EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001652/2024

Held in Glasgow on 19 & 20 March 2025

Employment Judge C McManus
Members J Smillie & G McKay

Mr R Scott	**Claimant** **Represented by:** **Ms W Govan -** **Claimant's Mother** **Lay** **Representative**
Tillicoultry Quarries Limited	**Respondent** **Represented by:** **Mr G McQueen -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:

1. The claimant's complaint of disability discrimination under section 15 of the Equality Act 2010 is well founded and succeeds.

2. The claimant's complaint of disability discrimination under section 21 of the Equality Act 2010 is well founded and succeeds.

3. The claimant is awarded the total gross sum of **£29,833.21 (TWENTY NINE THOUSAND EIGHT HUNDRED AND THIRTY THREE POUNDS AND TWENTY ONE PENCE)** in respect of his well – founded claims under the Equality Act 2010, that sum being comprised of:

    a. A total gross compensatory award of £22,366.54, which is subject to lawful deductions by the respondent in respect of tax and national insurance, on production of a valid confirmation to the claimant of proper receipt of those deductions.

b. A total injury to feelings (solatium) award of £7,466.67

REASONS

Background

1. The complaints are brought solely under the Equality Act 2010, relying on the claimant's protected characteristic of disability. At a Case Management Preliminary Hearing ('CMPH') before me, in December 2024, it was confirmed that the respondent accepted that the claimant has the protected characteristic of disability in respect of his Epilepsy. Following the CMPH, I issued a Note, together with questions for further particulars and a draft List of Issues. In general terms, the claimant relies on his treatment by the respondent, including his dismissal, after he had an Epileptic seizure at the respondent's premises. The period of alleged discrimination is from the date of that seizure until the dismissal. There is no issue in respect of the respondent having knowledge of the claimant's Epilepsy in that period. The claimant did not have qualifying service for an unfair dismissal claim under the Employment Rights Act 1996

2. The claimant was represented by his mother, who has no prior experience in Employment Tribunals. The respondent was professionally represented by Mr McQueen. Steps were taken throughout the hearing, in line with the overriding objective set out in Rule 3 of the Employment Tribunal Procedure Rules 2024 ('the Procedure Rules'), to seek to ensure that the parties were on an equal footing. That included additional questions being asked by the Tribunal during examination in chief of the claimant and cross examination of the respondent's witness.

3. The respondent's representative prepared a Bundle of Productions, which was presented numbered, ordered and paginated. Some additional documents were added to this during the hearing. Documents in that Bundle are referred to in this Judgement by their page number (1 – 154). The Tribunal only took into account documents in the Bundle which were referred to in evidence.

4. By the time of this Final Hearing ('FH') the parties had revised and agreed the List of Issues to be determined by the Tribunal. Parties also presented an agreed Statement of Facts.

Issues for determination

5. In discussions at the start of the FH, and during the proceedings, there were some concessions on the issues by both parties. This narrowed the issues for determination by the Tribunal. In respect of both the complaint under section 15 (arising from disability) and section 20/21 (failure to make reasonable adjustments), the claimant relied upon:-

    a. Not being referred to Occupational Health

    b. The respondent failing to consider the consultant's medical report

    c. The respondent failing to properly consider possible alternative roles, and

    d. Being dismissed.

6. In respect of the section 15 complaint, the respondent accepted the claimant's position that (1) having a seizure at work and (2) not holding a valid driving licence were 'something' arising from the claimant's disability. The respondent's position was to deny that (a) – (c) above was because of either (1) or (2). The respondent accepted that (d), the claimant's dismissal, was less favourable treatment because of his seizure at work, which arose in consequence of the claimant's disability. The respondent relied upon the dismissal as being a proportionate means of achieving the legitimate aims of:

    a. Protecting the health and safety of the claimant and other staff on site; and

    b. Efficient management of its workforce and resources.

7. In respect of the section 20/21 complaint, it was accepted that the respondent had a PCP of requiring employees in health and safety critical roles or where driving was involved not to have seizures at work. The claimant also relied

on the respondent having a PCP of requiring Quarry Operatives to hold a valid driving licence. The respondent denied that they operated that second PCP.

8. The claimant claimed that both PCPs relied on put him at a substantial disadvantage in comparison to those who are not disabled by the respondent. The disadvantages relied upon were:

    a. Not being referred to Occupational Health

    b. No consideration of consultant's medical report

    c. Failure to properly consider possible alternative roles, and

    d. His dismissal.

9. The claimant's position was that the steps the respondent ought reasonably to have taken to avoid the substantial disadvantage were:

    a. To refer him to Occupational Health

    b. To consider the consultant's medical report

    c. To properly consider possible alternative roles, and

    d. Not to dismiss him.

10. The respondent's position in respect of the section 20 /21 complaint was to submit that there was no causal link between the PCPs and the disadvantages relied upon.

11. The claimant's representative accepted that protecting the health and safety of the claimant and other staff on site was a legitimate concern for the respondent.

Issues

12. As the parties' positions at the FH narrowed the issues for the Tribunal's determination, the issues determined by the Tribunal were:-

Section 15

Was the claimant treated unfavourably by the respondent because of (1) having a seizure at work (2) not holding a valid driving licence by:

(a) Not being referred to Occupational Health

(b) Failing to consider the consultant's medical report

(c) Failing to properly consider possible alternative roles, and

(d) Being dismissed.

If so, was the claimant's dismissal a proportionate means of them achieving their legitimate aims of:

(1) Protecting the health and safety of the claimant and other staff on site; and

(2) Efficient management of its workforce and resources.

Section 20/21

Did the respondent have a PCP of requiring Quarry Operatives to hold a valid driving licence?

If so, did that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled in relation to:

- Referral to Occupational Health
- Failure to consider a consultant's report
- Failure to properly consider possible alternative roles
- Dismissal.

Did the accepted PCP of requiring employees in health and safety critical roles and driving roles not to have seizures at work put the claimant at a substantial disadvantage in comparison with persons who are not disabled in relation to:

- Referral to Occupational Health

- Failure to consider a consultant's report
- Failure to properly consider possible alternative roles
- Dismissal.

If so, did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage?

Proceedings

13. All evidence was heard on oath or affirmation. Following the claimant's evidence, evidence for the respondent's case was heard from Phillip Kerr (Area Production Manager).

Findings in Fact

14. This is not a narration of events but sets out the facts which are material to the issues to be determined. The following material facts were uncontested, admitted or proven.

15. The respondent operates from a number of sites in Scotland, extracting sand and gravel and producing ready mixed concrete, asphalt planks and aggregates. The respondent has approximately 325 – 350 employees. Health and safety is a critical concern for the respondent. The quarry industry can be dangerous and appropriate steps require to be taken to control or limit exposure to dangerous occurrences in a quarry. Operation of heavy machinery carries a risk of severe injury or death if appropriate safety precautions are not taken. If a person falls when working at heights, that could have serious consequences for themselves or others. The Ryeflatt site is the only site operated by the respondent where the material to be extracted is 8 / 10 meters *'below the water table'.* That increases the health and safety considerations at that site.

16. Philip Kerr has been employed by the respondent for 20 years. He has over 50 years' experience in the quarry business. For the past 10 years, he has been employed as Area Production Manager. He is responsible for the safe running of six sites operated by the respondent in Central Scotland, including

the site at Ryeflatt. He has approximately 40 employees under his direct report. Phillip Kerr has been involved in the capability process for a number of employees, including Quarry Operatives. Those processes have involved obtaining input from medical physicians and / or Occupational Health and discussions leading to employees returning to work on alternative / lighter duties for a period. Prior to dealing with the capability process in relation to the claimant, Philip Kerr had had no experience in dealing with an employee who was considered to be disabled in terms of the Equality Act 2010. .

