EMPLOYMENT TRIBUNALS

Claimant: Mr Y Patel

Respondent: NewDay Cards PLC

Heard at: London Central (by CVP)

On: 28, 29, 30, 31 October, 1 November and 13 December 2024

Before: Employment Judge Emery
Ms E Ali
Ms J Cohen

REPRESENTATION:

Claimant: Mr O Ogunyanwo (representative)
Respondent: Ms I Ferber KC (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

2. The following complaints of failure to make reasonable adjustments for disability are well-founded and succeed:

    a. Allowing him to work from home on a temporary basis on his return to work
    b. Allowing a phased return to work as recommended by his Occupational Therapist
    c. Investigating the possibility of getting Access to Work to pay for an electric wheelchair

3. The remaining complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

4. The complaint of direct race discrimination is not well founded and is dismissed.

REASONS

1. The claimant was dismissed following a period of 9 months sickness absence, after he unfortunately suffered a very serious stroke. At the time of his dismissal he says his Occupational Therapist had recommended his return to work on a gradual basis with significant adjustments.

2. The claimant says that his dismissal arises from his disability as he required reasonable adjustments which the respondent failed to make and he was dismissed because of his sickness absence. The respondent says that it was objectively justified in dismissing the claimant because there was no adjustments which could reasonably be made which would have enabled the claimant to return to a productive role.

3. The claimant says that there was a failure to make reasonable adjustments which could have had a material effect on his ability to successfully return to work. The respondent says that it was unreasonable for it to make at least one of the adjustments which the claimant's Occupational Therapist had said were preconditions for the claimant's return to work, and that the claimant suffered no substantial disadvantage as no adjustments would have enabled the claimant to return to his role in the foreseeable future.

4. The claimant alleges that he was treated less favourably than two named comparators who are while and who were on long-term sickness absence, that his race was a substantial reason for the failure to make reasonable adjustments and dismiss him.

The Issues

5. Direct race discrimination (Equality Act 2010 section 13)

    5.1 Did the respondent treat the claimant less favourably because of his race by failing to make reasonable adjustments for his disability and by dismissing him and not upholding his appeal as a result?

    5.2 He relies on the following comparators, Ms Smith, and Ms White, both employees of the respondent.

6. Discrimination arising from disability (Equality Act 2010 section 15)

6.1 Did the respondent treat the claimant unfavourably by dismissing him and rejecting his appeal? The respondent accepts that this amounts to unfavourable treatment.

6.2 Did the claimant's inability to work arise in consequence of his disability? The respondent accepts that this is the case.

6.3 Was the treatment a proportionate means of achieving a legitimate aim, taking into account any failure to make reasonable adjustments? The tribunal will decide in particular:

6.3.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

6.3.2 could something less discriminatory have been done instead;

6.3.3 how should the needs of the claimant and the respondent be balanced?

7. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

7.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

7.1.1 Requiring the claimant to work in the office at least 50% of the time: the respondent accepts that it had this PCP.

7.1.2 Requiring C during a phased return to be in attendance for longer than half an hour at a time and/or for longer than an hour at a time and/or requiring the C not to come back on a phased return. The respondent accepts that the 30 minutes requirement was a PCP, it does not accept it had a PCP of not allowing C (or anyone else) to return on a phased return.

7.1.3 Requiring the claimant to be able to move himself around in a wheelchair unaided. The respondent accepts that it had this PCP.

7.2 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability? The respondent says no substantial disadvantage because the claimant was unable to return to work at any point before he was dismissed. And he would not have been able to do productive work even if he had been able to return to work.

7.3 What steps could have been taken to avoid the disadvantage? The claimant suggests:

7.3.1 Allowing him to work from home on a temporary basis until he felt able to return to the office, as opposed to requiring him to work in the office at least 50% of the time.

7.3.2 Allowing a phased return to work as recommended by his Occupational Therapist; alternatively allowing such a phased return on the basis that the first 3 weeks were one hour in the morning and one hour in the afternoon, instead of the proposed shorter times.

7.3.3 Accommodating use of a wheelchair in the office area by ensuring someone was able to move his wheelchair when he needed to move and/or investigating the possibility of getting Access to Work to pay for an electric wheelchair.

7.4 Was it reasonable for the respondent to have to take those steps

The evidence and witnesses

8. The Tribunal heard from the claimant. For the respondent it heard from (i) Ms Sandra Wilkinson, Manager, Digital Contact Centre, who was the claimant's line manager and who dismissed the claimant; (ii) Ms Amanda Robertshaw, Senior Manager Fraud and Disputes Team, who heard the claimant's appeal against dismissal.

9. The Tribunal spent the first half-day of the hearing reading the witness statements and the documents referred to in the statements. We set out below our 'factual findings' in respect of all relevant issues.

10. The judgment does not recite all the evidence we heard, instead we confine our findings to the evidence relevant to the issues in this case. It incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

11. The claimant was employed by the respondent as a Digital Coordinator. His role was to take calls from credit-card customers. The respondent works on behalf of various credit card companies and shops, the claimant's role is to ascertain which card the customer has, draw down the relevant fact sheet for that card with the relevant questions, undertake an ID check, take their query, relevant personal information, deal with the query, take card payments.

12. Throughout this process the role requires detailed call notes to be taken of the query, the ID check, steps taken, and how it was resolved. Calls can last anything up to an hour. The claimant accepted that this job involved multi-tasking and a degree of dexterity in handling computer and phone.

13. The respondent trains its employees by requiring them to attend training days at the outset of employment and on return from a lengthy absence, for example maternity leave or long-term sickness absence. This involves two weeks of training, which is always undertaken in the office in group training sessions. Following the training, the employee would be shadowed by a senior colleague who would sit adjacent to monitor all calls and check for and correct any errors during each call. This part of the training requires each employee to 'pass' 5 calls at 90% with the correct processes and information and taking appropriate notes.

14. The claimant accepted that he would be required to undertake training and monitoring on his return from long-term absence. He did not accept that he would need to undertake the full two weeks training and monitoring, but he also accepted that the respondent may require employees returning from long-term absence to do so and he would have accepted if he had been required to undertake this training.

