



EMPLOYMENT TRIBUNALS

Claimant: Simon Moore

Respondent: Openreach Ltd

Heard at: Reading **On:** 30, 31 January, 3
February 2025

Before: Employment Judge Shastri-Hurst, Ms A Crosby and Mr F
Wright

Representation

Claimant: Mr S Phillips (trade union representative)

Respondent: Ms R Page (solicitor)

JUDGMENT having been handed down to the parties on 3 February 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunal Procedure Rules 2024, the following reasons are provided:

REASONS

Introduction

1. The claimant started work for the respondent, part of the BT Group which supplies and maintains broadband, on 5 August 2019 as a trainee engineer. By the time his employment with the respondent terminated following a period of notice, on 7 March 2023, he had been promoted to Advanced Engineer.
2. It is common ground that the claimant was a disabled person at the relevant time of this claim under the definition within s6 of the Equality Act 2010, by way of Autistic Spectrum Disorder (“ASD”), anxiety and depression. The respondent also accepted at the commencement of the hearing that it had the requisite knowledge of the claimant’s disability (and substantial disadvantage) for the purposes of the sections of the Equality Act 2010 (“EqA”) relevant to this claim.
3. The early conciliation process started on 13 February 2023 and ended on 27 March 2023. The claimant presented a claim for constructive unfair dismissal and failure to make reasonable adjustments on 27 April 2023.

There was originally a dispute relating to some pay issues, but those were resolved by the time of the hearing.

4. At the hearing, we had the benefit of reading statements and hearing oral evidence from the claimant. For the respondents, we heard evidence from:
 - 4.1. Ian Welsby – Senior Engineering Area Manager for Manchester, grievance investigation officer;
 - 4.2. Paul Dyde – Patch Manager covering Bracknell, the claimant’s first line manager for the majority of the relevant time;
 - 4.3. Martin Bull – Senior Engineering Area Manager for Hampshire and Berkshire, the claimant’s second line manager for the period that Mr Dyde was the claimant’s first line manager.
5. Reference to, for example, paragraph X of Mr Bull’s statement, is referred to as [MB/WS/X].
6. The respondent had initially intended to call Mr Justin Phillips who had also provided a witness statement. His statement primarily related to the issue of the provision of a printer, which was a matter relevant to the constructive dismissal claim. During the claimant’s cross-examination, he explained that the provision of a printer (or lack thereof) was not connected to his decision to resign in any way. As such the respondent took the view not to call Mr Phillips; as such, he did not swear to the truth of his witness statement. The Tribunal explained therefore that it would not give his statement as much weight as it would have done had he attended to swear to his statement.
7. The Tribunal also had sight of a bundle of 883 pages containing all relevant documents. Reference to page X of that bundle is referred to herein as [X].
8. The Tribunal puts on record its gratitude to both representatives for the professional and courteous manner in which they presented their respective cases.

Adjustments

9. At the commencement of the hearing, the Tribunal discussed what adjustments could be made to the Tribunal process in order to assist the claimant during the course of this hearing. We explained that breaks would be granted on request, and that we would take regular breaks in any event. We explained that, if the claimant needed time to answer, or look at a document, or needed any questions reworded, then that was all absolutely fine, he need only ask. We tasked Mr Phillips with asking us for any adjustments the claimant needed as well, just in case the claimant did not feel comfortable asking for himself.
10. We also had a discussion about eye contact. The Tribunal explained that its members would not always be looking at the person giving evidence, but may be looking down taking notes, or looking at documents. The claimant explained he found eye contact difficult, and so the Tribunal told him not to worry at all and that there was no need to look anyone in the eye.

Issues

11. Prior to the hearing, the parties had agreed a list of issues. The Tribunal, having taken until noon on Day 1 to read, made a minor adjustment in terms of the time frame for one of the allegations.
12. At the end of evidence and during submissions, the Tribunal also reworded (with consent of the parties) the alleged provision, criterion or practice under the reasonable adjustments claims.
13. We make the point at this stage that we understand the claimant's complaints to the respondent whilst he was still employed were wider than those we are looking at. We also recognise that the claimant found it perplexing that we did not deal with all the issues that he raised through his internal grievance. However, as we explained during the course of the hearing several times, we have in front of us an agreed list of issues which cover the claims within the claim form. Those are the only issues we will determine. We note that no application to amend was put before us at any stage to widen the scope of the agreed list of issues.
14. The List of Issues, with the minor changes we have set out above, was as follows:

