Case Number: 2305160/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr. A Mavour

Respondent: Clearbank Ltd

Heard at: London South

On: 29 and 30 April 2025
1 May 2025 – Tribunal only

Before: Employment Judge Cawthray
Ms. G Mitchell
Ms. S Dengate

Representation
Claimant: In person, not legally qualified
Respondent: Mr. R Dennis, Counsel

RESERVED JUDGMENT

1. The complaint of automatically unfair dismissal is not well-founded and is dismissed.

2. At the relevant times the Claimant was not a disabled person as defined by section 6 Equality Act 2010 because of hereditary exostoses and nighttime seizures.

3. The claim of failure to make reasonable adjustments is therefore dismissed.

4. The complaint of wrongful dismissal/breach of contract in relation to notice pay is not well-founded and is dismissed.

RESERVED REASONS

Background

1. This is a claim that was presented on 14 September 2023 following ACAS Early Conciliation between 23 July and 24 August 2024.

2. A case management preliminary hearing took place in front of Employment Judge Burge on 7 June 2024. At this hearing the Claimant's wife attended on behalf of the Claimant. At the hearing the issues were discussed and various case management orders were set. It is recorded, at paragraph 2 of the Order that:

"Mrs Mavour explained that Mr Mavour also has nighttime seizures and may have brain damage. She said his brain works quicker than his ability to formulate words. Mr and Mrs Mavour were content with Mrs Mavour representing the Claimant but Mr Mavour would benefit from an intermediary when he gives evidence or if Mrs Mavour is not available to represent him. He would also like hearings to be by video. The Respondent is content with video hearings."

3. Employment Judge Burge directed an intermediary assessment take place.

4. A Intermediary Report was produced on 8 July 2024. The report gives information on the Claimant's ability to communicate, and, in short, says an intermediary is not required at a hearing if recommendations are put in place.

5. Employment Judge Burge reviewed the Intermediary Report and in an Order dated 18 July 2024 set out a number of adjustments that would be put in place for future hearings and confirmed an intermediary would not be appointed to attend hearings.

6. A further Case Management Preliminary Hearing took place in front of Employment Judge Burge on 14 January 2025. At the hearing the adjustments set out it in the 18 July 2024 Order were discussed and agreed. It was explained to the Claimant that he could not pursue his breach of contract complaint in both the Employment Tribunal and the County Court and he was given time to determine which route he wished to move forward with. Case management orders were made to ensure the claim was ready for the final hearing and a timetable for the final hearing was discussed. The issues were also set out again, and agreed.

7. On 21 March 2025 the Tribunal wrote to the Claimant, under direction of Employment Judge Wright, and informed the parties the Claimant's notice pay complaint was stayed.

8. On 17 April 2025 the Respondent made an application that parts of the Claimant's witness statement be determined as inadmissible. It asked for the application to be considered in private at the start of the final hearing. The Claimant replied to the application, in writing, on the same day.

9. At 08:32 am on the morning of Day 1 of the final hearing Claimant emailed the Tribunal as below:

"It is with regret that I write to you to respectfully request an adjournment of this matter.
My family have taken suddenly ill which has left my wife with severe complications to her health. She is under the care of doctors and is receiving treatment however she has been advised to rest as she is at risk of further life-threatening complications."

10. The hearing started shortly after 10.00am and a discussion about the Claimant's application to adjourn took place.

11. The Claimant explained that his wife became unwell last week and attended the doctors and was prescribed with medication for a chest infection. The Claimant said his wife had previously had pneumonia and had scar tissue of 50% on her lungs.

12. The Claimant said that he did not know when his wife would be feeling better. The Claimant said his wife had been assisting him and he wouldn't be able to do hearing without her.

13. Mr. Dennis proposed that the Tribunal spent the first day reading and the situation be revisited the next morning at 10.00am, Day 2. He explained the provisions of rule 32 of The Employment Tribunal Procedure Rules and said that in order for exceptional circumstances to be satisfied the case law indicates medical evidence is provided. He said if the Claimant did not provide evidence of exceptional circumstances the Respondent was likely to object to the application for postponement.

14. The Employment Judge explained to the Claimant that it was a matter for him, but he could take the day and collate and send any medical evidence he wished in support of his application. The Employment Judge explained that if the application to postpone was refused, the hearing would continue.

15. It was decided that the tribunal would read for the remainder of Day 1. If the Claimant's wife was feeling better she could assist the Claimant as they wished. If she was not, the Claimant could renew his application for adjournment.

16. It should be noted that on both Day 1 and Day 2 the Claimant's wife was lying down in the bed behind the Claimant. The tribunal could not hear what the Claimant's wife was saying but she was making comments to the Claimant.

17. In order to make the best use of the rest of the time available on Day 1 for reading Mr. Dennis suggested some key documents. The Claimant

objected to this and said it was unfair. The Employment Judge explained that the Tribunal will not have time to read the Bundle from start to finish and it was usual practice for the Tribunal to read key documents before hearing any evidence. It was explained that the Claimant could give a list of documents that he considered to be key. He said he was not able to do this as his wife had been preparing the case. The Employment Judge assured the Claimant if the hearing continued the next day he could give a list of documents and the Tribunal could take time to read them before hearing any evidence.

18. At 11:54 the Claimant emailed the Tribunal. He had attached 8 documents. The first two documents related to his wife. One was a text message from Knights Hill to the Claimant's wife advising her a prescription was ready for collection and the other was a photograph of a bag of medication. The other documents were: an extract from the employment tribunal rules of procedure, information about Hereditary Multiple Exostoses and messages regarding and confirming an appointment for the Claimant on 6 May 2025 at Knights Hill Surgery.

19. The hearing started on day 2 shortly after 10.00am.

20. The Claimant said his wife was still unwell and asked for the hearing to be adjourned. The Claimant was given the opportunity to say whatever he wished. The Claimant said he didn't think she would be well by Thursday or Friday and that he couldn't continue without her.

