which required the claimant to partake in a skills gap assessment, being told by that manager to change one of his answers which the claimant contended amounted to untruth and was a fraud.”

19.17. Given the accepted overlap the tribunal has dealt with allegations two and four together.

19.18. The tribunal found the respondent directed the claimant to apply for a specified apprenticeship course. It made the same request to all those other employees who were recruited in the same cohort as the claimant.

19.19. The job advertisement, which the claimant saw before he applied for the post, made it clear that the respondent might require staff to undertake an apprenticeship.

19.20. Given the nature of the role the respondent was entitled to require newly recruited staff to be appropriately trained in customer service skills and techniques, not only for the benefit of the service users but also for their own benefit, so they could cope with the stress and strain of such work.

19.21. It was a perfectly reasonable management request for the respondent to require the claimant to undertake training that would likely benefit both the employee and the employer. The tribunal is satisfied that the training on offer had that potential benefit. The respondent was entitled on the evidence before it to reject the claimant’s assertion that his previous qualifications or experience exempted him from the training.

19.22. Neither did the tribunal consider the claimant’s argument, that he was performing satisfactorily in his probation period, to be a complete answer to his refusal which showed the respondents were acting capriciously.. There is a difference between doing sufficient to maintain employment and acquiring skills so the job can be done to a high level. The mere fact the claimant was performing at a

satisfactory level in his probationary period such that his retention was justified is beside the point. By way of illustration, it would not be a breach of the implied duty of trust and confidence for a firm of accountants to require a competent senior accountant to undertake a training course in networking to assist in business development of the practice, even if the accountant was highly skilled in the technical aspects of his or her role.

19.23. Putting aside the detail of the requirements for the apprenticeship, the reality was the respondent and Babington, the apprenticeship suppliers, had a different perception of the claimant's abilities to those of the claimant. The tribunal found they were entitled to hold that view. Without wishing to labour the point already made the tribunal found it unlikely, given the claimant's previous work record, and lengthy period of unemployment that he would not have benefited from the apprenticeship.

19.24. The claimant was, as the tribunal already found probably right that Babington reduced his score from 35% to 30% which they considered more realistic and would, of course, have meant the first hurdle for entry onto the apprenticeship was surmounted. However, whatever the correct score, it was irrelevant because the second element, the claimant accepting that he would benefit from the apprenticeship was not surmounted. The claimant did not consider he would benefit from it and refused to alter his view.

19.25. To conclude the tribunal considered the request of the respondent for the claimant to carry out the apprenticeship was a reasonable management request and that did not amount to a breach of the implied duty of trust and confidence.

19.26. The tribunal should say a little further about what the claimant referred to as the threats made to him to seek to persuade him to engage in the apprenticeship.

19.27. The tribunal found that the claimant was told by Ms. Lough on 28 April 2021 that unless he undertook the apprenticeship (i.e. following a reasonable management request) it could result in disciplinary action and he would not pass his probation but, at the latest, that threat had been withdrawn by 25 June 2021 when he was told he passed hisprobation. By 13 September 2021 he had it in writing that the apprenticeship was not any sort of fraud

19.28. By 11 May 2022 that had been repeated. It had been carefully explained to him in correspondence by Mr. Cantle that the respondent did not stand to benefit

financially whether the claimant did or did not change his answer. The claimant could not have reasonably believed there was some form of fraud, or that, at the latest from 25 June 2021, that he was at risk of disciplinary action, let alone dismissal.

19.29. The tribunal accepted that there was urging by the respondent for the claimant to change his answer to indicate that he would benefit from the apprenticeship but that was not as part of some sort of fraud but because respondent perceived there was a benefit both the claimant and to the business.

19.30. No form of disciplinary investigation, let alone hearing took place. The claimant did not resign until 08 January 2023.

19.31. The respondent did not breach the implied duty of trust and confidence.

19.32 *3. Unreasonably request the claimant to attend a meeting to discuss the outcome of a DSE assessment undertaken in April 2022, the meeting being held on 03 May 2022.*

19.33. The tribunal found the claimant was asked to attend a meeting which eventually took place on 03 May 2022 to discuss a DSE assessment.