Disability

1. *It is accepted by the respondent that the claimant was disabled by way of autism, anxiety and depression during the material time.*

Constructive Dismissal – s95 Employment Rights Act 1996

2. *Did the following incidents arise:*
 - a. *The respondent failed to address the claimant's concerns about poor provision of location information, raised from the point of the claimant's return to Mr Dyde's team in July 2022.*
 - b. *The respondent failed to provide the claimant with a printer?*
3. *Did these omissions result in a breach of trust and confidence?*
4. *Did the claimant affirm his contract since the act or omission took place?*
5. *Did the employee resign in response to the breach?*

Failure to Make Reasonable Adjustments

6. *Did the respondent apply the following provision, criterion or practice ("PCP"), the practice of providing location information by way of GeoPin, GeoHub and the Job Pack from the point of the claimant's return to Mr Dyde's team in July 2022.*

7. *If so, did it place the claimant at a substantial disadvantage compared to those who did not possess his disability?*
8. *If so, did the respondent take reasonable steps to avoid the disadvantage? The claimant says that the respondent should have implemented the following adjustments:*
 - a. *Continued use of the system known as GeoPin to navigate to site.*

Remedy

9. *If the respondent's conduct is found to have been discriminatory, what is the level of the injury to feelings award, if any, to which the claimant is entitled?*
10. *If the claimant was unfairly dismissed, what are the financial losses he has suffered?*
11. *Has the claimant mitigated his loss?*
12. *If there is a finding of unfair dismissal, should Polkey be applied?*

Findings of fact

Claimant's placement with the respondent

15. The claimant started work for the respondent on 5 August 2019.
16. Prior to the commencement of his employment, he underwent appointments with the Occupational Health team – those reports are at [102] and [104] dated 13 and 28 May 2019 respectively.
17. The claimant was clear on entering a working relationship with the respondent that he had Autistic Spectrum Disorder (“ASD”) and suffered with anxiety and depression. The respondent, for the purposes of this case, accepts that the claimant had those disabilities at the relevant time and that the respondent had the requisite knowledge of those disabilities.
18. The respondent uses “BT Passports” for employees with health issues, disabilities, or caring responsibilities. This is a document produced between an employee and their first line manager. The claimant's BT passport is found at [117]. From [119] it appears that the document was updated three times during the course of the claimant's employment, 22 July 2019, 14 May 2020 and 4 May 2022.
19. When the claimant started working for the respondent, he was a trainee engineer. By the time of his departure from the company on 7 March 2023 he had been promoted to Advanced Engineer. The claimant's termination of contract came about by way of his resignation on notice, tendered on 7 February 2023.

20. In September 2021 there was a reorganisation of the business, and the respondent moved the claimant to the Bracknell Team, managed by Paul Dyde. The claimant was initially assigned to new sites, however, as Covid took hold, that work was limited as no building was taking place. This meant that in reality the claimant was undertaking more “Build Work”.
21. In January 2022, there was a further reorganisation, at which point the claimant was moved to the Fibre Build Team. This was a new team, made up of engineers from across the business, or new recruits.
22. From February 2022, the claimant began asking to be transferred back to a New Sites team, or to an Ethernet team – [156]. In June 2022, the claimant was off work for some time for an eye operation. In July 2022, the claimant’s transfer request was granted due to a vacancy becoming available in a new sites team, with Paul Dyde once more. The claimant in fact only returned to work in September 2022 following recovery from his eye operation.
23. Geographically, the location of the claimant’s work altered. When previously with Paul Dyde, he had been on the Bracknell Team, however that team was no more. Instead, the claimant was absorbed into the Basingstoke Team.

