EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Blewitt	**v**	Mach Recruitment Limited

Heard at: Cambridge

On: 3 March 2025

Before: Employment Judge Tynan

Appearances
For the Claimant: In person (supported by Ms R Cottingham)
For the Respondent: Did not attend and was not represented

JUDGMENT having been sent to the parties on 13 March 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunal Procedure Rules 2024, the following reasons are provided:

REASONS

1. The Claimant presented his claim to the Tribunals on 29 December 2022. He claims that he was unfairly and wrongfully dismissed and that he was discriminated against as a disabled person; his complaints in that regard are pursued under sections 13, 15, 19, 20/21 and 26 of the Equality Act 2010.

2. The Respondent filed its response with the Tribunals on 6 February 2023. There were case management preliminary hearings on 3 July and 11 October 2023. The Respondent failed to comply with the Tribunal's case management orders made at those hearings. By a letter dated 20 June 2024, the Respondent was warned that consideration was being given to striking out the response because of its non-compliance with the Tribunal's orders. On 25 July 2024, following the Respondent's failure to make any representations in the matter or to request a hearing, Employment Judge Quill decided that the response should be struck out. By virtue of Rule 38(3) of the Employment Tribunal Procedure Rules 2024, the effect is as if no response had been presented, so that Rule 22 applies. The question under Rule 22 is whether a determination can properly be made of the claim on the available material.

3. When he struck out the response, Employment Judge Quill confirmed that the Respondent would be entitled to notice of any hearings and decisions of the Tribunal, but only entitled to participate in any hearing to the extent permitted by the Judge. When the pre-hearing checklist for the final hearing was subsequently sent to the parties on 24 January 2025 it was completed by the Respondent and returned on 31 January 2025; the Respondent stated that it intended to attend the final hearing. At Employment Judge Quill's direction, the Tribunal wrote to the parties on 4 February 2025, advising the Respondent amongst other things that the hearing would be cancelled in the event a judgment was given on the papers. A further letter followed on 11 February 2025, again at Employment Judge Quill's direction, in which it was confirmed that the claim would be determined at a hearing, to take place on 3 March 2025.

4. The Respondent did not attend and was not represented at today's hearing. Putting aside that had they attended today they would only have been entitled to participate to the extent permitted by me, I am satisfied that they were on notice of today's hearing and that I should proceed in their absence.

5. The Claimant submitted a bundle for today's hearing. His witness statement is in the seventh tabbed section of the bundle. Inclusive of an index and attachments, it runs to some 49 numbered pages. He adopted the statement as his evidence at the hearing and I was able to explore certain issues with him. Although his cognitive difficulties were sometimes apparent he was a straightforward, credible witness. I accept his evidence. I have also been assisted in my understanding of the claim by the eight-page statement of case at the third tabbed section of the bundle and by the 'Further and better particulars of claim' document (the "Further Particulars") at the fourth tabbed section which provides more formally pleaded grounds for the claim than the original narrative attachment to form ET1. The material available to me in this regard stands in contrast to the limited information in the Respondent's form ET3. At section 6.1 of its ET3, the Respondent wrote:

> "The claimant was paid in full during all sick leave up until the end of contract this was for a period of 2.5 years, notice was given which was three weeks contractual notice and this was processed and paid as per contract. Claimant challenged 3 months notice but this was only applicable when the claimant issued the respondent notice."

The Respondent failed therefore to address the fairness or otherwise of its decision to dismiss the Claimant or his complaints that he was discriminated against.

6. It was seemingly only at the case management preliminary hearing on 11 October 2023 that the Respondent offered the explanation that the Claimant had been dismissed for capability because his ill health meant he could not perform his role. However, there is no further information before me as to the respects in which the Claimant was said not to be capable of

performing the role or when and how the Respondent came to that conclusion. There are no witness statements from the Respondent and it did not write to the Claimant when it terminated his employment to explain the reasons for its decision in that regard.