17. There are three main functions at the Ryeflatt site: (1) excavation (including feeding the processing plant) (2) operating the static / processing plant (3) dispatch. Excavation involves extracting the materials from below the water table, using a 40T long reach excavator to place the material in a stock pile to allow it to dry. Once dry, the material is fed through the processing plant at a controlled rate, to be washed and separated. That feeding process involves driving heavy machinery mobile machinery (front wheel loaders also known as *'shovels)'*, to the stockpile, *'running'* the machinery, approx. 100 yards to the *'feedbox',* discharging the materials from the shovel into the feedbox and controlling the feed rate into the processing plant. Work in the processing plant includes walking on elevated platforms, checking the plant, keeping the plant clean, hosing out, climbing 20ft ladders and, on maintenance day, carrying out maintenance work, including within confined spaces. Dispatch involves using heavy mobile machinery to load lorries and move materials from the stockpile to various areas via conveyors. Lorries reverse into position and are loaded by front wheel loaders.

18. The claimant started working for the respondent as a Trainee Quarry Operative on 10 October 2022. The contract of employment is at (79 – 86). Prior to the commencement of his employment, on 5 October 2022, the claimant completed a Pre-placement Health Questionnaire (87 – 88). In that questionnaire form, in answer to questions asking if he had *'ever had any medical conditions or operations'* and if he was 'receiving any medicines or other treatments' the claimant wrote *'Epilepsy'.* That completed questionnaire form was returned to the respondent's HR department by the claimant. By

doing so, the claimant informed the respondent that he was diagnosed with Epilepsy. In the period from his completion of that questionnaire on 5 October 2022 until having a seizure in April 2024, no one within the respondent's organisation sought to discuss with the claimant any restrictions, adjustments or concerns in relation to the claimant working for the respondent, having had a diagnosis of Epilepsy. Throughout the claimant's employment with the respondent he was considered to be a valuable worker. He was always on time for work and there were no issues with his performance or capability while working.

19. When commencing in the role of a Trainee Quarry Operator's job, their tasks are to carry out sand sample tests, work on the weighbridge and print tickets for the lorries. Following a review, they are then expected to progress to further training on the plant (heavy machinery). Trainee Quarry Operators are expected to be trained up to operate and maintain the processing plant (power room). Those duties include assisting in the maintenance of the plant, including cleaning and checking for faults. Until June 2023, the claimant's duties were in respect of general maintenance of the plant, including cleaning, doing material samples, weighbridge duties, and 'general stuff to keep the plant going'. From around June 2023, the claimant was asked to do training so that he could operate heavy mobile machinery, particularly a *'shovel'* (front wheel loader). From June 2023, the claimant's working duties were in the *'feeding'* process, to operate a 'shovel' to load the hopper *('feedbox'),* feeding material into the processing plant. That involved driving the shovel up a ramp to a height of 5 meters, with the bucket of the machine raised, and for the contents of the bucket to then be discharged into the hopper. When the machine's bucket is raised, the machine is more unstable. The claimant's duties did not involve working close to water. From the time when the claimant's duties including driving mobile heavy machinery, he received an increase in hourly rate of £1 an hour. No new contract or terms and condition of employment were issued to the claimant in respect of that change.

20. On 29 or 30 April 2024, the claimant had a Return to Work interview, following a short absence for a wrist injury. During that Return to Work interview, the

claimant had an epileptic seizure. The claimant's Epilepsy had previously been well controlled by medication. The restrictions put in place during the COVID pandemic had an effect on the regularity of review of his Epilepsy medication. Prior to these restrictions, the claimant had had a medication review annually. The claimant had not had a medication review since before 2020.

21. The DVLA suspended the claimant's driving licence for a year post seizure. The respondent does not require a driving licence to be held by someone driving vehicles on the respondent's private property. At interview, prospective employees are asked if they have a valid driving licence because the sites are rural and not easily accessible unless by private car and because sometimes an employee may be asked to drive between sites.

22. When informed that the claimant had had a seizure, Phillip Kerr was concerned that if that seizure had occurred while the claimant was driving to the site, or while he was operating the shovel, then the claimant's loss of control during the seizure could have caused severe injury to himself or others.

23. The claimant was invited by letter to meetings with Phillip Kerr and Sophia Westerhuis (HR Manager), which were described in correspondence to him as 'Capability Meetings'. Sophia Westerhuis (HR Manager) wrote to the claimant on behalf of the respondent after each of these meetings. Her letter to the claimant following the meeting on 23 May 2024 (92 – 93) includes:

"Phil then explained that we have some concerns as you had a seizure while in the workplace and this could have happened while you were operating a machine or the plant. Phil explained that you need to explain your working environment to your neurologist and provide us with any feedback regarding your capability to perform the duties attached to your role. Phil explained we have a duty of care for your safety and the safety of others on site.

You explained that you do want to return to work but you need to see what happens and what is best for you. You explained that when your epilepsy is under control there is a small chance of a seizure.

Phil explained to you that the business will support you where possible but that we need to get further information from your consultant regarding your capability to perform your current role. We will arrange a further capability meeting following on from your neurology appointment."

24. Sophia Westerhuis' letter to the claimant following the meeting on 10 June 2024 (96 – 97) includes:

"Phil explained that from a health and safety perspective he has concerns about your capability to safely carry out some aspects of your role which include driving heavy plant, lone working around water and the operation of static plant and working at heights. I asked if your consultant had expressed any concerns around this and you said no but that you should not drive the loading shovel straight away. You stated that although your driving licence has been revoked due to your recent seizure you may be able to reapply for your licence within six months and that this does not apply to driving on private land. Phil clarified that he still has serious concerns regarding the safety risk involved in you driving a loading shovel regardless of it being on private land as we cannot guarantee that you will not have another seizure.

You explained that your consultant has provided a number we can contact if we wish to gain further information regarding your capabilities to carry out your role. I explained that I would contact your consultant and that we would meet again following your MRI scan to gain further update from you.

I also explained that we do have a number of other vacancies available which you can access through the employee app and that we would explore if a more suitable role exists within the business that would be more suitable given the high risk environment your current role operates within. I have also attached a copy of the current vacancies to this letter for your consideration. We will also consider if any reasonable adjustment can be made to your current role which would facilitate a return to work.

Phil explained to you that the business will support you where possible but that we need to get further information from your consultant and following your

MRI scan regarding your capability to perform your current role we will arrange a further capability meeting after the 25th of June."

25. The respondent did not contact the claimant's treating consultant. The respondent did not obtain a medical report on the claimant's capacity to work. They did not refer the claimant to Occupational Health. The claimant's position at the Capability Meetings held with him was that, in order to obtain a consultant's opinion more quickly than via the NHS, he was seeing a consultant neurologist privately. The respondent did not contact that consultant neurologist, despite informing the claimant that they would do so.

26. Following the 'Capability Meetings' in June 2024, the claimant was sent a list of current vacancies within the respondent's organisation. The vacancy list sent to the claimant dated 24/6/2024 includes a vacancy for Trainee Quarry Operative at Ryeflatt (102). That was the position the claimant had worked when he was first employed by the respondent. When the claimant had started in that position, he had not been required to drive heavy mobile machinery.

27. Phillip Kerr took the decision to dismiss the claimant. Phillip Kerr did not take any steps to ascertain whether there had been any contact with the consultant neurologist prior to making the decision to dismiss the claimant. Phillip Kerr was of the view that because the claimant could not *'guarantee'* that he would not have a seizure at work then, because of health and safety concerns, the claimant could not work on site. Neither Phillip Kerr nor Sophia Westerhuis took any steps to obtain medical input prior to their decision to dismiss the claimant. They did not seek expert medical advice on the risk of seizure in circumstances where the claimant's medication had been increased. Phillip Kerr was of the view that it is not appropriate for anyone who had a diagnosis of Epilepsy to work on site for the respondent. At the time of his decision to dismiss the claimant, Phillip Kerr was unaware that there was another employee working on site who had a diagnosis of Epilepsy.

