EMPLOYMENT TRIBUNALS

Claimant: Mr Azmat Mughal

Respondent: Croner-i Ltd

Heard at: London South, in public, by Cloud Video Platform

On: 29-31 January (last half day in chambers), 24 & 26 February in chambers, oral Judgment given on the afternoon of 26 February 2026

Before: Employment Judge Tsamados
With members:
Mr M Marenda
Mr T Harrington-Roberts

Representation
Claimant: Mr A Pincott, Counsel
Respondent: Mr E McFarlane, Solicitor

REASONS

These reasons were requested by the Claimant. Whilst they are a somewhat fuller version of the oral judgment given on 26 February 2025, they are not materially different as to the reasons given.

Background

1. By a claim form presented to the Employment Tribunal on 13 May 2023, following a period of early conciliation between 4 and 14 April 2023, the Claimant brought complaints of unfair dismissal and disability discrimination against the Respondent.

2. In its response, the Respondent denied the claim in its entirety.

3. A Preliminary Hearing for Case Management took place on 1 February 2024 and was conducted by Employment Judge Sudra at which the following matters were decided: the final hearing date was set for 28-31 January 2025; necessary Case Management Orders were made for the preparation of the case; the claims and issues were determined subject to the Respondent adding in certain matters and the parties then agreeing the list of issues.

4. The complaints were identified as: discrimination arising from disability contrary to section 15 of the Equality Act 2010 ("EQA"); failure to make reasonable adjustments contrary to section 20 EQA; and failure to deal with a flexible working request in breach of section 80H of the Employment Rights Act 1996 ("ERA"). For some reason, the complaint of unfair dismissal was not identified. The list of issues formed part of the record of that hearing.

5. The Claimant has the following impairments: severe arthritis to his right knee joint and hip joint and shortening of his right leg. The record of the Preliminary Hearing records that the Respondent conceded disability under the EQA and accepted that it had knowledge of the Claimant's disabilities.

6. Subsequent to the Preliminary Hearing, the Respondent submitted Amended Particulars of Response.

Documents and evidence

7. We were provided with a bundle of documents consisting of 301 pages after the insertion of two additional pages. I will refer to this as "B" followed by the referenced page reference where necessary.

8. We were also provided with a Chronology and Cast List.

9. There was a separate bundle containing the witness statements of both parties.

10. We heard evidence from the Claimant and on his behalf from Mr Cornelius Dzekashu by way of written statements and in oral testimony. Mr Dzekashu gave evidence from Texas in the United States of America but we were satisfied that the government of that country had given its permission for those resident there to give evidence to an overseas court or tribunal.

11. We heard evidence on behalf of the Respondent from Ms Lucy Cobb, Mrs Claire Martin and Mrs Angela Gill (nee Virdi) by way of written statements and in testimony.

12. I asked the parties to provide us with details of any documents they wished us to read otherwise we would simply look at the documents referred to in the witness statements or in oral evidence.

Preliminary matters

13. At the start of the hearing on the first day, Mr Pincott, appearing on behalf of the Claimant, made an application for leave to amend his claim to include a complaint of automatic unfair dismissal for making a flexible working request pursuant to section 104C(a) ERA. Mr McFarlane, appearing on behalf of the Respondent, objected to the application.

14. Having heard submissions from both representatives we adjourned to reach a decision. I do not propose to set them out here but we took them fully into account.

15. On resuming the hearing, I told the parties that we had decided to grant the application.

16. This was for the following reasons:

    a. The matter was raised within the claim form albeit by way of ticking the unfair dismissal box and in one line at the end of the particulars of claim. However, the Claimant was a litigant in person at the time;

    b. He was represented at the Preliminary Hearing for Case Management as indeed was the Respondent (both by different representatives to those present today). However, for some reason the complaint of unfair dismissal did not form part of the complaints or issues although the section 80G complaint was identified;

    c. We do not believe it equitable or fair to assume, as Mr McFarlane submitted, that the unfair dismissal complaint was dismissed on withdrawal or was struck out simply by its absence. We believe it more probable that it was an unfortunate oversight;

    d. The particulars of claim deal with the overall factual matrix leading to the dismissal. It is unlikely to require more than one or two further questions in chief and/or cross-examination to deal with the automatic unfair dismissal complaint;

    e. The Claimant in any event alleges that the reasons for his dismissal have been completely manufactured (reference paragraph 41 of his witness statement) which means that there needs to be an analysis of why he was dismissed;

    f. The prejudice to the Claimant is greater in refusing the application than it is to the Respondent in granting it;

    g. We would be very concerned if we were to refuse this application and at the end of the case come to the conclusion that the principal reason, if more than one, for the Claimant's dismissal was his flexible working request.

17. As a result, I directed that a complaint under section 104C(a) ERA be added to the List of Issues. The issues being: what was the reason, and if more than one, the principal reason for the Claimant's dismissal?

18. Given that the complaint was in the claim form and all that we have done is define it, there are no time limit issues arising.

The issues

19. The Respondent then provided a Revised List of Issues taking the amendment into account and correcting a number of typos which had been identified. The Revised List of Issues is attached to these reasons.

20. I made it clear to the parties that these are the issues that are going to be determined by the Tribunal and that we would not depart from them unless there were exceptional reasons for doing so.

Conduct of the hearing

21. We spent the first day dealing with the preliminary issues and reading the witness statements and referenced documents.

22. We heard evidence from the parties on the second and third day of the hearing. We received written submissions from both representatives which they spoke to on the fourth day of the hearing.

23. From approximately 11.50 am onwards that day we met privately, in Chambers, to reach a decision and after lunch sent the parties away. We were unable to complete our deliberations that day but were able to meet again in Chambers on 24 February 2025 and for half a day on 26 February. We gave oral judgment, at the parties request, in the afternoon of that day.

Findings of Fact

24. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

25. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

26. The Claimant was employed as an HR Advisor by the Respondent from 29 November 2021 until his dismissal with effect from 10 March 2023. His principal role was to respond to telephone calls made by Chartered Institute of Personnel and Development ("CIPD") members to a helpline operating between Monday to Friday from 9 am to 5.30 pm. He was part of a small team of HR Advisors, exact numbers of which varied over the period of his employment but were larger in numbers towards the end. Initially, the Claimant's line manager was Ms Angela Virdi, the Executive Sales Manager, who was covering as manager of the HR Advisors team. Subsequently, in May 2022, a line manager was appointed and the Claimant's line manager became Ms Lucy Cobb. Her line manager was Mrs Claire Martin.

