EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Gareth Stevenson	AND	Toolstation Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 7, 8 and 10 July 2025
(9 July 2025 In Chambers)

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms V Blake
Ms R Clarke

Representation
For the Claimant: In person
For the Respondent: Miss R Dawson, Solicitor

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are not well-founded, and they are hereby dismissed.

RESERVED REASONS

(as requested by the parties pursuant to Rule 60(4))

1. In this case the claimant Mr Gareth Stevenson, who was dismissed by reason of capability, claims that he has been unfairly dismissed, and that he was discriminated against because of a protected characteristic, namely disability. The discrimination claims are for direct discrimination, discrimination arising from disability, for failure to make reasonable adjustments, and for harassment. The respondent concedes that the claimant is disabled, but it contends that the reason for the dismissal was capability, that the dismissal was fair, and that there was no discrimination.
2. We have heard from the claimant. For the respondent we have heard from Mr Graham Prior, Regional Manager, and Mr Steve Bellamy, Divisional Director.
3. The claimant was afforded such breaks as were requested during this hearing as adjustments to ameliorate any disadvantage which might have been caused by his disability.
4. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral

and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

5. The Facts
6. The respondent Toolstation Ltd is a national supplier of tools and building equipment with over 500 stores in the UK. It is part of the Travis Perkins group of businesses. The claimant is Mr Gareth Stevenson. The claimant was employed as a Customer Service Representative at the respondent's Exmouth store from 16 January 2017 until his dismissal for health and capability related reasons on 6 December 2023.
7. The claimant was first diagnosed with Obsessive Compulsive Disorder (OCD) in 2002. He also suffers from long-term stress, and these impairments are related, for example any significant disruption to the claimant's routine can cause additional stress. This can cause upset, fatigue, and lack of concentration. The respondent has conceded that the claimant is a disabled person by reason of these two mental impairments, first OCD, and secondly long-term stress, at the times which are material to the claims before this tribunal. The respondent was also aware of these conditions.
8. The claimant had signed a written contract of employment, and his contractual hours were 20 hours a week in accordance with a rota which was to be published on a weekly basis. In addition, he could be required to work additional overtime if required by the respondent, and to cover sickness absence of other employees. The same provisions applied to other employees. There were usually seven or eight employees at the Exmouth store, and the store was open seven days a week. Usually there were at least two people working at the store at any one time. The normal weekly rota was prepared on the basis that employees worked 40 hours per week, or in the claimant's case half of that total, because 40 hours or 20 hours was the normal contractual position. It was very unusual for the respondent to move employees between different stores, and employees were expected to cover sickness and holiday absences from colleagues under their normal contractual provisions.
9. The claimant did not have any difficulty in undertaking his normal contractual hours and duties when he commenced employment in 2017. He got on well with his manager at the time, namely Mr Potter. Mr Potter had accommodated the claimant's request for religious reasons not to work on a Sunday or a Wednesday evening, and the claimant was aware that any repeated or long-term absences put stress on the other employees who then had to cover his absences.
10. The claimant was absent from work on certified sickness absence between December 2020 and May 2021 for a period of five months as a result of stress arising from problems at home. He confirmed at a welfare meeting during this period that his absence was caused by stress at home, and not his job with the respondent. He confirmed that he did not need any adjustments at that time, and he declined to attend any referral to Occupational Health (referred to as OH in this Judgment).
11. The claimant attended a Return to Work meeting on 4 May 2021. It was acknowledged that he had had 56 days of absence, and it was agreed that there would be a phased return to work under which the claimant would work 10 hours a week over two days. The claimant's GP fit-notes suggested that the claimant was fit to return to work with adjustments by working these hours on Mondays and Tuesdays. No explanation was given as to why should there was any need to work these two specific days rather than any other days, but this was the pattern of reduced hours which was adopted.
12. At a welfare meeting in August 2021 the claimant confirmed that he had been working his full contractual hours over four days for the last two months, and that the stress related absences were not work-related. The claimant also indicated that because of his OCD he would prefer to have three days' rest every week. Following further discussion, the claimant agreed to continue working his full contractual hours split over four days. There was no suggestion that the days specifically had to be Mondays and Tuesdays (or any other days).
13. On 16 August 2021 the claimant made a flexible working request which he stated "would entail my 20 hour contract being covered over four days instead of five". At that time the claimant generally worked Mondays, Tuesdays, and some hours on