28. The claimant was informed of his dismissal at a meeting with Phillip Kerr and Sophia Westerhuis on 1 July 2024, which the claimant attended with his

mother. That decision was confirmed to the claimant in letter dated 1 July 2024 (105 – 106). The claimant responded to that letter by email of 8 July to Sophia Westerhuis (107 – 108). That email set out his intention to appeal the decision. That email included the following:

"I have concerns regarding several discrepancies between what was stated in the letter and what was actually discussed during our meeting.

Firstly, your letter mentions that there was a discussion about reasonable adjustments that could be put in place to accommodate my condition. However this is not an accurate reflection of our meeting. There was no such discussion; rather, you informed me that there were no adjustments that could be made to support my continued employment.

Secondly, the letter states that we discussed current vacancies and agreed that no other suitable roles were available within the company. This is also incorrect. At no point during our meeting did we discuss alternative roles. You simply informed me that there were no vacancies available that could accommodate my situation.

Lastly, the letter inaccurately reflects our conversation regarding awareness of my condition at Tillicoultry. During the meeting, it was made clear by you that neither you / Human Resources nor Phil were aware of my Epilepsy, despite the fact that I had declared and discussed my condition at the beginning of my employment with the company. In the letter, you indicate that only Phil was unaware. This inconsistency is concerning and suggests a lack of proper communication within the team regarding important medical disclosures.

In light of these discrepancies and the fact that there was no genuine attempt to explore reasonable adjustments or alternative roles I wish to formally appeal the decision to dismiss me. Under the Equality Act 2010, it is required to explore all options and alternatives with an employee before making a decision based on their capability. The failure to do so constitutes discrimination."

29. Following his dismissal, the claimant received a letter from his consultant neurologist, Dr Derry to his GP, dated 16 July 2024 (153 – 154). That letter records *"Recent MRI and EEG normal";* "*Breakthrough seizure April 2024 but no further seizures since increasing medication*" and *"He is now on a more reasonable dose of Sodium Valporate for an adult."* That letter also records that the claimant was content to continue to take his prescribed medication at the increased level.

30. The claimant has not obtained alternative employment since being dismissed by the respondent. The claimant lives in a rural area, with no easy access to public transport. The DVLA's restrictions on the claimant's driving licence are due to be lifted in May 2025.

31. At the time of the claimant's dismissal, the respondent had a vacancy for the role of Trainee Quarry Operative at the Ryeflatt site. That was the job which the claimant had on commencing employment with the respondent. That job did not initially involve operating heavy machinery. There was no discussion with the claimant about whether he could continue to work for the respondent, doing the initial duties of the Trainee Quarry Operative role for a period of time. The claimant enjoyed his work at the Ryeflatt flat. Until he regained his driving licence, the claimant could have obtained a lift to the site from another employee.

Comments on evidence

32. Phillip Kerr's evidence was that after 12 weeks, Trainee Quarry Operatives were commenced on training on start up, operating and maintaining the plant, then they *'move onto SVQ' and then sit exams and get a ticket on the particular plant they are trained on.*' That position was not put to the claimant in cross examaination. There was no documentary evidence before us to show the duties of a Trainee Quarry Operative or of a Quarry Operative. There was no documentary evidence of training required to be carried out by a Trainee Quarry Operative or any time scales within which such training had to be carried out. The claimant's evidence was that until June 2023 his duties had not involved driving heavy machinery or climbing ladders. Although that

was a different position to Phillip Kerr's evidence, Phillip Kerr's position was not put to the claimant in cross examination. Under cross examination, the claimant disputed that his duties were accurately reflected in the document at 99 – 100. That evidence was significant because it was the claimant's position that as an alternative to dismissal he could have reverted, at least for a period (e.g. until he regained his driving licence), to the duties he did in the first months of his role with the respondent. That role was as Trainee Quarry Operative at the Ryeflatt site. There was a vacancy for that role at the time of the claimant's dismissal. There was no job description before us of either the Trainee Quarry Operative or the Quarry Operative role. The only contract of employment produced was that describing the claimant as Trainee Quarry Operative. There was no documentary evidence of the training modules or requirements for the role of Trainee Quarry Operative or of Quarry Operative.

33. Although there was no dispute that health and safety was a legitimate concern for the respondent, and that quarry work can be dangerous, we did not have sight of a Health and Safety Policy or Risk Assessments in place for the various functions at Ryeflatt site. Phillip Kerr's evidence was that HSE requires operators of heavy machinery to have an SVQ qualification. We had no evidence of the particular qualifications required, or whether the claimant had any such qualification. Phillip Kerr's unprompted evidence in examination in chief was *"With the right controls we limit exposure to dangerous occurrences in the quarry."* We did not have evidence of what controls were put in place or any consideration of controls which may have enabled the claimant to continue to work.

34. The respondent did not do what was set out in their letters to the claimant (96 – 97). They did not contact his consultant. It was significant that no steps were taken to seek a medical report on the claimant, from his treating consultant, from Occupational Health or from the claimant's GP. Phillip Kerr could not provide an explanation why the claimant was tasked with asking questions of his consultant, rather than this being done by HR. He could not explain why no contact was made by the respondent to the consultant. He did not accept responsibility for no information having been obtained from the

consultant or for no medical input having been obtained before he made the decision to dismiss the claimant. When asked if he took any responsibility to ensure that HR had contacted the consultant his reply was *"No. That's an HR matter."*

35. During the course of the Tribunal Hearing, the claimant's mother produced a letter from the claimant's treating consultant, Dr Christopher Derry (Consultant Neurologist) which the claimant wished to rely on. It was accepted (despite the wording in the parties' proposed List of Issues) that that consultant's letter had not been produced to the respondent. There was some discussion about whether it was necessary to recall the claimant to speak to the content of that report. The claimant's representative accepted that the claimant had not given the consultant's letter to the respondent (their position being because the respondent did not ask for it). The respondent's representative did not object to that report being included in the evidence before us (included at 153 – 154), on the basis that it was accepted that the position in that letter was that the claimant was fit for work other than for driving heavy machinery. On the basis of parties' acceptances, it was agreed that it was not necessary to recall the claimant to speak to the consultant's letter.

36. Phillip Kerr was not aware of the terms of any Capability Policy or policy covering Diversity and Inclusion. It was significant that in examination in chief, when asked about his understanding of the capability process, Phillip Kerr's evidence was "*The Capability Meetings are to make further progress, to get reports from consultants and such."* Despite this being his position, no medical input was sought in the claimant's case.

37. It was unsatisfactory that we did not hear evidence from a representative from HR. No explanation was given for this. Sophia Westerhuis was the representative from HR whose names were on the correspondence sent to the claimant referred to in the Findings in Fact. Sophia Westerhuis was present throughout the Tribunal proceedings.

38. During the course of the hearing, additional documents were relied on by the respondent to show that the document at 99 – 100 was that attached to email from Phillip Kerr to Sophia Westerhuis on 12 June 2024 (100A), that being in reply to Sophia Westerhuis' email of 11 June 2024 (100A – 100B). That email from Sophia Westerhuis includes:

"Phil as part of the capability process we have to demonstrate we have considered alternative roles which may be suitable for him and any adjustments to his current role which would allow him to return to work.

Would you be able to pull together some answers to the following questions for me and be as specific as possible giving explanations if the answer is no?