7. The Claimant was employed at the Respondent as Regional Operations Director – South. The Respondent is a Leeds based recruitment business that offers recruitment services across the country. According to its ET3 it employs 189 people. The Claimant has a 22 year history of employment in recruitment. He describes himself as a workaholic. On 7 February 2020 he had a cardiac arrest which has left him with a hypoxic brain injury. Whilst he recovered his mobility and speech over the following weeks, his memory and cognitive skills have been adversely affected. He also experiences significant fatigue and anxiety. He returned to work in October 2020, at which point workplaces and working practices had changed significantly as a result of the Coronavirus pandemic. On the Claimant's own evidence, his impaired memory and other cognitive issues meant this was a particularly challenging transition for him. Within the extensive medical evidence submitted by the Claimant as part of the bundle, there is a detailed report, including recommendations by Nadine Sowinski, an Occupational Therapist at Northamptonshire Healthcare NHS Foundation Trust. Her report is dated 21 January 2021 and extends to seven pages. She referred to having had several virtual meetings with Katie Barrett, the Respondent's Head of HR (whose name was given on form ET3 and who represented the Respondent at both case management preliminary hearings). Those meetings and their other interactions are documented in the Claimant's available medical records. Ms Sowinski noted in her report of 21 January 2021 that the Claimant was "eligible for consideration of reasonable adjustments" and went on to recommend 16 specific adjustments.

8. I am satisfied that at all material times, the Claimant was disabled within the meaning in the Equality Act 2010 by reason of hypoxic brain injury, for the reasons pleaded in the Further Particulars and detailed in the Claimant's witness statement. In any event, Employment Judge Bartlett recorded on 11 October 2023 that disability was conceded by the Respondent. The impacts of his disability are described in some detail by the Claimant in his witness statement and Further Particulars and also in Ms Sowinski's report. I shall come back to this.

Unfair and Wrongful Dismissal

9. It is not in dispute that the Claimant was entitled to three weeks' notice to terminate his employment.

10. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer (section 94 of the Employment Rights Act 1996 ('ERA')).

11. Section 98 of ERA provides,

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(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

…

(3) …

(4) Where the employer has fulfilled the requirements of subsection (1), 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.

12. The Claimant was summarily dismissed on 29 September 2022. I accept his evidence, supported with copy bank statements, that he did not receive payment for his notice period; the Respondent has failed to adduce any evidence in support of the contention in its ET3 that his contractual notice was processed and paid. There is and it seems to me could be no suggestion that the Respondent had cause to terminate his employment without notice or payment in lieu of notice. His claim that he was wrongfully dismissed, that is to say dismissed in breach of contract is well-founded. As I have said, it is not in dispute that he was entitled to three weeks' notice of termination. I shall award him three weeks' net pay and the value of any benefits by way of damages for breach of contract.

13. The Respondent has not advanced any particular explanation for, nor provided the context to, the Claimant's dismissal. Ms Barrett had

suggested to the Claimant in February 2022 that he might be referred for an occupational health assessment by the company's nominated specialist. However, this did not materialise. Ms Barrett scheduled one to one meetings with the Claimant in June 2022 but the meetings did not go ahead, leaving the Claimant with no understanding as to what they were intended to discuss. He had limited contact and no direct communications with his direct manager over this period; they did not meet to discuss the Claimant's work or his aims and objectives, performance, or health issues and challenges. This was in contrast to the Claimant's experience of his manager prior to his cardiac arrest and resulting brain injury when he says they communicated on essentially a daily basis.

14. On 27 September 2022 the Claimant was contacted by Ms Barrett who informed him that he would be let go following a decision to reduce headcount in the senior team. This was attributed to a downturn in business and negative press coverage. There was no suggestion that it was a tentative proposal in respect of which there would be a period of consultation. When the Claimant asked Ms Barrett whether this meant redundancy, the call was ended, with Ms Barrett telling the Claimant that she would call him back. They did not then speak again until 29 September 2022 when Ms Barrett set up a Teams call during which she told the Claimant that he was being dismissed with immediate effect by reason of ill-health. No further details were provided. As the Claimant had been back at work seemingly continuously since October 2020 (allowing for a period of furlough in 2021), if he was dismissed by reason of ill-health, it seems to me that it cannot have been due to any sickness absences that meant his continued employment was unsustainable, rather that his health issues had led the Respondent to conclude that he could not perform his role.