21. Mr. Dennis said that the Respondent objected to the application and set out the basis. In short, he submitted that the Claimant had failed to prove there were exceptional circumstances and that despite screen shots of prescription and mediation there was no medical evidence explaining how his wife was affected and had not demonstrated too unwell. It was submitted that there was no evidence that the Claimant was incapable of representing himself and directed the Tribunal to several parts of the Intermediary Report. He state that the report sets out an intermediary is not required provided reasonable adjustments were put in place and this did not include representation by the Claimant's wife. It was submitted that in relation to the adjustment for the Claimant to check understanding, this could be done by the Employment Judge if wife not present and asserted the Claimant had demonstrated that he was perfectly capable of expressing himself, answering questions and objecting when he felt something was unfair and had demonstrated this on Day 1 and Day 2.

22. Mr. Dennis further submitted that if the Tribunal considered there were exceptional circumstances it would not be in the overriding objective to postpone the final hearing. He said postponement would result in substantial prejudice to the Respondent, it would lead to delay and not known when a hearing would be relisted, that Mr. Dennis had prebooked hearings until March 2026, it had been almost two years since the events the claim was about, there was ongoing stress for witnesses and two of the witnesses were no longer employed by the Respondent and therefore the Respondent ability to control and called to a further hearing was less and costs would have been wasted.

23. The Employment Judge asked the Claimant if there was anything further he wished to say in relation to his application, having listened to Mr. Dennis's comments.

24. The Claimant did not comment specifically on Mr. Dennis's comments, but said raised concerns about Mr. Dennis commenting on the Intermediary Report, that it would be illegal to provide his wife's medical notes, that under Article 6 he should be able to choose how to run his case and referred to his wife being in pain.

25. The Tribunal adjourned to consider the position, and reconvened and the Employment Judge explained the decision orally.

26. Rule 32 of The Employment Tribunal Procedure Rules 2024 deals with postponements and is set out in full below:

Postponements

32.

(1) An application by a party for a postponement must be received by the Tribunal as soon as possible after the need for a postponement becomes known.
(2) In the circumstances listed in paragraph (3) the Tribunal may only order a postponement where—

(a) all other parties consent, and—

(i) it is practicable and appropriate for the purposes of giving the parties the opportunity

to resolve their disputes by agreement, or

(ii) it is otherwise in accordance with the overriding objective,

(b) the application was necessitated by an act or omission of another party or the Tribunal, or

(c) there are exceptionalcircumstances.
(3) The circumstances are—

(a) a party makes an application for a postponement less than 7 days before the date on which the hearing begins, or

(b) the Tribunal has ordered two or more postponements in the same proceedings on the application of the same party and that party makes an application for a further postponement.

(4) In this rule—

(a) "postponement" means a postponement of a hearing including any adjournment which causes the hearing to be held or continued at a later date;

(b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability.

27. The Employment Judge sought to speak, and in short bullet style sentences, when explaining the decision. It was explained that the application had been refused and explained the points set out below.

28. It was explained that the Tribunal accepted that the Claimant's wife was unwell with a chest infection and that she was on medication. The Tribunal accepted that the Claimant's wife was planning to assist the Claimant and had mostly prepared the case. The Tribunal understood that the Claimant wished for his wife to assist him.

29. The Tribunal had noted that the Intermediary Report sets out the strengths and weaknesses of the Claimant's communication abilities.

30. The Tribunal observed from the engagement with the Claimant on Days 1 and 2 that the Claimant was able to communicate clearly and confidently, that he responded to questions, asked questions and put forward points that he wished to make.

31. The Tribunal had noted that following receipt of the Intermediary Report Employment Judge Burge had listed, in the case management order dated 18 July 2024, eight adjustments to put in place at future hearings. The only adjustment with any reference to the Claimant's wife was 2.1.1, which reads:

"2.1.1 Breaks should be longer than usual to give Mr Mavour time to check his understanding with his wife (or if he appoints one, his legal representative) and also to enable him to have a break. As per the Intermediary's recommendation this should be one 20-minute break mid-morning and one 20 minute break mid afternoon."

32. It was explained that the Tribunal considered that the Employment Judge could check the Claimant's understanding, but noted they could not advise the Claimant.

33. It was emphasised that the Employment Tribunal was well used to undertaking hearings with litigants in person, and understood that the Claimant's wife was not legally qualified.

34. It was explained that the Tribunal felt the adjustments set out by Employment Judge Burge could be achieved and that the Employment Judge can check the Claimant's understanding, and he can be given extra time as he needed or wished.

35. It was noted that the Tribunal had not been directed to any document or report that said the Claimant needed his wife to represent him. The Tribunal noted that the application was not made on the basis that the Claimant was unwell, but was on the basis of his wife currently being unwell.

36. The Claimant had, on Day 1, said his wife had prepared cross examination already. It was considered the Claimant could consider this before needing to cross examine the Respondent's witnesses, likely on Day 3.

37. The Tribunal determined that a fair hearing could take place.

38. Having considered the situation fully, the Tribunal concluded that, the Claimant had not satisfied it that there were exceptional circumstances which meant the hearing should be adjourned.

39. Further, it was explained that the Tribunal had gone on and considered the prejudice caused to the parties if the hearing was postponed. For the Respondent if the application was allowed it was noted that it would likely lead to further cost, delay, stress and that two of the Respondent's witnesses no longer work for the Respondent but had agreed to attend the hearing this week voluntarily. For the Claimant, it would mean his wife not assisting him in the way he wished.

40. It considered that further significant delay is likely to impact memory further, noting events relate to July 2023, albeit this would impact all parties. It was noted that Mr. Dennis, presently instructed Counsel, is not available until March 2026 due to prebooked hearings. It was noted that relisting hearings in London South Employment Tribunal can take considerable time, and looking towards the end of 2026 or early 2027 on a general basis.

41. The Tribunal further considered that adjourning the hearing would not have been in the overriding objective, as there would be considerable delay, the balance of prejudice fell more heavily on the Respondent, but fundamentally, it was considered that a fair trial could take place now, in the absence of the Claimant's wife fully participating, with appropriate adjustments throughout the hearing.