Thursdays and Saturdays. The claimant confirmed that this gave him enough of a reliable structure, and stability, so as not to cause any difficulties in respect of his OCD.

14. During August 2021 the claimant felt that he had to return home because of an emergency arising from a possible gas leak. The manager at the Exmouth store at that time was now Mr Adrian Wheeler. He appeared to take a dim view that the claimant had left for this reason at short notice, and he challenged the claimant about this in September 2021. Following this event the claimant was absent on certified sickness leave for a further seven months from September 2021 until 18 April 2022. The claimant stated he was not prepared to work at the store if Mr Wheeler was the only other person present, for instance at times when the store might be opened or closed at the start or end of the day.
15. At this stage the respondent referred the claimant for a meeting with OH, which resulted in a telephone assessment on 4 April 2022. The resulting report recorded that his store manager expected him to work for 20 hours over five days but the claimant had requested to work the same hours compressed over four days. A phased return to work on this basis was suggested for a period of two to four weeks, and the report confirmed that the illness was because of "perceived work-related stress from a strained work relationship". There was no suggestion that the four-day week had to be on any specific days, and the claimant confirmed at this hearing that "he did not need set days at that time". The report also suggested that the claimant had requested Access to Work to provide a support worker to support him if ever he was having a one-to-one meeting with Mr Wheeler. He did not have any further one-to-one meetings with Mr Wheeler and accordingly a support worker was not provided.
16. In the event the claimant did not return on the basis which had been recommended by OH, and to which he had agreed. He submitted a fit note from his GP which suggested that he was fit to return working reduced hours, on each of Monday and Tuesday. The amount of hours was not specified, but the claimant usually worked five hours in each of these two days, which was a reduced workload of 10 hours per week.
17. The claimant had submitted a formal grievance against what he perceived to be Mr Wheeler's unacceptable conduct. His earlier Flexible Working Request to work for set days per week was granted during this process, and this was confirmed on 25 May 2022. However, by that stage the claimant was still only working two days per week, on a Monday and Tuesday. He accepted at this hearing that he was not able to work in accordance with his own suggested Flexible Working Request.
18. Although the claimant suggests that he was not aware of the same, and that as far as he knew some of his colleagues wanted to work increased hours, during this process the claimant's colleagues became increasingly dissatisfied with the effect which the claimant's reduced workload was having on their shifts. They had to work additional hours to cover the claimant's absences, and he was not available to cover their sickness and holiday absences, and these also had to be covered by the other colleagues. We accept the respondent's evidence that the claimant's absences were having a negative impact on the colleagues in the store, and that it continued to cause management difficulties in seeking to arrange to cover these absences.
19. That remained the position and there was then a welfare meeting with the claimant on 11 October 2022 at which the various options were again discussed with him. The claimant confirmed that he wished to resume his contractual hours of 20 hours per week but could not say when he would be able to do this. He was offered but refused a permanent reduction in his contractual hours to 10 hours per week because he did not think that this was financially suitable. He did say he was prepared to agree working 10 hours per week for six months as a temporary resolution. Nonetheless the claimant agrees that he intended to reach a position where he worked for 20 hours over four days, and the respondent continued to honour his holiday entitlement on the basis of the 20 hour contractual week.
20. The claimant continued working this pattern when he agreed to increase his hours to 15 hours per week. The claimant accepts that the respondent had been "very supportive" during this time. Meanwhile the respondent had obtained another OH

report dated 3 February 2023. In reply to a question as to what adjustments might be suitable the report concluded: “He will benefit from contractually reducing to 75% of usual hours (15 hours per week) over the next six months and agree with Mr Stevenson on any pattern of shifts both parties may find suitable in supporting him. He currently works Mondays and Tuesdays which helps him have a steady weekly routine. I understand he may cope with six or seven hour shifts, but I advise a degree of flexibility of hours would be of value in support of his continued presence in the workplace. This will minimise the sick absence and enable both parties to plan his routine.”