- *What are your main concerns from a H&S perspective given Rs condition and his recent features?*
- *Are there any adjustments we can make to his current role which are reasonable which would facilitate his return to work/*
- *can we restrict his use of mobile plant?*
- *Can we remove the requirement for loan working?*
- *Can we remove the requirement for working around water / lone working around water?*
- *Can we remove the requirement for him to operate or work around static plant?*
- *Can we remove the requirement for him to work at height?*

Scott would you be able to provide your thoughts from a risk assessment / H & S perspective?

It's important that we are able to demonstrate we have duly considered any reasonable adjustments or alternative roles."

39. Given the content of that email from Sophia Westerhuis, it was surprising that that that email was not initially included in the Documents Bundle. We did not

hear evidence from Scott McDonald (Health and Safety Manager) or see any reply from Scott McDonald. Prior to the email chain at 100A – 100B being produced, Phillip Kerr's evidence was Scott McDonald had '*asked me what my views were*' and that Phillip Kerr had then produced the document at 99-100. Phillip Kerr's evidence was that that document at 99 – 100 was his risk assessment. It was surprising that this was not set out using a risk assessment template. Although it was Phillip Kerr's evidence that the respondent regularly carries out risk assessments on all three functions at Ryeflatt, by completing a *'basic template'*, none of those risk assessments were produced. Phillip Kerr's evidence was that Scott McDonald had agreed with what he said. After the emails at 100A – 100B were produced, Phillip Kerr's evidence was then:

"I received a document from the health and safety officer asking me to put the main concerns from a health and safety perspective given Robert's condition. Then I looked at it and did a risk assessment and explained to Scott what my reasons where and why I didn't think he was capable of going back into the quarry."

That was an honest answer, but was not consistent with the document being a consideration of adjustments, which was what was submitted by the respondent's representative. The document at 99 – 100 was Phillip Kerr's justification for why the claimant could not be employed on the site, rather than a consideration of adjustments. The document at 99 – 100 does include Phillip Kerr's position on why no adjustments could be made. It says:

"Unfortunately, there are no adjustments to his current role that could facilitate his return to his current role as the machine operator feeding the process plant will always be involved in driving in close proximity to other heavy machinery and plant.

We could not restrict his use of mobile plant as his job as a mobile plant operator involves his current role at the face feed hopper or moving stocks in the processing plant area and loading trucks with products for dispatch."

and

"If we were to remove him from driving all mobile plant and transfer him onto the processing plant this would reduce any incidents arising from the operation of mobile plant.

The problems with him working or operating the process plant would create further issues regarding his safety such as climbing vertical ladders, working at height and the risks with access and ingress while when maintaining certain items of plant.

The only alternative role he could carry out on the site with some degree of safety would be on the weighbridge and material testing and with the site currently averaging only 300 tonnes of sales per day and the testing of four products per day this would only equate to three or at best four hours to complete and is currently being undertaken by other members on site and this position could not be justified as a full time position."

40. That Note at 99 – 100 was not produced to the claimant prior to his dismissal. The claimant first had sight of it in these proceedings. The claimant did not agree that it accurately set out his duties. That included that he did not accept that he required to work at heights or in confined spaces. Phillip Kerr accepted that he had not taken any steps to consider whether the claimant could have done, even for a limited period of time, the duties he had done when first employed by the respondent as a Trainee Quarry Operative. The vacancy list of 26/6/24 (101) shows that at the relevant time, the respondent had a requirement for the duties of a Trainee Quarry Operative to be carried out. Phillip Kerr admitted that there was no discussion with the claimant about whether he could return to limited duties, and / or reduced hours and / or reduced salary for a period of time *("I did not consider that, no.")*. Phillip Kerr's clear position was that because there was a risk that the claimant could have an epileptic seizure on site, he could not work on site. He took that view without gaining medical input on the likelihood of seizure, given that the claimant's medication had increased. (Phillip Kerr's evidence was *"If a medical report said it was very unlikely Robert would take another seizure then I would have considered that situation but Robert told me that he couldn't guarantee that he would not take another seizure."*). We accepted the

claimant's evidence that there was no discussion on reasonable adjustments, rather he was just told that there were no adjustments which could be put in place. That is consistent with the position in the claimant's email seeking to appeal the decision to dismiss, and also Phillip Kerr's evidence on the final meeting *("We explained to Robert that there was no adjustments and showed him the vacancy list and there was no vacancies that Robert could fulfil at that particular time.").* That position is also consistent with Phillip Kerr's clear position throughout his evidence that he considered that someone who had had a seizure could not work on site, because of the risk of injury to themselves or others if they had a seizure while working. That was Phillip Kerr's position from the time of being told that the claimant had had a seizure. It was very significant that when asked about the claimant having declared pre-employment that he has Epilepsy, Phillip Kerr's evidence was *"If I had been aware he wouldn't have got a job working in a quarry because of the dangers involved… When I was told that he had declared it on his application I made it clear that I was not aware of that and if I had been he would not have got a job in the quarry industry."* Phill Kerr clearly held that strong view throughout. His evidence was *"Throughout the process I was honest and truthful with the claimant. I was always clear that [the decision] was based on health and safety, nothing else, the safety of him and others on the site."* In relation to vacancies, Phillip Kerr's evidence was '*For obvious reasons there was nothing that he could fulfil.*'

41. Given that evidence, that no steps were taken to seek medical input prior to the decision to dismiss, and the content of the contemporaneous email from the claimant appealing the decision to dismiss him (107 – 108), we accepted that there had been no consideration of adjustments. Phillip Kerr had set out his position on there being no position for the claimant (99 – 100) and the claimant had been given the list of current vacancies. There was no consideration of the duties which the claimant could safely do, particularly with regard to the duties the claimant had carried out when he had first started as a Trainee Quarry Operative. In relation to the vacancies, Phillip Kerr's evidence was *"I had already made it quite clear that in my opinion he could not fulfil that function safely."* That view was taken without consideration of the

particular duties and without medical input, from the treating consultant, OH, or otherwise. Phillip Kerr's position in the document at 99 – 100 that *"The only alternative role he could carry out on the site with some degree of safety would be on the weighbridge and material testing…. would only equate to three or at best four hours to complete and is currently being undertaken by other members on site and this position could not be justified as a full time position"* is not consistent with the fact of their being a vacancy at the time for a Trainee Quarry Operative at Ryeflatt. There was no consideration of the duties involved in that role, and whether the claimant could safely carry out at least some of those duties, and receive a lesser rate of pay then doing those duties. Philip Kerr's evidence on discussions at the final meeting with the claimant, in July 2024, was *"we went through the process, the reasons why we could not employ him, because of the danger of him taking a further seizure when carrying out these functions" and that the claimant had 'understood the reasons why [I] came to that decision".* Telling the claimant why he could not be employed, without meaningful discussion, is not consideration of reasonable adjustments.

42. It was accepted that Dr Derry's position in July 2024 was that the claimant was fit for work other than driving heavy machinery. Phillip Kerr's evidence in relation to the claimant working on the static processing plant was *"My main concerns were obviously working at heights, climbing vertical ladders, going inside confined spaces for maintenance."* He was concerned that there would be *'severe consequences'* if the claimant had a seizure while doing that work. That position was taken however without input on the likelihood of the claimant having a seizure (given his increased medication) and without consideration of the claimant's position re the duties he carried out when first working as a Trainee Quarry Operative. Without job descriptions, training records or risk assessments of the various functions, we had to take a view on whether to prefer the evidence of the claimant or Phillip Kerr in respect of the duties the claimant had carried out in his first months of employment with the respondent. We took into account that Phillip Kerr was not always on site. We found the claimant to be entirely credible in his evidence before us. He was consistent throughout his oral evidence and his evidence was consistent

with the documentary evidence. Phillip Kerr's position on the duties initially carried out by Trainee Quarry Operatives was not put to the claimant. When the document at 99 – 100 was put to the claimant, the claimant was consistent in his evidence that that did not accurately reflect the duties he had carried out. Phillip Kerr's evidence was not entirely consistent with the documentary evidence, as described below. In these circumstances, we accepted the evidence of the claimant in respect of his duties. We accepted the claimant's evidence that until June 2023 his duties when working for the respondent did not involve climbing ladders, working in confined spaces or driving heavy machinery.

