EMPLOYMENT TRIBUNALS

Claimant:	**Mr G Richards**
Respondent:	**Openreach Limited**
Heard at:	**Exeter Employment Tribunal**
On:	**12, 13, 14 and 15 May 2025**
Before:	**Employment Judge Volkmer**

Representation

Claimant:	Mr Cooper, trade union representative (CWU)
Respondent:	Ms Jones, counsel

JUDGMENT

1. The Claimant's complaint of unfair dismissal is not well-founded and is dismissed.
2. The Claimant's complaint of discrimination arising from disability is not well founded and is dismissed,
3. The Claimant's complaint at paragraph 5.5.2 of the List of Issues of a failure to make reasonable adjustments is not well founded and is dismissed.
4. The Claimant's remaining complaints of a failure to make reasonable adjustments were made after three months from the act complained of. It is not just and equitable to extend time. These complaints are dismissed.

REASONS

1. The Claimant notified ACAS on 15 March 2024, and the certificate was issued on 26 April 2024. The claim was presented on 20 May 2024. The Claimant brings complaints of direct disability discrimination, disability discrimination arising from disability, a failure to make reasonable adjustments, harassment related to disability, victimisation and constructive dismissal.

2. The Tribunal heard witness evidence from the Claimant and Mr Evans for the Claimant and from Mr Platt and Mrs Hart for the Respondent.

3. I also considered the Hearing Bundle of 427 pages. References to page numbers in this judgment refer to the Hearing Bundle.

4. During the Claimant's evidence, it became clear that his case was that the adjustments set out at paragraphs 5.5.1, 5.5.3, 5.5.4, 5.5.5 and 5.5.6 of the List of Issues below should have been made by the Respondent in the Summer of 2023 rather than at the date his employment ended. As such, after cross examination, I explained to both parties that jurisdiction in relation to the reasonable adjustments complaint was in issue even though this was not recorded in the case management order of Regional Employment Judge Pirani sent to the parties on 18 December 2024. I explained to the Claimant that time limits required a claim to be presented within 3 months of the act complained of. I explained that in this case, the ACAS notification was on 15 March 2024, and the claim was presented on 5 May 2024, so this was significantly after three months from Summer 2023. I asked the Claimant why he had not presented the complaint within three months, or in the period between then and the time the claim was presented. I asked Mr Cooper if he had any questions solely on this point, he did not. Ms Jones was then also allowed to ask any questions she had in cross examination on this point.

The Issues

5. The following List of Issues was set out in the Case Management Order of Regional Employment Judge Pirani and sent to the parties on 18 December 2024. I have added the concession regarding disability and the legitimate aims pleaded by the Respondent. These are both taken from the Amended Grounds of Resistance. I have also added paragraph 1 in relation to time limits, for the reasons explained at paragraph 4 above.

1. Time limits

1.1. The Claimant commenced the Early Conciliation process with ACAS on 15 March 2024. The Early Conciliation Certificate was issued on 26 April 2024. The claim form was presented on 20 May 2024.

1.2. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide the following.

1.2.1. Was the claim made to the Tribunal within three months (plus early

conciliation extension) of the act or omission to which the complaint relates?

1.2.2. If not, was there conduct extending over a period?

1.2.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.5. Why were the complaints not made to the Tribunal in time?

1.2.6. In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal claim

2.1. What was the reason for dismissal? The Respondent asserts that it was a reason related to capability / some other substantial reason, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

2.2. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.2.1. the Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.2.2. the Respondent adequately consulted the Claimant;

2.2.3. the Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.2.4. whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant; and

2.2.5. whether dismissal was within the range of reasonable responses.

2.3. If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

3. Disability

3.1. The Respondent accepts that the Claimant was disabled within the meaning of Section 6 of the Equality Act 2010 at the relevant time by reason of stress and anxiety. The Respondent concedes that it had knowledge of the same from 6 December 2023.

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

4.1. Did the Respondent treat the Claimant unfavourably by dismissing him.

4.2. Did the Claimant's absence arise in consequence of the Claimant's

disability?

4.3. Was the unfavourable treatment because of that thing?

4.4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says its aims were:

4.4.1. ensuring the quality of its services to its service users;

4.4.2. ensuring an appropriate working environment for its employees;

4.4.3. expecting minimum levels of attendance from its employees;

4.4.4. employees to be able to undertake the services they are contracted to provide;

4.4.5. managing resource effectively;

4.4.6. complying with regulatory requirements (namely its minimum service levels as regulated by OFCOM).

4.5. The Tribunal will decide in particular:

(1) was the treatment an appropriate and reasonably necessary way to achieve those aims;

(2) could something less discriminatory have been done instead; and

(3) how should the needs of the Claimant and the Respondents be balanced?

4.6. Did the Respondents know or could they reasonably have been expected to know that the Claimant had the disability? From what date?

5. Reasonable Adjustments (Equality Act 2010 ss. 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: the Claimant's duties/job description as a Patch Lead.

5.3. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that his disability meant he could not return to work without help/adjustments?

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? From what date?

5.5. What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

5.5.1. assisting him with a job search;

5.5.2. complying with the recommendations of occupational health – they did not wait 3 months to allow a phased return to work;

5.5.3. offering alternative employment and/or restricted duties;

5.5.4. providing the Claimant with a restricted capabilities support process - in one of the respondent's policies;

5.5.5. offering flexible working arrangements - for example, working from home; and/or

5.5.6. allocating the Claimant additional support - a buddy system.

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

5.7. Did the Respondent fail to take those steps?

6. Remedy: unfair dismissal

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

6.2. 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?

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

(1) What financial losses has the dismissal caused the Claimant?

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

(3) If not, for what period of loss should the Claimant be compensated?

(4) Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

(5) If so, should the Claimant's compensation be reduced? By how much?

(6) Does the statutory cap apply?

7. Discrimination

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

7.2. What financial losses has the discrimination caused the Claimant?

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

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

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

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

7.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it by failing to issue a grievance about disability discrimination? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

7.8. Should interest be awarded? How much?

The Facts

5. The Respondent is a provider of internet and telephony services. The Claimant began his employment on 1 January 1990. The Claimant was hard working, very competent and successful during his time with the Respondent. He was promoted to the role of "Patch Lead". He had been doing this role for around three years. The role involved overseeing the safety and performance of around 15 to 20 engineers. The Claimant found that this role required him to undertake practical work "on the tools" most days as well as maintaining his management duties (doing safety checks on team members and problem solving for them in relation to their practical work). His evidence was that he would receive around 30 to 60 calls a day as well as doing 3 practical jobs a day and being required to complete onerous safety checking duties. The Claimant found the role was demanding and stressful.

6. The Claimant had had stress and anxiety from 2012. His evidence to the Tribunal was that he had hidden this from the Respondent as he was concerned about the stigma of mental health conditions as well as his view that managers within the Respondent tended to be indiscrete and might tell others about this. In July 2023 the combination of work-related stress and anxiety and the death of his closest friend led to the Claimant having a breakdown.