New Sites

24. The respondent’s engineers have two possible types of operation at which they may be required to attend, depending on which team they are assigned to: first, new sites, which, as the name suggests, are new builds that are in the process of being built. Second are the established sites that need engineering works to be undertaken (“build work”). New sites work was more stable, as it would be planned in advance. Build work was more reactionary and so less predictable.
25. There was an inevitable issue with new builds in that, because the site was not physically established, it would not always be possible to find the location by Google Maps or an equivalent, as the satellite maps would not have been updated to show work in development. There may also at the early stages not have been any road names or postcodes even to allow for easy navigation. This sometimes presented difficulties to engineers in finding the correct work site for their allocated jobs.
26. On commencing his employment, the claimant and his fellow engineers had the use of a BT application that could be used on their smartphones to assist them in finding the location of their work site. An engineer could enter the details of the equipment they were to install, and that would bring up on the map the precise location of the work to be done.
27. Engineers also had the benefit of a “job pack” for each work allocation. The purpose of the job pack was primarily to detail the various connections that

the engineer would have to make at the job site. If there were details of the location of the work available, those would also be included within the job pack. The job pack was provided by the developer of the site (in other words, not by the respondent).

28. The third method of locating a job site was to use GeoHub, which was a programme installed on a laptop or tablet. This would produce a static map of which one could zoom in and out. In terms of proposed sites, GeoHub would show those sites, but there was no navigational tool. This means that there would be insufficient detail to enable engineers to find the precise location of a particular job on that building site. The practical outworking of this is that a job site on GeoHub could appear to be in the middle of one particular block whereas, in reality, that one block is formed of multiple plots being built, and an engineer would then have to negotiate their way to the precise correct location.
29. Each new site had an NSR/FBC (new site rep or field-based co-ordinator) allocated to it. NSRs would be responsible for multiple sites. This terminology is interchangeable, we will use NSR for consistency.
30. An NSR is an employee of the respondent and is responsible for liaising with the developers of a new site. We were told by Mr Welsby, and we accept, that the NSR “owns” the relationship with the developer, and the quality control. This means that, prior to any engineer stepping foot on site, the NSR goes around the site, quality checks all the jobs, and ensures that the work is up to standard before “calling it off”. Once a job is called off, the engineers are able to come in to install the connections and so on. This means that, prior to the engineers being on site, the NSR should have a good understanding of the overall site, and where each individual job is located.
31. Therefore, if an engineer had difficulty locating a specific job site, they should be able to call their NSR for assistance in finding the right spot. Evidently, this may practically depend on the availability of the NSR, and their willingness or ability to assist. We were also told that an engineer could call their Patch Lead for help too.

GeoPin

32. GeoPin is a smartphone app that was developed in-house and was rolled out to engineers at the end of the first Covid lockdown, around Summer 2020.
33. The GeoPin functionality meant that an engineer could enter the details of the equipment to be worked on (whether that was a new installation or an existing installation). GeoPin would put a pin on a map where the work was to take place. This app would then interact with Google Maps, meaning that

an engineer's location would be marked on the same map with a blue dot. Therefore, an engineer could walk, mobile phone in hand, to the site accurately, following the relative location between blue dot and static pin on the GeoPin map.

34. Later on in the chronology, Mr Bull spoke to the developer personally regarding GeoPin. It transpired that GeoPin was never intended to have this specific functionality in relation to new sites. All it was intended to do was to show the job location for existing sites. It was not supposed to interact with Google Maps to allow the blue dot to appear at all, let alone for proposed sites.
35. When the claimant returned to work following his eye operation, he noticed that the GeoPin functionality had altered. The difference in functionality was that the location of jobs was no longer available for new sites. This meant that, in terms of finding a job location, the claimant was left with the function of GeoHub and any detail of location within the job pack.
36. This change had an effect on all of the engineers' ability to find new sites. However, given the claimant's disabilities, the effect on him was even more severe. For him, the practical issue was that, in not being able to find the location of the specific job, he would be late and there was a real possibility that he would not be able to complete his allocated tasks for the day. This led to him being incapacitated by his internal reaction to that concern, as he explained that "I have a need to finish the work I am given on any day". His reaction led to him "shaking as if he had Parkinsons and not being able to get his words out". The claimant was aware that other engineers were having the same difficulties in locating a site, and he recognised that they were able to cope with this in a way that he was not. We accept that the engineers allocated to new sites would all experience the same problem in finding a location, but those who did not share the claimant's disability were able to cope with that problem better than him.

Issue 2a – was there a failure to address the claimant's concerns about poor provision of location information which were raised once he was back in Mr Dyde's team in July 2022?