27. The Respondent operates as a Content and Consultancy business delivering a variety of content/online resources (including Tax, Tax Fee Protection Insurance, Accountancy, Health and Safety and general HR related matters) to a wide client base throughout the United Kingdom. It operates from two sites: Hinckley in Leicestershire; and Blackfriars in London.

28. We were referred to the Claimant's statement of main terms and conditions of employment at B62-64. This sets out a probation period of 6 months. Whilst it refers to documents contained within the Employee Handbook, we

were not provided with a copy of this. We did not have copies of the Flexible Working Policy, Disciplinary Procedure or Capability Procedure, although reference was made to them in evidence. There is a one page Grievance Procedure at B231. Reference was also made to a short service dismissal provision but we were not provided with a copy of this either. In addition, references were also made to a change to the arrangements for working from home following the government's Covid-19 work restrictions, which we were told may have been in writing but if it was, we were not provided with any documents recording what the previous arrangement was or what changes were made. We were somewhat surprised by the lack of documents, particularly given the nature of the Respondent's business.

29. The HR Advisors' performance was assessed by way of Key Performance Indicators ("KPI"), which included: productivity, the quality of the advice provided and whether responses to clients are provided in accordance with the Respondent's Service Level Agreement ("SLA") (again not provided), whether any client complaints are received and attendance/ timekeeping.

30. We heard evidence from Mr Cornelious Dzekashu as to the operation of the SLA. His evidence was unchallenged. He had joined the Respondent as an HR Advisor in January 2022 and was recognised by the Respondent to be a Senior HR Advisor. He had previously worked for the Croner Group from February 2020 until May 2021.

31. In essence, his evidence was as follows. He had come from the Respondent's sister company where he was used to strict adherence to the terms of the SLA. This he described as being central to the Respondent's operations and specifically mandated that all client calls, when logged by call handlers, be returned within a one hour period. The objective was to ensure prompt and timely service to clients, thus maintaining high standards of customer satisfaction and professionalism. Every adviser had to adhere to this timeline diligently and any failure to meet the one hour callback requirement resulted in the call being marked as "delayed". These delays negatively impacted both individual and team performance metrics, as they were reflected in their monthly performance reports. The enforcement of the SLA was strict and it was clear that any deviation from the standard would have adverse consequences on the team's overall assessment.

32. However, this was not his initial experience when he began working for the Respondent. When he raised his concerns about this, he discovered that the team had not been formally told about the SLA guidelines and had not received proper training. In particular, the team were unaware that they were required to respond to logged calls within one hour, which was a central tenet of Croner's service.

33. This situation continued until the appointment of Ms Cobb as Team Leader, when over time there was an increased emphasis on complying with the terms of the SLA.

34. Ms Cobb commenced employment with the Respondent on 9 May 2022 as HR Advice Manager. As far as we were aware this was her first managerial role and indeed the evidence suggested she was finding her feet in the role.

35. Prior to commencement of his employment, the Claimant completed an online Work Health Assessment Questionnaire. The information he provided was distilled by an OH Advisor into the Work Health Advice Notice. We note in particular that the OH Advisor's opinion in that document is that the claimant is fit for work with recommendations (at B74):

    "Recommendations Fit for work-but if you have any concerns about this individual, please submit a full management referral where needed with their consent, we will be able to disclose further information. will need periods to be able to get up and walk regarding his joints up when needed (sic)"

36. The Claimant was involved in a road traffic accident in 1984 which resulted in him undergoing surgery that led to a shortening of approximately 5 cm to his right leg. This later resulted in severe arthritis in his right hip joint and knee joint. At the Preliminary Hearing for Case Management held on 1 February 2024, the Respondent accepted that the Claimant was a disabled person by reason of these impairments and that it had knowledge of his disability at the material times.

37. The Claimant lives in Hatfield but used to live in St Albans. He travelled into work by public transport each day. He worked at the Respondent's office in Blackfriars Road in London. His commute to and from work was approximately 1 hour 20 minutes each way. He mostly drove or his wife drove him to St Albans railway station and from there he took a direct train to Blackfriars railway station and then took a short walk to his office. Sometimes, he travelled from Hatfield railway station to Kings Cross St Pancras, and then took an underground train to Blackfriars tube station.

38. As a result of his impairments, the Claimant had difficulties with his mobility, in as far as walking to and from the train stations and an inability to walk any faster if as a result of a late running train he was going to arrive late for work. He could only walk at one speed and unlike others who did not have his mobility issues, he could not speed up his walking between Blackfriars and the office, if his trains arrived late.

39. On one occasion, on 22 November 2022, the Claimant fell over at work having been unable to keep his balance. We were referred to an accident report form at B299 which records that the Claimant fell as he went to sit down, missing his chair.

40. On another occasion, on 7 December 2022, he tripped over and had a fall on his way to St Albans station. Whilst he attempted to continue his journey to work, the pain became unbearable and so he returned home and informed the Respondent of the position. He was subsequently off work for 2 days.

41. As we will come to, one of the matters that arose from his disability was that he was in pain and having to take medication to control it, which in turn affected his concentration. This appeared to become more pronounced after the two falls and severely affected his ability to walk to and from public transport.

42. During March 2020 until December 2021 there were periods during which there were government restrictions on leaving the house and going to a place

of work as a result of the Covid-19 pandemic. The Respondent and its staff of course had to adhere to these restrictions.

43. Ms Virdi said in evidence that when the Claimant was first employed he did ask about flexible working but it was made clear that the role was office based. She also stated that although there were occasions on which he asked to work from home, these were refused. She added that she believed the only time that the Claimant did work from home was during the government Covid-19 restrictions.

44. On 30 May 2022, Ms Cobb granted the Claimant's request to work from home on dates in May and June 2022 on which he needed to attend medical appointments (at B77). The Claimant requested to work from home rather than to travel to and from work around the appointments given the journey time and that the appointments were closer to his home than the office. Ms Cobb's email states:

"Just wanted to confirm today's conversation and your upcoming appointments:

Tuesday 31st May, blood test
Thursday 7th June,
Wednesday 22nd June

Please can you just confirm the reasons for the 7th and 22nd ?

As discussed, I'm happy for you to work from home on the days listed. In line with Company policy, being able to work from home due to appointments may be reviewed moving forwards but I will keep you updated on any changes."

45. On 17 February 2023, the Claimant emailed Ms Cobb asking to work from home on 23 February so as to attend a hospital appointment between 1-3 pm, given his commute time. In reply, Ms Cobb stated (at B200):

"As you know the business does not allow working from home. In line with our Company policy, you are able to take 4 hours for a hospital appointment with this time being worked back. If you are not able to complete your appointment and get back to the office in this time, you will need to take annual leave. This stance will not change."