7. The Claimant commenced sick leave from 31 July 2023. He was signed off by his GP as being unfit for work on the grounds of stress and anxiety until the end of his employment. There are no fit notes in the Hearing Bundle, but this is the Respondent's position and was not disputed by the Claimant.

8. Whilst the Claimant was absent, an engineer from his team stepped up to the Patch Lead role. This meant that the team was effectively one person short and the team could undertake fewer customer "jobs" than when they were fully staffed.

9. On 10 August 2023 the Claimant attended a sickness review meeting with his line manager, Chris Moses (page 103). During this meeting, the Claimant was reminded of support provided by the Respondent through their Employee Assistance Programme and Mental Health Service. When possible adjustments or support for a return to work were discussed, the Claimant's position was that he needed to have counselling before that decision could be

made (page 103). In relation to an agreed date for a return to work, the Claimant said that he was not in a position at that time to commit to a return date (page 104).

10. A further meeting took place between Mr Moses and the Claimant on 31 August 2023. Page 219 shows the Claimant's notes of the meeting. The Claimant's oral evidence was that at this meeting, he asked Mr Moses for a return to work on light duties and for an assisted job search ("AJS"). The Claimant told the Tribunal that Mr Moses' told him that there was no such thing as light duties, that Mr Moses had said he had spoken to Megan Case (Senior Engineering Manager and Mr Moses' line manager) and the Claimant would not get AJS and that that the Claimant would be "*in for a rocky road*" if he did not return. If the Claimant was looking for settlement that Ms Case had said words to the effect that whilst she still had a hole in her arse the Claimant would not get a payout from the Respondent and that she would be looking for "*resolution*", i.e. dismissal.

11. The Claimant's written evidence referred to asking for light duties, at paragraph 29. This indicates (albeit indirectly) that this was during the meeting which took place on 31 August 2023. Mr Moses' note in the "Contact Log" in relation to the Claimant, at page 217 states in relation to 31 August 2023: "*spent 2 hours talking about all sorts from what is happening in Garys (sic) life to things that are going on within the team. Gary seems to want to know the gossip with the highs and lows. Gary still unable to give a date of when he will return. Gary asked if there is any settlement offer available."* There is no reference to the Claimant asking for light duties or AJS. The Claimant's commentary on the contact log in relation to this meeting states "*Meeting discussed work and health and home situation for Gary, CM noted that GR was showing an interest in work and team both the highs and the lows. GR not able to give a date on his return at this time GR asked at this meeting about an assisted job search but was told that only a resolution would be an option."* (page 219). I note that in the appeal meeting, the Claimant refers to asking for and being denied AJS but did not raise that he had asked for light duties (page 131). When I raised this with the Claimant, he said that this was probably because it was inherent in AJS that a return on light duties was involved.

12. Given the Claimant's own notes of the meeting and what he raised at appeal stage, I consider that the Claimant is an honest witness but mistaken about the fact that he directly asked to undertake light duties. In my finding the Claimant asked about AJS at this meeting, which in his view implied his willingness to undertake light duties and was told that it was not available by Mr Moses.

13. There was a meeting on 14 September 2023 between Ms Case and the Claimant. Ms Case informed the Claimant that his absence was having an impact on his team as they had additional workload and also on the ability to provide services to customers due to having fewer resources. In relation to the question of returning to work, the Claimant told Ms Case that the thought of returning to work overwhelmed him and that he was nowhere near being able to deal with returning to work. In relation to adjustments, the Claimant stated that he was being supported through private healthcare and needed time. This finding is based on the Respondent's note (page 106) as well as the Claimant's note (page 219) which do not contradict one another.

14. There was a further meeting between the Claimant and Mr Moses on 28 September 2023 in which Mr Moses informed the Claimant that he would refer him to Occupational Health and that Ms Case would have a second line review with him. Mr Moses' note of the meeting records that "*I tried to advise him that he needs to try and make a decision on coming back but he was adamant that his head is not in the right place. I asked if he needed any support but he advised he is still getting it from outside of Openreach. Gary feels that the company owes him something for all his years worked here and would get the whole weigh of the union behind him if needed."* (page 217). The Claimant records: "*What CM hasn't noted is that he was (sic) this comment was in reference to GR asking for support in the form of AJS and getting back to work in a field that GR felt he would be able to cope with. CM was admaant (sic) that Resolution was the only option for GR and all that CM would discuss was that the company would seek resolution."* (page 220). Based on the Claimant's note, I find that the Claimant also asked for AJS at this meeting and it was refused.

15. I find based on the Claimant's evidence that there was a window between the meeting of 31 August 2023 and the end of September 2023 during which the Claimant felt that he would have been well enough to come back to work on light duties, thus also enabling him to potentially engage with AJS. Whilst there is no medical evidence to that effect and the Claimant's fit notes stated that he was not fit, the Claimant was very clear and repeated a number of times that there was this "window of opportunity". Following that, based on his own evidence, the Claimant's health deteriorated and after the end of September 2023 until his dismissal, he was too unwell to have returned to work in any capacity even on light duties.

16. On 9 October 2023, a second short meeting was held between the Claimant and Ms Case during which the Claimant said that he was not feeling any better and that he was not sure that a return to the Patch Lead role would ever be suitable (pages 108 and 220). Ms Case said that there might be a potential opportunity to step down to an engineering role. The Claimant's response was that he was not sure that this was any more suitable. Ms Case followed this discussion up the same day with an email setting out the discussion and stating that they had agreed that the next step would be an occupational health referral (page 108).

17. On 21 November 2023 the Claimant met with Mr Moses. Having previously hidden it from the Respondent, the Claimant at this meeting told Mr Moses that he had suffered from stress and anxiety for the last ten years (pages 218 and 221) and how he had been affected by it.

18. On 6 December 2023 the Claimant attended an Occupational Health appointment. The Occupational Health Report set out the following:

    "*Mr Richards has been absent from work since the 31st July 2023 with anxiety and depression. This was triggered by the relatively sudden death of a very close friend with cancer. However on talking to Mr Richards it is quite clear that his underlying history of anxiety depression stretches back 10 years or so. He has been on medication for that time and he remains on that medication at the same dose. He has also had counselling and CBT in the past which he has found very useful.*

Mr Richard tells me that in July 2023, following the death of his friend, he had become significantly more anxious and on his first day of sickness absence he had got ready for work but was unable to leave the house due to anxiety. He continues to struggle with the symptoms of depression and anxiety including being indecisive, lack of confidence, mood swings, irritability and disturbed sleep patterns. His concentration remains impaired however he does watch television and do household chores. He finds that walking his dog is therapeutic. He initially tried to access bereavement counselling through the NHS but there was a very long waiting list and this has not happened. He has therefore had some private counselling over the last 2-3 weeks but this has been of limited value so far. As noted his antidepressant medication remains unchanged and he is a reluctant to increase medication because of previous problems with higher dose. Unfortunately Mr Richards reports a decline in his mental health with symptoms worsening rather than improving. He certainly does not feel in any position to resume work and at present is struggling to look forward to a time when he can.