42. The application was refused.

43. After explaining the decision the Claimant strongly disagreed with the decision and made several references to his article 6 rights being breached. The Claimant said it would be illegal to share his wife's medical records. For completeness, neither the Tribunal or Mr. Dennis had asked for his wife's medical records but had explained that he may wish to provide medical evidence to support his application for adjournment, but that was a matter for him.

44. The Employment Judge sought to answer the Claimant's queries and repeated key points of the decision. It was explained that the decision was a case management decision that had taken into account all the information available.

45. During this stage the Claimant and his wife were speaking, but it was not clear to the Tribunal what was being said. The Claimant said, several times, that his wife was advising him to say goodbye.

46. The Employment Judge encouraged the Claimant to have a break and reflect. Despite being offered several times to have a break to reflect the Claimant did not wish to do so. It was explained that he if left the hearing, there was a chance that the hearing may continue in his absence, and that the Tribunal would need to ascertain the Respondent's position if the Claimant left the hearing.

47. The Claimant left the hearing at approximately 11.30am.

48. Following a short break Mr. Dennis referred to rule 44, which is set out below and set out that the Respondent's position was that the hearing should continue in the Claimant's absence.

Non-attendance

47. *If a party fails to attend or to be represented at a hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it must consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.*

49. The Tribunal adjourned to consider the position. The Tribunal concluded that, in the circumstances noting that it was the Claimant's decision to leave the hearing and the factors in deciding the application to amend, it was appropriate to continue with the final hearing in the Claimant's absence.
50. The parties had provided a bundle of 492 pages. The Claimant had provided a witness statement, that was read but noted the Claimant had not sworn or affirmed it as being true. The Respondent's witnesses, Ms. Betts, Ms. Bates and Mr. Phillips affirmed their evidence as being true. Mr. Dennis submitted written submissions.
51. After considering the submission the Tribunal deliberated the decision on day 3, without any parties present and time was spent on Day 4 by the Employment Judge writing this Judgment and Reasons.
52. Mr. Dennis confirmed that the Respondent was not pursuing its application dated 17 April 2025 and that this may need to be revisited if any third party asked for a comment but asked the Tribunal to note the anonymity provisions in relation to High Court and County Court proceedings.

Issues

53. The issues in the case had been agreed at previous case management hearing and are set out below with the original numbering for ease of reference.

1. Protected disclosure

1.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1 What did the Claimant say or write? When? To whom? The Claimant says they made disclosures on these occasions:

(a) On 7 July 2023 the Claimant told Mr Philips that Lindsay had asked him to take out all of his words from the one-to-one form and only use her words, and the Claimant was concerned for his own record and also her doing this to others;

(b) On 7 July 2023 the Claimant also told Mr Philips that changes he had made on Dynamic 365 had not been saved, there had been incorrect charges the previous month caused by the system error and that it was an ongoing issue.

1.1.2 Did they disclose information?

1.1.3 Did they believe the disclosure of information was made in the public interest?

1.1.4 Was that belief reasonable?

1.1.5 Did they believe it tended to show that:

1.1.5.1 a criminal offence had been, was being or was likely to be committed;
1.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;
1.1.5.3 a miscarriage of justice had occurred, was occurring or was likely to occur;
1.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;
1.1.5.5 the environment had been, was being or was likely to be damaged;
1.1.5.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

1.1.6 Was that belief reasonable?

1.2 If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer.
If so, it was a protected disclosure.

2. Automatic unfair dismissal (Employment Rights Act 1996 section 103A)

2.1 Was the reason for the Claimant's dismissal (or, if more than one, the principal reason) that the Claimant made a protected disclosure?
If so, the Claimant will be regarded as unfairly dismissed.

3. Remedy for unfair dismissal

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the Claimant?

3.1.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.1.3 If not, for what period of loss should the Claimant be compensated?

3.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway?

3.1.5 If so, should the Claimant's compensation be reduced? By how much?

3.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.1.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

3.1.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

3.1.9 If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

3.1.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

3.2 What basic award is payable to the Claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

4. Disability

4.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Did they have a physical or mental impairment: hereditary exostoses and nighttime seizures.

4.1.2 Did it have a substantial adverse effect on their ability to carry out day-to-day activities?

4.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

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

5.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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

5.2.1 To allow an employee to be accompanied to a dismissal/disciplinary meeting by a TU representative or colleague?

5.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he needed his wife to be present?

5.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

5.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

5.5.1 Allowing the Claimant's wife to accompany him at the meeting

5.6 Was it reasonable for the Respondent to have to take those steps?

5.7 Did the Respondent fail to take those steps?

6. Remedy for discrimination

6.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the Claimant?

6.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4 If not, for what period of loss should the Claimant be compensated?

6.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

6.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

6.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

6.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

6.11 By what proportion, up to 25%?

6.12 Should interest be awarded? How much?

7. **Breach of Contract/Wrongful dismissal**

7.1 Did this claim arise or was it outstanding when the Claimant's employment ended?

7.2 Did the Respondent do the following:

7.2.1 Fail to pay the Claimant's notice pay

7.3 Was that a breach of contract?

7.4 How much should the Claimant be awarded as damages?

Findings of Fact

General

54. The Respondent is a specialist technology enabled clearing bank providing banking services.

55. There is a dispute about the date on which the Claimant started employment with the Respondent. However, it is not necessary to determine the exact start date in order to determine the issues in the claim but the Tribunal find started in role as Finance Manager on 11 April 2023. The role involved supporting the Financial Control team in delivering financial accounting processes and reporting.

56. The Claimant has a contract of employment that he signed for on 22 March 2023.

57. The first six months of the Claimant's employment were a probation period. If employment was terminated, by either side, during the probation period the Claimant was entitled to two weeks' notice. Performance and suitability for the role was monitored during the probation period.