15. On 31 July 2022, the claimant suffered a large stroke which affected the right side of his brain. As a consequence he was in hospital from this date to 22 December 2022. He continued suffering significant symptoms and had frequent treatment and rehabilitation thereafter.

16. For rehabilitation, the claimant was assisted by an Occupational Therapist at Leeds Community Neurological Services – Ms Stubbs. Ms Stubbs wrote to Ms Wilkinson on 19 December 2022 setting out a history of his rehabilitation. She says that he has experienced several significant changes to his functional ability, he is making "good progress however still has a long way to go and challenges to overcome" in his recovery. He currently requires assistance with mobility, his left arm has "no current functional use of movement". He has high levels of fatigue, there were issues with cognition including reduced attention, (sustained attention, attentional switching and divided attention); and executive difficulties (reduced abstract and flexible thinking.). It says that the claimant will require "support and consideration of when and how it is appropriate for him to return to work…. [he] will require adjustments". Ms. Stubbs was unable to give a time frame for his return (122).

17. By 20 January 2023 the claimant was seeking to discuss a return to work, he sought an appointment with Ms Wilkinson and his Occupational Therapist. He spoke to Ms Wilson, the Centre Manager, who told him there would be a phased return, with "no rush" to return to work on phones, that he would not necessarily have to start at 50% of hours on his return and that there would be a "full integration plan" on his return to work (123).

18. On 25 January 2023 Ms Stubbs provided a report with recommendations for the claimant's "graded return to work". This says he has high levels of fatigue, significantly reduced mobility, no functional use of his left upper limb, and his ability to focus, switch and divide his attention, and ability to plan and think flexibly

has been affected. It says that his "aim" is to return "approximately April 2023" following the end of his rehabilitation; a graded return, working from home for the foreseeable future "to return to the office he would require an access assessment and transport", he is unable to climb stairs. It suggests a graded return:

a. 1st week one hour a day 3 days a week (30 minutes am, 30 minutes pm)
b. 2nd week 4 days same hours
c. 3rd week 1 hour 30 per day, 4 days a week (45 minutes am and pm)
d. 4th week - 2 hours a day 4 days a week
e. Month two – continued gradual return, increasing to 3 hours a day 4 days a week by the end of month two
f. Month 3 – aim for ½ contracted hours
g. By month 6 – aim to return full time.

This was the "aim … this is flexible and to be reviewed".

19. The report says that the claimant may require support with doing two tasks at once; listening to information for a long period; quickly switching between tasks; concentrating for a prolonged period; typing and phone calls; problem solving with customers on the phone; talking for a long period of time. The claimant accepted in his evidence that all of these matters are requirements of his role.

20. The claimant's 2nd long-term absence meeting was on 1 February 2023. The claimant and Ms. Stubbs attended online. Ms. Stubbs 22 January 2023 report was discussed. The claimant was asked about his current symptoms, and he said that he was suffering from severe fatigue, was very drowsy, on strong painkillers as his pain was not under control, that often it was very difficult to stay awake. At this time the recommendation was he should not leave his house. He needed to use a wheelchair or a stick to move around the house. At his stage he could not climb stairs, he was having home adaptations.

21. The claimant confirmed he was aiming for a potential return to work in April 2023, "depending on his progress through rehabilitation" (131-136). The follow-up letter confirms to the claimant that a "suitable phased return to work plan" including retraining would be put in place; a further absence review would be arranged for March 2023.

22. Ms. Stubbs emailed Ms. Wilkinson on 7 March 2023. She reports that the claimant was undertaking an "intensive" rehabilitation programme in India and was making progress. But "high levels of fatigue, concentration and thinking skills are still impacting him daily"; he still had no functional use of his right arm "he is keen to explore return towards the end of April". Because he was unable to drive, she recommended he work initially from home, with a view to returning to the office once he had adaptations to his car (143).

23. On 20 March 2023 the claimant spoke to the respondent saying that he was seeking to return on 24 April 2023, that he would need a desk assessment for work and home (148).

24. The claimant attended a final absence review meeting on 14 April 2023. The claimant was asked questions about his rehabilitation, he said that there was improvement in his movements, he could now climb stairs. On his "levels of fatigue and concentration" and "realistically" how he thinks he could manage at work, the claimant said that if the return-to-work plan formulated by Ms. Stubbs was adhered to "he could be okay and get used to it, taking it step by step".

25. The claimant confirmed he was still on morphine and codeine, that this treatment may be changed to injections in the future. If he was drowsy at work, he said he would drink coffee. If he got drowsy during a customer call, he said he would be okay and would manage to get to the end of the call. His concentration was impacted "but is confident that he will get used to it again, but it will take time."

26. He said that he hoped to be able to start work phasing in slowly on 22 April; however fit notes were available for as long as necessary. Because he was unable to drive his car without adaptations, discussion was had about how he could come into work. The claimant also mentioned that he needed assistance to "get around and get to the toilet" which would require somebody to push him around when required. This is because he had a manual wheelchair which needed to be pushed, he said he didn't qualify for a motorised wheelchair unless he could not walk for life.

27. On Ms. Stubbs recommendation that his phased return starts 30 minutes twice a day, he said that "it would be a help to start getting him back into routine"; he suggested that he could increase this to starting at 1 hour twice a day.

28. Ms. Wilkinson argued at the meeting that 30 minutes twice a day was "not sustainable" as time was needed to get him logged in and set up, and then to be given "all the information and learning", this is an issue she would need to "seriously consider.". She said that this recommendation was "not quite feasible and she would need to consider how this would impact him and his health"; that the recommendations would be considered, but not all could be guaranteed "as we need to look at the business perspective also."

29. The claimant was told that a further sick note was required "straightaway (advised of AWOL process)" (155).

30. The outcome of the 14 April 2023 meeting was delayed because of Ms. Wilkinson's leave, in the meantime the claimant sent a further Med3 stating he was not fit to return to work for the period 21 April to 19 June 2023 (156). He phoned on 24 April, saying he "wanted to start the ball rolling to return to work" (158).