46. It appeared that there had been a change in the Respondent's stance or policy relating to working from home. This was quite difficult to pin down with any certainty. However, we have attempted to do so in what follows. We were not helped by the lack of documentation.

47. In August 2022, Mr Dzekashu tendered his resignation due to the challenges of commuting from Peterborough to London, coupled with significant childcare responsibilities, which were affecting his ability to effectively perform his duties. In response, the Respondent offered him a flexible working arrangement, allowing him to work two days from home and three days in the office.

48. We were referred to the letter from Ms Cobb to Mr Dzekashu at B75 confirming this arrangement, which was initially from September 2022, then reviewed in December, with a further review in March 2023. The ongoing arrangement was made on the basis that he was expected to continue to achieve the targets of his Senior HR Advisor banding and if the arrangement had a detrimental effect on the operations of the business or his performance

was not to the expected standard, it might be necessary to review it at an earlier date.

49. In late February or early March 2023, he was verbally informed that the Respondent intended to discontinue this arrangement as it had decided to bring all employees back to the office. However, he continued to work under the same arrangement until he left the Respondent's employment in May 2023.

50. Ms Cobb confirmed in evidence that there was a change to the Respondent's policy in allowing employees to work from home once the Covid-19 government restrictions had been lifted. The reason why she had refused the Claimant's request to work from home in February 2023 was that the Respondent's policy was strictly that employees worked in the office without exception. This was communicated to managers by the Respondent's Director, Ben Chaplin, and then cascaded by the managers to all staff. Ms Cobb believed that this was an oral communication. Certainly, as we have said, we were not provided with anything in writing as to this change in policy. Ms Cobb accepted by reference to Mr Dzekashu's evidence, that this change happened at some point in February 2023 and certainly before she dealt with the Claimant's flexible working request (which we will come to). The Claimant made his flexible working request on 1 February, attended a meeting to discuss it with Ms Cobb on 8 February and she sent him her outcome letter on 10 February 2023.

51. Mrs Martin said in evidence that she believed the change to the working from home policy was made earlier than February 2023, "after Covid", as she put it. However, she added that she was not involved in the decision and so could not say when it was made with any certainty.

52. Ms Virdi's evidence was perhaps more from a sales perspective given her role. But she stated that the Respondent was an "office based company", as she put it, and as soon as the government restrictions regarding travel to work ended, everyone was back in the office. She believed this to have been at some point between Christmas 2021 to March 2022 but could not recall any more exactly than this. Her further evidence was that it was made clear to job applicants and existing staff that the Respondent was an office based company and that whilst it was possible to request to work from home, no one did. It was clear from what she said that from her perspective it was very unlikely she would have taken on new staff to work from home or allowed existing members of staff to work from home if they requested it and that this reflected company policy. Her mantra being that the Respondent was an office based company.

53. In June 2022, the Claimant attended a one to one meeting with Ms Cobb. Their discussion was summarised within her email to him dated 27 June 2022 (at B82). We note that this does not record any concerns as to the Claimant's performance.

54. On 15 July 2022, the Claimant attended a probation review meeting with Ms Cobb. We note that this was held after the date on which the Claimant's probationary period had ended (which was on 29 May 2022).

55. We were referred to the Probation Review Form at B86-87. On the face of it the Claimant's performance is marked as "good" with some elements as "excellent". We note that at B87 the Claimant's concern as to the cost of trains is recorded.

56. By letter dated 25 July 2022, Ms Cobb wrote to the Claimant confirming that he had successfully passed his probationary period (at B90-91). The letter particularly notes that she is encouraged by his performance in his role and his achievement of the KPIs, the expectations of which are then set out in some detail.

57. In her oral evidence, responding to cross examination questions as to the apparent disparity between this and her later reviews of the Claimant's performance, Ms Cobb stated that whilst she could not disagree with the letter, in reality she did not think that the Claimant was in fact hitting his KPIs and at that point she was new to management and was perhaps overly generous in her marking of his performance.

58. Ms Cobb said in evidence that her aim was to conduct monthly reviews with staff. This clearly did not happen with the Claimant. We would observe that if there were such concerns about his performance, then we would have expected her to prioritise reviews with the Claimant over her other activities.

59. In August 2022, the Claimant attended a further one to one meeting with Ms Cobb at which she acknowledges an improvement in the Claimant's performance since his last one to one. The only note of concern was as to his lateness. The meeting was summarised in her email of 31 August 2022 (at B97). By this time, the Claimant had been late on four occasions, although due to train delays and only by a few minutes. The email implies that the policy (again not something we have seen) was triggered by 3 occasions of lateness and Ms Cobb does state that she chose not to take action on the 3rd occasion.

60. On 1 September 2022, Ms Cobb sent the Claimant a letter of concern as to his lateness for work which by then was on 4 occasions due to train delays (at B98). The letter advised that if the Claimant was late on any further occasions within the next 3 months (reflecting a rolling 6 month period) he may be subject to formal disciplinary action in line with the Respondent's absence policy and disciplinary procedure. These are not documents that we have been provided with.

61. Later that day, the Claimant spoke with Ms Cobb and raised his concern that her letter was unfair, that he was only late by a few minutes and was not able bodied and so it took him longer to travel. Ms Cobb advised the Claimant that the letter was an informal warning. She said in evidence that they had already discussed the possibility of him catching an earlier train and that they could consider adjusting his working hours. There is an exchange of emails at B103 to 108 in which the Claimant is querying the letter of concern. We were referred to what appears to be an undated file note from Ms Cobb at B109. The bundle index dates this as 10 October 2022. This appears to

indicate that the discussion about the letter of concern was more probably on a later date than 1 September 2022 or perhaps ongoing.

62. On 20 October 2022, the Claimant attended a review meeting with Ms Cobb. We were referred to the Review Form at B110-112. There was some discussion in evidence as to what this told us about the Claimant's performance.

63. In oral evidence, Ms Cobb stated that on B110 she had recorded that the Claimant's rating was "average" and that she had written her comments across the three columns marked "average", "good" and excellent", albeit the heading "average" has been crossed out. The Claimant's position was that the ratings were all "good" and "excellent".