21. The report also suggested that the adjustments would be on a temporary basis for up to 6 months, so that the expectation was that the claimant would be back to his full 20 hours per week by about August 2023
22. In reply to this suggestion the claimant was offered an alternative permanent solution, namely a reduction in his normal contractual hours from 20 to 15 on a permanent basis. The claimant declined this because he did not think it was viable, and confirmed he still intended to do 20 hours per week. Meanwhile the respondent’s ongoing agreement to these adjustments continued to cause concerns with the other employees at the store.
23. It is also noteworthy that the report suggested “any pattern of shifts” and it did not advise that Mondays, Tuesdays, or any other specific days, were required to be worked as a necessary adjustment.
24. On 21 March 2023 the respondent held a first capability meeting with the claimant under its capability procedure. Mr Graham Prior, the Regional Manager, from whom we have heard, chaired this meeting. The invitation letter to the claimant had confirmed that: “we will be considering all the available information to make a decision in reference to your ongoing absence from work and your future with the Company”.
25. At that meeting the claimant confirmed that “the situation has settled” and that the company had been “supportive and very understanding”. The claimant confirmed that things were improving, and that he was feeling stable as at that time. It was also at that time that the claimant agreed to an increase in his weekly hours from 10 to 15, notwithstanding that OH had suggested 15 hours per week several months earlier.
26. There was then a second consultation meeting under the respondent’s capability procedure between Mr Prior and the claimant on 30 May 2023. The invitation letter made it clear that if the respondent was unable to identify suitable alternatives for the claimant, then the situation might lead to the termination of his employment because of ill health and incapacity. This was repeated at the meeting, and the claimant confirmed that he understood this. The claimant also confirmed that his relationship with his manager Mr Wheeler was “okay at the moment”. There was a discussion about the flexibility in working days and the claimant confirmed that he was “happy to change shifts with a minimum of five days’ notice”. He also confirmed that the respondent was doing all it could to continue to support him.
27. With effect from 3 September 2023 the claimant agreed to increase his weekly hours from 15 hours over Monday and Tuesday only, with 20 hours on Monday, Tuesday and Friday on alternative weeks, which was effectively an average of 17.5 hours per week. There was then a further OH assessment on 30 October 2023 at which the claimant had suggested that this arrangement should be extended in the hope of his being able to return to the full 20 hours every week in 3 to 6 months’ time. The report also recorded that the claimant had been on reduced hours for nearly two years and that there appeared to be no inclination on the part of the claimant for him to confirm exactly when he would return to his contractual 20 hours. This arrangement was “having a disruptive and adverse effect in-store as his colleagues have been covering the extra hours which is now causing fatigue and stress amongst others”.
28. By letter dated 22 November 2023 Mr Prior invited the claimant to a third full capability meeting. It was made clear that “the purpose of this meeting will be to review the situation with all the information available at this time. Based upon our discussions we will aim to make a decision in reference to your future with the company and you should

be aware that this could lead to the termination of your employment due to ill-health and incapacity."