31. Ms. Wilkinson wrote to the claimant on 5 May 2023 saying that he was being dismissed on grounds of long-term absence. The decision records:

    a. He had "no expected return to work date where you will be able to resume the activities you performed prior to your absence".
    b. The level of absence was excessive and unsustainable.
    c. The level of support recommended by Ms. Stubbs, starting at 30 minutes with an expected return to work plan taking several months to a year before he may be able to return full time was "not something we can sustain"; that the 30 minutes sessions would be unmanageable as the mandatory training courses take longer than 30 minutes, tasks take longer than 30 minutes, and the Quality Team would be "restricted" in their checks.
    d. Without an adapted car, he could not work in the office for the foreseeable future;
    e. In the office he would need pushing around the office and to the toilet that this is "not something we can provide".
    f. The respondent requires 50% office attendance and the claimant would not be fit enough to achieve this for a significant period, making his training and integration "much more difficult to achieve".
    g. She was not convinced the claimant had the capability and mobility to achieve a successful return to work without impacting his health further;
    h. His absence had led to operational issues with longer wait times and a failure to meet service levels.

32. The decision concludes that "continued absence with no foreseeable return is unsustainable" and the respondent could not provide someone to move him around the office and to the toilet (159-63).

33. Ms. Wilkinson said in her evidence that at the time she did not see any ambiguity between the claimant's sick note dated 21 April 2024 and his request to return to work on 24 April; she said that the sick note was the claimant's "doctor's advice on whether he can return", and this took precedence over his planned return to work date. She said that the sick notes meant "he was not capable of working … his GP was advising he was not fit to work, and I relied on the advice of his GP", which "overrode" the Occupational Therapist's report. She accepted that the claimant had said he could provide medical certificates, and that she had requested a certificate from him at the final absence meeting, but also that she "relied on the sick certificates" in determining to dismiss. She said that she "assumed" the GP was aware of the Ms. Stubbs report but had decided that no return to work was possible, even with adjustments.

34. In her evidence, Ms. Wilkinson said that the main sticking block to the claimant's return to work was the requirement he work 30 minutes twice a day "an unsustainable requirement".

35. Ms. Wilkinson's clear evidence was that the rest of the adjustments suggested by Ms. Stubbs "would have been possible" and would have been actioned. They were not because "we never had a date for his return." She said that no access to equipment or other adjustments were considered as he was not ready to return to work. The respondent accepted in evidence that it did not consider, for example, digital dictation software as an alternative to having to type notes.

36. Ms. Wilkinson also confirmed that the business considered whether the claimant could return at 30 minutes twice daily just logging on and checking emails for the first month and then starting his training when his hours increased; her view was that training was not feasible in the first few weeks. She said, "if he had been well enough, we would have started with adjustments on this basis" but "he was not well enough to return".

37. Ms. Wilkinson said that the claimant's retraining would have been possible once the claimant's hours increased to 3 hours a day 4 days a week – month two / three of Ms. Stubbs recommendations. She said that "realistically" the claimant would be required to work 2-hour sessions to support his integration and complete the required training.

38. Ms. Wilkinson said that she was aware of AtW and that a motorised wheelchair could be provided under this scheme. She said that she "assumed" the claimant's answer at the 14 April 2023 meeting, that he was not entitled to a motorised wheelchair, was referring to AtW, not as he says to an NHS motorised wheelchair. She accepted that she did not discuss or pursue this issue further, that the decision letter statement that a motorised wheelchair "is not currently a possibility" was in response to the claimants' statement that he did not qualify for one. She said that had the claimant returned to work, AtW would have been addressed with HR. She accepted that the lack of a motorised wheelchair was a factor in her decision to dismiss the claimant.

39. At the date of dismissal, the claimant remained on significant pain killing medication including opiates and codeine, his pain had not markedly improved since his hospital discharge, meaning he was sleeping poorly and having to nap during the day. The respondent says that this means it is "wishful thinking" that he would have been able to return to work in the foreseeable future. The claimant argues that he had been referred to fatigue management as part of his rehabilitation, that he had learned techniques to address drowsiness, he "would have managed to perform" if he had returned to work, especially on the graduated return recommended by Occupational Health.

40. The claimant disputed the respondent's characterisation of his health that there was "no change between January and April 2023". He said that he had been improving day by day, "not major training, but minor improvements." He gave the example of re-passing his driving test, an example he says of addressing visual inattention and visual field loss, symptoms he was experiencing in December

2022. The claimant accepted he still had significant ongoing symptoms in April 2023.

41. The claimant's case is that he could have returned to work starting an hour twice a day, more than recommended by Ms. Stubbs who recommended building up to an hour twice a day in month 2. During these proceedings, Ms. Stubbs was asked whether this was a possible adjustment. Her strong opinion was that returning on this basis would risk significant setbacks in the claimant's health and she reiterated her previous advice.

42. The claimant appealed on 13 May 2023. His grounds of appeal include (166):

    a. There was a failure to make reasonable adjustments as recommended by Ms. Stubbs
    b. "It was wrong" to say he did not provide a return-to-work date
    c. The requirement to work 50% in the office was indirect discrimination
    d. The respondent should have referred him to Occupational Health if it was unhappy with his therapist's report.

43. In his responses arranging dates of an appeal hearing, he sent two short emails with significant typos, making them virtually unintelligible (164). In his evidence, he accepted that at end April 2023 he still would have needed someone to watch his typing and giving assistance when required.

44. The appeal decision was that the respondent could not sustain the adjustments which had been suggested; the respondent could not assist with helping him from his car and pushing him around the office. The decision considered the issues in Ms. Stubbs report, of support the claimant required with typing, problem solving, and talking for a long period of time, all of which would "significantly impact" on his ability to carry out his role for the foreseeable future. It stated that the plan recommended for his return and that time it would take for him to return to his role full time "is not something we can accommodate". The fact he needed a "significant amount of support to get around the office" meant that he would not be able to be in the office 50% of the time as required by the respondent (177-80).