At this time then he is unfit to resume work. I do not think there is a likelihood of an imminent return. I do think he would benefit from some specific bereavement counselling, noting the ongoing significant impact that the death of his friend has on him. I also wonder if an alteration in medication might help though I understand Mr Richards' reluctance. A review with his GP to discuss this may therefore be useful. I reminded Mr Richards of the EAP service.

Specific Questions

Likely date of return to work?

Unknown- seems unlikely within 3 months.

Do any temporary or long-term restrictions apply and for how long?

On return working with someone else and a phased return would be helpful initially. I do not think that work is fundamentally the issue here but the impact of his symptoms on his confidence and concentration will be a barrier to him returning to work.

What if any self-help options may help the employee deal with the issues raised?

Mr Richards has already accessed his tool bag of self help assistance. External therapeutic intervention is required.

Is the employee likely to render reliable service and attendance into the future?

In principal (sic) yes. The underlying mental health issues whilst long term should not permanently prevent him from resuming his role but as noted further therapeutic intervention and time are required.

Is performance significantly affected by ill health and for how long is this likely to continue?

Mr Richards is unfit to work at this time. He is likely to be unfit for at least 3 months but with intervention should be in a position to resume working at some stage.

Is the employee fit to continue in their current post?

Not at this time

Future Plans

At this stage there is no requirement for further OH review. Once his symptoms start to improve then re referral may facilitate adjustments and a return to work." (page 115)

19. The following day, on 7 December 2023, the Claimant had a further meeting with Ms Case. The Claimant told Ms Case that he felt his mental health had gone downhill since the previous meetings despite still using his private counsellor. The Claimant informed Ms Case that the mental health issues he was facing were not new and he had suffered for ten years but dealt with this in private with his family previously. The events he had faced in the last year had worsened these feelings hence the situation he was now in. Ms Case's response was to say that he had hidden it well. When there was a discussion regarding what was preventing a return to work, the Claimant referred to stress management and the inability to deal with any pressure and make decisions. When asked whether this feeling was worse when thinking about the Patch Lead role than an Engineering role with no team the Claimant said that he was unable to comment (pages 112 and 221).

20. Mr Platt, also a Senior Engineering Manager for the Respondent, who is usually based in Wales was asked to undertake maternity cover for Ms Case's maternity leave. He was an independent manager and did not know the Claimant prior to this time. There was a handover meeting during which Ms Case told Mr Platt that the Claimant was an exemplary engineer and explained the background to his sickness absence and process. They discussed Ms Case's offer of an alternative role as an engineer. Ms Case explained that she had made this offer in order to take away the stress of the supervisory part of his role. This finding is based on Mr Platt's oral evidence. There was a suggestion in Mr Cooper's submissions that there had perhaps been something inappropriate discussed in this handover (such that might influence the decision to dismiss), this was not put to Mr Platt in cross examination and there was no evidence in front of me which undermined Mr Platt's evidence on the point, which I found credible and adopt in these findings of fact.

Final Capability Meeting

21. Mr Platt invited the Claimant to attend a capability meeting to take place on 9 January 2024. The invitation letter informed the Claimant that one outcome of the hearing might be dismissal and that he was entitled to be accompanied to the meeting (page 120).

22. There is a transcript of the meeting starting at page 301 of the Hearing Bundle, although it is difficult to understand some of the entries. The Claimant was

accompanied to the meeting by a friend and colleague, Cathy Chapman. It was clear from his oral evidence that Mr Platt had understood this person to be a trade union representative, but the Claimant clarified in his oral evidence that she was not.

23. A lengthy period of time was spent in the meeting discussing the Claimant's highly successful career with the Respondent and his significant achievements during that time.

24. Both Mr Platt and the Claimant agreed that Ms Chapman had been the person who had been recorded as saying in the meeting "*we've had a long discussion as well about returning to work. You know, maybe doing something like part time or doing other duties or, you know, coming back on the gradual basis and is adamant he's made his mind"* (page 331). Mr Platt's evidence, which I found credible as it is consistent with the context, was that the Claimant then said the next recorded comment "*Like to go, but we can't afford to go"* (page 331).

25. Mr Platt had originally included in his statement a comment at paragraph 17 that the Claimant had expressly told him that he felt there was no way he would be able to return to work and that it was the right time for him to leave the business so that he could focus on getting better. Mr Platt corrected this to be an inference of the same before swearing the contents of his witness statement to be true.

26. Mr Platt recalled in oral evidence that the Claimant had said words to the effect of "*I'm done*". I find, based on Mr Platt's evidence, the transcript, context and content of the wording in the transcript, that the Claimant stated: "*It's my health and 55 years old now…. I can't go forward like this, you know*" (page 332). Ms Chapman also raised whether it was possible to offer the Claimant a 12 month settlement package as she had seen this being offered to a colleague.

27. From the comments set out above, Mr Platt concluded that the Claimant felt that he could not return and now was the right time to leave the business in order to focus on making himself better. This is what he recorded in his rationale, although incorrectly saying that this was something the Claimant had explicitly said (page 123). I note that the Claimant did not object to this at the time or make any statement in the appeal that he had not made this statement.

28. Mr Platt decided to bring the Claimant's employment to an end. He sent the Claimant a dismissal letter dated 24 January 2024 (page 125). This enclosed a "Resolution Rationale" setting out that:

"*Although I appreciate that this is a very difficult period for you, sadly there remains to be no indication of a return in any capacity and your continued absence has had a significant impact on Openreach and the additional costs of keeping your role open. During the time you have been off work we have been extremely busy with the impact storms have had with an increased workstack. Not only has your absence impacted Openreach financially through us having to cover your role, but it's also meant your colleagues have had to work even harder to deliver our regulated minimum service levels set by OFCOM, whilst we roll out our ambition to full fibre the UK, not to mention the impact such absences can have on the morale of your colleagues. In determining an*

appropriate outcome, I have taken all the evidence, submissions, and mitigation into account. I have considered the various options available to me under the company's attendance process and whether they are appropriate in the circumstances, in making my decision. In reaching my final decision, I have carefully and fully considered your length of service with the company alongside previous attendance records." (pages 123 and 124).

29. The Claimant was dismissed with three months' notice. This meant his employment would end on 24 April 2024. The Claimant was informed of his right to appeal.

Appeal

30. The Claimant notified the Respondent on 21 January 2024 that he intended to appeal (page 128). No written grounds of appeal were included with this notification.

31. Mrs Hart (Regional Director, Wessex, Ms Case's line manager and therefore the Claimant's third line manager) was appointed to hear the appeal. She wrote to him on 26 January 2024 saying that the meeting would take place on 1 February 2024. The Claimant was notified of his right to be accompanied by a colleague or trade union representative. Normally the Respondent did not permit family members to accompany employees to appeal meetings, but at the Claimant's request, permitted him to be accompanied by his wife.