29. This meeting took place on 4 December 2023. Mr Prior made it clear to the claimant that the respondent needed to balance the needs of the claimant and the needs of the business and the other staff. He made it clear the respondent wished the claimant to return to normal but agreed that this would not include working on Sundays because of his religious belief. Mr Prior confirmed that the respondent would give the claimant four weeks' notice of this new arrangement and confirmed that the store manager would accommodate the claimant's preference as to the working days if the business was able to do so. The claimant suggested that he might wish to make a flexible working request to work his reduced hours and Mondays, Tuesdays and Fridays, but Mr Prior confirmed that this would be declined because that arrangement had already been accommodated and the respondent needed more flexibility to function efficiently as a business.
30. Mr Prior therefore made an offer to the claimant on these terms: (i) a new arrangement would apply whereby the claimant returned to working his contractual hours of 20 hours; (ii) the claimant would be given four weeks' notice of this new rota, which would commence in January 2024; (iii) the claimant would receive four weeks' notice of all work rotas going forwards; (iv) he would receive at least one week's notice of any change in the notified rotas; and (v) his preference to work on Mondays, Tuesdays and Fridays was noted and would be accommodated if business needs allowed.
31. For the record, we find that this offer complied with the recommendations earlier made by OH in that OH had noted the claimant wanted to return to full hours within 3 to 6 months (without giving any rationale) and the new arrangement was due to commence three months after that, and in any event the claimant had confirmed that it was "not about the hours". There appeared to be no reason relating to the claimant's disability as to why he could not increase the 17.5 hours which he was doing on average to his contractual hours of 20 hours per week. In addition, there had never been any recommendation that the claimant had to work on specific days such as a Monday or Tuesday. The point was that the claimant needed structure and stability, and what was on offer, namely four weeks' notice of all rotas, accommodating the claimant's preference for days where possible, and giving one week's notice of any changes, appeared to meet any difficulties which the claimant would otherwise face because of his OCD, in short because this offer provided stability and structure.
32. The claimant declined to agree to this offer at the meeting saying "it's not the hours it's the days for me". Mr Prior commented that the respondent had never received a clear reason as to why he preferred to work specific days. This question had been asked before, and the claimant remained unable to answer that question. Similarly, he was unable to tell this Tribunal why he was only able to work specific days such as a Monday or Tuesday, and certainly gave no explanation that his preference to do so was in any way related to either of his two disabilities.
33. The claimant told Mr Prior that "I need a least a week to decide if I can accept this or not". Mr Prior did not agree to this proposal, but he did agree to adjourn the meeting until the following morning (5 December 2023) to enable the claimant to consider the matter overnight and to provide his answer.
34. At this meeting Mr Prior and the claimant had also discussed the possibility of alternative employment. The claimant suggests that Mr Prior's search was perfunctory, but we accept Mr Prior's evidence that he checked the respondent's database and there were no suitable alternative jobs for the claimant. In addition, home working was not a suitable alternative because of the claimant's customer facing role.
35. At 10:06 on 5 December 2023 the claimant then emailed Mr Prior to the effect that he did not feel mentally strong enough to deal with it and he felt emotionally overwhelmed. Mr Prior emailed back suggesting that the claimant spoke to Employ Assist as a support mechanism and to confirm whether he would be attending the meeting in person or by video to confirm his decision. The claimant did not do so, and Mr Prior decided to terminate the claimant's employment: "having considered all the information

presented in your consultation meetings and the impact the reduced hours are having on our department". The claimant was dismissed with effect from 6 December 2023 when the decision was confirmed by letter of that date from Mr Prior. The reason given for the dismissal was capability, and the claimant has paid his notice pay in lieu.