43. It was not disputed that if an individual had a seizure while working on site, that could present a significant risk of harm to themselves or others. Philip Kerr did not show an understanding of the Capability procedure being anything other than a series of meetings with the claimant. There was no evidence of any training being provided to him by the respondent in relation to dealing with a disabled employee. Phillip Kerr described his understanding of the capability process as *"(1) is he fit to do the job? (2) are there any other positions he could be employed in to work in a safe environment (3) get an update on his health."* The capability procedure followed in relation to the claimant was not a meaningful procedure and did not involve obtaining input from medical experts or consideration of reasonable adjustments.

44. It was significant that Phillip Kerr's position on learning that the claimant had had an epileptic seizure was that he shouldn't have been given the job *("If they had come to me and said can we offer someone a job with a diagnosis of epilepsy I would have said no you can't take that person on in that position…Robert should never have been given the job.")* He did not dispute that that had been his response. We accepted that that position was adopted by Phillip Kerr because of his concern that if someone had an Epileptic seizure on site, that could cause risk of serious harm to themselves or others. We accepted that serious harm could be caused because during the seizure the individual would not be in control of heavy machinery operated by them at the time and would be liable to fall if working from a height. On the evidence

before us, we did not accept that that means there can be no consideration of duties which a person diagnosed with Epilepsy can do on site.

45. Phillip Kerr's explanation on why the claimant had not been referred to OH was *"Until we got evidence from the scan there was no point sending him to OH. Robert was telling us that he was having a scan and as soon as he had the results from the scan he would get back to us…. .If Robert had come back with evidence from his consultant then on the basis of that evidence we could have sent him to Occupational Health."* That position is not reflected in the terms of the dismissal letter to the claimant of 1 July 2024 (105 – 106). No explanation was provided as to why no referral was made a later stage. Given that it was accepted that the position in the consultant's letter of 16 July 2024 is that the claimant was fit for work aside from driving heavy machinery, it is reasonable to conclude that had the respondent awaited that letter (which included reference to the scan results being *'normal'*), that could have impacted on discussions about adjustments, and duties the claimant could do. We accepted the claimant's reliance on the short period (15 days) between the dismissal and the letter from the consultant and agreed that it would have been reasonable for the respondent to await that information from the consultant prior to the decision to dismiss. The dismissal letter of 1 July (105 – 106) gives no indication of any discussion on awaiting medical information. The respondent relied on the claimant's position that he could *'not guarantee'* that he would not have another seizure on site. Phillip Kerr's evidence was not consistent with the position in the correspondence sent to the claimant. His oral evidence did not suggest that the respondent was seeking or awaiting medical input. His evidence was:

"We never got any report from Robert at any time in the whole process. If we had, we would have taken other steps like going to Occupational Health. If he had said there was no chance of him taking another seizure we could be more relaxed. [I had to consider] health and safety and the consequences if he took a seizure at work: the dangers involved to himself and other men on site."

46. Phil Kerr's evidence was that at the meeting when the claimant was dismissed, the claimant told him that *'his consultant said he could return to work but couldn't go onto driving duties'*. That is consistent with the position in the report dated 16 July 2024. It was clear from Phil Kerr's evidence that there was no consideration of adjustments to the claimant's role to allow him to continue work without driving heavy machinery. Phillip Kerr admitted that there had been no such consideration. There was no consideration of the claimant reverting to the tasks he had first done as Trainee Quarry Operative. The fact that there was a vacancy for that role evidences that there was a requirement for the work carried out carried out by a Trainee Quarry Operative to be done.

47. The representatives had agreed a Statement of Facts. In considering this we took into account that the claimant's representative is not legally qualified. The purported agreed Statement of Facts included, at 4.12.4, the following:

"PK explained he had considered potential adjustments but that he considered none could be implemented due to the high risk working environment and the tasks associated with the claimant's role."

48. It was clear from the claimant's evidence and from the claimant's representative's cross examination of Phillip Kerr that it was not accepted that Phillip Kerr had provided that explanation to the claimant.

49. The List of Issues included an identified issue of whether the claimant had been treated unfavourably in terms of section 15 EqA by the respondent *'Failing to properly consider possible alternative roles.'* That was not entirely consistent with the position in the 'Agreed Statement of Facts', which included a purported agreement that Phillip Kerr had *'explained that he had considered potential adjustments'.* On the evidence before us we found that Phillip Kerr had not considered reasonable adjustments. Phillip Kerr's view was coloured from the outset by his belief that it was not reasonable for anyone with a diagnosis of Epilepsy to work on a quarry site. When asked if he had considered possible adjustments prior to the decision to dismiss, Phillip Kerr's evidence was that he had not. Given that Phillip Kerr accepted that he had

not considered adjustments which could be made to roles to allow the claimant to continue his employment, we accepted the claimant's position in his evidence that Phillip Kerr had told the claimant that there were no adjustments which could be made but had not '*explained'* his considerations, other than because of the risk of seizure. Taking into account the overriding objective, the evidence before us and the fact that the claimant was not legally represented, despite what was set out in the 'Agreed Statement of Facts', we proceeded on the basis that it was not accepted that Phillp Kerr had considered potential adjustments.

50. We accepted the claimant's position that the respondent had employed at least one other person to work on site who had a diagnosis of epilepsy. When that was put to Phillip Kerr in cross examination, his response was "*I didn't know that at the time".* He did not dispute that another employee with a diagnosis of epilepsy had worked on heavy mobile machine at the Ryeflatt site.

51. We took into account that the claimant did not pursue his appeal of the decision to dismiss him. His position was that he did not do so because he was *"set on going down legal channels" a*nd he felt *'they weren't going to give me my job back anyway'.*

Relevant law

52. The claimant relies on section 15 of the Equality Act 2010 (discrimination arising from disability). The provisions of section 15 are as follows:

"(1) A person (A) discriminates against another (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.

53. Following *City of York Council v Grosett [2018] ICR 1492, CA*, section 15 requires an investigation of two distinct causative issues:

- Did A treat B unfavourably because of an identified 'something'; and
- Did that something arise in consequence of B's disability.

The Tribunal should determine, was the claimant's disability the cause, or a significant (more than trivial) influence on or for that unfavourable treatment? If so, the question is, has the respondent established that it had a legitimate aim? Then, if so, has the respondent established that the treatment of the claimant by the respondent was a proportionate means of achieving that legitimate aim?

54. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (*Homer v Chief Constable of West Yorkshire [2012] UKSC 15*). It is for the tribunal to balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee (*Land Registry v Houghton and others UKEAT/0149/14*). The tribunal should consider whether the measure taken was proportionate at the time the unfavourable treatment was applied (*The Trustees of Swansea University Pension & Assurance Scheme and another v Williams UKEAT/0415/14*).

55. The claimant also relies on the respondent having failed in their duty to make reasonable adjustments. The applicable provisions of section 20 EqA are as follows:

> *"(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…."*

56. The consideration is on whether the identified PCP(s) put the claimant at a substantial (i.e. more than minor or trivial) disadvantage in comparison with persons who are not disabled. If so, what steps does the claimant say it would have been reasonable for the respondent to have taken to avoid that disadvantage? Did the respondent know, or could they reasonably have been expected to have known, (i) that the claimant had a disability and (ii) that the claimant was likely to be placed at a substantial disadvantage? Did the respondent fail to take such steps as it was reasonable for them to take to avoid that disadvantage. The relevant period in this case was after the claimant had the seizure at work, until his dismissal i.e. from 29 or 30 April until 1 July 2024.