32. The Claimant expanded on the reasons for his appeal at the meeting, the transcript of which is at page 130 of the Hearing Bundle, which I deal with in paragraph 33 below when I set out the outcome of the appeal. The Claimant told Mrs Hart that he had asked for an assisted job search ("AJS"). He felt that he could not go back to being a Patch Lead and wanted to explore a different role in the company which was less stressful to get back to work. He felt a six month AJS would have been appropriate. He indicated a home-based role giving engineers advice would be appropriate. Following the meeting, the Claimant sent an email to Mrs Hart on 5 February 2024 making some further appeal points related to comments allegedly made by Ms Case (page 140).

33. Mrs Hart conducted an investigation and wrote to the Claimant on 27 February 2023 (page 152) with the appeal outcome as follows.

    33.1. The allegation that the decision was based on personal bias and sick record alone and had been reached too quickly given the Claimant's length of service and previous achievements was not upheld. Mrs Hart found that due care and consideration was given to the decision. The decision was made "*after considering the report from the OHS team who clearly advised that they could not see a return to work being possible for a minimum of 3 months, the support that had been offered throughout the process, some of which was not accepted, the impact on your team, the wider business and our customers and the fact that in your resolution meeting you clearly indicated by you that you did not want to return to the business"* (page 146). Mrs Hart's evidence was that she had based her conclusion that the Claimant had indicated he did not want to return on the transcript of the meeting with Mr Platt, not just on what Mr Platt had told her. There is no

evidence to the contrary and this is credible given that Mrs Hart had the transcript available to her and because it appears reasonable to form that view from the transcript alongside Mr Platt's account.

33.2. It was found that Ms Case did make a comment to the Claimant that he "hid that well" when he had told her of his mental health problems over ten years. However, the appeal point was not upheld because in the context it was intended to be a supportive comment (page 147).

33.3. The Claimant had complained that his Occupational Health report was not sent to him first. Mrs Hart's investigation found that, in accordance with the correct process, it had been sent to the Claimant 48 hours before it was sent to the Respondent. He had had the option of objecting to it being provided to the company during that time, but did not respond (page 147).

33.4. The allegation that the Occupational Health report was used as a trigger for dismissal rather than a support tool was not upheld. Mrs Hart considered that it was appropriately taken into account: it stated that the Claimant was not able to return. This together with the fact that the Claimant himself did not see himself returning was balanced against the needs of the business.

33.5. Allegations that Mr Moses had told the Claimant that Ms Case had said he would "*be in for a rocky road*" and said "*as long as I have a hole in my ass he wont be getting a pay out*" were not factually upheld on the basis that both Ms Case and Mr Moses had denied this. It was found to be appropriate that Ms Case had meetings with the Claimant remotely because she was heavily pregnant.

33.6. It was found that the appropriate policy had been followed.

33.7. In relation to the adjusted job search, the Claimant's appeal point was not upheld because he had never been well enough to return to work, which was a requirement for AJS. Further, the Claimant had been offered the alternative of an engineer role.

33.8. Mrs Hart did not uphold the complaint that Mr Platt was inexperienced and may have been influenced by Ms Case and should have paused the capability meeting. Mrs Hart found that Mr Platt was an experienced senior manager and that in circumstances where no pause was requested, it was appropriate to carry on with the meeting. Further Mrs Hart considered that the process had been followed appropriately.

33.9. It was found appropriate that the Claimant had not been offered a financial package. The Claimant's role was still needed.

33.10. Mrs Hart partially upheld a complaint that the dismissal letter contained errors and that the Claimant's access to systems had been incorrectly immediately revoked. These had been rectified.

33.11. It was partially upheld that it had been inappropriate for Ms Case to say that the Claimant was letting his team down.

33.12. It was found that the appropriate procedure had been followed.

34. Overall Mrs Hart upheld the dismissal decision.

The Law: Unfair Dismissal

35. The Respondent's position is that the reason for the dismissal is capability which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("ERA 1996"). Section 98 of ERA 1996 sets out the following:

"(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

…

(4) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality"

36. The Tribunal must then determine whether the dismissal was fair or unfair pursuant to section 98 (4) of ERA 1996 which provides that:

"…. *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and –
(b) shall be determined in accordance with equity and the substantial merits of the case".

37. The Tribunal must apply the range of reasonable responses which was summarised by Mr Justice Browne-Wilkinson test in *Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT*:

"*We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [S.98(4)] is as follows:*
(1) the starting point should always be the words of [S.98(4)] themselves;
(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;
(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

38. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

39. The guidance given in *BS v Dundee City Council [2014] IRLR 131 CSIH* (approving the cases of *Spencer v Paragon Wallpapers Ltd [1976] IRLR 373,* and *East Lindsey District Council v GE Daubney [1977] IRLR 181),* was as follows:

"*First, … it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. … this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered*." [27]

40. Although it was a case relating to a conduct dismissal, *British Home Stores Limited v Burchell 1980 ICR 303, EAT*, sets out a general approach to reasonableness which is also applicable to a capability dismissal (*DB Schenker Rail (UK) Ltd v Doolan EATS 0053/09*). Three elements must be established in relation to a capability dismissal (as to the first of which the burden of proof is on the employer; as to the second and third, the burden is neutral): (i) that the employer genuinely believed the employee not to be capable; (ii) that the employer had reasonable grounds on which to conclude as they did; and (iii) that the employer had carried out as much investigation as was reasonable in the circumstances of the case.

Discrimination arising from Disability

41. The provision relating to discrimination arising from disability is set out at section 15 of the Equality Act 2010 ("EqA"):

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

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

64. Pursuant to *Trustees of Swansea University Pension and Assurance Scheme and anor v Williams [2018] UKSC 65*, there is a relatively low threshold required to establish unfavourable treatment and engage section 15 EqA. It is an analogous to concepts of disadvantage and detriment.

65. Mr Justice Langstaff explained the approach Tribunals should take to establishing causation in *Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT*, as follows.

"*26. The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" — and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.*
27. In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.
28. The words "arising in consequence of" may give some scope for a wider causal connection than the words "because of", though it is likely that the difference, if any, will in most cases be small; the statute seeks to know what the consequence, the result, the outcome is of the disability and what the disability has led to."

66. Mrs Justice Simler also dealt with the question of causation in *Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT*, in which she said:

"*this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.*"

67. In the same case, Mrs Justice Simler stated that in relation to determining whether the "*something*" arose in consequence of the disability, "*The critical question was whether on the objective facts, her refusal to return [the*

"something"] arose in 'consequence of' (rather than being caused by) her disability. This is a looser connection that might involve more than one link in the chain of consequences."