64. On the face of it we do not accept Ms Cobb's explanation. On balance of probability we find the comments are reflective of good and excellent ratings. There is nothing inconsistent with this view on the subsequent pages, particularly the discussion of career pathway and progression to senior HR adviser. Whilst Ms Cobb said in evidence this only came up because the Claimant had raised it, we note there is no proviso given as to the need for his performance to improve first. We did not accept Ms Cobb's evidence that at this stage the Claimant was not hitting his statistics in his current banding.

65. On 21 October 2022, the Claimant attended his GP and was issued with a fitness for work certificate for the period of three months stating that due to Osteoarthritis of the hip and knee, for which he was awaiting surgery, he may not be fit for work. The certificate advises that the Claimant should be considered for amended duties and/or workplace adaptations and suggests that the Respondent liaise with him regarding flexible working, perhaps from home, until he has the surgery. This is at B113.

66. The Claimant chose not to disclose this to the Respondent and carried on attending work at the office in Blackfriars. He said in evidence that his concern was that he did not want to indicate to the Respondent that he needed surgery and would require substantial time off to recover and he was aware that the Respondent dismissed another employee in similar circumstances. Ms Cobb was not aware of this fit note until her meeting with the Claimant in January 2023.

67. As we have referred to above, the Claimant was absent from work due to ill-health on 7 and 8 December 2022, following a fall on the way to work. We were referred to his Return to Work Interview Form at B114-116. During the interview with Ms Cobb, the Claimant tells the Respondent that he requires surgery which was originally scheduled for December 2022 but he asked for it to be delayed until March 2023.

68. On 19 December 2022, the Claimant advised Ms Cobb that he required time off to look after his wife and children. She authorised this as time off for dependents. In his written evidence, the Claimant explained that he told Ms Cobb that his son was being bullied at school and this was causing him further mental stress. He further stated that he indicated that he was considering making a flexible working request but she told him that this would not change

anything. This was not put to Ms Cobb in cross examination and we are unclear what her alleged response meant.

69. In January 2023, the Claimant attended a one to one meeting. Ms Cobb subsequently sent the Claimant an email documenting this meeting on 20 January 2023 (at B133-134). The email states that the meeting discussed his KPIs in line with the performance framework using the period 05/01 to 18/01. The email then sets out the Claimant's ratings by reference to a number of headings: productivity, SLA management and call quality. The major failing is on call quality and in this respect Ms Cobb tells the Claimant that there needs to be an improvement over the next 4 weeks. We note that the email does not make it clear what might happen next if there was no improvement. The email records the agreed proposals moving forward. Ms Cobb also sets out her concerns as to the Claimant's knowledge. The email ends by noting that the Claimant mentioned at the meeting that he was having a challenging time personally at the moment, something that she was aware of. She states that he confirmed that he was not raising this as an excuse but simply wanted her to be aware of it.

70. The Claimant's position is that his performance was not far off the required levels and that his stats were not significantly lower than that of colleagues and in some respects better. He further states that he highlighted his medical conditions and the issues with his son. Indeed, we can see this set out in his email to Ms Cobb dated 26 January 2023 at B132. This also indicates that it is at this meeting he reveals the existence of the previously undisclosed fit note dated 21 October 2022, by reference to his having previously ignored medical advice.

71. By email dated 27 January 2023, at B131, Ms Cobb replied to the Claimant's email stating that she is aware of his current personal and medical issues and hence her reference to them in her previous email. Her email also states that the Claimant had told her that he was not using these issues as an excuse but if he felt they were having an effect on his performance, to provide further details so that she could understand how best to support him. However, she also states that similar issues regarding his call quality have been raised before and have been discussed informally and as far as she was aware at that time there were no issues that could have been impacting on his performance.

72. On 1 February 2023, the Claimant sent an email to Ms Cobb in which he made a statutory flexible working request (at B135) and attached medical evidence in support (at B136-139). In essence, the Claimant requested to work 3-4 days per week from home as soon as possible because of the worsening of his hip and knee arthritis causing a severe impact on his ability to travel and the risk of falls or injuries. In submissions, Mr McFarlane disputed whether the request had been properly made under the statutory regime, as we will come to later.

73. On 6 February 2023, Ms Cobb acknowledged the Claimant's request and arranged for them to meet to discuss it on 8 February (at B151-152).

74. The meeting took place on 8 February 2023. The Claimant attended and was accompanied by Mr Dzekashu, a work colleague. Ms Virdi was present as note taker. We were referred to the notes of the meeting at B153-155. At the meeting the Claimant explains about his road traffic accident in 1984, the injury sustained to his leg and the ensuing severe arthritis. He further explains about the impact on his health, the pain he is suffering, the effects of the medication he is taking and the restrictions to his mobility particularly when travelling to and from the office. He also explains that he is registered disabled and awaiting surgery. He states that he is not seeking a permanent change but asks for flexibility whilst he has his surgery and the period of recovery/rehabilitation. He explains that the plan is that he will have surgery and then recover and then a second surgery after which his medical advisers are confident that he will be okay. When asked how long this might be, the Claimant indicates that it is the NHS so he cannot say but possibly 6 months and then when asked how long he would need to recover, he states 3 months. Ms Cobb then states that the request would then be for a year. The Claimant responds that the surgery is booked for 16 March 2023, he will have a consultation on 10 February and at which he will have a clearer understanding of what needs to be done.

75. We note that very early on in the meeting, Ms Cobb states that the Respondent is "not a home-based company, it has made been (sic) clear when you started and throughout, if it is not approved what else can I do?" (at B153). The Claimant responds that he does not think there is anything else because it is his train journey and comes back to this each time he is asked what other options there might be, if his request is refused. Indeed, it is apparent from the notes of the meeting that Ms Cobb explores other options when in reality the only viable option is working from home.

76. We also note that Ms Cobb states the following (at B154):

> *"I need to be mindful that you will not have me or the team there to help (if the Claimant is working from home) and I need to bear that in mind and I will. I also need to consider the separate conversation we are having (which would appear to be a reference to her concerns about his performance)".*

77. By a letter dated 10 February 2023, Ms Cobb wrote to the Claimant refusing his request (at B157-159). The decision was made on the basis of the detrimental impact on the quality of service delivered and the detrimental impact on performance. These are two of the eight reasons for refusal set out within the legislation governing flexible working requests.

78. In essence, Ms Cobb refused the request on the following basis: her separate concerns as to his performance as per her email of 20 January 2023; her concern that by working from home, the Claimant would not have immediate access to her and to the team, reducing the support available to him; by reference to the expected statistics of an HR Advisor Band 2 and his actual statistics as at 9 January 2023; that statistics on occasions where due to train strikes he worked from home indicate that home working does not positively impact his performance; that the Respondent is an office-based organisation; that he offered no other suggestions should his request not be approved; that the obligation upon the Respondent is to support with reasonable adjustments during working time and not on his journey to and from the office.