58. Clause 14 of the contract of employment sets out provisions in relation to Confidential Information.

59. The Respondent has a Staff Handbook which includes a Disciplinary Policy and an Acceptable Use Policy for Systems and Communications Policy. The latter clearly sets out that employees should not move ClearBank data outside of the corporate environment and should not send ClearBank information to any personal email addresses. It warns that doing so could amount to gross misconduct, disciplinary action or dismissal.

60. Ms. Betts, then Financial Accounting Manager, was the Claimant's line manager and became concerned about the Claimant's performance and behaviour shortly after he started in role but initially sought to encourage him. She considered he had poor attention to detail, lacked ownership of responsibilities, lack of fundamental accountancy skills and had concerns about general behaviours such as speaking over.

61. Ms. Betts sought to give feedback to the Claimant on errors as they arose and tried to give him constructive feedback. Ms. Betts felt the Claimant did not accept feedback well and she did not feel he could undertake the role without supervision and she needed to follow up on work.

62. On 7 June 2023 Ms. Betts relayed her concerns about the Claimant's performance to Mr. Phillps, then Interim Head of Finance. Ms. Betts then notified HR.

63. On 27 June 2023 Ms. Betts sent the Claimant a performance snapshot document containing objectives. The Claimant was required to complete parts of the form as part of the appraisal process. The Claimant returned it on 7 July 2023, before the scheduled one to one meeting with Ms. Betts. Ms. Betts was concerned the Claimant had largely copied ClearBank's stated values and not provided examples of what he had achieved.

64. After receipt of the document Ms. Betts spoke with Mr. Phillips. She had raised concerns about the Claimant with Mr. Phillips previously and repeated them. She said she was of the view that the Claimant should be dismissed and Mr. Phillips agreed and suggested she speak to HR.

65. On 7 July 2023 Ms. Betts and the Claimant had a one to one meeting to discuss his appraisal in the afternoon. In the meeting Ms. Betts raised a concern about a write off. Ms. Betts considered the Claimant did not respond well and asserted the matter was Ms. Betts fault. Ms. Betts considered the Claimant did not understand the write off principal she was raising. She also sought to obtain the Claimant's perspective on how he thought he was doing and discussed the Performance Snapshot document. Ms. Betts considered the Claimant attempted to deflect blame on her, diverted issues and talked over her.

66. Following the meeting, at 3:24pm, Ms. Betts emailed Mr. Phillips summarising the position from her perspective and ends *"As discussed, I will be engaging with HR on Friday 14 July to take next steps."*

67. Following the one to one meeting between the Claimant and Ms. Betts the Claimant called Mr. Phillips on 7 July 2023. Mr. Phillips considered the Claimant to be agitated and the Claimant said to Mr. Phillips that he did not share Ms. Betts' view of his performance. The Claimant mentioned the £7.20 issue. Mr. Phillps does not recall the Claimant telling him that Ms. Betts had asked him to take out all of his words from the one-to-one form and only use her words, and the Claimant was concerned for his own record and also her doing this to others.

68. Further, Mr. Phillips does not recall the Claimant telling him that changes he had made on Dynamic 365 had not been saved, there had been incorrect charges the previous month caused by the system error and that it was an ongoing issue.

69. In the Claimant's witness statement he does not set out anywhere that he said that he made the alleged comments to Mr. Phillips on 7 July 2023. The reference to speaking to Mr. Phillips is set out at paragraph 7 of the Claimant's witness statement, and this is copied in full below.

"Additionally, Ms. Betts canceled a scheduled one-to-one meeting, claiming there were no concerns, but when a rescheduled meeting occurred on July 7, 2023, it lasted only a few minutes before Ms. Betts became upset over receiving constructive feedback. She subsequently canceled the meeting again and demanded that I rewrite the meeting notes to align with her version of events. I found this request concerning, as it seemed to be an attempt to falsify official documentation, which could constitute fraud. Given the troubling nature of Ms. Betts' actions, I felt compelled to escalate my concerns to her manager, Mr. Robert Phillips."

70. The Tribunal find, on the balance of probabilities, that the Claimant did not make the comments to Mr. Phillips that he alleges as protected disclosures.

71. Ms. Betts had no knowledge of what the Claimant now relies on as his alleged protected disclosures at the time she formed the view the Claimant should be dismissed.

72. On 11 July 2023 Ms. Betts met with Mr. Phillips and Ms. Bates, HR Business Partner and discussed the process of terminating the Claimant. Ms. Bates helped Ms. Betts prepare for a dismissal meeting to take place on 14 July 2023.

73. Ms. Betts sent the Claimant a TEAMs invite for a meeting to take place between 11.00 and 11.30 on 14 July 2023. The invite was headed "Catch up". The Claimant was not warned that the meeting was to discuss dismissal.

74. The Claimant attended the meeting from home, but did not have his camera on. The meeting was recorded, at the Claimant's request. Ms. Bates also attended the meeting.

75. At the outset of the meeting Ms. Betts told the Claimant he was not performing at the standard required, had failed his probation period and was being dismissed with effect that day. She explained that he would receive a payment in lieu of his two weeks' notice. She explained that around midday the Claimant's access to the Respondent's systems would be cut off.

76. The Claimant raised concerns. The Claimant's wife then joined the meeting and said she was taking over for her husband and was hearing a lot of things that were illegal. Ms. Mavour said she would be advocating for her husband who was a disabled person and had a right to reasonable adjustments. She referenced the Claimant telling the Respondent their children had surgery and that their disabilities come from him because of a rare genetic disorder.

77. Neither Ms. Mavour or the Claimant provided any clear information about hereditary exostoses or nighttime seizures in the meeting.

78. The meeting lasted 13 minutes.

79. At 11.28 on 14 July 2023 the Claimant sent an email from his work email address to his personal email address which attached three documents containing confidential information about the Respondent and its customers. This has been determined as having happened by the High Court.

80. At 3.07pm on 14 July 2023 Ms. Bates emailed the Claimant confirming he had failed his probation period and his employment was being terminated. It also states the Respondent would be happy to consider have another call, in view of his wife's comments, but needed to know more about his disability and why the adjustment was needed.