Justification

42. Turning to objective justification, considering whether an action is objectively justified under section 15 EqA involves "*weighing the employer's justification against the discriminatory impact. To do that, [the Tribunal] must engage in what is called critical scrutiny, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end….. while the test is an objective one and not a band of reasonable responses test, the authorities also establish that the test as to whether the measure is "necessary" does not mean that the employer must show that it was the only course open to it in order to achieve its aim. It effectively means "reasonably necessary", as judged by the tribunal." Stott v Ralli Ltd 2022 IRLR 126, EAT.*

43. The Equality and Human Rights Commission Code sets out that, in order to be a "legitimate aim", the aim should be "*legal, should not be discriminatory in itself, and must represent a real, objective consideration*." (paragraph 4.28).

44. *Seldon v Clarkson Wright and Jakes (A Partnership) 2012 ICR 716, SC* noted that aims had to be relevant to the particular circumstances of the employment in question.

> "*Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. For example, improving the recruitment of young people, in order to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned. Avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce*." [61]

45. In *NSL Ltd v Zaluski 2024 EAT 86*, HHJ Auerbach summarises the authorities as follows:

> "76. *However, the following particular points emerging repeatedly from the authorities (I cite only some examples) also need to be kept in mind. Firstly, the PCP must be "appropriate" to the aim or aims found to have been legitimately relied upon, which means that it must be rationally connected to that aim or aims, in the sense of being logically capable of furthering them (see, for example, Homer at [20] and [22]).*
>
> *77. Secondly, the respondent does not have to show that the application of the PCP or PCPs was necessary to the achievement of the aim, in the sense of there being no alternative way to do so. Rather, the question is whether it is reasonably necessary: Hardys & Hansons plc v Lax at [28]. However, the balancing exercise may therefore include consideration of whether there*

were reasonable alternatives to the imposition of a discriminatory PCP: Homer at [24]. Further, in the proportionality or balancing exercise, the impact of the PCP on the affected group must be weighed against the importance of the employer's need. The more serious the disparate impact, the more cogent the justification must be: Hardys & Hansons plc v Lax at [19]; Homer at [20] and [24]."

Knowledge

46. The principles relating to knowledge of disability in the context of section 15 EqA were summarised by HHJ Eady QC, as she then was, in *A Ltd v Z [2020] ICR 199 (EAT)* as follows.

> *"(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.*
>
> *(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.*
>
> *(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.*
>
> *(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at paragraph 31.*
>
> *(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:*
>
> > *"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all*

workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).

(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

Failure to make reasonable adjustments

47. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA.

"*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.
…
(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.
…

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."

48. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in *Environment Agency v Rowan [2008] IRLR 20 EAT* at paragraph 27. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer (or the physical feature if applicable); (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant. *Rowan* was specifically approved by the Court of Appeal in *Newham Sixth Form College v Sanders [2014] EWCA Civ 734*. The matter to be identified at (i) would now also include the relevant auxiliary aid as a third alternative.

49. As set out in *Newham Sixth Form College*, "*these three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage"* [14].

50. Per HHJ Richardson at para 37 of *General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14 KN*: "*The general approach to the duty to make adjustments under section 20(3) is now very well-known. The Employment Tribunal should identify (1) the employer's PCP at issue; (2) the identity of the persons who are not disabled with whom comparison is made; and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Employment Tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step". Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take*".

51. In *Nottinghamshire City Transport Ltd v Harvey [2013] EqLR 4 EAT*, the EAT found that the Tribunal had erred by identifying the one-off application of a flawed disciplinary process to the Claimant as something falling within a PCP:

"*"Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply….*
19. Given the fact, as it is conceded by Mrs Parkes to be, that there was no evidence here that the employer made a practice of holding disciplinary hearings in a way that eliminated consideration of mitigation or in a way in which there was no reasonable investigation, it seems to us that there was no

sufficient evidence to show that the application of the Respondent's disciplinary process in the case of the Claimant was a provision, criterion or practice. It was something that represented unfair treatment of him, as the finding by the Tribunal in respect of unfair dismissal recognises, but not all unfair treatment involves a failure to adjust that which is a provision, criterion or practice.
20. … A one-off application of the Respondent's disciplinary process cannot in these circumstances reasonably be regarded as a practice; there would have to be evidence of some more general repetition, in most cases at least.".

52. In *Ishola v Transport for London [2020] EWCA Civ 112*, the Court of Appeal confirmed this approach:

"*37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.*
38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010 , all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.
39. In that sense, the one-off decision treated as a PCP in Starmer is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of the element of repetition about it. In the Nottingham case in contrast to Starmer, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way."

53. As set out in *Thompson v Vale of Glamorgan Council EAT 0065/20* by the EAT: "*The Tribunal should identify the nature and extent of the "substantial disadvantage" caused by a PCP before considering whether any proposed step*

was a reasonable one to have to take… There must obviously be some causative nexus between disabilities relied on and the "substantial disadvantage"; the tribunal should look at the "overall picture" when considering the effects of any disabilities."

54. The duty to make adjustments only arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The test of reasonableness is an objective test, which is for the Tribunal to determine based on its own assessment of what was reasonable (*Smith v Churchills Stairlifts plc 2006 ICR 524, CA*).

55. In *Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 CA*, the Court of appeal made the following comments regarding assessing reasonableness "*Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps" and 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 practicability 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 substantive disadvantage. 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*" [29].

56. An important factor in assessing reasonableness is the question of whether the adjustment would be effective. The Tribunal must engage with the question of the prospects of success of the claimant's proposed adjustments. Not to do so is an error of law (*North Lancashire Teaching Primary Care NHS Trust v Howorth EAT 0294/13* at paragraph 37).

Knowledge

57. Paragraph 20(1) of Schedule 8 to the EqA provides that: "*A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement*".

58. In relation to a complaint of a failure to make reasonable adjustments, it is a defence if the employer did not have actual knowledge and could not be reasonably be expected to know (also commonly referred to as not having constructive knowledge) of (i) the disability; and (ii) the disadvantage created by the PCP, physical feature or lack of an auxiliary aid.

59. The principles relating to knowledge of disability set out in *A Ltd v Z* (see above at paragraph 46) can be applied to reasonable adjustments. The parts of the summary set out which relate to constructive knowledge of disability are also applicable to constructive knowledge of disadvantage in relation to a failure to make reasonable adjustments complaint.

Burden of proof in relation to EqA complaints

60. The provisions relating to the burden of proof are to be found in section 136 of the EqA:

    "*136 Burden of proof*

    (1) This section applies to any proceedings relating to a contravention of this Act.
    (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."

61. *Efobi v Royal Mail Group Ltd 2021 ICR 1263, SC*: the claimant is required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the Tribunal could infer an unlawful act of discrimination.

62. *Igen v Wong [2005] EWCA Civ 142* remains the leading authority in relation to the application of the burden of proof set out in section 136 EqA in relation to discrimination cases. It is not sufficient for the claimant simply to prove facts from which the tribunal could conclude that the Respondent "*could have*" committed an unlawful act of discrimination. It is clear that the claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent *did* commit an unlawful act of discrimination it can.