79. The letter advised the Claimant of his right of appeal to Mrs Martin within 5 working days of the date of receipt of the letter.

80. On 17 February 2023, the Claimant sent an email to Mrs Martin appealing against the refusal of his flexible working request (at B160). The Claimant said in evidence that he attached a number of supporting documents to the email which are at B161-177. Mrs Martin was unsure as to whether she had seen all of these documents but said that she had certainly seen some of them. In essence, the Claimant reiterated the medical reasons why he had requested to work from home but the Respondent's focus had been on performance rather than a consideration of the medical grounds and his performance was not a matter that was discussed at the meeting.

81. Also on 17 February 2023, the Claimant sent an email to Ms Cobb advising that he had to attend a hospital appointment on 23 February between 1-3 pm in relation to his total hip replacement surgery in March 2023. He also explained that his journey time is between 1 hour 20 minutes to 1 hour 30 minutes each way. Given that the appointment was in the middle of the day, he requested to work from home that day. This email is at B201. Later that afternoon, Ms Cobb replied to the Claimant refusing his request to work from home. Her email is at B200 as states as follows:

"As you know the business does not allow working from home. In line with our Company policy, you are able to take 4 hours for a hospital appointment with this time being worked back. If you are not able to complete your appointment and get back to the office in this time, you will need to take annual leave. This stance will not change."

82. As a result, the Claimant had to work back the time taken to attend the appointment and take half a day's annual leave.

83. By a letter dated 27 February 2023, Mrs Martin wrote to the Claimant acknowledging his appeal, setting a hearing date for 1 March 2023. In the letter, Mrs Martin summarised the grounds of appeal as follows:

"Your employer failed to understand the reasons for your flexible working request. You feel that the focus was on performance and strongly believe that in the outcome letter the grounds of your request were completely ignored even though you provided sufficient medical evidence."

84. The appeal hearing took place on 1 March 2023 before Mrs Martin. It was conducted by MS Teams. The Claimant attended with Mr Dzekashu accompanying him. We were referred to the notes of the meeting at B205-212. It is fair to say that the meeting very much covered the same ground as covered by Ms Cobb at the meeting on 8 February 2023.

85. By letter dated 6 March 2023, Mrs Martin wrote to the Claimant rejecting his appeal. This is at B218-220. Mrs Martin said as follows: the Respondent understood the Claimant's condition; that his GP initially suggested changing working hours or the ability to work from home; at no point did the Claimant ask for reduced working hours, however he has since stated that he believes is unfit for work unless he works from home; he stated that he had chosen to continue to attend the office because he wanted to remain in work and try to manage things as best he could; that his flexible working request was not indefinite but would be for a period of somewhere between eight months to one year given his hip replacement surgery and knee surgery. Her letter went

on to state that she had carefully considered the points he raised but had decided not to uphold his appeal. In addition, she stated that she considered the reasoning behind the original decision to be sound and that she did consider what he had advised about his medical condition. The letter went on set out the discussion at their meeting regarding alternative suggestions should his request not be approved. The letter records that they Claimant did not suggest anything. However, Mrs Martin went on to set out a number of suggestions in order to support the Claimant.

86. The letter continues:

"We aim to create a culture of growth. So we can focus on development and assisting our team to reach their potential, we need to create an environment that focuses on learning and offers ongoing feedback. To do this effectively, we need our teams to be present in the office.

Effective team working and collectively with both leadership and peer groups are essential for the necessary speed of communication and decision making for our clients.

The role of the CIPD/HR Advisor cannot be performed effectively from home for the reasons set out above. In addition to this, the advisory nature of the role and the sensitive and high risk topics upon which you are advising require face-to-face supervision from our leadership team and a level of confidentiality that can only be achieved in an office environment."

87. Mrs Martin then sets out the reasons for declining the Claimant's request as follows:

"On consideration, I feel that agreeing to this request would:

- *have a detrimental effect on the Company's ability to meet clients/customers demands because your current performance levels are not aligned with the KPI's you should be achieving, and you have a need of 1:1 support from colleagues and your manager.*
- *have a detrimental effect on the quality of service delivered by the Company because your performance and quality of advice provided is not meeting the standards, we would expect from someone in your position. To support your ongoing development, we needs to be able to assist you on live calls at the support of your management colleagues around you."*

88. The letter ends by stating the current legislation precludes the Claimant making a further application more than once in a 12 month period.

89. On 7 March 2023, Ms Cobb conducted a one to one with the Claimant. In her email to the Claimant dated 9 March she summarised the discussion (at B223). This indicates that the Claimant was below target on all but Referrals.

90. On 8 March 2023, the Claimant sent an email to Ms Cobb in which he requested reasonable adjustments (at B222). The email refers to supporting medical evidence although it is not clear what was attached. The email sets out medical reasons affecting the Claimant's ability to travel on public transport and asks for a reasonable adjustment although not identifying what he seeks. It does not appear that Ms Cobb responded to this email although in her written evidence she did state that it was unclear what the Claimant was seeking and he did not suggest any adjustments.

91. On 9 March 2023, Ms Cobb met with the Claimant to discuss his poor performance and how to progress matters. She was accompanied by Ms Virdi as a note taker. The Claimant objected to her being in the meeting on the basis that it was supposed to be informal and Ms Cobb could take her own notes. It is clear that the meeting became heated and did not conclude.

92. The Claimant wrote to Ms Cobb by two emails both sent in the early hours of 24 March 2023 in which he set out his concerns about the way she had behaved and the conduct of the meeting and stated that he had to leave because he became unwell (at B235-236). He also stated that they agreed to continue the meeting the following day.

93. In evidence, Ms Cobb denied behaving in an untoward manner. Ms Virdi said in oral evidence that the Claimant and Ms Cobb were both being very direct with each other and talking together and their conduct towards each other could be perceived as aggressive when it was more like rudeness.

94. After the meeting, the Claimant stayed at work for approximately 90 minutes during which he forwarded a number of documents to his personal email address, cleared out his personal belongings and said goodbye to his colleagues.

95. On 9 March 2023, Ms Cobb sent an email to the Claimant requiring him to attend a capability meeting on 10 March 2023 (at B225). The email indicated that the purpose of the meeting was to discuss his performance in respect of his quality and productivity scores and allow him the opportunity to provide an explanation for his consistent failure to meet the expectations of his banding. The email attached a copy of the capability procedure (which as we have indicated we do not have) and warned that if the Claimant was unable to provide a satisfactory explanation for the matters of concern and considering his length of service, his employment may be terminated.