37. The claimant had raised issues in early 2022, for example in February [156] and May 2022 [117] and in review of his BT Passport with Justin Phillips on 3 May 2022. These concerns were raised before his transfer back to PD's team.
38. From the time at which he was back in Mr Dyde's team in September 2022, the first communication we have seen in which the claimant raised any concerns about location issues was November 2022: namely on 24 November 2022 [131] and 29 November 2022 [130].

39. Prior to these matters being raised in November 2022, in September 2022, the claimant had a discussion with Martin Bull on the telephone, suggesting the creation of a temporary Quality Assurance role which he would be keen to fill – [MB/WS/9]. This conversation was followed up in emails in November 2022 - [130-133]. Mr Bull explained that the respondent's view was that this proposed role was already part of the Patch Lead's role, the answer was therefore "no".
40. At this stage we pause to consider one discrete argument raised by the respondent. The respondent suggested to the claimant in cross-examination and to us in submissions that the reason (or part of the reason) for the claimant's resignation was the refusal to give him this Quality Assurance role. We reject that proposition. We note that the matter of the Quality Assurance role is not mentioned in the claimant's witness statement, which demonstrates to us that this matter was not of particular concern to him in terms of the issues in this case. There is no good evidence before us to suggest that this was acting on his mind at the time of his resignation: it is supposition from the respondent.
41. Returning to the November emails, in the email on 24 November 2022, the claimant raised the problem of locating job sites for new sites, explaining the limitations of the information that engineers are given. He further set out that he would be leaving his employment in the New Year due to the stress this was causing him and the fact that in the claimant's eyes "there seems to be no will anywhere to improve standards".
42. Mr Bull replied to the claimant's email of 24 November on 28 November - [131]. Mr Bull informed us that, at this stage, he was unaware that the claimant was disabled. Mr Bull told us the first time he became aware of the claimant's disabilities was on 29 November 2022. No solutions were offered in the email of 28 November, other than a reassurance that the respondent does not require engineers to get through all their planned work for any given day.
43. On 29 November 2022, the claimant sent a further email on [130] in which he clearly set out three requests:
- 43.1. A clear understanding of where to go and what the claimant would be doing when he got there;
 - 43.2. A printer for the job packs to make them easier to interpret;
 - 43.3. To be allocated tasks totaling less than the claimant's working hours on the understanding that he would pick up more work on completion.
44. On the point of the provision of a printer, a printer was provided to the claimant on or around 6 December 2022. The claimant made it clear in evidence that, although he considered that this was too late given this had first been raised in May 2022, the provision of a printer had nothing to do with his resignation. We accept this evidence.

45. On receipt of the 29 November 2022 email, Mr Bull did not take it to be a grievance, but did take steps to remedy the claimant's concerns as we now set out within the following chronology.

46. On Monday 5 December 2022 at 11.06.09hrs [162], the claimant emailed Mr Dyde and Mr Bull, complaining about the lack of information to enable him to find the correct location.

47. Further, on Monday 5 December, at 09.47.29hrs [138], the claimant sent a further email, complaining about GeoPin and the change in its functionality, as well as the impact on the claimant:

“For whatever reason (cost or workload reduction) a decision was taken by someone not to enter the location of our equipment on GeoPin until after it has been commissioned.

...

Please accept this email as a formal complaint of indirect discrimination and deal with it accordingly”.

48. We note that this email was not treated as a grievance by the respondent.

49. In response to this email, Mr Bull called the claimant which led to the claimant forwarding to Mr Bull an email that had been sent by the claimant in June 2022 (not previously sent to Mr Bull) - [254].

50. Mr Bull emailed the claimant in response on 6 December [253], stating:

“I do want to stress that Paul and myself are trying to do what we can to help, both to educate ourselves but also to identify and implement what adjustments we can.

...

We may be able to get you a ruggedised tablet, this would enable you to access geohub without the risk of damaging it accidentally.

It won't solve the geopin sat nav functionality right now but may help identify where you should be going based on planned routes rather than just commissioned.”

51. The claimant replied to this at 1700hrs on 6 December 2022 in which he explained as follows - [252/253]:

“[GeoHub] isn't fit for purpose for field work...

Therefore, thank you for the offer but a hardened laptop using a database designed for office use won't be of much help. This is why we had the GeoPin app for field engineers. I realise that the decision not to update GeoPin until after an installation has been completed was not yours and is completely out of your hands. ...

Clearly the decision to only populate the app after build was not yours. Please do not think for one minute that I blame either yourself or Paul.