63. It is not sufficient to shift the burden of proof (in relation to a direct discrimination complaint) for a claimant to show only a difference in status and a difference in treatment. These are bare facts which only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. (*Madarassy v Nomura International Plc [2007] EWCA Civ 33*).

64. *Madrassy* further sets out that "could conclude" "*must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later) the tribunal would need to consider all the evidence relevant to the discrimination complaint*".

65. In *Artem Limited v Edwins [2024] EAT 136* this was also emphasised by HHJ Tayler, who stated that in relation to considering whether there was sufficient evidence to shift the burden of proof "*an Employment Tribunal should not ignore evidence that suggests discrimination. However, I should also add that it is important that Employment Tribunals do not ignore evidence that suggests*

there has not been discrimination. What must be ignored at the first stage is any exculpatory explanation for the treatment."

66. Per *Igen*, in which the Court of Appeal approving the revised *"Barton Guidance"* if the burden of proof has moved to the respondent:

"*10) It is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.*

11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [the protected characteristic]...

12)That requires a tribunal to assess not merely whether the Respondent has proven an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question." [76]

67. In relation to a complaint of discrimination arising from disability, in order to establish a prima facie case of discrimination, the claimant has the burden of proving (i) that they were treated unfavourably by the employer; (ii) that the "something" they rely on arose as a consequence of disability. If these elements are established and there are facts from which it could be inferred that the "something" was the reason for the unfavourable treatment, the burden of proof will shift to the respondent (*Pnaiser v NHS England 2016 IRLR 170, EAT*).

68. In relation to a complaint of a failure to make reasonable adjustments, establishing that there is a provision, criterion or practice ("PCP") and demonstrating that this caused substantial disadvantage to the claimant, "*[t]hese are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant.*" [45] *Project Management Institute v Latif 2007 IRLR 579, EAT*. However, proving these is not sufficient to shift the burden of proof to the Respondent. Unless there is evidence before the Tribunal of an adjustment which at least on its face appears reasonable and which would mitigate or eliminate the disadvantage, the burden does not shift to the respondent (paragraphs 49 and 53, *Latif*).

69. If the burden does shift to the respondent, it must then show why it was not reasonable to make the relevant adjustment and/or the question of whether the proposed adjustment would have removed the disadvantage.

Time Limits

70. Section 123 EqA provides that:

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

71. Section 140B EqA permits an extension of time where ACAS early conciliation is undertaken:

"In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

72. If the claim is brought outside of the three month time limit, the Tribunal must make a determination in relation to section 123(1)(b) EqA: whether the claim has been brought within "*such other period as the employment tribunal thinks just and equitable*".

Conduct extending over a period

73. For the purposes of calculating time limits, 123(3)(a) EqA refers to the concept of "*conduct extending over a period"* in relation to which the time will start to run

at the end of that period. The case of *Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686*, related to predecessor legislation, but can be applied in relation to 123(3)(a) EqA regarding the concept of conduct extending over a period as follows.

"*52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period". I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the appeal tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaint that the commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.*"

74. Conduct extending over a period may as a matter of law relate to more than one different protected characteristic – there is no requirement that the conduct relates to the same protected characteristic (*Worcestershire Health and Care NHS Trust v Allen 2024 EAT 40*).

75. The EAT in *South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168* made clear that any act which is found not to be an act of discrimination cannot be part of a continuing act. The claimant cannot rely on acts which are found by the Tribunal not to be breaches of the EqA for the purposes of establishing conduct extending over a period.

When does time start to run in relation to reasonable adjustments?

76. Under s123(4) EqA, in the absence of evidence to the contrary, the employer is to be taken as deciding not to do something either when it does an act inconsistent with doing it, or if there is no inconsistent act, on the expiry of the period in which it might reasonably have been expected to do it.

77. In in *Fernandes v Department for Work and Pensions EAT [2023] 114*, the EAT summarised the position established in the leading cases of *Matuszowicz v Kingston Upon Hull City Council [2009] IRLR 288* and *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640* as follows at paragraph 16.

"*The principles set out in the existing authorities amount to the following propositions:*

a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled employee from a PCP (presuming the knowledge requirements are met) and failure to make the adjustment is a breach of the duty once it becomes reasonable for the employer to have to make the adjustment.

b. Where the employer is under a duty to make an adjustment, however, limitation may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.

c. That notional date will accrue if the employer does an act inconsistent with complying with the duty.

d. If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee."

Should the Tribunal use its discretion to extend time?

78. The Court of Appeal in *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640* summarised the position at paragraphs 18 and 19:

"[18] … It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

79. Legatt LJ went on to say [25] "*As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard*.".

Discrimination arising from disability: Discussion and Conclusions

80. It is agreed that the Claimant was dismissed. This is an act of unfavourable treatment. It is because of the Claimant's absence from work. The Claimant's absence arose from his disability.

81. I find that the Respondent had knowledge of disability from 21 November 2023 when the Claimant informed Mr Moses of the long-term effect and substantial nature of his stress and anxiety. The Claimant did not seek to argue that there had been prior constructive knowledge. The Respondent conceded knowledge from 6 December 2023 (the date of the Occupational Health appointment), however given the disclosure by the Claimant in the meeting on 21 November 2023 (the facts of which are not in dispute), I find that is the relevant date.

82. The Respondent relied on the following as legitimate aims as justifying the Claimant's dismissal:

    82.1. ensuring the quality of its services to its service users;
    82.2. ensuring an appropriate working environment for its employees;
    82.3. expecting minimum levels of attendance from its employees;
    82.4. employees to be able to undertake the services they are contracted to provide;
    82.5. managing resource effectively;
    82.6. complying with regulatory requirements (namely its minimum service levels as regulated by OFCOM).

83. I do not accept "expecting minimum levels of attendance from its employees" is a stand-alone legitimate aim. I consider that it is inherently indirectly discriminatory to disabled employees who are more likely to be absent from work. When I raised this in submissions, Ms Jones attempted to explain on what basis this was itself objectively justified briefly in submissions. Ms Jones explained that she had previously understood this to relate to a minimum requirement to work "on the tools". I did not read it that way and I did not follow on what basis this was said to be justified (I had asked for a submission on the point and the submission was "for all the reasons already stated"). In summary this aspect had not previously been considered by the Respondent. I consider this aim is not legitimate.

84. I consider that the remaining stated aims are legitimate aims. They are not discriminatory in themselves and represent real, objective considerations for the Respondent's business. These findings are based on the evidence of the Respondent's witnesses, and the Claimant himself. There did not appear to be any dispute that these were real considerations for the Respondent's business.

85. I consider that the treatment complained of was an appropriate and reasonably necessary way to achieve those aims.

86. At the time of dismissal, there was no indication of when or if the Claimant could return. The Claimant in my finding, gave a clear indication that he did not want

to return to his role of Patch Lead. He had not accepted the offer of a role as an engineer. The circumstances were that the Claimant was too unwell to return to work even on light duties, and the return date was unknown.