45. Ms. Robertshaw argued in her evidence that at the appeal stage she did not feel the claimant was "anywhere near" being able to be in the office 50% of the time. She said that "it was quite obvious" that the claimant remained seriously ill, that he was "struggling to have a conversation with me … this raised health concerns", because the claimant was struggling, she did not consider there was any need to further consult an Occupational Therapist. She said that it was clear 30 minutes was the maximum time the claimant was capable of working for the foreseeable future.

46. Ms. Robertshaw also accepted that her view the claimant was incapable of working was based on what she saw of the claimant's health and the discussion

had during the appeal hearing "it was on the evidence I had including observations of the claimant … I evidenced and witnessed it that day." The claimant's case is that his mental and physical health deteriorated significantly after and as a consequence of his dismissal, that it is unreasonable to take account of this assessment without seeking a further medical report.

47. Ms. Robertshaw accepted in her evidence that a return to work starting at 30 minutes sessions building up to 3 hours a day in month two was a potentially feasible return to work plan, had the claimant been fit to return to work.

48. It was suggested to Ms. Robertshaw why the respondent "did not wait longer" to assess his fitness for work, there had been for example one employee who she was aware of who had 16 months absence and had not been dismissed. She said that she took a lot of issues into consideration, the length of time he would need to be trained on his return, his clear ill-health. She argued that the circumstances of the claimant's comparators was different "they are different illnesses and different support was required," She said she did not consider giving more time to the claimant to get better, that she considered his obvious ill-health at the hearing was a clear indication he could not return to work for the foreseeable future.

49. Ms. Robertshaw argued that Access to Work and a wheelchair were not discussed at the appeal, as the claimant was not fit to return. She did not consider a desk assessment or for example recording devices; the decisive factor for her was his current poor health and, when he would have been fit to return, the length of time it would take to train and integrate him into the business, the fact that there may be "complications" with him using the systems, the fact he needed to work from home and the impact of a lack of support this would involve.

50. The claimant relies on a comparator for his claim of direct race discrimination, Ms. White, an employee of the respondent who had a stroke and was allowed to stay off work for a year and adjustments were made. Neither Ms. Robertshaw or Ms. Wilkinson were involved in any decisions involving Ms. White or Ms. Smith. Their evidence was that each condition can be different, that the circumstances with the claimant were not the same.

51. Ms. Wilkinson accepted that other staff members including Ms. White had longer periods of sickness absence and had not been dismissed; the reason the claimant as dismissed as he "was not well enough to continue in his current role".

Closing Submissions

52. Both parties gave detached submissions lasting 2 hours each. We considered these carefully and set out the most relevant arguments below.

Relevant legislation and case law

53. Reasonable adjustments

a. *Environment Agency v Rowan* [2008] IRLR 20: in order to make a finding of failure to make reasonable adjustments there must be identification of

i. What is the PCP and has it been applied by the respondent;
…
ii. the identity of non-disabled comparators (where appropriate) – i.e. employees who have not suffered a stroke; and

iii. the nature and extent of the substantial disadvantage suffered by the claimant from that PCP.

b. The Statutory Code of Practice on Employment, EHRC: The duty to make reasonable adjustments as 'a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled'.

c. *Redcar and Cleveland Primary Care Trust v Lonsdale EAT [2013] EqLR 791*: The duty involves 'treating disabled people more favourably than those who are not disabled'.

d. *Sheikholeslami v University of Edinburgh [2018] IRLR 190:* "It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question … For this reason also, 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 circumstances."

e. *Fareham College Corporation v Walters [2009] IRLR 991:* Whether there is a substantial disadvantage is an objective test measured by comparison with a non-disabled comparator: "In many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play".

f. *Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ 1265:* In a sickness absence and dismissal case, it will be clear that a disabled

employee whose disability increases the likelihood of absence from work is disadvantaged when compared to non-disabled employees as they are obviously at greater risk of being absent on grounds of ill health. In relation to the duty to make adjustments, it may be reasonable to alter trigger points at which dismissal may be considered.

g. *Royal Bank of Scotland v Ashton [2011] ICR 632:* When considering reasonable adjustments, the focus must not be on the way in which the respondent acted, or their thought processes. The focus should be an objective analysis of the practical result of the adjustments which could be taken.

h. *Archibald v Fife Council [2004] UKHL32:* the duty to make reasonable adjustments necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is thus not just a matter of introducing a 'level playing field' for disabled and non-disabled alike, because that approach ignores the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled.

i. EHRC Code of Practice on Employment (2011) paragraph 6.28: factors which may be taken into account when deciding if a step is reasonable:

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

j. *Aylott v Stockton-on-Tees Borough Council 2010 EWCA Civ 910:* it may be a reasonable adjustment not to dismiss a disabled employee.

k. *HM Prison Service v Johnson* EAT [2007] IRLR 951: if the consequences of the disability are irretrievable, and the employee is unlikely to return to work, the duty to make adjustments falls away.

l. *Conway v Community Options Ltd* EAT *[2012] EqLR 871:* if an adjustment would not enable a return to work, it will not be reasonable for it to be made.

m. *Noor v Foreign and Commonwealth Office* EAT *[2011] EqLR 448:* The adjustment contended for need not remove entirely the disadvantage. It is

not a relevant question at liability that for the adjustment to be reasonable, it must prevent the disadvantage.

n. *'Romec v Rudham EAT [2007] All ER D 206*: If there was a 'real prospect' of removing the disadvantage it 'may be reasonable'; only if there was 'no prospect' of removing the substantial disadvantage would it not be a reasonable adjustment.

o. *Cumbria Probation Board v Collingwood [2008] All ER D 04:* it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made *will* remove the substantial disadvantage; it may be a failure to make a reasonable adjustment which gave the claimant '*a chance*' of returning to work.

p. *Leeds Teaching Hospital NHS Trust v Foster* EAT *[2011] EqLR 1075*: When considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring.

q. *Smith v Churchills Stairlifts plc [2005] EWCA 1220".* 'Reasonableness' imports an objective standard and it is not necessarily met by an employer believing that they believed that the making of the adjustment would be too disruptive or costly or may not succeed.