19.34. The reason the respondent had commissioned a DSE report was to better inform itself of the continued difficulties the claimant faced in terms of the provision of a chair.

19.35. Given the past history of the claimant being unhappy with chairs supplied by specialist contractors it was desirable that the claimant was involved in reviewing the report from Back Care Solutions and the respondent gaining his input before ordering yet another chair.

19.36. The claimant himself at the meeting made a number of suggestions as regards other possible chairs which the respondent promptly referred to Wagstaff for advice. The tribunal considered this was a further indicator of the potential benefit of the meeting, and the fact the respondent genuinely wanted to find a solution

19.37. The claimant accepted in cross examination that it was a reasonable request to ask him to attend the meeting to discuss a suitable chair.

19.38. Given that express concession in cross examination, the background to the meeting, the fact that this was a reasonable management instruction that was to the claimant's benefit, it cannot be said respondent did not have reasonable and proper

course to issue that instruction.

19.39. It follows the there was no breach of the implied duty of trust and confidence.

19.40. The tribunal has concluded that the claimant has not established primary facts which either individually or taken together would amount to a fundamental breach by the respondent of the implied duty of trust and confidence.

19.41. Given the tribunal's conclusion is not strictly necessary to deal with the further limbs that a claimant must satisfy to bring a successful complaint of constructive unfair dismissal.

19.42. However, if the tribunal was found, elsewhere, to be wrong on any of its primary findings it considered it helpful to set out what it found on the additional issues.

19.43. The tribunal was not satisfied that the reason the claimant resigned was because of the alleged breaches of the implied duty of trust and confidence as identified by the claimant.

19.44. The tribunal was careful to remind itself that any proven breaches did not need to be the main reason for the resignation. It was sufficient if they were a reason for resignation.

19.45. The tribunal considered that the claimant resigned for two reasons, one that he was disenchanted with the respondent's efforts to find him a suitable chair and secondly because he had the opportunity to apply for promotional job. The tribunal reminded itself it was not one of the agreed issues that the claimant resigned because of any failure of the respondent to make reasonable adjustments.

19.46. The tribunal was reinforced in this judgement by its finding of fact in respect of the grievances which again pointed away from the acts or omissions upon which the claimant now relied upon as being a cause of his resignation.

19.47. In the circumstances the claimant would have failed on that ground.

19.48. For completeness Mr. Healy asserted that the claimant had affirmed any breach of contract. Whilst the passage of time may be a factor in looking affirmation, what is required is evidence that the claimant treated bygones as bygones. Looking at the last incident, as found by the tribunal from the most favourable perspective of the claimant, it was May 2022 with the claimant resigning in January 2023.

19.49. The tribunal was not satisfied that the claimant's subsequent grievances demonstrated that he was effectively working under protest.

19.50. From May 2022 until January 2023 the claimant continued to draw pay and treat the contract as subsisting.

19.51. The tribunal found that in all the circumstances the claimant had affirmed any proven fundamental breach of contract.

20.Pay slips

20.1.A worker is entitled, every time he is paid his wages or salary, to receive a written statement giving a breakdown of the amount paid to him: see sections 8 to 12 ERA 96.

20.2.A complaint must be bought while the employee is still employed by the employer or within three months of the date on which the employment ceased, or within such further time as the tribunal considered reasonable where it was satisfied that it was not reasonably practicable for the application to be made before the end of the period of three months (section 11 (4) ERA 96).

20.3. The claim is brought in time because it was brought within three months of the termination of the claimant's employment.

20.4. Under ERA 1996 s 8 an employee is entitled to an itemised pay statement *'at or before'* every payment of *'wages or salary'.* However, if the statement is provided any later than this, the employer will be in breach. This is illustrated by the decision in **Cambiero v Aldo Zilli & Sheenwark Ltd EAT/273/96 (9 July 1997, unreported), [1997] Lexis Citation 3554**, where the employer failed to provide any pay slips during the claimant's employment but then supplied most of them some six weeks after the employment terminated. The employer was held to be in breach of the statutory provision.

20.5. Here the tribunal is satisfied on the basis of its findings of fact the pay slips were not provided *"at or before"* every payment of wages or salary. There were periods when the claimant had no access to his electronic pay slips and did not receive manual pay slips.