36. The claimant was offered an appeal and did so by letter dated the next day 7 December 2023. The appeal was heard by Mr Steve Bellamy, the respondent's Divisional Director for its South Division, from whom we have heard. He had just been appointed and it had no previous dealings with the claimant or others in the Store. He was therefore a senior and independent manager.
37. He investigated each of the grounds of appeal raised by the claimant and reviewed the history of the OH reports and the minutes of the various consultation and capability meetings. Mr Bellamy held an appeal hearing with the claimant on 9 January 2024. He also interviewed Mr Prior, and Mr Wheeler, later that week. Mr Bellamy determined that it was not practical for the business to continue to try to cover the reduced hours with existing colleagues. Mr Bellamy decided to reject the claimant's appeal. However, Mr Bellamy did try to retain the claimant in the respondent's employment. He repeated the offer which had been made by Mr Prior, but he also added an improvement to that offer.
38. The improved offer which was open to the claimant following his appeal hearing was the same as Mr Prior's offer, save that instead of the contractual position of one week's notice being required to notify the claimant of any changes in the rota, Mr Bellamy agreed that the claimant could have four weeks' notice of every rota, and four weeks' notice of any change to any specified rota, and that effectively the claimant would only be asked to work on days other than his preferred days to cover holiday absences from other colleagues in the store and that he would always have at least four weeks' notice of being required to do so.
39. The claimant declined to respond to this offer, and he then commenced the Early Conciliation process with ACAS on 2 February 2024 ("Day A"), and ACAS issued the Early Conciliation Certificate on 15 March 2024 ("Day B"). The claimant presented these proceedings on 17 April 2024. Subsequent to this, the claimant has alleged that he was harassed by Mr Wheeler. The allegation is that "On 9 July 2024 at 8:17pm, the Claimant was walking along the road with his wife and young son in Exmouth, when Adrian Wheeler of the Respondent drove past him, rolled down the window and put one finger up to the Claimant." This allegation is denied by the respondent.
40. In the event, the claimant did not give any direct evidence to the effect that this had happened, and his wife was not present at this hearing to confirm any such allegation. Mr Prior gave evidence to the effect that after this allegation had been raised he challenged Mr Wheeler about this incident. Mr Wheeler denied flatly to Mr Prior that any such incident had occurred. Mr Wheeler did not give any evidence to this Tribunal about this matter. In these circumstances we are unable to conclude on the balance of probabilities that this incident occurred, and even if it had, we have no evidence to suggest that this impugned conduct related to either of the claimant's disabilities.
41. Having established the above facts, we now apply the law.
42. <u>The Law</u>
43. The reason for the dismissal was capability which is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 ("the Act").
44. We have considered section 98 (4) of the Act which provides "…. 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".
45. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant

alleges direct disability discrimination, discrimination arising from a disability, failure by the respondent to comply with its duty to make adjustments, and harassment.

46. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
47. As for the claim for direct disability discrimination, under section 13(1) of the EqA 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.
48. Under section 39(2)(c) EqA an employer (A) must not discriminate against an employee of A's (B) … By dismissing B. Further, under section 39(7)(b) dismissal includes termination of employment by B by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.
49. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
50. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
51. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
52. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
53. We have considered the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen Ltd v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Ayodele v Citylink Ltd [2018] ICR 748 CA; Environment Agency v Rowan [2008] IRLR 20 EAT; Newham Sixth Form College v Sanders EWCA Civ 7 May 2014; Archibald v Fife Council [2004] IRLR 651 HL General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 EAT; Sheikholeslami v University of Edinburgh [2018] IRLR 1090; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; Royal Bank of Scotland v Ashton [2011] ICR 632 EAT; Project Management Institute v Latif [2007] IRLR 579 EAT Pnaiser v NHS England [2016] IRLR 170 EAT; Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14; City of York Council v Grosset [2018] IRLR 746 CA; Sheikholeslami v University of Edinburgh [2018] IRLR 1090; Robinson v Department for Work and Pensions [2020] IRLR 884; Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] IRLR 306 SC; Homer v West Yorkshire Police [2012] IRLR 601 SC; Hardy & Hansons plc v Lax [2005] IRLR 726 CA; Birtenshaw v Oldfield [2019] IRLE 946; O'Brien v Bolton St Catherine's Academy