57. In *Lamb v The Business Academy Bexley UKEAT/0226/15*, the EAT said:

"The phrase 'PCP' is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions."

Code of Practice

58. In determining the complaint under the Equality Act 2010, the Tribunal had regard to the Equality and Human Rights Commissions Code of Practice on Employment ('the EHRC') (2011). The EHRC Chapter 5 is relevant to complaints under section 15 EqA. Chapter 6 of the EHRC is relevant to the duty to make reasonable adjustments. This includes, at paragraph 6.10, guidance that the phrase *'provision, criterion or practice' "should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."*

Equal Treatment Bench Book

59. We took into account the relevant guidance in the Equal Treatment Benchbook ('ETBB') (updated February 2021), in particular:

- Chapter 1 – Litigants in Person and Lay Representatives
- Appendix B – Disability Glossary – Epilepsy

Submissions

60. Both representatives helpfully exchanged and provided to the Tribunal written submissions (although the claimant's representative was not asked to do so). Both representatives were given the opportunity to speak to those submissions and answered questions from the Tribunal.

61. The respondent's representative relied on the following case authorities:

- *Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT039714 3 - 22*
- *Pnaiser v NHS England and another [2016] IRLR 170 23 - 54*
- *Robinson v Department for Work and Pensions [2020] EWCA Civ 859 55 - 80 Williams v Trustees of Swansea University Pension and Assurance Scheme and another [2018] UKSC 65 81 - 91*
- *Private Medicine Intermediaries Ltd v Hodkinson and ors EAT 013414 92 - 112 Land Registry v Houghton and others UKEAT 014914 113 - 125*
- *Homer v Chief Constable of West Yorkshire [2012] UKSC 15 126 - 137*
- *The Trustees of Swansea University Pension & Assurance Scheme and another v Williams UKEAT 41514 138 - 153*
- *Environment Agency v Rowan [2008] ICR 218 EAT 154 - 173*
- *Lamb v The Business Academy Bexley UKEAT022615 174 - 195*

Burden of Proof

62. The applicable burden of proof is as set out in s136 of the Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. –v- Wong and others 2005 ICR 931, CA* (as approved by the Supreme Court in *Hewage –v- Grampian Health Board [2012] IRLR 870*). The burden of proof initially lies with the Claimant to establish a prima facie case. If he does so, then the burden of proof falls to the respondent. In terms of section 136 EqA:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

63. The Tribunal required to consider the strength of all the evidence, presented to it by both parties, and decide whether the claimant had made out his case, on the balance of probabilities.

Decision

Section 15

64. We required to determine whether the claimant treated unfavourably by the respondent because of (1) having a seizure at work (2) not holding a valid driving licence by:

(a) Not being referred to Occupational Health

(b) The respondent failing to consider the consultant's medical report

(c) The respondent failing to properly consider possible alternative roles, and

(d) Being dismissed.

On the findings in fact, the respondent

- Did not refer the claimant to Occupational Health

- Did not consider the consultant's medical report

- Did not properly consider possible alternative roles for the claimant, and

- Dismissed the claimant.

It was accepted that the consultant's report was not provided to the respondent. It is however significant that there was no explanation before us as to why HR did not follow up on their written position to the claimant that they would contact his consultant. In those circumstances, the claimant can rely on a failure to consider input from the claimant's consultant.

65. We accepted the claimant's position that those actions were unfavourable treatment. We did not accept the submissions of the respondent's representative that (1) not referring the claimant to OH (2) not considering the consultant's medical report was not unfavourable treatment. Those submissions were based on the position that those steps would have made no difference to the outcome. That is not relevant to whether the treatment was unfavourable treatment. The treatment was unfavourable treatment because the claimant was put to a disadvantage by the treatment. That is with regard to the EHRC Code' see para 5.7 and *Williams v Trustees of Swansea University Pension and Assurance Scheme and anor 2019 ICR 230, SC.*

66. The reason for that unfavourable treatment was not because the claimant did not hold a valid driving licence. The respondent did not require the claimant (or other Quarry Operatives) to hold a valid driving licence.

67. Following the approach in *City of York Council v Grosett [2018] ICR 1492, CA*, on the evidence of Phillip Kerr, the reason for the claimant's treatment was because the claimant had had an Epileptic seizure at work. It was because the claimant had had an Epileptic seizure at work that Phillip Kerr decided that the health and safety risk was such that the claimant could not be allowed to continue to work on site. It was because the claimant had had an Epileptic seizure at work that Phillip Kerr took the view that it was not safe

for the claimant to work on site. It was because the claimant had had an Epileptic seizure at work that Phillip Kerr took that view without input from the consultant or Occupational Health. In terms of section 15, the 'something' which was the reason for the unfavourable treatment was that the claimant had had an Epileptic seizure at work. That seizure clearly arose in consequence of B's disability. The claimant's disability was the cause for that unfavourable treatment.

68. The respondent had legitimate aims of (a) protecting the health and safety of the claimant and other staff on site and (b) efficient management of its workforce and resources. In circumstances where:

- At the time of the claimant's dismissal there was a vacancy for a Trainee Quarry Operative at the Ryeflatt site;
- there was no identification of the duties of the Trainee Quarry Operative role which the claimant could safely carry out;
- there was no attempt to offer the claimant limited duties / part time / reduced hours work, even for a limited period;
- there was no medical input sought from Occupation Health or from the claimant's treating consultant on the likelihood of seizure given the claimant's increased medication;
- at the meeting when the claimant was dismissed the claimant had informed the respondent that his treating consultant's opinion was that the claimant was fit for work apart from driving heavy machinery;
- the letter from the claimant's treating consultant with the opinion that the claimant was fit for work apart from driving heavy machinery was received less than 2 weeks after the claimant's dismissal;
- we accepted the claimant's evidence on the duties he had carried out for the respondent until June 2023,

the respondent did not show that their treatment of the claimant was a proportionate means of achieving those legitimate aims.

69. It was clear that Phillip Kerr was of the view that the health and safety risks from someone having an Epileptic seizure on site were such that it was not appropriate to employ anyone to work on site who had a diagnosis of epilepsy. That was clear from Phillip Kerr's comment *"If I'd known that he wouldn't have got the job."* Although we understood that that position came from a health and safety perspective, that decision was made without any medical input on the likelihood of further seizure. No questions were asked of an appropriate medical physician to ascertain the answers to question such as why had the claimant experienced an Epileptic seizure, had there been any change in medication since that seizure, what was the effect of that medication or to ascertain the likelihood of the claimant having another seizure. His decision to dismiss the claimant was based on the claimant's position that he could *'not guarantee'* that he wouldn't have a seizure. On the basis of Phillip Kerr's evidence, the reason the claimant was not referred to Occupational Health / input was not sought from the consultant was because it was Phillip Kerr's view that it was not appropriate for anyone who could not guarantee that they wouldn't have an Epileptic seizure to work on site.

70. We did not accept the respondent's representative's submissions that it would have made no material difference to the outcome if the respondent had made an Occupational Health referral, or considered the consultant's report. It was accepted that the position in the report was that the claimant was fit for work, except for operating heavy machinery. If the respondent had waited to obtain that report from the claimant's consultant, they could then have used that informed position to consider alternatives to dismissal. The consultant could have been asked additional questions, including his opinion on the likelihood of further seizure. Phillip Kerr is not medically qualified. Occupational Health could have provided insight into the duties which could safely be done by the claimant. Phillip Kerr's decision was taken without appropriate medical or Occupational Health input. He applied a blanket view that because of a risk of epileptic seizure the claimant was not fit to carry out any duties on site. That was not proportionate. The respondent did not take proportionate steps to pursue their legitimate aims.