52. Discrimination arising from disability – objective justification

a. *Chief Constable of Gwent Police v Parsons and Roberts UKEAT/0143/18*: once a prima facie case of discrimination arising from disability is shown the onus is on the employer to establish justification, which involves showing that the unfavourable treatment was a reasonably necessary and proportionate means of achieving a legitimate aim.

b. *Hensman v Ministry of Defence* EAT *[2014] EqLR 670:* when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

c. *City of York Council v Grosset [2018] EWCA Civ 1105:* the test of justification is an objective one to be applied by the tribunal; therefore, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, it is the ET which must make its own assessment. In addition, the EHRC Employment Code of Practice makes it clear that a link between failure to put in place reasonable adjustments and

the unfavourable treatment in issue under EqA 2010 s 15(1)(a) may be an important factor to be taken into account when determining justification.

d. *Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918:* where a policy permits potentially different responses to any particular circumstance, for example the application of an absence policy, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim.

e. *Knightley v Chelsea & Westminster Hospital Foundation Trust [2022 IRLR 567:* If the Tribunal accepts the employer is pursuing legitimate aims when dismissing the claimant, the Tribunal must conduct the necessary balancing exercise to weigh up their discriminatory effect to determine the question of proportionality.

f. *Birtenshaw v Oldfield [2019] IRLR 946*: in assessing proportionality the Tribunal should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

g. *Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43*: the duty to make adjustments and the prohibition from discrimination arising from disability may be closely related. 'An employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence may have breached both duties.

h. *Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265: Where there is a link between reasonable adjustments and s.15 unfavourable treatment, a failure to make those reasonable adjustments is to be considered as part of the objective justification balancing exercise.*

i. Ali v Torrosian (t/a Bedford Hill Family Practice) UKEAT/0029/18: the authorities on the objective balancing exercise show that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim.

j. Department for Work and Pensions v Boyers EAT 0282/19: The proportionality assessment requires the tribunal to carry out an objective balancing exercise, between the needs of the employer, and the negative effect of the dismissal on the claimant.

k. O'Brien v Bolton St Catherine's Academy [2017] ICR 737: where sickness absence is the 'something arising in consequence' of disability, the impact on the employer of the continuing long-term absence will be so obvious that a general statement to that effect will suffice.

Conclusions on the facts and the law

Time

53. The issue between the parties on time is whether time started to run from dismissal (the respondent arguing that the appeal was a failure to take an act, which is not an 'act' for limitation purposes) or from the appeal decision (the claimant saying that upholding the appeal was an act).

54. The claimant's final date of employment was 5 May 2023, the ACAS conciliation process was 5 July – 16 August 2023. The respondent says the limitation date was 16 September 2023. The claim was issued on 9 October 2023.

55. The claimant says that there was a continuing act throughout the dismissal process which includes the appeal decision; this decision on 16 June 2023 was a positive act not to uphold the appeal, rather than a failure to act. If correct, the primary limitation period would end on 15 September 2023. Because the conciliation process ended within the primary limitation period, the six-week length of that conciliation period extends the limitation period to 27 October 2023.

56. We accept that the claimant alleges post-employment discrimination, we accept that the appeal constitutes a continuing act in the dismissal process, which includes an appeal. We also accept that the decision not to uphold the appeal constitutes an act as it was a decision, rather than a failure to take a decision which would be an omission. We accept that the limitation period starts from the appeal decision, and that the claim has therefore been brought in time.

57. If we are wrong on this point, we would extend time on a just and equitable basis. The claimant's health significant deteriorated after his dismissal, and we accept that he did not immediately seek legal advice. It was reasonable for him to believe that on the basis of the appeal he was experiencing continuing discrimination, that he reasonably believed his claim was in time. He also hoped that the appeal would resolve issues.

58. In this circumstance, and balancing the prejudice to the parties, it would be entirely prejudicial to the claimant if his claims were not allowed to proceed because they were brought out of time. There is little prejudice to the respondent as it has been able to appropriately defend the claims.

Reasonable adjustments – the PCPs and substantial disadvantage

59. The PCPs were accepted, bar a dispute about the 2nd part of the 2nd PCP, a practice of not allowing the claimant to return to work on a phased return. We accept that this was not a PCP of the respondent: we accept the respondent's evidence that had he been signed fit to return (Ms. Wilkinson) or was clearly fit to return (Ms. Robertshaw) the claimant would have been able to return to work on a

phased return. The issues for the respondent were whether the claimant was fit to work, and whether they could accommodate the 30 minutes twice daily element of the phased return.

60. The respondent accepts that the issue of the identity of comparators without the claimant's disability is not a significant issue in this case. We accept that they put the claimant at a substantial disadvantage compared to someone without his disability. Per *Griffiths,* both the claimant's absence from work and the requirement for significant adjustments when fit to return disadvantages him in comparison to non-disabled employees – he was at much greater risk of being absent on grounds of ill health, of needing a phased return and of needing complex adjustments on his return.

61. The respondent's headline argument is that the PCPs were never applied to the claimant as he was never well enough to return to work. Accordingly, it says that there was no substantial disadvantage. We disagree with this argument for the reasons set out below.

Working 50% in the office

62. We accept the respondent's evidence that the 50% working in the office requirement could be and often was varied for respondent employees returning after long-term absence.

63. However, in the claimant's case, the respondent believed that he was unlikely to be able to work 50% of the time in the office for the foreseeable future even if he did return. In submissions, the respondent accepted that this belief was "one part" of the decision to dismiss.

64. The claimant was therefore substantially disadvantaged by this PCP, as the respondent's perception that he would be unable to comply with it for the foreseeable future was a factor in his dismissal. 50% in the office was what the respondent believed was the minimum possible to be a productive employee after retraining.

65. In addition, the respondent's expectation was for employees to quickly build up to 50% of hours, in order to complete the relevant training which could only be undertaken from the office. Had the claimant attempted to comply with this expectation, he would have been at a substantial disadvantage because it would have been tiring and physically difficult for him. Ms. Stubbs supplemental report was clear – had he attempted to work beyond her recommended return to work plan there was a likelihood his condition would worsen.