[2017] EWCA Civ 145; Kapenova v Department of Health [2014] ICR 884; Cross v British Airways plc [2005] IRLR 423 EAT; Redcar and Cleveland Borough Council v Bainbridge [2007] IRLR 91; Hensman v Ministry of Defence UKEAT 0067/14/DM; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT; Unite the Union v Nailard [2018] IRLR 730 CA; Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 EAT; GE Daubney v East Lindsey District Council [1977] IRLR 181 EAT; BS v Dundee City Council [2013] IRLR 131 CS; Garrick's (Caterers) Ltd v Nolan [1980] IRLR 259; O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

54. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015) ("the ACAS Code").
55. Decision
56. The claimant's claims to be determined by this Tribunal were agreed at a case management preliminary hearing and set out in an agreed List of Issues in the Case Management Order of Employment Judge Smail dated 8 November 2024 ("the List of Issues"). The claimant had legal advice at that time. The parties confirmed at the commencement of this hearing that they understood and agreed that these were the only issues which fall to be determined by this Tribunal. The claimant also clarified at this hearing that the alleged failures to make adjustments relate to the circumstances as they arose at his third capability meeting with Mr Prior on 4 December 2023, and as at the appeal hearing with Mr Bellamy on 9 January 2024. That being the case, there are no jurisdictional issues relating to time as previously indicated.
57. The claimant's claims are therefore for disability discrimination, (being direct discrimination, discrimination arising from disability, an alleged failure to make adjustments, and harassment), and for unfair dismissal. We deal with each of these claims in turn
58. The Claimant's Disability:
59. The disabilities relied upon by the claimant are Obsessive Compulsive Disorder (OCD), and Long-term Stress. For the reasons explained in findings of fact above, we find that at all material times the claimant suffered from these mental impairments which had a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities, including social interaction, fatigue, and concentration. There was a substantial adverse effect because it was more than minor or trivial, and there was a long-term effect because it lasted for at least 12 months. The respondent has conceded that the claimant was a disabled person by reason of these two impairments relied upon at all material times. We agree with that concession, and we so find.
60. Harassment:
61. Turning to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
62. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a

tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.

63. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." Similarly, Langstaff P emphasised in Betsi at para 12: "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc ..."
64. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: "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 consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."
65. On the question whether conduct is "related to" a protected characteristic, in Unite the Union v Nailard the Court of Appeal explained that the words "related to" in section 26 EqA encompass both actions which are "caused by" the protected characteristic, and those "associated with" the protected characteristic.
66. There are seven allegations of harassment, and the first four relate to Mr Prior's conduct of the third capability meeting on 4 December 2023. We deal with each of these in turn.
67. The first is: "Immediately refusing the claimant's flexible working request without any due consideration".
68. We reject this assertion as not being factually correct. The respondent had been considering how to accommodate the claimant's request for various adjustments for over 18 months. It is true that the claimant requested a permanent flexible working arrangement with him working his preferred days of Monday, Tuesday and Friday, but that was the arrangement which the claimant was working at that time and it is simply not true that Mr Prior failed to give due consideration to the claimant's request to make that permanent. The various options which were open to the claimant had been discussed and considered many times.
69. The second is: "Asking the claimant to agree to a change in working arrangements without any prior indication that this would be the case," and the third is: "Not providing the claimant with information surrounding the consequences of his decision."
70. We also reject these assertions as not being factually correct. The claimant had been notified both verbally and in writing that this would be the case. Mr Prior's letter of invitation to the third formal capability meeting dated 22 November 2023 stated: "the purpose of this meeting will be to review the situation with all the information available

at this time. Based upon our discussion we will aim to make a decision in reference to your future with the Company, and you should be aware that this could lead to the termination of your employment due to ill-health and capacity."