71. Phillip Kerr had decided from the time of learning of the claimant's Epileptic seizure that it was not appropriate for the claimant to work on site. On the facts in this case, for the reasons set out above, the respondent's unfavourable treatment of the claimant was not a proportionate means of achieving their legitimate aim of protecting the health and safety of the claimant and other staff on site.

72. The fact of the Trainee Quarry Operative vacancy shows that the respondent had a need for the duties of that post to be carried out, and could pay the wages for that post. The claimant had already gone through the training for operating heavy machinery. No explanation was provided by the respondent as to why the claimant could not do the initial duties of the Trainee Quarry Operative post, even for a limited time, with wages commensurate to those duties. In these circumstances, the respondent's unfavourable treatment of the claimant was not a proportionate means of achieving their legitimate aim of efficient management of its workforce and resources.

73. We did not accept the respondent's representative's reliance on *Private Medicine Intermediaries Ltd v Hodkinson and ors*. Distinct from that case, in this case, we have found that the respondent acted in breach of their obligation to make reasonable adjustments (sections 20 & 21 EqA).

Section 20/21

74. The respondent did not operate a PCP of requiring Quarry Operatives to hold a valid driving licence. The respondent did operate a PCP of requiring employees in health and safety critical roles and driving roles not to have seizures at work. That PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled in relation to:

- The claimant not being referred to Occupational Health
- The respondent's failure to consider a consultant's report
- The respondent's failure to properly consider possible alternative roles

- The claimant's dismissal.

75. On the evidence of Phillip Kerr, the reason the claimant was not referred to Occupational Health, that a consultant's report was not considered, that he did not consider possible alternative roles for the claimant and for the claimant's dismissal was because Phillip Kerr believed that there was a possibility of the claimant having a seizure on site and that possibility presented a high risk to the health and safety of the claimant and others. Phillip Kerr had made up his mind from the outset that it was not suitable for the claimant to work on site because he had had a seizure at work. That decision was based on the claimant being unfit to work both in operating heavy machinery and at heights. It was accepted that the position in the consultant's report was that the claimant was not fit to operate heavy machinery. The report does not state any concerns about the claimant working at heights. It is not clear whether the consultant was asked about that. The respondent did not give the consultant any information on the job duties. On Phillip Kerr's evidence, other employees who were not disabled were referred to Occupational Health or medical input was sought and they were placed on lighter duties for a time. On that evidence, the respondent's PCP of requiring employees in health and safety critical roles and driving roles not to have seizures at work did put the claimant at a substantial disadvantage in in comparison with persons who are not disabled in respect of the matters relied upon. Occupational health / medical input was obtained for others but not for the claimant.

76. We then considered whether the respondent took such steps as it was reasonable to have to take to avoid the disadvantage. It would have been reasonable for the respondent to have referred the claimant to Occupational Health, with a description of the duties of the roles of Trainee Quarry Operative and of Quarry Operative and sought the input on the claimant's fitness to carry out the roles, or some of the duties. It would have been reasonable for the respondent to have considered a report from the claimant's treating consultant. It would have been reasonable for the claimant to have considered what duties could safely be done by the claimant which were

required and would be done by the person in the vacant Trainee Quarry Operative role at Ryeflatt. It would have been reasonable for the claimant to have been offered the vacant Trainee Quarry Operative role, which did not (at least initially) require driving or operating heavy machinery.

77. In all these circumstances, the respondent failed in their duty to make reasonable adjustments. The complaint under sections 20 and 21 EqA is well founded and is successful.

Remedy

78. Remedy is in terms of the Equality Act 2010 section 124. In the circumstances of this case, where the claimant's employment with the respondent has terminated, we consider it is appropriate to make an award for compensation. The compensatory award should, '*as best as money can do it'*, put the claimant in the position they would have been in but for the unlawful conduct (*Ministry of Defence v. Cannock and ors [1994] IRLR 509*). The loss must be caused by the unlawful conduct.

79. The claimant has suffered financial loss as a result of the respondent's unlawful discrimination and is entitled to an award of compensation that is both adequate and proportionate (*Wisbey v Commissioner of the City of London Police [2021] EWCA Civ 650*). We considered the claimant's losses which flowed directly from the unlawful discrimination.

80. We considered what position the claimant would have been had the respondent not acted unlawfully. It was significant that no issues had been raised with the claimant in relation to his capacity to work on site after he disclosed that he was taking medication for Epilepsy and that it was not disputed that there was another Quarry Operative working at the Ryeflatt site who was diagnosed Epileptic and who operated heavy mobile machinery. At the time of the claimant's dismissal, there was a continuing requirement for the duties carried out by a Trainee Quarry Operative to be done. Given the claimant's consistent position in his evidence, we accepted his position that until June 2023 in his role as Trainee Quarry Operative he did not require to operate heavy machinery or climb ladders. We heard no evidence from the

respondent on any reason why the duties carried out by the claimant in his first months of employment with the respondent had to be carried out by someone in the role of 'Trainee Quarry Operative'. The claimant had been trained and so was no longer a trainee but we accepted his evidence that he could have continued working for the respondent, doing the type of tasks normally done by a Trainee Quarry Operative in the first months of their role. We heard no evidence from the respondent in respect of any obligation on them to hire trainees, rather than allowing the claimant to do those duties. We accepted the claimant's position that he would have accepted continuing working for the respondent at a lower wage. We therefore calculated remedy based on the claimant's income had he been appointed to the duties of the Trainee Quarry Operative role. The financial loss was based on the National Minimum Wage earned in that role for the full period because it may be that, on proper consideration of adjustments, the respondent would consider that the claimant should continue to work on the duties which did not involve driving heavy machinery or climbing ladders, and so would not earn the increase for doing that type of work.

81. In terms of the contract (at 79 – 86), when the claimant began working for the respondent as Trainee Quarry Operative he did so on the basis of a 40 hour working week, with gross hourly wage rate of £9.98. In April 2024 the claimant would have been entitled to the National Minimum Wage of £11.44 per hour. We therefore used that gross figure to calculate the claimant's wage loss. If not operating heavy machinery, the claimant would not have earned the £1 per hour extra for those duties. The claimant's gross earnings from July 2024, if appointed to carry out the initial duties of the Trainee Quarry Operative role, would have been a gross weekly wage of (40 x £11.44) £457.60. From the date of dismissal (1 July 2024) until the Tribunal (20 March 2025) is a period of 37 weeks. That is a gross past wage loss figure of (37 x £457.60) £16,931.20.

82. As at the time of the Final Hearing, the claimant's position was that he was due to regain his driving licence on 1 May 2025. On the basis that the consultant's report stated that the claimant's MRI was 'normal' and that he

was on a more suitable adult dose of the medication to control seizures, because no issues were raised at the time of the claimant disclosing to the respondent that he was on medication for Epilepsy, and on the evidence that the respondent employed another Quarry Operative who was diagnosed with Epilepsy (but had not had a seizure on site), we considered that had the claimant pursued his appeal of the decision to dismiss, there was a likelihood that that appeal would have successful and he could have been retained to carry out the duties normally done by a Trainee Quarry Operative in their first few months of work.

83. As set out in the Presidential Guidance on General Case Management (Remedy), Guidance Note 6 at (6 - 8) re mitigation:

"(6) All persons who have been subjected to wrongdoing are expected to do their best, within reasonable bounds, to limit the effects on them. If the Tribunal concludes that a claimant has not done so, it must reduce the compensation so that a fair sum is payable.