Requiring attendance for longer than 30 minutes during a phased return

66. The respondent argues that its decision not to enable a phased return commencing at 30 minutes was not a substantial disadvantage, because "not only

would 30 minutes have not been an advantage to the claimant, in fact would have done him harm."

67. We note that in adopting this position, the respondent relies in part on its employees' personal assessment of the claimant's capabilities as well as the claimant's self-reporting of his ongoing symptoms and his medication at the relevant time.

68. We do not accept this argument, as there was no medical evidence available to the respondent on the impact of his medication on his return to work, or on the impact of his continuing symptoms on his ability to undertake a phased return. The respondent made a judgment call without up-to-date medical evidence.

69. We do not accept that, based on this evidence, the respondent can show its belief that the claimant was not put at a disadvantage because he was too unwell to return to work was a reasonable belief.

70. How people present in a Teams return to work meeting does not necessarily equate to their ability to perform their role. Ms. Stubbs professional opinion was that her return-to-work plan was feasible, if not guaranteed to work. At no time thereafter during his employment did the respondent seek a further professional opinion from her, a similar provider, or Occupational Health.

71. We accept that this policy or practice put the claimant at a substantial disadvantage compared to someone without his disability. It meant that he was unable to return to work in circumstances where he believed he was fit to return on a phased return, and where the only professional medical opinion was that this phased return may work, Ms. Stubbs had reiterated this position in the March meeting, and where no up-to-date opinion was sought.

72. Requiring a start to work at (say) one-hour sessions would have put the claimant at a substantial comparative disadvantage. He could not return to work on this basis, as Ms. Stubbs 2024 report is clear that this could have caused a substantial health relapse.

Requiring the claimant to be able to move himself unaided in a wheelchair

73. Again, this is a practice the respondent had at this time. The respondent argues that there is no disadvantage to the claimant because, had he been able to return to work, the Access to Work process would have started and he would, all being well, have been provided with an electric wheelchair.

74. We did not accept this argument. The dismissal letter makes it clear that a factor in his dismissal was the fact that he would not be able to move himself unaided in a wheelchair. The respondent did not put its mind at this stage to Access to Work, it believed that the claimant would be returning to work and he would need

assistance to move round. He could not push himself and this was a factor in his dismissal.

75. We did not accept the respondent's argument that it was implicit in the decision that the use of a manual wheelchair was not a factor in his dismissal.

76. While it may have been a misperception by the respondent that the claimant had no entitlement to a motorised wheelchair, this practice was a substantial comparative disadvantage because the claimant was unable to wheel himself around unaided, and this for the respondent meant he was could not return to work for the foreseeable future, it was a factor in his dismissal.

What steps could have been taken to avoid the disadvantage and was it reasonable for the respondent to take those steps?

77. We do not accept the respondent's arguments that there was no prospect of the adjustments succeeding, for the reasons we set out below we believe the majority of adjustments suggested by the claimant, considered objectively and focusing on the practical result of the possible adjustments, would have led to a 'prospect' or a 'chance' of a successful phased return to work.

The claimant suggests:

Allowing him to work from home on a temporary basis until he felt able to return to the office

78. We did not consider this to be a reasonable adjustment as a long-term adjustment at the outset of his return to work, for the following reasons: Firstly, the claimant needed to undertake training which he could only do from the office. Secondly, one of the purposes on his return to work would have been to assess his equipment at work to enable him to work from the office, and to assess any other requirements, for example Access to Work for a motorised wheelchair. Had he not been able to return to the office, he would not have been in a position to complete his training or to access the support he needed to work from the office.

79. However, it is also the case that the claimant would have been unable to return to the office without assistance with his mobility. The respondent was unable to agree to someone pushing the claimant. But the respondent was clear that to resolve the Access to Work application to get a wheelchair he needed to have returned to work. Equally, the claimant was unable to attend the office for any period of time until he got a motorised wheelchair.

80. This becomes a catch-22 situation: Ms. Wilkinson's decision was made in part because the claimant was not able to move around independently in the office, but the respondent was not willing to consider the Access to Work process until he had returned to work.

81. For this reason, the Tribunal concludes that it would have been a reasonable adjustment to allow the claimant to start his return to work from home on a temporary basis while his office equipment was being sorted and while an Access to Work application was being progressed. He may have required attendance at the office to progress adapted office equipment and for a health and safety assessment, but we conclude that for the first month of his return it would have been a reasonable adjustment to allow him to work from home pending the outcome of the workstation assessments and Access to Work application.

82. Following this period, the claimant would have required attendance at work to complete his training. The Occupational Therapist assessment suggested the claimant may have been fit to return 3 hours a day by month 3 of his return. Ms. Wilkinson agreed in her evidence that training was feasible working 3 hours a day; she agreed that commencing training by month 3 was a reasonable timeframe.

83. In addition, once his training had been completed, we see no reason why a reasonable adjustment could have been to allow the claimant to work from home over 50% of the time occasionally on a temporary basis: the respondent's witnesses accepted that this could be done.

84. The respondent argues that working from home would not have worked as an adjustment, because the claimant was not going to be in a position to return to work. As we make clear above, we do not agree, as Ms. Stubbs was clear that this was a plan which may succeed on a gradual phased return to work. Having looked at all the evidence we consider that this adjustment stood a prospect of enabling a successful return to work at the very outset of his return and then on an ad hoc basis following completion of his retraining.

Allowing a phased return to work as recommended by his Occupational Therapist

85. Ms. Wilkinson was clear in her evidence that the twice daily ½ hour return to work was the only adjustment recommended by Ms. Stubbs which could not be adopted. She was clear that all other recommendations could be adopted by the respondent had the claimant been in a position to return to work.

86. The respondent's position is that a phased return is a normal occurrence with the respondent; the "crux" as Ms. Ferber stated in her closing, was that a return on 30 minutes could not be accommodated.

87. Also, the respondent argues that the claimant would not have been compliant with Occupational Therapist recommendations, he adopted "unrealistic positions" to return to work; he "did not have insight" into the seriousness of his condition and how this would affect him if he returned to work.