96. On the morning of 10 March 2023, the Claimant sent an email to Ms Cobb in essence indicating that given the impact on his health as a result of recent events he would not be attending work or the capability meeting (at B226).

97. By letter dated 10 March 2023, Ms Cobb wrote to the Claimant informing him of her decision to terminate his employment with 2 months' payment in lieu of notice (at B233-234). Her letter stated that the Claimant was dismissed for poor performance and failure to improve despite being given additional support since January 2023 citing his quality and productivity statistics. Ms Cobb appears also to cite the following as reasons for dismissal. That despite Claimant's reliance on experiencing stress and being unable to attend work set out in his email of 10 March, he remained in the office for one hour and 30 minutes after their meeting that day concluded, during which he forwarded company emails and printed copies of company information, and said goodbye to his colleagues. From this she assumed that he had no intention of returning to the business. The letter then continues:

"Considering the above and the original purpose of our discussion, your performance and lack of improvement, as well as your length of service in accordance with our formal procedures, I have decided that dismissal is the appropriate action.

This will take effect immediately and you will be paid two months' pay in lieu of notice."

98. The Claimant sent a statement of fitness for work dated 10 March 2023 with a covering email timed at 2.39 pm to Ms Cobb (at B228). The statement was for a period of 8 weeks stating that he was not fit for work due to "acute stress

and osteoarthritis of hip (awaiting surgery)" at B229. The statement also contained the narrative:

"Upcoming hip operation on 16.03.23 causing stress compounded by work situation. Advised that he is not fit to engage with work or employment related issues until after recovery from surgery."

99. It would appear that the Claimant sent the statement of fitness for work after his employment had been terminated given the email at B232. The letter had been sent at 12.55 pm on 10 March 2023 and the fit note at 2.39 pm that day.

100. We were told in oral evidence that the Respondent had a short service dismissal provision which allowed the dismissal of staff with less than two years' service without the need to follow a full capability procedure. However, as we have said, we never saw the written provision.

Submissions

101. We were provided with written submissions from both parties which they amplified orally. We do not propose to set these out in writing, unless specifically referred to in our conclusions but we would ensure the parties that they have been fully taken into account.

Relevant Law

102. Section 15 Equality Act 2010:

"(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

103. Section 20 Equality Act 2010:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.
(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format…"

104. Section 21 Equality Act 2010:

"(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.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

105. Sections 80H Employment Rights Act 1996:

"(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—

(a) that his employer has failed in relation to the application to comply with section 80G(1);

(b)t hat a decision by his employer to reject the application was based on incorrect facts; or

(b) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b)."

106. Section 104C(a) Employment Rights Act 1996:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
(a)made (or proposed to make) an application under section 80F..."

Conclusions

Time limits

107. There are no time limit issues.

Disability Discrimination

108. References are to the matters set out in the List of Issues.

Disability

109. The Respondent has conceded that the Claimant is a disabled person for the purposes of the Equality Act 2010 and had knowledge of this at the relevant times. This is also apparent from our findings of fact.

Discrimination Arising From Disability

110. The complaint is set out at paragraphs 1 to 4 of the Revised List of Issues.

111. Under section 15 EQA, discrimination arising from a disability is essentially where a claimant alleges that he has been treated unfavourably as a result of something arising from his disability. The respondent must know or have been reasonably expected to know that the claimant had the disability. It is a defence to such a complaint if the employer can prove the unfavourable treatment was a proportionate means of achieving a legitimate aim.

Requirement to make time back etc

112. The less favourable treatment which arose in consequence of the Claimant's disability is either having to make time back or use annual leave to attend a

medical appointment on 23 February 2023. The Claimant asked to work from home that day but was told he could not. As a result he had to work time back and take a half a day's annual leave.

113. We do not accept the Respondent's reliance on O'Hanlon v HMRC [2007] IRLR 404 as an analogous situation (reference paragraph 3.1 of Mr McFarlane's written submissions). In that case, the claimant wanted to be paid for disability related absence. In the case before us, the Claimant asked to work from home to facilitate his attendance at his appointment and thereby avoid a disproportionately long trip to and from work. He was not asking to be paid for his absence but intended to make up any time taken to attend his hospital appointment which was closer to his home than the Respondent's office in Blackfriars.

114. The something arising from his disability is the need to attend medical appointments.

115. We find that the Claimant was treated less favourably because of something arising from his disability.

116. Moving onto the justification defence. The Respondent has not shown a legitimate aim or that the refusal to work from home was proportionate. We had no submissions on this matter at all.

Dismissal

117. The less favourable treatment is the Claimant's dismissal.

118. The something arising is multi-faceted according to the Revised List of Issues at paragraph 2. Dealing with them one by one:

    a. The need to attend regular medical appointments. We did not accept that this was something arising from the Claimant's disability and as far as he only had one appointment lined up i.e. one on 23 February 2023. Thereafter he was to have surgery;

    b. The need to be absent for work or to work from home following his planned surgeries. We find that this was something arising from the Claimant's disability. Clearly the Claimant was going to be absent from work due to the surgery or, if allowed to, to work from home;

    c. Being in pain and taking medication which affects concentration both impact upon performance. We find that this was something arising from the Claimant's disability. This was a consequence of his hip/knee condition;

    d. Stress arising from all the above. We find that this was something arising from the Claimant's disability and was something particular apparent towards the end of the Claimant's employment. Whilst it was abundantly clear from the last fit note provided, Ms Cobb only received this after deciding to dismiss the Claimant.

119. We then considered whether the dismissal was related to one or more of the matters identified as arising from the Claimant's disability?

120. It is clear that the Claimant was dismissed because of a combination of the first three and to a lesser extent the last one. It is disingenuous for the Respondent to suggest that these matters had no bearing on the Claimant's performance and in turn his dismissal.

121. Moving onto the justification defence. The Respondent relies on the legitimate aims set out at paragraph 4 of its submissions. Whilst these aims appear laudable and if you take them in the round, as suggested by Mr McFarlane's submissions. But where this defence fails is on proportionality. Rather than dismissing the Claimant for performance issues the Respondent could have taken other less discriminatory steps to try to achieve those aims: referring the Claimant to OH to better understand the causes and potential solutions for his performance issues or allowing him to work from home for a trial period undergoing monitoring to address his medical issues. Indeed, it appears that his request for reasonable adjustments went unanswered. Further, we note that the Respondent had more HR Advisors in post towards the end of the Claimant's employment.