15. Particularly in the context of the Respondent's failings referred to below, I conclude that the Claimant was dismissed because the Respondent found his health related issues time consuming and difficult to manage and was unwilling to invest the necessary time and effort in that regard. The fact that the Respondent never documented its concerns in writing, failed to document or minute any meetings or discussions with the Claimant and did not even confirm his dismissal in writing, points to an organisation that was entirely neglectful of its responsibilities in the matter. I conclude that the Claimant was perceived as an inconvenience to the business and that stereotypical assumptions were made regarding his ongoing ability to perform his role and contribute. In particular, I find that following his brain injury he was perceived by the Respondent to no longer be a suitable fit in terms of its established operating model of a flexible, agile, essentially self-sufficient workforce. The Respondent initially planned to remove the Claimant from the business by citing a need to reduce headcount. In fact there was no such need, merely a desire to remove the Claimant from the business in the most expedient way. When the Claimant questioned what was happening on 27 September 2022, the Respondent changed tack and proceeded instead to terminate him on grounds of incapability. Whilst that is a potentially fair reason for dismissal, in my judgement the Respondent

acted unreasonably in relying upon his ill-health as sufficient reason for dismissing him. There is no evidence that it addressed its mind to the respects in which his health issues may have been impacting his work performance and there was certainly no opportunity for the Claimant to consider and address or even dispute its concerns via a capability process, within which he was given advance notice of meetings and an opportunity to be accompanied (an important consideration in this case given his impaired cognitive abilities). He was not offered training, feedback or other support (including adjustments) to meet the Respondent's reasonable expectations of him, whatever these may have been. Quite simply, no thought was given to the matter on the Respondent's part. Even had the Respondent had well-founded concerns as to the Claimant's ability to perform his role, there is no evidence that consideration was given to redeploying him. As I shall come to, the Respondent failed to implement reasonable adjustments in relation to him; an employer's failure in that regard is a material factor in the fairness of any health related dismissal. Furthermore, there is no evidence that the Respondent was in possession of up to date medical evidence, or a current occupational health assessment when it decided to dismiss the Claimant. Its failure in that regard was unreasonable. The Claimant's dismissal was not even confirmed in writing, he was simply issued with a P45 which gave an incorrect leaving date. He was not offered a right of appeal. To the extent that the Respondent dismissed the Claimant for health-related poor performance, there was, as I shall come back to, a wholesale failure on the part of the Respondent to adhere to the relevant acas code of practice, something I am required to consider on the question of the fairness of the dismissal. In all the circumstances, I uphold the Claimant's complaint that he was unfairly dismissed.

Discrimination

16. I also uphold the Claimant's s.13, s.20/21 and s.26 Equality Act 2010 complaints. They are fully pleaded in the Further Particulars, including the narrative account of the facts and matters that are said to support the complaints. My task under Rule 22 is to assess whether a determination can properly be made on the available material. In my judgement, it can.

Section 13 of EqA 2010

17. Section 13 of EqA 2010 provides:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

18. The Claimant's originally complained that he was directly discriminated against in the following respects:

18.1. By being dismissed;

18.2. By the manner of his dismissal;

18.3. Between May 2021 and September 2022, by reason of the Respondent's alleged failure to communicate with him on a range of matters, but in particular by failing to set goals and objective for him or to otherwise indicate its performance expectation of him, and by failing to provide feedback, training and other information to enable him to perform his job;

18.4. By not providing him with a calm/ quiet working environment;

18.5. In expecting him to work independently without supervision, guidance, support or clear instruction;

18.6. By cancelling and rescheduling meetings;

18.7. In failing to action points arising in the course of meetings with the Claimant.

19. It is not in dispute that the Claimant was dismissed. I have set out above that he was dismissed in a perfunctory way on 29 September 2023, having questioned whether his role was redundant when it was initially suggested on 27 September 2023 that there was a need for headcount reduction.

20. I accept the Claimant's evidence that over the period of 15 months or so leading up to his dismissal, namely following his return to work in May 2021 after a period of furlough leave, the Claimant was essentially left to his own devices and expected simply to get on with the job, with no clear direction or even guidance in terms of what was expected of him. There was no job or project specification notwithstanding he was assigned to various short term client placements. For example, when he was assigned to a Sainsbury's site in the weeks following his return from furlough leave, he was informed by Ms Barrett that the Respondent wanted him to "make an impact on the business". He experienced the same lack of direction when he moved to a Boohoo site in or around August 2021 and where he remained until approximately May 2022. He was essentially supernumerary as there was already a manager on site when he arrived. In his witness statement the Claimant describes being deeply unhappy and feeling abandoned by the Respondent. Emma Yates, an Advanced Specialist Occupational Therapist, subsequently reported in March 2023 that she had been unable to get hold of Ms Barrett during this time; the Claimant states that Ms Barrett failed to acknowledge email correspondence from Ms Yates in or around October 2021 and remained unresponsive following a chasing email, and that further emails in March and April the following year similarly went unanswered. The Claimant was occasionally able to reach the Regional Operations Director for a telephone catch up, but there were no one-to-ones, feedback sessions or appraisals. It seems to have been during the Boohoo placement that the Claimant experienced a particularly busy and noisy working environment.