88. Ms. Ferber argued that on the totality of the evidence, the Tribunal can decide that it would not have been reasonable to take this step, in particular considering what

the claimant was saying at the time and in cross-examination – the claimant was "not realistic" about how little he could do.

89. We did not accept this argument. The claimant made it clear in the April 2023 final stage absence meeting that his improvement was slow but real, that he did get drowsy but had learned coping techniques; that he believed he would be able to undertake his role with adjustments. That was broadly in line with Ms. Stubbs assessment and prognosis.

90. While the respondent may have had genuine doubts about his ability to undertake his role with the suggested adjustments, in these particular circumstances it could, and should, have sought further advice from a specialist. As it stands, the specialist advice was that a return at end-April was achievable, the claimant wanted to return and believed he could do so, and there was no medical evidence to the contrary. As above, we do not accept that a perception of a lay person is necessarily accurate as to what a disabled person can achieve.

91. In light of Ms. Stubbs report, we do not accept that the respondent was entitled to rely on a medical certificate that it had requested to say that the claimant was not fit to return on the recommended phased return. The claimant had been asked to provide this certificate or face being awol. The certificate was contrary to Ms. Stubbs recommendations; in its evidence the respondent said it deferred to Ms. Stubbs over (say) Occupational Health as she was the expert. Ms. Wilkinson accepted in her evidence that if she had seen this contradiction at the time, she would have checked with his GP whether the claimant was fit to return on the phased return.

92. We accept the respondent genuinely believed that the claimant was not fit to return to work, but we do not accept that in the absence of up-to-date medical evidence that this belief was reasonable.

93. The respondent also argues that returning on 30 minutes sessions is in-itself not a reasonable adjustment as it means the employee remains unproductive. We accept that little can be achieved in half an hour at work.

94. However, this was a suggested adjustment for only the first month of return. Ms. Wilkinson said that workplace adjustments could not be accommodated until the claimant was back at work. The respondent accepts that had he returned, adjustments would have been required to his workstation at home and at work.

95. It is also clear that the claimant could not have returned to work until he was able to independently move around the office with a motorised wheelchair. On the respondent's case he was unable to return to the office without being able to independently move around. Such equipment takes some weeks to apply for from Access to Work.

96. Given the respondent saw no chance of the claimant returning to work from the office until equipment was put in place and a motorised wheelchair procured, we saw no reason why the respondent could not have considered the first month following a return to work as initially to address logistical issues – equipment, consideration of dictation software, Access to Work arrangements – to see whether these could in practice be implemented. During this month, we conclude that it would have been possible for the claimant to log-on, to check emails, to reorientate himself however brief each session.

97. In saying this we accept that as far as the respondent is concerned, the first two months of a return would effectively be written off as unproductive time, as the claimant would not be able to undertake training.

98. But Ms. Stubbs envisaged the claimant potentially getting back to 50% of contracted hours by month 3. We conclude that it is not an uncommon scenario that it can take time to procure the equipment needed at work for disabled employees to undertake their role. We do not consider that it would be reasonable for an employer to refuse to make such adjustments because of such a time-lag, even if this means there would be a period of unproductivity.

99. Again, it would be a catch-22 situation for employees needing equipment if this was not a reasonable adjustment because there would be a period of unproductivity because of a delay in procuring the equipment.

100. To reiterate, the respondent accepted in evidence that the other adjustments mentioned by Ms. Stubbs could be achieved, as long as the claimant was fit to return to work.

101. We conclude having considered the evidence that a return to work on the very graduated return recommended by Ms. Stubbs, was an adjustment which could have been undertaken, it is one which stood prospects of successfully integrating the claimant back to work.

A phased return with the 1st 3 weeks working one hour twice daily.

102. Ms. Stubbs 2024 report is clear that such an adjustment was not recommended because of the need to return to work on a very gradual return; one hour twice daily she considered would be detrimental to his health and would not work. For this reason, we conclude that this was not an adjustment which stood prospects of successfully integrating the claimant back to work.

Accommodating use of a wheelchair in the office area by ensuring someone was able to move his wheelchair when he needed to move…

103. We do not accept that it was a reasonable adjustment for the respondent to ensure there was someone present who could move his wheelchair. Practicably, this would require the hiring of a carer or similar; it was not reasonable for the respondent to ask its employees to vary their work, including pushing the claimant

to the toilet and around the office. Considering the resources and disruption to the workplace, we do not consider it was reasonable for the respondent to undertake such a hiring exercise, to employ extra personnel to assist the claimant.

… And/or investigating the possibility of getting Access to Work to pay for an electric wheelchair.

104. The respondent accepted that it would have investigated the possibility of Access to Work for an electronic wheelchair had he returned to work. This was clearly an adjustment which could have been sought from Access to Work.

105. The respondent's rationale for not considering this prior to his return, and instead saying the claimant would require pushing around, was because of the respondent's mistaken misconception that he could not qualify for a wheelchair from Access to Work, which was based on one comment by the claimant in a return-to-work meeting. This meeting did not discuss Access to Work or ask whether the claimant was aware of Access to Work. Had these questions been asked, it would have become clear that the claimant was referring to an NHS motorised wheelchair.

106. Access to Work was mentioned by the claimant and his rep at the appeal. However, no thought was given to whether this adjustment could assist the claimant's return to work. The initial misconception and the respondent's failure to turn their mind to Access to Work thereafter is one of the factors which led to the claimant's dismissal.

107. We conclude that it was a reasonable adjustment for the respondent to seek a motorised wheelchair via Access to Work. There is a significant prospect that this would have enabled him to move around the office independently, which would have lessened the respondent's concern about his ability to independently move around at work. Clearly it would have also assisted the claimant to engage in a phased return to work.

Discrimination arising from disability (Equality Act 2010 section 15)

108. The respondent accepts that the claimant was unable to work because of his disability, and that he was treated unfavourably by being dismissed and his appeal being rejected.

<u>Was the treatment a proportionate means of achieving a legitimate aim, taking into account any failure to make reasonable adjustments?</u>

109. The respondent relies on the legitimate aims of (i) requiring its employees to undertake productive work and (ii) to appropriately manage long-term absences. These are clearly legitimate aims.