81. At 16.09pm on 14 July 2023 Ms. Bates emailed the Claimant explaining the Respondent had become aware that he had emailed several confidential documents to himself, explained this was a breach and asked him to delete the email and confirm he had not kept copies. The email explained that if he did not the comply the Respondent*: "will treat your conduct as gross misconduct sufficient to justify immediate termination. This will mean that you will not receive any pay in lieu of notice and only the entitlements accrued up to and including today."*

82. The Claimant did not confirm that he had deleted the information. The Respondent decided not to pay in lieu of notice because it considered he had committed gross misconduct after being told he was being dismissed and before his employment ended.

83. The Claimant appealed the decision to dismiss him. His appeal was not upheld.

84. The County Court dismissed the Claimant's complaint for pay in lieu of notice as a debt.

<u>Disability</u>

85. It is noted that in his Disability Impact Statement the Claimant references several health conditions. However, the two conditions relied on as alleged disabilities in this claim are: hereditary exostoses and nighttime seizures.

86. Upon appointment, the Claimant did not disclose to the Respondent that he had any health conditions. He never requested any adjustments be made to his role. Ms. Betts, Ms. Bates and Mr. Phillips had no knowledge of the Claimant having any disability.

87. In relation to hereditary exostoses, the findings of fact are set out below.

88. The Claimant provided a five page extract from his medical records. There is no reference to hereditary exostoses in the records. However, it does state, under a section headed *"Significant Past" "19 Feb 1979 Disorder of musculoskeletal system".* The Tribunal understand this is now referred to as hereditary exostoses. The Tribunal accepts that the Claimant has had this condition from childhood.

89. In the medical evidence provided, there is no note of the Claimant attending his GP for any reason related to hereditary exostoses.

90. The Claimant has, within his Disability Impact Statement and other documents sent to the Tribunal provided general information about hereditary exostoses. However, he has not set out in any clear detail how this condition impacts his daily activities at the time this claim was about.

91. The Tribunal note that in paragraphs 22 and 23 of the Disability Impact Statement the Claimant references pain being caused by walking long distances, long days or sitting for too long and that *"exercise is more difficult as HME impacts him more now he is older"* and shoes rubbing. There is no information about frequency or the extent of any difficulties.

92. In relation to nighttime seizures, the Claimant attended his GP on 2 August 2023 to discuss sleep issues. The notes state: "*has had this issue for many months snoring, feels sleepy during the day – more towards OM doesn't drive regularly, sometimes to shops etc. no incidences where has fallen asleep at wheel currently under a lot of stress – lost job as accountant and has been struggling financially. no thoughts DSH. Currently trying to find another job. Wondering whether that may have worsened this".*

93. The notes of a telephone consultation earlier on 2 August 2023 refer to the Claimant shaking in the night and breathing changes and waking but the Claimant being unaware. The note references extreme fatigue in the date and that his wife says this has been *"ongoing for years but in the last month has become severe, they are unable to sleep well as a result finding it hard to function the day after due to fatigue".*

94. The Claimant was referred to a sleep clinic by in August 2023 for suspected OSA (understood to be obstructive sleep apnoea). The attendance at his GP and the referral were after his employment with the Respondent ended.

95. Under a heading *"Problems Active"* there is a note *"29 Sep 2023 Obstructive sleep apnoea".*

96. There is no record of the Claimant attending the GP in relation to nighttime seizures before 2 August 2023.

97. There does not appear to be any medical report in the Bundle.

98. At paragraph paragraph 5 of the Claimant's Disability Impact Statement it states:

"Mr. Mavour also has a referral to the sleep clinic for his nocturnal seizures/shaking with a query for sleep apnea. All Mr. Mavour knows is that it is exacerbated by stress. The distress caused by the false allegations and the unfair treatment by the respondent has led to an increase in these nocturnal seizures/shaking episodes. This in turn is affecting the amount and quality of sleep both Mr and Mrs Mavour are able to get."

99. On the information provided, including the Claimant's statements, it is not clear if the Claimant has attended a specialist sleep clinic,.

100. There is no further detail about the impact of any sleep issues, but paragraph 6 does refer to the need to care for his disabled children meaning work has to be completed during the night and early hours of the morning.

Law

Protected Disclosures

101. The relevant sections of the Employment Rights Act 1996 are set out below:

43A Meaning of "protected disclosure"

43A Meaning of "protected disclosure" In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection.

(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

102. The Claimant must prove that they have made a protected disclosure.

103. The necessary components of a qualifying disclosure to an employer were summarised helpfully by HHJ Auerbach in *Williams v Michelle Brown AM (UKEAT/0044/19/00):*

> *"9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."*

104. There must be a disclosure of information. The disclosure must contain facts, not simply make an allegation. A disclosure can be made orally and in writing. It makes no difference if the recipient is already aware of the information provided.

105. The case of *Cavendish Munro Professional Risks Management Limited - v- Geduld [2010] ICR 325* makes clear, there is a need to convey facts, and not just make an allegation. An opinion does not equate to information *(Goode -v- Marks and Spencers PLC EAT 0442/09).*

106. The Employment Appeal Tribunal in the case of *Kilraine -v London Borough of Wandsworth UK EAT/0260/15* warned that tribunals should take care when deciding if the alleged disclosure was providing information as in practice information and allegations are often intertwined and the fact that information is also an allegation is not relevant.

107. The information disclosed must tend to show the alleged wrongdoing in section 43B, and therefore requires sufficient factual content.

108. A communication asking for information or making inquiry is unlikely to be conveying information.

109. The Claimant must have a reasonable belief that the disclosure is made in the public interest.

110. There is no definition of public interest in the legislation. A matter that is of "public interest" is not necessarily the same as one that interests the public.