21. The Claimant states that a number of meetings (whether in-person or remote) were cancelled by Ms Barrett and rescheduled. There is an example of this in the initial weeks following his return to work in October

2020 at paragraph 14 of the Claimant's witness statement. At paragraph 16 he refers to a meeting being cancelled early in 2021 and the effect this had upon him. He also refers in his witness statement to Ms Barrett's failure to attend scheduled meetings with his occupational therapist, occasions when she either joined late or left early, and delays he experienced in arranging new meetings. This is consistent with Ms Barrett's failure to respond to emails. It evidences to me, as the Claimant alleges, that identified actions points were neglected. As I have noted already, Ms Barrett failed to attend scheduled meetings in June 2022 and ended their discussion somewhat abruptly on 27 September 2022 when the Claimant questioned whether it was a redundancy situation.

22. The direct discrimination complaints were finessed at the case management hearing on 11 October 2023. Although this is not clear on the face of the hearing record, I suspect that may be because certain of them were more obviously s.20/21 and 26 Equality Act complaints. The Claimant continues to complain that his dismissal, including how it had been handled, was direct discrimination. Otherwise, his direct discrimination complaints are focused on a lack of one to one meetings and appraisal, and the Respondent's failure to provide written reasons for his dismissal and failure to pay his notice pay.

23. The Claimant has established the necessary primary facts to support his complaints. The question though is whether the circumstances are such that I can and should infer that the treatment in question was done on the grounds that he was disabled.

24. The mere fact that an employee is treated unreasonably does not suffice to justify an inference of unlawful discrimination: Zafar v Glasgow City Council [1998] ICR 120). Nevertheless, discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. Otherwise, mere proof that an employer has behaved unreasonably or unfairly will not by itself trigger the transfer of the burden of proof to an employer, let alone prove discrimination (see in particular paragraphs 98 to 101 of the Court of Appeal's judgement in Bahl v The Law Society and others [2004] IRLR 799).

25. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, it was held that a Tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances and appeal against the rejection of those grievances. The EAT said:

> 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristics."

26. The Claimant relies upon a hypothetical comparator for his s.13 complaints. Accordingly there is no evidence available to me as to how other non-disabled employees were treated in the same or similar circumstances, including where the Respondent was looking to terminate their employment. As I shall come to shortly, the Respondent breached its s.20 duty to the Claimant and he was also harassed. Ms Barrett was directly involved in various of these matters, including the Claimant's dismissal. In the absence of any evidence and explanation from the Respondent it is not possible to know to what extent Ms Barrett may simply have been acting on the instruction of others. However, the matters complained of reflect a pattern of treatment. In the context of the Respondent's failure to make reasonable adjustments for the Claimant and Ms Barrett's harassment of him and given both my findings and conclusions at paragraph 16 above, as well as the Respondent's abject failure to offer any explanation for its unreasonable treatment of the Claimant, I infer that it was not simply a matter of the Respondent treating the Claimant unfairly, but that his disability was a material factor in the Respondent's decision to dismiss him and to do so in both a summary and perfunctory way, and thereafter not to offer him any explanation for his dismissal (which failure is compounded in the ET3). As regards the lack of one to one meetings and appraisals, on the Claimant's evidence these stopped happening when he returned to work following his absence from the business. The obvious change was that the Claimant then had an acquired brain injury. Even in the context of an organisation that seems to have valued having a flexible, agile and self-sufficient workforce, in my judgement it provides grounds from which to infer that the lack of meetings and appraisals was because the Claimant had become disabled, or at least it has shifted the burden to the Respondent to provide an innocent explanation for this change to his management. The Respondent has failed to provide any explanation in the matter. In my judgement, the Claimant's direct discrimination complaints are well-founded.