87. As a result of the Claimant's absence, there was one fewer person in his team. At the time workload had increased due to storm damage. This affected both other employees (in relation to their workload and morale) and the levels of service that could be provided. This affected both customers and the ability to meet minimum service levels mandated by the regulator, OFCOM.

88. Without knowing when or if the Claimant would ever return, deciding whether to dismiss was an exercise in weighing indefinite absence with the factors set out at paragraph 87. I find that in these circumstances a dismissal did strike the appropriate balance between the Claimant's and the Respondent's needs. It was an appropriate and necessary way to achieve the aims set out in 4.4.1,4.4.2, 4.4.5 and 4.4.6 of the List of Issues. It is unclear how dismissing the Claimant is a way to achieve the aim at 4.4.4 of the List of Issues/paragraph 82.4 above ("employees to be able to undertake the services they are contracted to provide"). I do not consider it was necessary to achieve that aim.

89. In relation to the appeal, this was a fair process. The Claimant at this stage was not saying that he had new medical information showing he would return within or particular period, nor was he saying that he was well enough to return. The circumstances which were relevant to the dismissal in relation to the Claimant's absence remained unchanged. The same reasoning therefore applies. The dismissal of the appeal struck the right balance between the needs of the Claimant and the Respondent in all of the circumstances.

90. There was much focus in Mr Cooper's submission regarding the comments allegedly made by Ms Case and passed on to the Claimant by Mr Moses. However, there is no harassment complaint made against either of them. Mr Cooper was not able to explain the relevance of these points to the List of Issues to be determined. Neither Mr Moses nor Ms Case were involved in the Claimant's dismissal or appeal. There is no evidence from which I could conclude they were able to influence the decision to dismiss the Claimant. Mr Platt made the decision in relation to dismiss and he was not involved in the alleged comments. I therefore do not make any findings about the alleged comments or consider them relevant to the points to be determined.

91. The complaint of discrimination arising from disability is not well founded and is dismissed.

Failure to make reasonable adjustments: Conclusions

92. The Tribunal has found that the Respondent had knowledge of disability from 21 November 2023.

Reasonable adjustment at 5.5.2 – complying with the recommendations of OH to waiting three months to allow a phased return to work

93. This allegation relates to the dismissal date and is in time.

94. I accept that a requirement to undertake job duties set out in the job description for Patch Lead is a PCP. I accept that it put the Claimant to a disadvantage – he could not cope with it because of his stress and anxiety. These matters do not appear to be in dispute between the parties.

95. I do not accept that the OH recommended waiting three months for the Claimant to return to work to allow a phased return to work. The report stated that the return date was "*unknown"*, that it was not thought that there was a "*likelihood of an imminent return"* and that it "*seemed unlikely within 3 months*" (page 115). It recommended that if and when the Claimant could return, it should be a phased return. Mr Platt was very clear that a phased return would have been available to the Claimant if he was well enough to return. In my finding the references to "interventions" in the report (which Mr Cooper suggested might relate to workplace adjustments) were clearly references to those therapeutic interventions previously referred to in the same report: namely an increase in medication and specific bereavement counselling.

96. In considering reasonableness the likelihood of something being effective can be taken into account. The OH advice was not that he would be well in 3 months' time. It was unclear at this point when or if the Claimant would ever return. This was also the Claimant's own view. Balancing the needs of the business against there being no timescale for return, the same analysis applies as that set out above in relation to the discrimination arising from disability complaint. In those circumstances it was reasonable for the Respondent not to wait three months.

97. The complaint of a failure to make reasonable adjustments is not well founded and is dismissed.

Remaining reasonable adjustment complaints: are the complaints made within three months?

98. The first consideration in relation to these complaints is whether or not they are in time. It became clear during the evidence that the Claimant's case was that the rest of the suggested adjustments should have been made in Summer 2023.

99. These do not form part of a series of similar acts – only acts found to be a breach of the EqA can be taken into account, as such there are no other acts which can form part of a series. The Tribunal must therefore consider whether it is just and equitable to extend time.

100. As set out in ***Matuszowicz*** a refusal to make an adjustment sets time running. I have found, based on the Claimant's evidence that the Respondent refused twice to allow the Claimant undertake an adjusted job search "AJS", the later occasion was on 28 September 2023 (paragraph 14). This refusal sets

time running in relation to the adjustment pleaded at paragraph 5.5.1 of the List of Issues ("*assisting him with a job search*"). The three month time limit therefore expired on 27 December 2023. ACAS notification was on 15 March 2024. This is outside of the three months, so no extension to the time limit is applied for ACAS conciliation. Since the Claim was presented on 20 May 2024, this was presented outside of the three month time limit.

101. In relation to the adjustments pleaded at paragraphs 5.5.3, 5.5.4, 5.5.5 and 5.5.6 ("*offering alternative employment and/or restricted duties; providing the Claimant with a restricted capabilities support process - in one of the respondent's policies; offering flexible working arrangements - for example, working from home; and/or allocating the Claimant additional support - a buddy system*"), there was no express refusal to make the adjustments.

102. In determining the date from which time starts to run, the Tribunal must identify the date on which the period expired in which the Respondent might reasonably have been expected to make the relevant adjustments. In the circumstances of this case, I consider that the end of September 2023 is the appropriate date.

103. This was the date from which, on the Claimant's evidence, his health got worse. It was the end of the "window of opportunity" during which the Claimant was well enough to return to work. The Claimant's evidence was that part of the reason his health deteriorated at this point was because he came to a realisation that the management team had closed ranks and were not going to help him by providing him with the claimed adjustments. The test set out in *Fernandes* of considering when the reasonable employee, based on the facts known to the Claimant, would have concluded that the duty would not be complied with, was in my finding met at the end of September 2023. Although this is an objective test. I consider the Claimant's position (from which I consider he had himself concluded that the duty would not be complied with) was reasonable in the circumstances.

104. This means that the three month time period for making complaint of a failure to make reasonable adjustments ended on 29 December 2023. The ACAS conciliation having commenced on 15 March 2024, and the claim having been presented on 20 May 2024, this complaint was not presented within three months from the date of the act complained of.

Is it just and equitable to extend time?

105. In order to decide whether it is just and equitable to extend time I must weigh the balance of prejudice between the parties. Merits can be taken into account when making a decision as to whether to extend time.

106. In taking merits into account in relation to the balancing exercise, I take the following findings into account.

107. I have found that the Respondent had knowledge of disability from 21 November 2023. This post-dates the "window of opportunity" from around 31 August 2023 to end of September 2023 when the Claimant was well enough to

return to work on light duties. No duty to make reasonable adjustments can arise before the Respondent has knowledge of disability. The Respondent did not have knowledge of disability during the window of opportunity, therefore there was no duty to make reasonable adjustments. After the ”window of opportunity”, the Claimant’s evidence is clear that the offer of “restricted duties” (referred to by both parties as “light duties” throughout the hearing) (5.5.3) would not have been effective to alleviate the disadvantage because he would not have been well enough to undertake any duties at all (even if restricted/light duties).