However, the fact remains that as a company, Openreach have made a material change affecting ALL FND engineers. The fact it has severely impacted me due to

my condition is pretty much the definition of indirect discrimination. As you are aware, the level of anxiety it has caused me have [sic] had a huge detrimental effect on my mental health.

...

With all of the above considered, I think the best course of action is to continue with my complaint in order to ensure that future cost saving decisions may consider who uses the tool and what for”.

52. Mr Bull replied on 6 December at 17.14hrs - [251-252]:

“If you’re ok I would like to catch up again later on this week regarding the complaint so that I can ensure its raised appropriately. I do have a call scheduled with HR to seek further clarity as well.

In the immediate term, I know Paul has raised a request for support from our EAP team who should be in touch soon, please let me know if this does not happen.

I also understand that you have given consent for an OHS referral which will allow a professional to offer Paul and myself further advice on how we may help you.

I am with Paul tomorrow as well where we will continue exploring what we can do tactically and quickly to help in the absence of GeoPin.....

I will also get details of the ruggedised tablet as, whilst you are right the system may be deemed as office use, the device is what the nsr’s [sic] use so I would hope it may offer some benefit. Maybe we could get an nsr to meet you on site somewhere and show you theres [sic]?

I also have the contact in CTIO who sadly was unable to speak to me today but as soon as I pin him down I'll update you with what I find.

In the meantime, [if] you have any concerns, please do reach out to Paul or myself and do remember that EAP is available...”

53. We consider this response from Mr Bull at this stage to be appropriate and correct in his actions and planned actions, and demonstrates an understanding of the claimant's concerns and his position. There was however, as we have already stated, a failure to recognise this as a formal complaint.

54. On 7 December 2022 the claimant emailed Mr Bull and Mr Dyde again, in which he focuses on GeoPin and stated that “[t]he best mitigation for the lack of GeoPin would be to rectify the extremely poor quality Job Packs...” - [251]. We note that the claimant ended by saying “I’m not looking to take any form of legal action, even if I’m unable to continue my employment. ...”.

55. Mr Dyde and the claimant met on the Thursday, 8 December 2022, for three and a half hours. Mr Dyde considered this to be a positive meeting, in which there had been good communication between the two men.

56. On 14 December 2022, the claimant emailed Mr Dyde and others (not Mr Bull) - [140]. This email raised the specific complaint about how job allocations were appearing on the FND app. The claimant gave a clear example on [140]: the app was showing his own jobs and his apprentice's jobs as all being assigned to him. He explained that "just seeing that I have 18 hours' worth of work assigned to me is enough to cause huge amounts of anxiety, in my case this leads to depression and muddled thinking making me ineffective". This email was forwarded by the union to Mr Bull on the same day asking him to look at it as a matter of urgency – [140].
57. The next email we have is the claimant's email of 18 December 2022 at [142] to which he attaches a letter entitled "To whom it may concern". That letter is found at [143]. He sent an updated and expanded attachment on 9 January 2023 – [147]. The claimant ended that email with "I will now have to wait for the CWU and UnionLaw to review the evidence before deciding how best to proceed".
58. Mr Bull did not treat this email or the attached letter as a grievance. This is despite having received the earlier email from the claimant stating he wanted to raise a formal complaint. We find that the correct response to this email from the claimant would have been to ask the employee whether he wished this to be treated as a grievance in line with the grievance policy, as opposed to assuming it was not a grievance simply because it did not have that label attached to it. It should have been flagged as a grievance at this stage.
59. Despite not triggering the grievance procedure at this stage, Mr Bull did engage with the claimant about his email of 18 December 2022 and had a conversation with him at their next weekly telephone conversation. Following this conversation, the claimant went off work and did not return.
60. In the course of his investigations, Mr Bull spoke to Peter Hanlon the Senior Manager for Transformation, who indicated that Mr Bull needed to speak to Ian Smith regarding GeoPin. Mr Smith was the Technical Solutions Consultant for App Innovation who was, at that stage, on long-term sick leave. Mr Bull spoke to Mr Smith once he returned to work, on 10 February 2023 – [MB/WS/26]. It transpired that GeoPin was never intended to have the functionality of tracking a location for proposed sites. Mr Smith's belief was that this was caused by a bug and was deleted when bugs were fixed routinely – referenced at [877]. At this point, Mr Smith explained that it was envisaged that GeoPin had only 12 months left before being replaced by another system. Mr Bull told us that he was informed by Mr Smith that the development of GeoPin over that next 12 months was planned; there was therefore no room for attempting to put back in place this functionality for proposed sites because the app was coming to the end of its life. In the event, GeoPin is still being used by engineers and has not yet been replaced.