Section 26 of the Equality Act 2010

27. Section 26 of EqA provides,

> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic; and
>
> (b) the conduct has the purpose or effect of-
>
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

28. In order to succeed in his s.26, complaints the Claimant must do more than simply establish that he has a protected characteristic and that he was subjected to unwanted conduct: Madarassy v Nomura International plc [2007] IRLR 246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR 931. It has been said in the context of s.13 that a Claimant must establish something "more" than unfavourable treatment and a protected characteristic, even if that something more need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.

29. In Governing Body of Windsor Clive Primary School & Anor v Forsbrook & Anor [2024] EAT 183, the EAT has very recently considered the question of how tribunals should approach the question of whether unwanted conduct is "related to" a relevant protected characteristic. His Honour Judge Beard said:

> "29. … It is clear that "related to" is a broad concept, as set out in Haringey v O'Brien. However, the concept cannot be so broad as to be meaningless. I am of the view that, as Ms Roddick argues, the conduct must relate to the protected characteristic, here disability, in some clear way. It is for the ET to spell out that relationship between the conduct and the disability. It will be necessary, therefore, for an ET to identify with some clarity the precise conduct which creates the prohibited environment. This will also be true in deciding whether that conduct is unwanted in the sense that the statute applies to it."

The case concerned correspondence issued by the employer in the context of its attendance and wellbeing policy. HHJ Beard went on to observe:

> "38. It seems to me that the difficulty with the lack of reasons in respect of unwanted conduct may relate to a reluctance for the ET to describe the use of the absence process as unwanted conduct. In my judgment, properly constructed, the statute provides that unwanted conduct is based on the subjective view of the claimant. It is only in the unlikely circumstances that the "purpose" of the use of the absence procedure is to create the prohibited environment that a claim could succeed without more. In dealing with the "effect" of the

> conduct the claimant's perception is subjected to the test of reasonableness pursuant s.26(4). It is through that subsection that the effect of unwanted conduct is to be viewed."

30. As to the effect of s.26(4), in Richmond Pharmacology v Dhaliwal [2009] ICR724 it was observed,

> "A respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence; it should be *reasonable* that that consequence has occurred… overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt…
>
> …dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

31. The Claimant complains that Ms Barrett cancelled or rescheduled meetings, often at short notice. I refer to my findings above; he has established the primary facts in support of his complaint. Ms Barrett's conduct was undoubtedly unwanted. The extensive medical documents submitted by the Claimant evidence that she and, by extension, the Respondent, was made aware that the Claimant would struggle to manage sudden or ad hoc changes to his schedule; both the Claimant and Ms Sowinski explained this to Ms Barrett. In my judgement, that creates the necessary relationship between the conduct complained of and the Claimant's disability. It was reasonable for the Claimant to regard it as having created an intimidating etc working environment for him.

32. As regards Ms Barrett's alleged comment on 30 September 2021 that the Claimant was not as confident as he used to be, I accept that the comment was made, that it was unwanted and that it related to the Claimant's disability (alternatively, that this can be inferred such that the burden shifts to the Respondent to provide an innocent explanation for it). The Claimant, as Ms Barrett was aware from at least 2020, was experiencing significant symptoms of fatigue and anxiety following his brain injury, and that this was in turn affecting his confidence. He was self-evidently not as confident as he had been before he became disabled. The comment related to his disability and in my judgement it was entirely reasonable for the Claimant to feel that his dignity had been violated and an intimidating etc environment created,

33. I uphold the Claimant's complaints that he was subjected to harassment.

Section 20 of the Equality Act 2010

34. Section 20 of EqA 2010 defines the duty to make adjustments as follows,

> Duty to make adjustments
>
> (1) …
> (2) …
> (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) …

35. It is not necessary in this case for the Tribunal to have regard to the second or third statutory requirements.

36. The PCPs, as set out at paragraph 24 of the Further Particulars are clear and well defined. They reflect the practices and ways of working at a busy organisation that seems to have lacked certain of the more formal structures and processes that one might expect to find at other businesses. Instead, it expected its staff to be flexible and agile, to take the initiative and to work independently. I am satisfied from the Claimant's witness statement and evidence today and from the Further Particulars, which I do not repeat here, both that the PCPs in paragraph 8.1 of the List of Issues were applied to him and that they placed him at a disadvantage as set out in paragraph 8.2 and also in paragraph 28 of the Further Particulars, so that the Respondent's s.20 duty of adjustment was triggered.