Reasonable adjustments

122. Under sections 20 and 21 EQA, there is a duty upon employers to make reasonable adjustments to the workplace. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage. The adjustment has to be reasonable. The respondent must know or have been reasonably expected to know that the claimant was likely to be placed at the disadvantage.

123. The PCPs relied upon are at paragraph 5 of the Revised List of Issues:

    a. The requirement for employees to work from the office full time; and

    b. Allowing employees only four hours off to attend a hospital appointment with this time being worked back. If an employee cannot complete an appointment within this time, then the employee is required use annual leave.

124. The Respondent admits both PCPs.

125. Moving onto substantial disadvantage.

126. The Claimant had to travel for approximately two hours and forty minutes each day, with such travel including use of public transport, walking to and from train stations, and navigating steps etc on the way.

127. Following the deterioration of his health, this became increasingly difficult and a number of medical opinions were given which indicated such travel was no

longer feasible for the Claimant, at least prior to his surgery and any subsequent recovery (at B249, 250 & 257).

128. The result of the Respondent's policy requiring all staff to be office based was that the Claimant was suffering increasing amounts of pain above his normal level as a result of his commute and at increased risk of injury.

129. To cope with that pain he had to take increasing amounts of pain killers, which in turn made it difficult for him to concentrate, with side effects such as drowsiness and dizziness.

130. The Claimant was also required to take annual leave to attend a pre-surgery medical appointment, which meant that he lost the opportunity to use that leave for his own leisure. In addition, this meant that he had to take half a day's leave and work back half a day to attend the pre-surgery hospital appointment in the middle of the working day. It also follows from the policy of not allowing working from home from February 2023 onwards (save in the case of Mr Dzekashu, a Senior HR Advisor, and it was more probably than not done as an alternative to losing him as an employee).

131. Turning them to whether there were reasonable steps that the Respondent could have taken to address the disadvantage.

132. The Respondent could have allowed the Claimant to work from home, at least for a trial period, to evaluate whether this would alleviate the substantial disadvantage he was put to.

133. It was apparent in evidence that the Respondent had used technology to conduct video meetings and had even used it to conduct the Claimant's flexible working appeal, the appeal officer being based at the Respondent's Hinckley site.

134. The Respondent's own statistics set out in the letter refusing his flexible work application suggested that the Claimant was performing better during periods of working from home, even on ad hoc occasions without a formal working from home plan in place (at B158).

135. The Respondent has tried to suggest that it offered other alternative adjustments. It did not. There is a list of possible adjustments within the flexible work appeal outcome letter at B219 but in reality this was purely a list of discussion points none of which would have adequately addressed the central issue caused by full time attendance in the office, i.e. that the Claimant would have to travel to and from work each day by public transport.

136. Some reliance was placed by the Respondent on the adjustment to hours of work. However, given that the Respondent operated an advice line from 9 am to 5.30 pm each day, a late start would still have required the Claimant to finish at 5.30 pm and travel home during the rush hour and similarly arriving for 9.00 am albeit leaving earlier. In addition, a reduction in hours would have meant a reduction in pay.

137. Turning to knowledge. Whilst the Respondent has conceded disability and knowledge, we would emphasise and endorse Mr Pincott's submissions. The Respondent and all its decision makers were clearly aware at all times of the Claimant's disability and in particular the disadvantages suffered by him as a result of having to travel to and from work. The Claimant told each of the decision makers himself, and he provided them with medical evidence setting out the difficulties he had with travel, and the consequential effect on his use of pain relief.

Flexible working

138. The law relating to the right to request flexible working is contained in sections 80F–80I ERA and expanded in the Flexible Working Regulations 2014. There is government guidance on the GOV.UK website, though it has no legal status. There is also an ACAS Code of Practice aimed at employers: Handling in a reasonable manner requests to work flexibly (June 2014). The Code must be taken into account by Employment Tribunals when deciding cases under the Regulations. The legislation does not give any right to work flexibly, but it makes it easier for an employee to make the request and have it properly considered.

139. Of course, any worker can ask his/her employer for changes in hours or other flexible arrangements without following any statutory procedure. However, if the worker wants to invoke the specific statutory right to make a request, there are certain conditions.

140. An eligible employee may apply to his employer for a change in his terms and conditions of employment regarding hours, time of work or working partly or wholly from home. Any permitted change will be permanent (unless agreed otherwise) and the employee will have no right to revert back to his/her former hours of work. The rules do not offer the option of an employer imposing a trial period: it is either 'yes' or 'no' to the employee's request. However, there is nothing to stop the parties agreeing to a trial period if either of them is unsure whether the change would work.

141. An employee cannot make more than one application to the same employer in 12 months. The application must be in writing and contain the following information:

- the date of the current application;
- the date of any previous application or confirmation that there has been none;
- a statement that the application is being made under the statutory right to request flexible working;
- the flexible working pattern applied for and the date it should come into effect;
- an explanation of what effect, if any, the employee thinks the proposed change will have on the employer and suggestions as to how the effect may be dealt with.

142. The employee is not expected to know exactly what the effect on the employer may be. This is just to show s/he has considered the likely impact

of the proposed change. A well thought-out application also makes it more likely the employer will agree. The ACAS Code recommends that employers make clear to employees what information should be included in a written request to work flexibly.

143. There used to be strict procedural requirements that an employer had to follow when dealing with the request. Now it is only necessary that the employer deals with the application 'in a reasonable manner' and notifies the employee of the decision within three months of the application or any permitted appeal unless any longer period is agreed. What is reasonable is set out in the ACAS Code and must be taken into account by a Employment Tribunal when it decides whether the employer has correctly followed the procedure. The ACAS Code recommends these steps: the employer should discuss the request with the employee; consider the application carefully; and inform the employee of the decision as soon as possible; this should be in writing to avoid future confusion. If the request is rejected, the employer should allow the employee to appeal. ACAS says it can be helpful to discuss the decision with the employee to see whether any further facts emerge.

144. The rules say that an application will be treated as withdrawn if the employee, without good reason, fails to attend both a first meeting arranged by the employer to discuss the application and the next meeting arranged for that purpose. If the employer has allowed an appeal, the application will be treated as withdrawn if the employee similarly fails to attend a first and rearranged meeting. The employer must notify the employee that s/he has decided to treat the application as withdrawn for these reasons.