110. The claimant says that the failure to make reasonable adjustments means that this claim must succeed. The respondent argues that his poor health and inability to work other than very short periods meant that no adjustments could have avoided dismissal. It also says that the balancing exercise between the needs of the respondent and the claimant clearly favours the respondent, notwithstanding the negative the effect of dismissal on the claimant.

111. We accept that the focus should not be about the process adopted during the respondent's assessment of the claimant's fitness. But there were significant issues with the process. We do not accept that it was proportionate for the respondent to rely on the GP's medical certificate and their own assessment of the claimant's ability to do his role without first seeking clarity on the contradiction between the medical certificate and Ms Wilkinson and Ms Robertshaw's personal observations, and Ms Stubbs recommendations.

112. In saying this, we accept that Ms Wilkinson had genuine concerns about how the claimant presented himself at the April 2023 final absence meeting. The respondent was entitled to consider this perception, the claimant's speech remained slurred, and he was saying he was suffering from significant fatigue and was taking strong painkilling medication.

113. We note that both respondent witnesses accepted that other employees had been off work for a longer period, they also say that each medical condition is different. This is clearly correct, but in the claimant's case there was a report with recommendations on a graded return.

114. Appropriate management of long-term absences will usually involve a careful assessment of a recommended plan to return to work, and whether that plan is feasible. Consideration should be given to the recommended adjustments. For the respondent, all adjustments were possible bar the 30 minute twice daily for the first month of employment.

115. We conclude, given the discrepancy between the GPs medical certificate and Ms Stubbs report, and given the scepticism felt by Ms Wilkinson about the claimant's ability to return to work at that time, and considering the balance of prejudice between the respondent and the claimant, that the respondent did act proportionately in believing at the final absence meeting that the claimant was not fit to return to work end-April 2023.

116. Equally, in balancing the discriminatory effect with the legitimate aim, and noting the facts, including longer absences for other employees, it was not proportionate to dismiss the claimant at this time.

117. There was a 3 month old report which said the claimant would be able to return when his condition had improved, potentially end-April 2023 which had not been updated. Ms Stubbs has reiterated this advice in March 2023. The respondent

had required a medical certificate which certified the claimant as not fit to return. The claimant was saying he was fit to return, the respondent believed he was not fit to return. There was significant ambiguity and a lack of clarity.

118. We conclude that there was a less discriminatory measure which could have been taken, which was to seek an up to date report from Ms Stubbs or, as Ms Stubbs treatment of the claimant had stopped by April 2023, another Occupational Therapist. This would have taken into account the claimant's health and prognosis in April 2023, and may have given a new date for a potential return to work.

119. To reiterate, at least one other employee had been absent for 16 months, another for over 12 months; the claimant had a report recommending a phased return. Given the lack of clarity, it was not proportionate to dismiss at this time.

120. Given the respondent did allow more lengthy periods of absence with other employees, this was not an issue which was to the significant detriment to the respondent; on the other hand dismissal was clearly a huge detriment to the claimant.

121. This was a less discriminatory and more proportionate approach, and it could have provided an up to date assessment of the claimant's fitness to return. This may have delayed the claimant's return to work to, say, June/July 2023.

122. As we say above, given the practical adjustments needed to equipment, a return to work would have taken some weeks to implement. We have concluded above that it would be a reasonable adjustment for the claimant to have these weeks to have his equipment sorted, an Access to Work application made, and to start logging on and monitoring emails.

123. We therefore do not consider that it was proportionate to say that the 30 minute return was not practicable. While on balance this may not be favourable to the respondent, it would have been for a short period on Ms Stubbs report, and that time was needed to progress the equipment and wheelchair. Within 3 months the claimant would have been training again on Ms Stubbs proposed timetable.

124. We therefore do not accept that dismissal was the proportionate outcome as there were less discriminatory actions which would have balanced the needs of the respondent and the claimant.

125. Requiring its employees to undertake productive work: Ms Wilkinson's evidence was that if the claimant was training by month 3, this would be an acceptable pace of return. It follows that this was the proportionate step to take, and the balancing exercise clearly favours the claimant.

126. Dismissal because the claimant would not be able to undertake training and undertake productive work earlier was therefore not a proportionate means of achieving the respondent's legitimate aim.

127. There was a less discriminatory way of achieving the aims of the respondent, which would have been to accept that the first two months would involve the assessments and ordering of equipment and slowly building up hours before a return to training in approximately month 3.

128. While this is clearly not a positive position for the respondent, it does not significantly impact the respondent's legitimate aim, again noting that the respondent accepts all the adjustments bar the initial return to work recommendation.

Direct race discrimination (Equality Act 2010 section 13)

129. Rid R treat C less favourably because of his race by failing to make reasonable adjustments for his disability and not upholding his appeal as a result?

130. The claimant relies on two comparators. He says that Ms White suffered a stroke, had a significant absence and was then allowed to work from home for a year was not dismissed. He says that Ms Smith had a long period of absence and was not dismissed.

131. The respondent says that Ms White received ill-health retirement, an option not open to the claimant because he was employed on a lower grade. It says that Ms Smith had a back condition which required an operation, after which she had a limited period working from home. Both appear to have been off work for a longer period than the claimant.

132. We were given very little evidence of these comparators, and the respondent's witnesses knew little or nothing about their circumstances. This is unsatisfactory, given their identities were known some time before this hearing, relevant disclosure in relation to the comparators does not appear to have occurred.

133. But we accept that the existence of ill-health retirement as an option will potentially lead to a longer period of absence; it takes time for insurers to make the relevant assessment, and an employee should not be dismissed while this is progressing. We also accept that Ms Smith's condition and prognosis after her operation makes her circumstances materially different.

134. The claimant has therefore not shown that the reason for his dismissal and unsuccessful appeal is in any way connected to his race. It is instead connected to the respondent's perception that the claimant was not well enough to return to work and their belief that it was not reasonable to enable the claimant to return to work initially 30 minutes twice daily. This claim therefore fails.

Judgment approved by

Employment Judge Emery

28 February 2025

Judgment sent to the parties on:

12 March 2025

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For the Tribunal:

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