(7) The Tribunal will expect evidence to be provided by claimants about their attempts to obtain suitable alternative work and about any earnings from alternative employment.

(8) The Tribunal will expect respondents, who consider that the claimant has not tried hard enough, to provide evidence about other jobs which the claimant could have applied for."

84. The claimant did not pursue his appeal of the decision to dismiss. Given that no issue was taken when he first disclosed to the respondent that he had Epilepsy and it was not dispute that the respondent had employed another Quarry Operative who had epilepsy, it is possible that that appeal would have been successful. The appeal email (107) set out relevant appeal points.

85. We took into account that the claimant lives in a rural area and that without a driving licence it is difficult for him to obtain employment, particularly employment which requires early starts or late finishes (e.g. Amazon warehouse working). We accepted the claimant's evidence that he has made

some attempts to find work but that that has been limited because he lives in a rural area and currently does not have a driving licence and so would have difficulty travelling to work.

86. In calculating the financial loss arising from the discrimination, we accepted the respondent's representative's reliance on the availability of employment in non-safety critical roles, and accepted that, if the claimant regains his driving licence in May 2025, (which he expects) then he ought to be able to obtain employment in such a non-safety critical role within 3 months, i.e. by end July 2025. The earnings from that employment would be at least at the National Minimum Wage rate. As the claimant can reasonably be expected to gain employment at the National Minimum Wage rate from 31 July 2025, we considered that the appropriate period of future loss from the Final Hearing was until 31 July 2025. That is a future loss period of 19 weeks. On the National Minimum Wage rate applicable from April 2025 of £12.21, that equates to a weekly loss of (40 x £12.21) £488.40 x 19 weeks = £9,279.60. On application of point (6) in the Guidance stated above, we considered it appropriate to limit the claimant's period of loss to end on 31 July 2025, taking into account the evidence presented by the respondent in respect of alternative employment and they claimant's duty to mitigate his loss and obligation to find alternative employment. On that basis, we calculated the claimant's gross financial losses which flowed directly from the discrimination as (£16,931.20 + £9,279.60) £26,210.80.

87. On application of point (6) in the guidance stated above, we considered it appropriate to make a deduction from the financial award to take into account the claimant's failure to pursue the appeal. We applied a deduction of 20%. That reflects the possibility of the claimant's appeal being successful and also takes into account the possibility of it not being successful, and the claimant being dismissed after proper consideration of adjustments (*Chagger v Abbey National plc [2009] EWCA Civ 1202 Civ*). In making those deductions, we took into account that consideration of any uplift or decrease in award to reflect non-compliance with the ACAS disciplinary code applies to conduct dismissals where there is an issue of 'culpable conduct' (*Holmes v Qinetiq Ltd*

UKEAT/0206/15). The deduction in relation to the claimant's failure to pursue his appeal was not in terms of the ACAS Code of Practice, but was to ensure that the compensatory award was made in accordance with the Guidance Note, as stated above. The 20% reduction is calculated as (£26,210.80 x 20/100) £5,242.16.

88. The figure in respect of gross financial loss arising from the unlawful discrimination is ((£26,210.80 - £5,242.16) £20,968.64. The respondent is entitled to deduct from that gross compensatory amount of £20,968.64 appropriate amounts in respect of National Insurance and tax deductions.

89. The claimant is entitled to an award in respect of injury to feelings ('solatium'). We took into account the general principles that underlie awards for injury to feelings, set out in *Prison Service and ors v Johnson 1997 ICR 275, EAT*. We took into account Lord Justice Mummery's guidance in *Vento v Chief Constable of Yorkshire Police (No. 2) [2003] IRLR 102*, that some of the elements that injury to feelings encompasses are *'subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on'*. We took into account the EAT's guidance in *Komeng v Creative Support Ltd EAT 0275/18* that, when considering awards for injury to feelings, a tribunal's focus most be on the effect of the unlawful discriminatory treatment on the claimant, not on the gravity of the discriminatory acts of the respondent. We had regard to the guidance from the EAT in *Eddie Stobart Ltd v Graham [2025] EAT 14* particularly at paragraphs 30 to 52, stating at 51 *"The burden is on the claimant to show that their feelings have been injured and to what extent."* And at 52 *"in most cases, the description upon which the tribunal bases its award will usually be a claimant's account, in their own words, of how the unlawful treatment made them feel."* When asked how his treatment by the respondent made him feel, the claimant's answer was *"absolutely gutted"* and that he had *'enjoyed working there'.* He felt he had been *'basically hung out to dry'* and that he had lost his job because he has epilepsy. There was no evidence of the claimant having attended counselling or being prescribed medication because of the unlawful acts. The claimant confirmed under cross

examination that he did not rely on any medical evidence in respect of psychiatric injury or impact suffered as a result of the respondent's unlawful actions. There was no evidence of the claimant having attended counselling or being prescribed medication because of the unlawful acts. The claimant's representative confirmed that the claimant did not wish to rely on any medical reports other than the letter from Dr Derry dated 16 July 2024 and that the claimant would not be recalled to give evidence on any further medical reports (although given the opportunity to do so). The letter from Dr Derry dated 16 July 2024 includes the sentence *"His main concern since I saw him last is that he has, unfortunately, lost his job."*

90. The bands of the Vento scale at the material time (from April 2024) were Lower band £1,200 - £11,700 (less serious cases); Middle band £11,700 - £35,200 (cases that do not merit an award in the upper band) ; Upper band £35,200 - £58,700 (the most serious cases).

91. On the evidence before us, we considered that the injury to feelings award should be in the lower Vento band. On the guidance from the EAT in *Eddie Stobart Ltd v Graham*, we took into account that the claimant's upset was in respect of his treatment over a series of Capability meetings. This was not then a one off, isolated incident. We accepted the claimant's evidence that he felt *'hung out to dry'* because the respondent had failed to meaningfully engage with him to find ways to continue his employment with them. Over the series of meetings, there was a continuing course of action, rather than a one-off act of discrimination. The claimant has lost a job which he enjoyed and which suited him in terms of location. The claimant did not give evidence of any underlying condition which would exacerbate the effect of the treatment. On the evidence heard, an award for injury to feelings is made of £7,000, which is within the lower band of *Vento.*

92. We did not hear any evidence on pension loss or on any other matter which would increase the award.

93. Interest is awarded, on application of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803, Reg 3(1), at the applicable rate of 8%.

94. On the financial loss, interest is awarded from the date of dismissal (1 July 2024) until the date of this Judgment (1 May 2025). That is a period of 10 months. The monthly interest on the gross financial loss of £20,968.64 at the judicial rate of 8%, is ((£20,968.64/12) £1,747.39 x 8/100) £139.79. For the 10 month period that equates to interest of (£139.79 x 10) £1,397.90. Interest on the financial loss is awarded of £1,397.90, giving a total gross financial award of (£20,968.64 + £1,397.90) £22,366.54 (subject to appropriate deductions for tax and National Insurance).

95. In respect of the injury to feelings award, interest is also awarded from the date of dismissal (1 July 2024) to the date of this Judgment (1 May 2025). At an accrued interest rate of 8% per annum, that interest is (£7,000 x 8/100) £560 per annum, or £46.67 a month. For the 10 month period that equates to interest of (£46.67 x 10) £466.67. That equates to a total injury to feelings award of (£7,000 + £466.67) £7,466.67.

96. The claimant is entitled to a total gross award of (£22,366.54 + £7,466.67) £29,833.21 in respect of his successful complaints (subject to appropriate deductions for tax and National Insurance on the gross figure of £22,366.54). We were satisfied that that overall figure squares with the relevant findings in fact and is not manifestly excessive.

Date sent to parties **01 May 2025**