71. The fourth is: "Pressurising the claimant to make a decision immediately without explaining why an instantaneous decision was needed."
72. Again, we reject this assertion as not being factually correct. When the claimant was unable to give an immediate decision in reply to Mr Prior's offer, Mr Prior agreed that the claimant could consider the matter overnight and confirm his position the following morning.
73. The fifth and sixth allegations of harassment are linked. The fifth is: "Continuing with the third capability meeting on 5 December 2023 despite the claimant being too unwell to attend, make representations, or ask further questions," and the sixth is: "Making the decision to terminate the claimant's employment without having yet considered the claimant's response about his future working arrangements."
74. We agree, and we find these two allegations are factually correct. We can understand why Mr Prior appears to have lost patience with the claimant given the adjustments which had been in place for over 18 months. The other frustrating aspect was that the claimant had confirmed that the problem was "not about the hours", and that he remained determined to work his chosen days of Mondays, Tuesdays and alternate Fridays. The respondent was aware that the claimant wished to have a structured rota in advance, because he found change at short notice to be disruptive and stressful. Nonetheless, despite asking the question on a number of occasions, the claimant remained unable to explain why his disability caused any substantial disadvantage which could only be assisted or ameliorated by working on those specific days. The respondent did not receive any confirmation as to why the claimant felt he needed to work only on these specific days, rather than other days, provided that he was given due notice of the rota so as to provide the structure and stability which he needed.
75. It was against this background, and the claimant's continuing failure to provide confirmation of why he needed to work these specific days, and also when he could commit to undertaking his contractual 20 hours, that Mr Prior continued the meeting on 5 December 2024 and (in the absence of any further input from the claimant) made his decision to terminate the claimant's employment. On balance we do not think that this amounts to harassment because the statutory definition is not met. To the extent the claimant felt that this process and the decision created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, we do not think it was reasonable for him to perceive that that was the case. Even if we are wrong on this point, and for example the claimant felt intimidated by this decision-making process, we cannot find that the impugned conduct (Mr Prior's actions above) were related to the claimant's disability. The reason why these actions occurred was that after a lengthy period of adjustments there was a pressing need for the respondent to resolve the ongoing employment difficulties with the claimant colleagues. We do not find that the fifth and sixth allegations of harassment are well founded.
76. The seventh and final allegation of harassment is this: "On 9 July 2024 at 8:17pm, the Claimant was walking along the road with his wife and young son in Exmouth, when Adrian Wheeler of the Respondent drove past him, rolled down the window and put one finger up to the Claimant." This allegation is denied by the respondent as never having happened. For the reasons explained at the end of our findings of fact, we are unable to conclude on the balance of probabilities that this incident occurred, and even if it had, we have no evidence to suggest that this alleged impugned conduct related to either of the claimant's disabilities. For these reasons this allegation is also dismissed.
77. The claimant's claim for unlawful harassment is therefore not well-founded and it is hereby dismissed.
78. Direct Discrimination:
79. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his disability than an actual or

hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed.

80. As for the correct comparator, paragraph 3.29 of the EHRC Code of Practice on Employment (2011) provides: The Comparator for direct disability discrimination is the same for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself.
81. As confirmed in Ayodele v Citylink Ltd, section 136 EqA imposes a two-stage burden of proof. Under Stage 1 the burden is on the employee to prove from all the evidence before the Tribunal facts which would, if unexplained, justify a conclusion not simply that discrimination was a possibility, but that it had in fact occurred. Under Stage 2 the burden shifts to the employer to explain subjectively why it acted as it did. The explanation need only be sufficient to satisfy the Tribunal that the reason had nothing to do with the protected characteristic.
82. In Madarassy Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was 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. The bare facts of a difference in status and a difference in treatment 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 act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in Ayodele v Citylink Ltd.
83. In this case, we have accepted the evidence of Mr Prior that he dismissed the claimant because the respondent could no longer tolerate the business and staff disruption caused by the claimant's working pattern, despite nearly two years of support and adjustments. He did not dismiss him because the claimant was a disabled person. Similarly, Mr Bellamy did not reject the appeal and confirm dismissal because the claimant was a disabled person. On the contrary, Mr Bellamy wanted to retain the claimant, and made an improved offer of further adjustments in the hope that the claimant would accept these and remain in the respondent's employment.
84. We find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination is not well-founded, and it is hereby dismissed.
85. Reasonable Adjustments
86. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in Environment Agency v Rowan. 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; (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.
87. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.