20.6. The tribunal must therefore make a declaration in favour of the claimant, which it has done, in accordance with its previous express findings of fact on this issue.

21.Knowledge and reasonable adjustments

21.1. Under schedule 8, part 3 of the EQA 10 an employer 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 disabled person had a disability and it was likely to place him at the relevant substantial disadvantage. The actual or constructive knowledge is of the facts that made the claimant a disabled person, not that the consequences made the claimant a disabled person in law.

21.2. The tribunal is satisfied the respondent had actual knowledge of EDS and knew that the claimant's disability placed him at a substantial disadvantage from June 2021. That was when the respondent first knew claimant had been diagnosed with EDS and its effects.

21.3. The tribunal was not satisfied it had knowledge prior to that date.

21.4. It reached this conclusion for the following reasons: -

- The claimant never contended he had a disability prior to June 2021 to the respondent. He did not even know of the condition until he was diagnosed with it. Whilst a claimant's view is not determinative what the respondent was being told or not told at the time is a relevant consideration.
- The respondent had followed up on the claimant's health questionnaire and there was nothing therein to raise constructive knowledge.
- Whilst the respondent had undertaken a DSE assessment and was seeking to source specialist equipment for the claimant prior to diagnosis, that was because of his large build. His stature in itself was not relied upon as a physical impairment, and in itself would not put the respondent on notice that the claimant had EDS.

22.Time

22.1.Mr. Healy submitted that all the complaints of a failure to make reasonable adjustments were out of time and that it was not just and equitable to extend time.

22.2. Section 123 EQA 10 states: –

"…Proceedings on a complaint … may not be brought after the end of –

(a) the period of three 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."

22.3. When calculating time regard must be had to section 140B of the EQA 10, which effectively extends time whilst the parties are engaged in early conciliation.

22.4. The key question is when does time run from in a case where it is contended there has been a failure to make a reasonable adjustment.

22.5. This is a difficult and troublesome area of law as the Court of Appeal explained in **Matuszowicz -v-Kingston upon Hull City Council [2009] ICR 1170** where it was noted that, rather perversely, in the context of time limits it was in the interest of a respondent to allege that it might reasonably have expected to have dealt with the adjustment in question much earlier than it actually did.

22.6. The tribunal was assisted by the recent decision of the EAT in **Fernandez -v-DWP UKEAT/2023/114** at paragraph 16 where His Honour Judge Beard said: -

"The principles set out in the existing authorities amount to the following propositions:

a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled employee from a PCP (presuming the knowledge requirements are met) and failure to make the adjustment is a breach

of the duty once it becomes reasonable for the employer to have to make the adjustment.

b. Where the employer is under a duty to make an adjustment, however, limitation may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.

c. That notional date will accrue if the employer does an act inconsistent with complying with the duty.

d. If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee."

22.7. The conclusions of the tribunal on this difficult point are as follows: –

- One in respect of all the auxiliary aids other than the chair they were supplied; the respondent having accepted that the claimant was placed at a substantial disadvantage as he could not work comfortably at a workstation. If the claimant alleged those auxiliary aids were inadequate or wrong, time ran from when they were made available to him. All the complaints in respect of these auxiliary aids are out of time, the tribunal having found they were made available to him on the dates set out in its findings of fact
- Two, the position in respect of the chair was different. Again, the respondent was aware the claimant was placed at a substantial disadvantage. It had a duty to make a reasonable adjustment which was continuing until he was told that there was no chair available on the market that would address the claimant's concerns. That was on 25 July 2022, at the very latest (arguably before). The claimant was given that information on 04 October 2022. The complaint in respect of the chair is therefore out of time
- Three, in terms of the adjustments recommended by occupational health, the tribunal found the respondent complied with them, but even if that was wrong the claimant was not at a substantial disadvantage from when he was placed on special leave because he was not required to work. It follows that any such complaint would also be out of time.

22.8. The tribunal then considered whether or not it would be just and equitable to extend time.

22.9. The burden is on the claimant to convince the tribunal that it is just and equitable to extend time. The discretion is the exception rather than the rule, **Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.**

22.10. Whilst the tribunal in exercising its discretion it is not required to adopt the checklist set out in section 33 of the Limitation Act 1980, see **Adedji -v- University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23** at para 37 but it can be a useful tool for the tribunal to consider.