61. On 23 January 2023 on [164], the claimant raised a request for a settlement. Those emails continue into February 2023 up until the claimant resigned on 7 February 2023 - [169].
62. On 15 February 2023, the claimant was sent an invitation to a grievance meeting – [172].
63. Having explored the relevant chronology, and returning to Issue 2a, we consider that the respondent failed to raise the matter as a formal grievance as it should have done. However, it did take steps to try to address the claimant's concerns practically; for example talking to the developer, offering him ruggedised laptop, referring him to EAP and getting his permission to go to Occupational Health, as well as repeating that he could ask for help from the NSR. We consider that not all these efforts were done in a timely manner.
64. We accept that, despite these efforts, the respondent did not come up with a solution to the fundamental issue the claimant was experiencing regarding finding new sites. In parallel, the claimant's mental health was deteriorating significantly to the extent he felt that he wanted to remove himself from the workplace.
65. In terms of the claimant's resignation, we consider that the following played a part in his decision to resign:
 - 65.1. He had previous experience of a mental health breakdown, from which it took him eight years to recover and get back into the workplace. The claimant felt that he was heading down that path again, and he considered himself to be incapacitated for his job due to his mental health. He was suffering the effects of his disabilities so much that, even whilst he was still at work, he told us that he would stand at the front door for 15 minutes bracing himself to go out and get to work;
 - 65.2. He did not want his colleagues to see him in the state he found himself;
 - 65.3. His decline in mental health was at least in part due to the claimant's view that the respondent was not providing him with the information he needed to be able to do his job, and was therefore exacerbating his symptoms. Furthermore, the claimant's reasonable view was that there was no end in sight in terms of the respondent solving the issue of better location details to proposed sites that would meet the claimant's needs.

Law – constructive unfair dismissal

66. Section 95 of the Employment Rights Act 1998 (“ERA”) sets out circumstances in which an employee is dismissed:

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

- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
- (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
- (c) the employee terminates 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.”

67. “Constructive dismissal” as set out in sub-section 1(c) is the statutory version of a principle originally from common law. The burden is on the employee to prove constructive dismissal. In order to establish that he has been constructively dismissed, the employee must show:

- 67.1. there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment;
- 67.2. the employer's breach caused the employee to resign, and
- 67.3. the employee did not delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal.

Implied term

68. The relevant term in this case alleged to have been breached is the implied term of trust and confidence between the parties. The term has been established in the case of Malik v Bank of Credit and Commerce International SA 1997 ICR 606 to mean that an employer or employee:

“will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties”.

69. It is established that it is not the intent of the respondent that matters, but the effect – Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 page 670-671:

“To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it”

70. A breach of the implied term of trust and confidence will always amount to a fundamental breach – Morrow v Safeway Stores plc 2002 IRLR 9.

Reason for resignation

71. It is a question of fact for the Tribunal as to whether the claimant resigned in response to the breach. The breach need not be the only reason, but the claimant must have resigned at least in part because of the breach. The “crucial question is whether the the repudiatory breach played a part in the dismissal” - Abbycars (West Horndon) Ltd v Ford EAT 0472/07, paragraph 34.

Affirmation

72. An employee must not wait too long before resigning, otherwise he may be taken to have affirmed his contract. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, it was held that the employee “must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged” - page 226. Although delay is a factor, it is not determinative.

Unfairness

73. If it is established that the claimant resigned in response to a fundamental breach and did not affirm their contract, then they will have been constructively dismissed. If so, the next issue for the Tribunal to consider is whether the dismissal was unfair.

Law – failure to make reasonable adjustments

74. The provisions regarding reasonable adjustments are set out at ss20 and 21 of the Equality Act 2010 (“EqA”):

“20(2) The duty [to make reasonable adjustments] comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

...

21(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

....”