111. The focus is on whether the worker/employee reasonably believed that the disclosure was in the public interest.

112. In *Chesterton Global Limited and others -v- Nurmohamed [2017] EWCA 979* the Court of Appeal made a number of useful observations when dealing with the issue of public interest. It made the point that simply considering whether more than one person's interest was served by a public disclosure was a mechanistic view and required the making of artificial distinctions. The Court of Appeal said that instead a Tribunal should consider four relevant factors. It reiterated that Employment Tribunals should be cautious when making a decision about what "is in the public interest" when dealing with a personal interest issue because "*the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle blowers – even, where more than one worker is involved. But I am not prepared to say never."*

113. The four factors that the Tribunal should consider when looking at public interest are:

The numbers in the group whose interests are affected;

The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer, in terms of the size of its relevant community i.e. staff, suppliers and clients, the more obviously should a disclosure about its activities engage the public interest, though this point should not be taken too far.

114. There can be more than one reasonable view as to whether a disclosure has been made in the public interest, and the Tribunal should not substitute its view for that of the Claimant; it must consider whether the Claimant subjectively believed the disclosure was in the public interest, and whether that belief was reasonable. *Chesterton* established that the necessary belief is that the disclosure is made in the public interest; the particular reasons why the worker believes that to so be is not of the essence. Also, while the worker must have a reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – the Court of Appeal doubted whether it need be any part of the worker's motivation.

115. The Employment Appeal Tribunal in *Dobbie v. Felton (t/a Feltons Solicitors) [2021] IRLR 679* provided further guidance on the meaning of "in the public interest", particularly at paragraphs 27-30. Disclosures about certain subjects are, by their nature, likely to be "made in the public interest" (see paragraphs 30-31). 30. The question of the reasonable beliefs of the Claimant needs to be determined.

116. The Claimant must show that they have a reasonable belief that the "information disclosed tends to show". The case of *Soh v Imperial College of Science Technology and Medicine EAT 0350/14* it was confirmed that there is a distinction between a worker saying "I believe X is true" and "I believe that this information tends to show that X is true".

117. The test of reasonable belief is objective and subjective. The case of *Phoenix House Ltd v Stockman [2017] ICR 84* explains that a judgment must firstly be made as to whether the Claimant's belief was reasonable and secondly whether objectively, on the perceived facts, there was a reasonable belief in the truth of the complaints.

118. The test for assessing whether the worked has a reasonable belief is a low threshold, but the Claimant's belief must be based on some evidence – rumours and unfounded suspicions are not enough to establish reasonable belief.

119. There can be a qualifying disclosure even if the facts relied upon turn out to be wrong.

120. In cases dealing with a number of alleged disclosures it is necessary to look at them individually.

<u>Automatic unfair dismissal</u>

121. Section 103A of the Employment Rights Act 1996 states:

103A Protected disclosure.

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 made a protected disclosure.

122. The burden is on the claimant to show that the principal reason for dismissal was the protected disclosure.

123. Section 103A indicates that there may be more than one reason for a dismissal. An employee will only succeed in a claim of unfair dismissal if the Tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure.

124. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. Lord Justice Elias confirmed in *Feccitt and ors v NHS Manchester (Public Concerns at Work intervening) 2021 ICR 372 CA* that the causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B of the Employment Rights Act 1996. The latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas section 103A requires the disclosure to be the primary motivation for a dismissal.

125. If the protected disclosure was merely a subsidiary reason, the claim will fail.

126. A Tribunal needs to consider two questions: firstly, what is the reason for dismissal, and secondly whether a disclosure was protected. The question of whether the principal reason for dismissal was a protected disclosure is a question of fact for the Tribunal to make. In cases of multiple disclosures, the approach is to ask whether the disclosures, taken as a whole, were the principal reason for dismissal.

127. Where an employee has less than two years' service the employee has the burden of showing, on the balance of probabilities, that the reason for dismissal was for an automatically unfair reason.

128. A tribunal may draw inferences from facts established by evidence, but is not obliged to do so.

<u>Disability</u>

129. For the purposes of section 6 of the Equality Act 2010 (EqA) a person is said to have a disability if they meet the following definition:

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2)A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5)A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6)Schedule 1 (disability: supplementary provision) has effect.

130. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition.

131. Further assistance on the definition is provided in Schedule 1 of the EqA. The definition poses four essential questions:

a) Does the person have a physical or mental impairment?
b) Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
c) Is that effect substantial?
d) Is that effect long-term?

132. However, it is important to look at the overall picture.

133. There is guidance set out in *J v DLA Piper* in relation to approaching the issue of whether someone has an impairment. The EAT noted it was good practice in every case for tribunals to look at the issue of whether someone has an impairment separately from the question of whether it has an adverse effect on their ability to carry out normal day-to-day activities. However, that did not mean that tribunals should rigidly adhere to that approach, and in some cases (particularly if it involves resolving difficult medical questions) it is appropriate to firstly consider whether the Claimant's ability to carry out normal day to day activities has been adversely affected. Where the answer is yes, in most cases a tribunal can infer that the Claimant was suffering from a condition which has produced that adverse effect, namely an impairment.

134. In *Aderemi v London and South Eastern Railway Ltd [2013] ICR 591,* Langstaff P stated: “It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which the Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect on his ability, that is to carry out normal day to day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading of “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other”.

135. The term “substantial” is defined at section 212 as “more than minor or trivial”. Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socializing.

136. Under paragraph 2(2) of Schedule 1 to the Equality Act 2010, if an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day to day activities, it is to be treated to have that effect if that effect is likely to recur.

137. Paragraph 2(1) of Schedule 1 states:

2(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

138. Likely should be interpreted as meaning “it could well happen” rather than it is more probable than not it will happen; see *SCA Packaging Limited v Boyle (2009) ICR 1056.*

139. A claimant must meet the definition of disability as at the date of the alleged discrimination. *Cruickshank v Vaw Motorcast Ltd [2002] I.C.R. 729.* This position was again repeated by the EAT in *Alao v Oxleas NHS Foundation Trust [2022] EAT 135*, where Eady P held that when assessing the question of disability the Tribunal was "bound to have regard" to the position as at the date of the acts of discrimination in issue. A Tribunal must not take into account matters post the relevant period.