22.11. The tribunal have had regard to the following factors: –

22.12. The length of the delay. It cannot be said that the delay was such that could not be a fair trial or the respondent was unable to trace witnesses. The delay in the tribunal's judgement ranged from years to months. All the claims other than in respect of the chair were out of time by in excess of a year. It was only the claim in respect of the chair that was potentially a few months out of time. The length of the delay was a weighty factor that told against the claimant.

22.13. The tribunal then looked at the claimant's explanation. In essence he blamed his union. As the tribunal had already observed it was surprising that his union representative did not touch upon this matter in evidence. The union member of this tribunal, applying his very long experience, considered it unlikely, given the size of the PSA that the mere fact the claimant moved from one government department to another would impact upon the ability of the union to obtain prompt advice. Whilst the tribunal may have found the explanation surprising and had, as it is already noted throughout this judgement concerns as to the claimant's overall credibility it was minded to accept his account. The fault of a trade union is a factor that a tribunal may take into account when deciding to exercise its discretion see **Wright -v- Wolverhampton City Council UKEAT/0117/08**. The tribunal considered this was a factor that weighed in the claimant's favour.

22.14. The tribunal is not satisfied that it can be said the respondent misled the claimant or concealed relevant facts. The tribunal has noted the claimant's concerns as regards the SAR requests which threw up further information. What was important was the claimant, even before termination, was well aware of the existence of

employment tribunals and strongly believed he had been badly treated. He knew the gist of his complaint. He did not trust the respondent hence why he wanted his trade union representative present at all meetings months before his termination. This is a factor that points away from granting an extension.

22.15. On of the claimant's case he knew for some months prior to resignation that the chair that he wanted was in the respondent's view unavailable. On his own case he believed the other auxiliary aid had not been supplied and again on his case that the occupational health recommendations had not been followed. At the latest the claimant could have started early conciliation in October 2022 but he did not. He did not make an application for legal advice to union until December 2022. That delay is not great but it is a factor that favoured the respondent.

22.16. Whilst internal grievance proceedings may be relevant factor in determining whether or not to extend time, see **Apelogun-Gabriels –v- London Borough of Lambeth 2002 IRLR 116 CA** the proceedings the claimant issued had little relevance to the issue of reasonable adjustments. This is not a factor that therefore would support an extension of time.

22.17. The tribunal has then stood back and take into account the various competing factors. Having done so it determined, although not without some hesitation as it accepted the arguments were finely balanced, it concluded it was not just and equitable to extend time.

22.18. The tribunal then considered, if it was wrong on that point then to look at the merits of the claimant's allegation of a failure to make reasonable adjustments.

23.Reasonable adjustments.

23.1. Section 20 of the EQA10 imposes a requirement on an employer: -

- where a provision criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled ,section 20 (3) EQA 10.
- whose premises have a physical feature which puts a disabled person at a substantial disadvantage ,section 20 (4). EQA10
- where a disabled employee will be put to a substantial disadvantage if they are not provided with an auxiliary aid ,section 20 (5) EQA10.

…to take such steps as it is appropriate to have to take to avoid the disadvantage or to provide an auxiliary aid.

23.2. The taking of steps may in certain cases involve a measure of positive discrimination.

23.3. While employers are required to take such steps as are reasonable in all the circumstances to help disabled people, which they are not required to make for others, what steps an employer should take involves striking an objectively reasonable balance. The deciding issue for the tribunal on any section 20/21 claim is often what steps it would have been objectively reasonable for the respondent to take which it did not take at all, took to a lesser extent than needed, or took later than needed. The test as to effectiveness is not that an adjustment will only be reasonable if it is completely effective, the tribunal's focus should be on whether the adjustment would be effective by removing or reducing the disadvantage a claimant is experiencing at work as a result of his or her disability, not whether the adjustment would advantage the claimant generally: **Tameside Hospitals NHS Trust v Mylott [2009] 0352/09, EAT.**

23.4. Whether an adjustment is reasonable is a question for the tribunal to determine objectively, **Morse -v- Wiltshire County Council [1998] IRLR 352.**