108. The other part of paragraph 5.5.3 is a suggestion that the Claimant should have been offered an alternative role. The Respondent’s evidence, which I accept, was that there were no suitable alternative roles available other than an engineer role which the Claimant did not accept. There were no home-based roles which could have been offered to the Claimant, and the Claimant’s role could not be undertaken from home. The duty to make reasonable adjustments arose from 21 November 2023. From this time to his dismissal, the Claimant was not well enough even to do any work at all. As such, it would not be reasonable for the Respondent to create a role for the Claimant: he would not have been well enough to do it, so it would not have been an effective measure.

109. The Claimant accepted that the assisted job search process required an employee to be back at work on light duties in order to engage with it. The same reasoning therefore applies in relation to an assisted job search (5.5.1), if he was not well enough to work at all, then assisting him with a search for an alternative role would not be effective to alleviate the disadvantage (i.e. get him back to work).

110. I was not taken to any document showing what the “restricted capabilities support process” was (5.5.4). When asked about this, on the Claimant’s evidence, it related to focussing on what someone could do, rather than what they could not. Effectively akin to light duties. Again, the same reasoning applies as I have discussed in relation to light duties.

111. Paragraph 5.5.5 related to offering flexible working arrangements - for example, working from home. Again, if the Claimant was not well enough to work in the period after the Respondent had knowledge of disability, an offer to work from home would not have been effective after 21 November 2023: the Claimant was not well enough to undertake any work at all, even from home.

112. In relation to allocating the Claimant a buddy system (suggested adjustment 5.5.6), again the same reasoning applies. After the duty to make reasonable adjustments arose, the Claimant was not well enough to work in any capacity. The adjustment would not have been effective.

113. I take into account the Claimant’s illness affecting his ability to bring the complaint. The length of the delay in making the claim was just over five months. No submission was made by the Respondent that there were any real practical difficulties which would be caused by the extension of time.

114. Taking all the circumstances into account, I must balance the prejudice between the parties. I consider that the failure to make reasonable adjustments complaint would not succeed for the reasons I have explained: none of the adjustments would have been effective to alleviate the disadvantage because the Claimant was too ill to work in any capacity after the point at which the Respondent had knowledge of disability. Therefore, whilst I take all of the circumstances set out above into account, in particular I consider that it does not create significant prejudice to the Claimant to be prevented from pursuing an unmeritorious complaint, whereas it is more of a prejudice for the Respondent to defend an unmeritorious complaint. I do not consider that it is just and equitable to extend time.

115. The complaints of a failure to make reasonable adjustments in relation to paragraphs 5.5.1, 5.5.3, 5.5.4, 5.5.5 and 5.5.6 of the List of Issues are out of time and are dismissed for want of jurisdiction.

Unfair Dismissal: conclusions

Consultation

116. The Respondent conducted the type of contact and consultation during the Claimant's sickness absence and leading to his dismissal which a reasonable employer could be expected to undertake. Attempts were made to keep abreast of the Claimant's progress and maintain contact with him during his absence.

Medical position

117. The Respondent obtained up-to-date Occupational Health input to understand what the Claimant's prognosis was, and what could be done to support the Claimant to return to work. The outcome was that the date of return was unknown. There were no adjustments which were suggested should be made until there was some improvement in the Claimant's health.

118. It was appropriate for the Respondent to take into account the Claimant's view, which was that he did not know if he could ever return to his role as Patch Lead. As highlighted in *BS v Dundee City Council [2014] IRLR 131 CSIH* if an employee states that he is no better and does not know when he can return to work, that is a significant factor operating against him.

Conclusions

119. I find that Mr Platt had a genuine belief that the Claimant did not have capacity on the grounds of stress and anxiety and dismissed the Claimant for that reason. This is based on his witness evidence.

120. Therefore, in my finding, the reason for the dismissal was capability, which is a potentially fair reason within section 98(2)(b) of ERA.

121. I consider that based on the Claimant's own statements that he could not return to work due to his stress and anxiety, the length of his absence and

the Claimant's fit notes stating that he was not fit for work because of stress and anxiety, as well as the information in the Occupational Health report this belief was based on reasonable grounds.

122. In relation to the reasonableness of the investigation or in effect, the procedure, this was within the range of reasonableness. The Claimant was able to put forward his position and provide evidence he wanted to be considered. Mr Platt considered whether the barriers to the Claimant's return could be resolved. All of the likely adjustments, such as light duties or a phased return required an improvement in the Claimant's health such that he was well enough to return on light duties or a phased return. Mr Platt considered alternative positions and reasonably concluded that because the Claimant was not well enough to return in any capacity, this would not provide a resolution.

In all the circumstances, could the Respondent be expected to wait any longer and, if so, how much longer

123. The circumstances in this case were that:
   123.1. the Claimant had very long and distinguished service;
   123.2. the Claimant had been off sick for around 5 months;
   123.3. Occupational Health advice was that there was no known timescale for return and there were no suggested adjustments which would assist before the Claimant's health improved;
   123.4. the Claimant did not himself envisage he would be well enough to return within any stated timescale;
   123.5. a move to a more junior role had not been accepted by the Claimant.

124. In these circumstances, I do not consider that Respondent could be expected to wait any longer as this was for an unknown timescale. The Claimant himself did not see a return to his role to be on the horizon and indicated he may never be able to. Mr Platt reasonably considered steps to remove any barriers to return and no alternatives to dismissal were identified which appeared likely to be effective.

125. Mr Platt's took into account the Claimant's long and exemplary service to the Respondent. Whilst very long and exemplary service is one of the relevant factors weighing in an employee's favour, it is not a deciding factor. Mr Platt took it into account appropriately and balanced against other factors.

126. It was not put to Mr Platt in cross examination that he had not taken into consideration that the Claimant was still entitled to sick pay. This was raised in submissions. I have not therefore been able to make a finding of fact on this as it was not addressed in evidence. In all the circumstances, even if not considered, I do not consider it to be a matter of such significance that it would have taken the Respondent outside of a reasonable range of responses. Whilst the Claimant was still entitled to some company sick pay, this is a pay entitlement and not an indication of the period of time the business can sustain absence for.

127. Taking all of this and balancing it against the pressures on colleagues and service levels, Mr Platt determined it was appropriate to dismiss the Claimant.

128. The Claimant's position regarding his health and the medical information did not change at appeal stage. Therefore, the same considerations apply as I have set out above.

129. In all of these circumstances I consider that it was within the range of reasonable responses to dismiss the Claimant.

130. The complaint of unfair dismissal is not well founded and is dismissed.

Approved by

Employment Judge Volkmer

Date: 2 June 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON
13 June 2025

Jade Lobb
FOR THE TRIBUNAL OFFICE