145. An employer may only refuse the application on one of the specified grounds, i.e.:

- additional costs;
- detrimental effect on ability to meet customer demand;
- inability to recruit additional staff or re-organise work among existing staff;
- detrimental impact on quality or performance;
- insufficient work during the periods the employee proposes to work;
- planned structural changes.

146. As long as the employer's refusal falls within one of these specified grounds and is not based on incorrect facts, the employee cannot challenge the refusal under the flexible working procedure. However, an Employment Tribunal is entitled to examine evidence as to the circumstances leading to the refusal in case this indicates the employer was relying on incorrect facts.

147. An employee can bring a Tribunal claim if the employer:

- failed to deal with the flexible working application in a reasonable manner;
- did not notify the decision within three months or any agreed extension;
- wrongly treated it as withdrawn; or
- if a decision to reject the application was based on incorrect facts or an impermissible ground.

148. Turning then to the case before us.

The form of the application

149. The Respondent submits that the Claimant's request was not made in the manner required under section 80F because it does not include a specified start date for the request. We reject this submission on the basis that the Claimant made it clear that he wanted the change "to start as soon as possible" (at B135). Whilst this is not a specific date, it a sufficiently clear indication.

Deal with in a reasonable manner

150. We have taken into account Mr Pincott's reference to the guidance given by Whiteman v CPS Interiors Ltd and ors ET Case No.2601103/15 albeit we acknowledge that this only a persuasive authority. When considering flexible working requests, employers must:

    a. Follow a reasonable procedure and the rebuttable presumption is that if the Acas Code is followed the procedure is reasonable (and vice versa);

    b. Act in good faith, in that they must genuinely consider if one or more of the section 80G(1)(b) grounds for refusing the request applies. However, there is no requirement that the employer must reasonably consider that one or more of those grounds applies. (In the tribunal's view, an employer acting in bad faith would be in breach of section 80G(1)(b), rather than section 80G(1)(a));

    c. There is an obligation on employers to give some real thought to the employee's request — to (in the words of the Acas Code) "consider the request carefully looking at the benefits of the requested changes in working conditions for the employee and your business and weighing these against any adverse business impact of implementing the changes". (Again, the tribunal considered this was more an aspect of subsection (b) than subsection (a));

    d. It is not for the tribunal to assess the substance of the employer's decision or to decide whether it fell within the "band of reasonable responses". That would be to read words into the legislation that simply are not there. On the contrary, what mattered was the employer's subjective views.

151. From our findings it was clear from the evidence of both Ms Cobb and Ms Virdi that any request to work from home would have been rejected at the time in question because of the Respondent's policy in relation to home working had changed and the Respondent was an office-based organisation. Indeed, Ms Cobb used the phrase "this stance will not change" when rejecting the Claimant's request to work from home on 23 February 2023 (at B200). Ms Virdi was more emphatic in her evidence. We were also very concerned about the total lack of documentary evidence as to what the Respondent's policy as to working from home was and what it was changed to. We did not even have a copy of the flexible working policy.

152. We were also taken by the timing of events. The Claimant had been allowed to work from home in the past to attend medical appointments. He made his application to work from home as a flexible working request and this was rejected. During the meeting to discuss the application there was an early focus on what did the Claimant want if the Respondent did not accede to his request and the consideration of a series of non-viable alternatives. There is no discussion about performance issues at that meeting but these are relied upon at length in rejecting the application in the outcome letter. Then a week later, his further application to work from home to attend a medical appointment is rejected by the application of what in effect is a blanket ban on working from home.

153. We therefore agree with Mr Pincott's submissions that this is not indicative of the Respondent meaningfully engaging in considering the Claimant's request. Indeed, after the application is refused, the Claimant requests reasonable adjustments on the same grounds as his flexible work application and this is apparently ignored.

154. The appeal decision did not take the matter any further.

Incorrect facts

155. We have taken into account Mr Pincott's reference to Commotion Ltd v Rutty [2006] ICR 290, EAT, in which the Employment Appeal Tribunal held:

> *"[I]n order for the tribunal to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the tribunal are entitled to enquire into what would have been the effect of granting the application. Could it have been coped with without disruption? What did other staff feel about it? Could they make up the time? and matters of that type. We do not propose to go exhaustively through the matters at which a tribunal might wish to look, but if the tribunal were to look at such matters in order to test whether the assertion made by the employer was factually correct, that would not be any misuse of their powers and they would not be committing an error of law."*

156. The Respondent relies upon the performance issues to reject the Claimant's application in that working from home would have a detrimental impact on the quality of service delivered and on performance.

157. The difficulty with the reasons given is that we have already found that the Respondent did not meaningfully engage with the Claimant's request and did not raise those performance issues in the discussion with the Claimant at the flexible work request meeting. The matter was taken no further on appeal.

158. The Respondent made no attempt to explore with OH or to take other advice as to what the specific effects on his ability to perform were as a result of working full time in the office and alternatively how his performance might have been affected by working from home. It even produced statistical evidence which indicated an improved performance when he had temporarily worked from home but ignored it.

159. There was no enquiry into the effect of the Claimant not being in the office full-time in terms of the impact on other staff or an enquiry into ways of providing remote support on the days the Claimant was working from home.

160. Whilst not obliged to offer it, one possibility would have been to grant the request for a trial period or subject to strict monitoring and ending the arrangement if it was not working (as with Mr Dzekashu, who did not obviously give cause for concern as to his performance).

161. Indeed, our view based on our findings is that the Respondent had a blanket policy that all staff had to work in the office and entered the matter with a closed mind.

Automatic unfair dismissal

162. Section 104C(a) ERA requires us to find that the reason, or the principal reason, if more than one, for the Claimant's dismissal was that he made a flexible working request. As Mr McFarlane submits, the burden of proof, where there is no complaint of ordinary unfair dismissal, is on the Claimant (Smith v Hayle Town Council [1978] IRLR 413).

163. Whilst there clearly were a number of operative reasons for the Claimant's dismissal linked to his disability, it is apparent to us that the principal reason was not his flexible work application. Indeed, Mr Pincott acknowledges this in his written submissions although we do not accept the conclusion he sets out in paragraphs 76 and 77. The principal reason was performance and we have found that the dismissal was as a result of something arising from disability.

Further disposal

164. We will allow a period of time to resolve the issue of remedy (6 weeks). If that is not possible, the parties should let the Employment Tribunal know by 9 April 2025 and we will list a 1 day remedy hearing in liaison with the parties and make CMOs to prepare the matter for that hearing.

Attached: Revised List of Issues

Employment Judge Tsamados
9 April 2025