23.5. In **Project Management Institute v Latif 2007 IRLR 579** the EAT explained that, in order to shift the burden onto the employer, the claimant must not only establish the duty has arisen but facts from which it can be reasonably inferred, absent an explanation, it has been breached. Accordingly, by the time the case is heard, there must be evidence of some apparently reasonable adjustments that could be made. If the claimant sets out the steps, the tribunal must decide whether the respondent's given reasons for not doing them are objectively reasonable by critically evaluating them, weighing their importance to the employer against the discriminatory effect;

23.6. The tribunal has already found the respondent did make reasonable adjustments in respect of the auxiliary aids save for the chair, in that they were delivered to the respondent and available to the claimant. The claimant is right that some of the equipment remained at his place of work rather than being delivered to him at home but given he was on special leave the equipment was not required. They could not remove the claimant's substantial disadvantage even if they had

been supplied because the claimant did not have a suitable chair and could therefore not work.

23.7. There is no doubt the lack of a suitable chair placed the claimant at a substantial disadvantage

23.8. The main concern exercising the respondent was the issue of the chair.

23.9. Did the respondent take reasonable steps in relation to the chair?

23.10. The tribunal is so satisfied and reached that conclusion for the following reasons.

- The respondent was familiar with dealing with employees with disabilities hence why it had his own specialist department to deal with such matters, DWAP. It also utilised a specialist contractor in terms of equipment namely Wagstaff.
- The evidence before the tribunal was that Wagstaff provided services to a number of government departments. There was nothing before the tribunal to suggest that they were anything other than a professional and well-respected contractor which the respondent was entitled to trust.
- The claimant can fairly point to the fact that a number of different chairs were recommended to him but that is not a factor the tribunal would hold against the respondent. The fitting of a person for a chair is not an exact science. While measurements may be taken at the end of the day it is how the employee feels in the chair.
- The respondent did not simply accept when Posturite said it could not source a chair which the claimant found satisfactory, that, that was the end of the matter. It proactively asked Wagstaff to go off contract and contacted another specialist supplier, Back Care Solutions.
- The respondent actively engaged with the claimant, for example by asking him if he had any suggestions he could make in respect of chairs. He did so, but for the reasons already recorded, none was suitable.
- The respondent even asked the claimant for permission to approach his medical advisers to see whether they could assist He did not provide that consent. The respondent cannot be criticised for seeking to explore yet another avenue to attempt to address the claimant’s substantial disadvantage.

- The tribunal had little hesitation in rejecting the claimant's contention that the reality was there was some form of conspiracy to dismiss him because his condition would worsen. All the evidence pointed to the fact the respondent were anxious to obtain a suitable chair for the claimant. The respondent was frustrated as the claimant in respect of the lack of a suitable chair. It sensibly agreed with the suggestion the claimant would be placed on special leave until a suitable chair could be found so as not to aggravate his condition.
- Whilst it was true that a part could have been manufactured, which might have met what the claimant believed was required, given that the professional advice was that the resulting chair would be unstable and placed the claimant at risk of injury, the respondent was entitled to reject that suggestion.
- The correspondence the tribunal has already quoted extensively in its findings of fact also showed the extent to which the respondent was taking active steps to explore all avenues to find a chair. It was clear from the evidence of the respondent, particularly those at DWPWAT that they found the situation frustrating and indeed had never come across a situation before where a chair could not have been found.

23.11. There was no apparently reasonable adjustment that could be made such as to shift the burden of proof. There were no other objectively reasonable steps the respondent could have taken which it did not take.

23.12. For completeness the tribunal should briefly comment as regards the occupational health recommendations. As the tribunal have already noted they would not remove the claimant's substantial disadvantage. In any event they were made, and the claimant when he was working from home, was able to regulate and self-manage.

23.13. For all the above reasons the complaint of a failure to make reasonable adjustments must be dismissed.

24.Summary.

24.1. To conclude the complaint of failing to make reasonable adjustments and constructive unfair dismissal fails but the complaint of a failure to provide itemised pay slips succeeds.

Employment Judge **T.R.Smith**

Dated 30 August 2024

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