37. In Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10, the EAT confirmed that there does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to

be a reasonable one. Instead, it is sufficient for the tribunal to find that there would have been a prospect of the disadvantage being alleviated, a point also made in Noor v Foreign and Commonwealth Office 2011 ICR 695, EAT. These decisions were endorsed by Elias LJ in Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA, in which he observed:

> 'It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'

38. In Smith v Churchills Stairlifts plc 2006 ICR 524, CA, the Court of Appeal confirmed that the test of reasonableness is an objective one and it is ultimately the employment tribunal's view of what is reasonable that matters. The Claimant does not have any burden in the matter, since the duty, once triggered, is an employer's. Whilst the Equality and Human Rights Commission's statutory Code of Practice on Employment includes examples of matters that a tribunal might take into account (see para 6.28), my focus is on the practical result of the measures that can be taken In Burke v The College of Law and anor 2012 EWCA Civ 37, CA, the Court of Appeal made it clear that a holistic approach should be adopted when considering the reasonableness of adjustments in circumstances where it takes a number of adjustments, working in combination, to ameliorate the substantial disadvantage suffered by a claimant.

39. I am satisfied (albeit the Claimant does not have the burden of proof in the matter) that it would have been reasonable for the Respondent to have implemented the adjustments identified in paragraph 26 of the Further Particulars, all of which were recommended by Ms Sowaski or indicated in her report. In summary:

39.1. The Claimant should have been offered suitable training and instruction prior to each new placement and allowed additional time in which to learn any new skills required for the placement;

39.2. The Respondent should have endeavoured to ensure the Claimant was provided with a suitable working environment, that is to say a reasonably quiet and calm workspace, possibly a room or workspace of his own, where he would experience a reduced level of noise and fewer interruptions;

39.3. The Claimant should have had structure and routine in his working day, for example a written role description for each placement and basic daily task lists, including timeframes for completion, as well as discussion of them with his manager. He should also have had set hours of work, with the most demanding or urgent tasks being scheduled during the morning when he was likely to be less fatigued and at his most productive;

39.4. In addition to clear and concise instructions, the Claimant's understanding should have been checked and verified on a regular basis;

39.5. Sudden or ad hoc changes to the Claimant's diary or schedule should have been avoided as far as reasonably practicable; and

39.6. The Respondent should have supported the Claimant in devising and maintaining a daily routine.

40. In my judgement, had these adjustments been implemented they would at the very least have ameliorated the disadvantages identified at paragraph 28 of the Further Particulars. By failing to implement the adjustments, the Respondent breached its s.20 duty and thereby discriminated against the Claimant.

Sections 15 and 19 of EqA 2010

41. Section 15 of EqA 2010 provides,

> 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.

42. Although s.15 complaints typically go hand in hand with s.20/21 complaints, the Claimant has not identified the thing(s) that arose in consequence of his disability or certainly not in a sufficiently precise way that I am able to understand and adjudicate upon his complaints. The complaints do not succeed.

43. Section 19 of EqA 2010 provides:

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

44. The Claimant's complaints do not succeed because he has failed to show the requisite adverse disparate impact as required by s.19(2)(b) of EqA 2010. He has the primary burden in the matter. That burden may be discharged, amongst other things, by statistical or expert evidence and other witnesses, including the Claimant himself. In appropriate cases, Tribunals may take judicial notice of matters that are well known, the most often cited being the adverse impact upon women of employers not permitting flexible or agile working. Otherwise, however, Tribunals should avoid reaching conclusions intuitively or on the strength of their gut feeling in the matter. There must be a proper evidential basis for concluding that the relevant PCP has given rise, or would give rise, to the relevant group disadvantage. In this case there is no evidence before me and nothing in respect of which I might take judicial notice to be able to conclude that the requisite group disadvantage has been established. The complaints are not well founded.