Provision, criterion or practice (“PCP”)

75. The first requirement of this claim is that there be a provision, criterion or practice (“PCP”). The terms “provision, criterion or practice” are not defined within the legislation, and are to be given their ordinary meaning; they are broad and overlapping terms and should not be narrowly construed – Ishola v Transport for London [2020] EWCA Civ 112. A PCP can cover informal as well as formal arrangements. Simler LJ held that the function of a PCP “is to identify what it is about the employer’s management of the employee or its operation” that causes the substantial disadvantage - paragraph 36 Ishola.

76. The finding of a PCP is a matter of fact for the Tribunal – Jones v University of Manchester [1993] IRLR 218.

Substantial disadvantage

77. “Substantial” means no more than minor or trivial – s212(1) EqA.

78. The Tribunal must consider the identification and consideration of the actual functional effects of the disability. In Thompson v Vale of Glamorgan Council EAT 0065/20, the EAT set out:

“The Tribunal should identify the nature and extent of the “substantial disadvantage” caused by a PCP before considering whether any proposed step was a reasonable one to have to take...There must obviously be some causative nexus between disabilities relied on and the “substantial disadvantage”; the tribunal should look at the overall picture” when considering the effects of any disabilities”.

79. The Tribunal’s analysis must be based on the evidence regarding the claimant’s actual disability as opposed to any general assumptions. The position must be judged on the true facts, not on any assumptions made by either party, or the Tribunal – Copal Castings Ltd v Hinton EAT 0903/04.

80. The question of disadvantage must focus on the disadvantage allegedly caused by the PCP.

81. The test is whether the claimant suffered a substantial disadvantage compared to others who do not share his disability. This is not a comparison with the population at large, but with those with a class or group of non-disabled comparators. The Employment Appeal Tribunal (“EST”) has held that it may not always be necessary to identify actual comparators, but that the nature of those non-disabled comparators will be self-evident from the PCP found to have been put in place – Fareham College Corporation v Walters 2009 IRLR 991.

82. The EAT's decision in the above case is reflected in the Equality and Human Rights Commission's Code of Practice on Employment, which states at paragraph 6.16:

“The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular [PCP] or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly — and unlike direct or indirect discrimination — under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's”.

83. In Sheikholeslami v University of Edinburgh 2018 IRLR 1090 the EAT held that the comparative exercise required it to establish whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability.

Reasonable adjustment

84. The Tribunal will need to identify the “step” or “steps”, if any, the employer could reasonably have taken to reduce the disadvantage.

85. The burden is on the claimant to identify in broad terms the nature of the adjustments. At that point the burden then shifts to the employer to show that the adjustment in question either would not have reduced or prevented the disadvantage, or would not have been reasonable.

86. Ultimately it is a matter for the Tribunal to determine what is reasonable – Smith v Churchills Stairlifts plc 2006 ICR 524. In other words, the Tribunal can substitute its view for that of the employer in terms of whether it considers the adjustment to be reasonable. The question of reasonableness must focus on the practical result of the implementation of any measures: in other words, it is the efficacy of the proposed measures that are key.

87. The Tribunal also has the ability to conclude that a different adjustment from the one that the claimant proposed or preferred was reasonable – Garrett v LIDL Ltd EAT 0541/08.

88. The ECHR Code of Practice on Employment (2011) sets out various factors that may be relevant when considering the reasonableness of any proposed adjustments:

- “whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.”

89. There is no requirement that adjustments suggested by a claimant should remove the substantial disadvantage in its entirety – Noor v Foreign and Commonwealth Office [2011] ICR 695. The statute states that the reasonable adjustment should “avoid” the disadvantage. Therefore, a respondent will not avoid liability solely by demonstrating that the disadvantage would have been suffered even with the adjustment. If the adjustment would have acted to avoid or alleviate the disadvantage, that is sufficient for liability to attach under ss20/21.

CONCLUSIONS

Constructive Unfair Dismissal

Issue 2a – was there a failure to address the claimant’s concerns about poor provision of location information which were raised once he was back in PD’s team in July 2022?

90. As we have found, there was a failure to raise the claimant’s concerns as a grievance in a timely manner, although steps were taken practically to attempt to deal with those concerns.

Issue 2b – did the respondent fail to provide the claimant with a printer?

91. We did not need to determine this issue, and we need make no findings about the provision of a printer. This is due to the claimant stating that the issue of a printer was nothing to do with his resignation.