140. As to the effect of medical treatment, paragraph 5 of Schedule 1 provides:

5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2)"Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3)Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

141. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled "Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability" ('the Guidance'). The guidance should not be taken too literally and used as a check list (see Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19).

<u>Duty to make reasonable adjustments</u>

142. The legislation regarding complaints of a failure to make reasonable adjustments is contained within sections 20 and 21 of the Equality Act 2010.

143. Section 20 of the Equality Act 2010 states:

20 Duty to make adjustments

(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.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21 Failure to comply with duty

(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.

144. The duty to make reasonable adjustments appears in section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3) – *"(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."*

145. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

146. In *Environment Agency v Rowan [2008] ICR 218* it was emphasised that an employment tribunal must first identify the "provision, criterion or

practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

147. The words "provision, criterion or practice" ("PCP") are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In *Ishola v Transport for London [2020] EWCA Civ 112* it was said: *"all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."* It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

148. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

149. Substantial disadvantage is such disadvantage as is more than minor or trivial.

150. In *County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the* Employment Appeal Tribunal summarised the following additional propositions:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;
- It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; s/he need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;
- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s);
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:

  The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
  The extent to which it is practicable to take the step;
  The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities; -The extent of its financial and other resources;

The availability to it of financial or other assistance with respect to taking the step;
-The nature of its activities and size of its undertaking;
- If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

151. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.*

152. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

153. An important consideration is the extent to which the step will prevent the disadvantage. Although the Equality Act 2010 uses the term "avoid", this is not an absolute test. (The position is different in auxiliary aid cases where the employer has to take such steps as it is reasonable to take to have to provide the auxiliary aid).

154. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law: *Romec Ltd v Rudham [2007] All ER(D) (206) (Jul), EAT*. The Court of Appeal put the matter this way in *Griffiths v Secretary of State for Work and Pensions [2017] ICR 160:*

155. "So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."

156. Broadly speaking, and all other things being equal, the more effective the adjustment is likely to be the more likely it is to be a reasonable adjustment; the less effective it is likely to be, the less likely it is to be reasonable. Effectiveness must be assessed in the light of information available at the time, not subsequently: *Brightman v TIAA Ltd UKEAT/0318/19 2 July 2021* (paragraph 42).

Notice pay/wrongful dismissal

157. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provided, by a payment in lieu of notice.

158. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter.

Conclusions

159. The Tribunal reached its conclusions, which were unanimous, by applying the law to the findings of fact.

Protected Disclosures

160. The first issue for determination is whether or not the Claimant made the alleged protected disclosures. The Tribunal dealt with these separately.

161. The first alleged protected disclosure is that:

On 7 July 2023 the Claimant told Mr Philips that Lindsay had asked him to take out all of his words from the one-to-one form and only use her words, and the Claimant was concerned for his own record and also her doing this to others.

162. As set out in the findings of fact above, the Tribunal did not find that, as a matter of fact, the Claimant told Mr. Philips that Lindsay had asked him to take out all of his words from the one-to-one form and only use her words, and the Claimant was concerned for his own record and also her doing this to others.

163. Accordingly, the Tribunal conclude that this allegation fails factually, the Claimant did not give make the comment he alleges to Mr. Phillips.

164. The second alleged protected disclosure is that:

On 7 July 2023 the Claimant also told Mr Philips that changes he had made on Dynamic 365 had not been saved, there had been incorrect charges the previous month caused by the system error and that it was an ongoing issue.

165. As set out in the findings of fact above, the Tribunal did not find that, as a matter of fact, the Claimant told Mr. Philips that changes he had made on Dynamic 365 had not been saved, there had been incorrect charges the previous month caused by the system error and that it was an ongoing issue.

166. Accordingly, the Tribunal conclude that this allegation fails factually, the Claimant did not make the comment he alleges.

167. As neither of the alleged statements have been found to have been made the Tribunal did not go on to consider the other stages required to determine whether a disclosure was protected.

Automatically Unfair Dismissal

168. As it was concluded that the Claimant had not made a protected disclosure, the Tribunal could not go on to consider whether the reason, or principal reason for dismissal, was that the Claimant made a protected disclosure.

169. In any event, based on the findings of fact, the Tribunal noted and considered that the reason for dismissal was that the Respondent had formed a view that the Claimant was not able to do his role in the way it required.

170. The Tribunal reminded itself that it was not considering an ordinary unfair dismissal complaint and was not considering fairness.

171. The allegation of automatically unfair dismissal fails.

Disability

172. The Tribunal considered each alleged disability separately, dealing first with hereditary exostoses.

173. The following conclusions and analysis are based on the findings which have been reached above and in consideration of the law and Guidance.

174. The Guidance under each of the sections states that a section should not be looked at in isolation but in conjunction with the other sections. The sections are: A (the definition), B (substantial), C (long term) and D (normal day to day activities). It is important to consider whether the alleged effects on day-to-day activity, when taken together, could result in an overall substantial adverse effect, paragraph B4.

175. As noted in the findings of fact, the Tribunal accept the Claimant has hereditary exostoses, and went on to consider whether this condition had a substantial adverse and long term effect on day to day activities.

176. The next issue for consideration is if the impairment, the hereditary exostoses, had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities.

177. The Tribunal kept in mind that the relevant date for consideration was July 2023 and it must have regard for matters as they were are time of the alleged discrimination.

178. The Tribunal kept in mind it is important to consider that substantial in this respect means more than a minor or trivial.

179. Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socializing.

180. The Tribunal accept that the Claimant may experience pain and find exercise more difficult. However, the determination is a very specific one considering whether he meets the established definition at section 6 of the Equality Act.

181. The Claimant's GP records do not indicate any attendance to discuss management of any symptoms relating to hereditary exostoses.

182. Nevertheless, it was considered what the Claimant was not able to do, and the Claimant has not provided any clear or specific detail about any limitation on day to day activities, or any adaptions he makes, other than the general and vague references in paragraphs 22 and 23 of his Disability Impact Statement.