The ACAS Code of Practice

45. In my judgement, the Acas Code of Practice on Disciplinary and Grievance Procedures ("the Code") applied in this case in so far as the Respondent dismissed the Claimant for alleged incapacity. As I have noted already, it was unrelated to sickness absence, rather, as Employment Judge Bartlett recorded, to his alleged inability to perform his role. Paragraph 1 of the Code confirms that it applies in cases of poor performance. In terms of the Respondent adherence or otherwise to the Code: there is no evidence that it operated a capability procedure (paragraph 2); there was no investigation (paragraphs 4 and 5); the Claimant was not informed in writing of the problem or invited to a meeting to discuss it, with a reminder of his right to be accompanied (paragraphs 9 and 10); there was no discussion on 29 September 2022 and the Claimant was not afforded an opportunity to state his case (paragraph 12); the Claimant was not permitted a companion at the meeting on 29 September 2022 (paragraph 13); his dismissal was not confirmed in writing, indeed he was not afforded any opportunity to improve (paragraphs 14 and 15); the Claimant was not advised of his appeals rights (paragraphs 22 and 26). The question under s207A of the Trade Union & Labour Relations (Consolidation) Act 1992 is whether the Respondent failed to comply with the Code in relation to the relevant matters complained of and, if so, whether its failure in that regard was unreasonable. It failed to comply with the Code in numerous material respects and it has failed to offer any explanation for its significant failure in that regard. It is a medium sized business which had access to HR support and advice at the relevant time through Ms Barrett. In my judgement, its failure to adhere to the Code in the various respects just identified was unreasonable. The Respondent was dealing with a vulnerable employee with clearly identified needs; there was a compelling need for any concerns to be addressed within a structured process that adhered to the Code. Instead, the Claimant was dismissed summarily and cast aside in a perfunctory way. In all the circumstances, I think it just and equitable to increase the award in this case by 25%.

Polkey/Chagger

46. Pursuant to s.123.1 of the Employment Rights Act 1996 where a Tribunal upholds a complaint of unfair dismissal it may award compensation as it considers just and equitable in the circumstances, having regard to the losses sustained by the claimant in consequence of dismissal. In accordance with the well-established principles in Polkey v AE Dayton Services Ltd 1988 ICR 142, HL the Tribunal may make a just and equitable reduction in any compensatory award under s.123(1) to reflect the likelihood that the employee's employment would still have terminated in any event. The burden of proving that an employee would or might have been dismissed in any event rests with the employer. Nevertheless, Tribunals are required to actively consider whether a Polkey reduction is appropriate. In Software 2000 Limited v Andrews and Others the EAT reviewed the authorities at that time in relation to Polkey and confirmed that Tribunals must have regard to all relevant evidence including any evidence from the employee. The fact that a degree of speculation is involved is not a reason not to have regard to the available evidence unless that evidence is so inherently unreliable that no sensible prediction can be made. It is not an all or nothing exercise, rather it involves a broad assessment of matters of chance.

47. Applying Polkey principles in practice requires an evidence-based approach drawing upon common sense and experience. In the final analysis any final decision must meet the requirement of justice and equity.

48. The principles in Polkey are equally applicable in discrimination cases - Chagger v Abbey National plc [2009] EWCA Civ 1202, CA.

49. In my judgment, notwithstanding the Respondent's failure to put forward any case in this regard, even had he not been treated unfairly and discriminated against, the Claimant would inevitably have left the Respondent's employment. He told me that his health has deteriorated further since he was dismissed by the Respondent and that he is currently not working, in receipt of state benefits and excused on health grounds from the normal requirement to actively search for employment. I explained the Polkey principles to the Claimant in the course of the hearing and took a break to allow him an opportunity to discuss these with his partner. His position, which I accept and which is effectively unchallenged by the Respondent, is that had the identified adjustments been put in place he would have remained in post. He believes, had he been redeployed that there is no chance he would have been dismissed; however, in my judgement he approaches the matter with the benefit of hindsight, but in any event without sufficient regard to his current situation; I conclude that he would not have accepted redeployment had this been offered in September 2022 because of the financial implications for him but also as a matter of personal pride and because he is a workaholic who was unwilling to give up. I conclude, and indeed the Claimant ultimately accepts, that even with the appropriate adjustments and support mechanisms in place, within a further 18 months of his dismissal he would

have reached a point that he could no longer continue working by reason of his declining health and have either resigned his employment or agreed a mutual termination with the Respondent. Compensation shall accordingly be calculated on the basis that the Claimant would have left the Respondent's employment by 27 March 2024.

Approved:

R Tynan

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Employment Judge Tynan

Date: 23 June 2025

Sent to the parties on:
2 July 2025

For the Tribunal Office

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