Issue 3 – did the omission result in a breach of trust and confidence

92. We consider that, although the respondent did not act in a timely manner in relation to all steps it could take regarding the claimant’s complaints raised in November 2022, this is not sufficient to be a fundamental breach of contract to enable the claimant to consider himself released from his contract.

93. We have to consider whether the respondent’s conduct was such as was “likely to destroy or seriously damage the relationship of trust and confidence between the parties”. We are not satisfied that the conduct, or lack of action, by the respondent was so bad as to reach this high threshold. We have found that the respondent did take steps to address the claimant’s concerns – see paragraph 63 above. The respondent’s only real error was

to not raise the claimant's concerns as a grievance earlier, and to delay in some of the steps it took.

94. The constructive unfair dismissal claim therefore fails at this point, as we conclude that there was no fundamental breach of contract.

95. For completeness, in terms of the reason for the claimant's resignation, we have set out our findings on this matter at paragraph 65 above.

96. In any event, and as we have stated, the constructive dismissal claim fails due to a lack of a fundamental breach.

Reasonable Adjustments

PCP

97. We find that the manner of providing location information via GeoPin, GeoHub and Job Packs was a practice that amounts to a PCP, and as applied to all engineers.

Substantial disadvantage

98. We accept that the GeoPin functionality had changed by the time the claimant returned to Mr Dyde's team in September 2022, so that it would not facilitate a tracking/mapping function to jobs on proposed sites.

99. We conclude that this PCP, following the claimant's return to work in September 2022, did cause the claimant to suffer a substantial disadvantage when compared to those who did not suffer from his disabilities. As we have already stated, although the engineers were all provided with the same information, and all sometimes experienced difficulty in finding jobs on new sites, the impact was greater on the claimant than on those not sharing his disability. We accept that there would have been a range of responses to the difficulty in navigation, however we accept that the disadvantage to the claimant in relation to the disadvantage to those others was more than minor or trivial because of his disabilities.

Reasonable adjustment

100. In terms of the specific reasonable adjustment pleaded, we accept the evidence we were given about the information that the respondent obtained from the GeoPin developer, that it only had 12 months left, and

that the timetable for work on the app was set, meaning that there was no capacity to explore putting the requisite functionality back in. This is particularly so, given the case that GeoPin was not designed to have the functionality that the claimant wanted and had been able to access in the past.

101. Therefore, we do not consider that the adjustment put forward by the claimant was a reasonable adjustment in those circumstances.

102. We have thought about what else reasonably the respondent could have done to address the issue of locating new work sites and avoid or reduce the substantial disadvantage to the claimant.

103. We are restricted in our remit to the evidence we have heard and seen, considering the particular PCP we have found to exist. We cannot see that there were any further adjustments that the respondent reasonably could have made beyond those that had been offered to the claimant. We find that the respondent offered the following – see for example [PD/WS/15]:

103.1. Being provided with GeoHub on a ruggedised laptop;

103.2. Speaking to the Patch Lead (which at the relevant time was Mr Dyde);

103.3. Speaking to the NSR;

103.4. Being paired with another engineer who could help locate the right site;

103.5. Providing a printer to print off the job packs.

104. As such, the complaint of reasonable adjustments fails at this stage, in that the respondent had taken such steps as were reasonable for them to take in all the circumstances. Therefore it was not in breach of its duty to make reasonable adjustments.

Comment

105. We consider this to be a very sad case in which the respondent has lost a clearly very skilled, diligent and conscientious worker. Had the claimant not resigned when he did, we would have hoped and expected to see him supported through an absence procedure, with other possibilities such as redeployment considered. However, the parties did not get to that stage.

106. From the respondent's side, we consider that Mr Dyde and Mr Bull both cared about the claimant, genuinely tried to help him and did not want

to lose him. The claimant seems to have recognised this in some of his correspondence.

107. We appreciate the professional and courteous manner in which all parties and witnesses have conducted themselves.

108. Our particular thanks go to Mr Moore, the claimant. We appreciate that this was a far from easy process for him. We put on record our thanks for his attendance, and our respect for giving his evidence in a clear, considered and eloquent manner, despite the clear negative effect this process has had on him.

Approved by

Employment Judge Shastri-Hurst

28 February 2025

REASONS SENT TO THE PARTIES ON

3 March 2025

FOR THE TRIBUNAL OFFICE