183. The Claimant appears to be able to assist his wife with childcare responsibilities and was not experiencing any symptom to such an extent that he felt it necessary to seek further medical support at the relevant times.

184. The Claimant was not unable to work, and raised no concerns about the impact of his condition on his ability to work.

185. The Tribunal concluded that, on the basis of the information available, that the Claimant has not demonstrated there is any day to day activity that he could not do. The Guidance, in paragraph B9 stresses the importance of considering the things that a person cannot do or can only do with difficulty.

186. Accordingly, the Tribunal concluded that there was no evidence provided to, either from the Claimant or in documentary form, to support a finding that the Claimant's hereditary exostoses had a substantial adverse impact on normal day to day activities in July 2023.

187. The Tribunal considered whether the Claimant had medical treatment, including medication, or took other measures to treat or correct the impairment and whether the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures.

188. The Claimant has provided no clear information about any treatment or measures taken at the relevant time.

189. In considering whether the effects of the impairment long-term the Tribunal must decide:

i. Did they last at least 12 months, or were they likely to last at least 12 months?
ii. If not, were they likely to recur?

190. The Tribunal acknowledge that hereditary exostoses is a lifelong condition. There is insufficient evidence available to reach a conclusion in relation to the long-term nature of the effects.

191. The Tribunal conclude, on the evidence available, that there is insufficient evidence that when taken together the symptoms identified by the Claimant (pain being caused by walking long distances, long days or sitting for too long and exercise being more difficult) had a substantial and long-term adverse effect on his ability to carry out normal day to day activities at the point of the alleged discriminatory event.

192. The Claimant has not met the burden of proof in relation to hereditary exostoses.

193. In relation to nighttime seizures, again, the Tribunal kept in mind that the relevant date for consideration was July 2023 and it must have regard for matters as they were are time of the alleged discrimination, which specifically was 14 July 2023.

194. The Tribunal accepts that in August 2023 the Claimant was waking in the night and had disturbed sleep.

195. The Tribunal kept in mind it is important to consider that substantial in this respect means more than a minor or trivial.

196. As set out in the findings of fact, the first reference to attending the GP and reference to waking and shaking in the night was 2 August 2023. The Claimant has not provided any evidence on the impact of any nighttime seizures on his ability to carry out normal day to day activities, either whilst employed or after.

197. Accordingly, the Tribunal concluded that there was no evidence provided to, either from the Claimant or in documentary form, to support a finding that the Claimant night time seizures had a substantial adverse impact on normal day to day activities in July 2023.

198. In relation to considering whether the Claimant had medical treatment, including medication, or took other measures to treat or correct the impairment there is no evidence of any treatment or measures taken at the relevant time, indeed is not clear if the Claimant actually attended a sleep clinic or not.

199. It was further considered that the Claimant's sleep declined with stress following his dismissal.

200. In considering whether the effects of the impairment are long-term the Tribunal considered that, at the time of the alleged discrimination the there was insufficient evidence to conclude that any nighttime seizures had lasted for 12 months or were likely to last for at least 12 months. Also, there was no evidence to indicate that they were likely to recur or last for the Claimant's life time.

201. The Tribunal conclude, on the evidence available, that there is insufficient evidence that nighttime seizures had a substantial and long-

term adverse effect on his ability to carry out normal day to day activities at the point of the alleged discriminatory event.

202. The Claimant has not met the burden of proof in relation to nighttime seizures.

203. The Claimant has not evidenced that the individual conditions relied on meet the definition under section 6 of the Equality Act 2010. The Tribunal determined that there is insufficient evidence to conclude that each separate condition had a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities but in relation to a cumulative effect, the Claimant does not appear to suggest that there was any cumulative effect of the two conditions he relies on but the Tribunal considered whether all the symptoms he has set out (and naturally the conditions) taken together had a cumulative effect which rendered the Claimant for the purposes of the Equality Act 2010.

204. The Tribunal concluded that even when taking the Claimant's symptoms together, at their worst, there remains insufficient evidence that when taken together the symptoms had an adverse effect on his ability to carry out normal day to day activities. Accordingly, it concluded that the Claimant has not evidenced that the cumulative effect of the conditions relied on meet the definition under section 6 of the Equality Act 2010.

Failure to make reasonable adjustments

205. As the Tribunal concluded that the Claimant was not disabled at the material times in accordance with section 6 of the Equality Act 2010 it was not necessary to go on to consider the reasonable adjustments complaint as the duty only arises where a Claimant is disabled.

206. The complaint fails.

Notice Pay/Wrongful Dismissal

207. The Claimant was dismissed without notice. His contract of employment sets out that he is entitled to two weeks' notice during the probationary period.

208. As set out in findings of fact, initially, on dismissal the Claimant was told that he would be paid in lieu of his two week notice period. However, it was then discovered that the Claimant had emailed himself confidential information, as summarised in the findings of fact above.

209. When dealing with a wrongful dismissal claim, the Tribunal must consider whether the Claimant fundamentally breached the contract of employment by an act of gross misconduct, or whether he did something so serious that entitled the Respondent to dismiss without notice.

210. In distinction to a claim of ordinary unfair dismissal (which was not brought as the Claimant has less than 2 years' service), where the focus is on the reasonableness of managements decisions, and immaterial to what decision the Tribunal would have reached, it must decide whether the Claimant was guilty of conduct serious enough to entitle the Respondent to terminate the employment without notice.

211. The Tribunal conclude that, on an objective assessment, on the balance of probabilities, the Claimant's actions, in sending an email attaching confidential information to his personal email address shortly after being told that he was dismissed for failing his probation period was sufficiently serious to amount to a fundamental breach entitling the Respondent to dismiss the Claimant without notice.

212. The claim fails.

Approved by:
Employment Judge Cawthray

Date: **2 May 2025**

JUDGMENT SENT TO THE PARTIES
ON: **9 May 2025**

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

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

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