88. It is the essence of the duty to make reasonable adjustments that it requires the disabled person to be treated more favourably (as a result of their disability) than the non-disabled. They may need special assistance to compete on equal terms – per Lady Hale at para 47 of Archibald v Fife Council.
89. As 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".
90. There is no requirement to show that the disability caused the substantial disadvantage, merely that the PCP caused a substantial disadvantage to the disabled person as compared to those who are not disabled. This comparative aspect of the reasonable adjustments provision was described by Simler J in Sheikholeslami at para 48: "It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP … There is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances"
91. It is incumbent on a claimant to show the duty to make reasonable adjustments has arisen and there are facts from which it could be reasonably inferred, absent adequate explanation, that it has been breached. That requires (i) the showing of both substantial disadvantage (to show that the duty has arisen), and (ii) evidence of some apparently reasonable adjustment that could have been made (the issue of breach) see Project Management Institute v Latif.
92. The test of reasonableness of adjustment is an objective question to be determined by the tribunal – see Royal Bank of Scotland v Ashton. What is important is that the adjustment(s) chosen by the employer address the disadvantage and not that it is the claimant's preferred solution. As confirmed by the EAT in Linsley v HMRC: "An employer is not required to select the best or most reasonable of a selection of reasonable adjustments, nor is it required to make the adjustment that is preferred by the disabled person. This was also confirmed by the Court of Appeal in Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220 at [44] in which it is said that "so long as the particular adjustment selected by the employer is reasonable it will have discharged its duty"." It is also crucial for the Tribunal to ensure that in making this assessment it keeps in mind the particular disadvantage relied upon given the requirement for there to be correlation between the disadvantage in question and the steps taken to alleviate that disadvantage (Linsley at para 31).
93. In this case there are three PCPs relied upon by the claimant, which are these: (i) the requirement to work contractual hours; (ii) the requirement to work a minimum amount of contractual hours; and (iii) the requirement to work the same amount of contractual hours a week. The respondent does not dispute the first two of these, which it says is effectively the same PCP (namely to comply with the contractual hours), and we agree that these requirements were in place.
94. The third PCP is disputed by the respondent, because it says that as a matter of fact at the end of his employment the claimant worked Monday and Tuesday one week, and Monday Tuesday and Friday the next. There was no requirement or PCP to the effect that the claimant was required to work the same amount of contractual hours each week. We think that is putting the cart before the horse. We find that there was a

PCP to that effect, but an agreed reasonable adjustment had already been put in place by the respondent.

95. The question remains therefore the extent to which the claimant suffered any substantial disadvantage by reason of any of the three PCPs in comparison to non-disabled comparators, and if so whether the statutory duty to make reasonable adjustments was engaged.
96. The substantial disadvantage to which the claimant asserts he was put by these PCPs is this: "He requires stability in his weekly routine to ensure that he has a sufficient number of days away from the workplace as a coping mechanism to reduce stress which is a trigger for his OCD, and to ensure he can attend work consistently and thereby reduce his sickness absence." It is important to note that there is no suggestion here that the claimant might be at any disadvantage by not working specifically on Monday and/or Tuesday. It is stability in the working routine (and not any specific day(s)) which he says is required. Similarly, there is no suggestion that any substantial disadvantage would be suffered by reference to the amount of hours which the claimant would be required to work. This is consistent with the claimant's confirmation to Mr Prior that it is "not about the hours".
97. The four adjustments which the claimant asserts it would have been reasonable for the respondent to have made are these: (i) agreeing with the claimant a timescale by which he believed working up to 20 hours was achievable; (ii) following OH advice and keeping the claimant on 17.5 hours per week for 3 - 6 months and then re-assessing his hours afterwards; (iii) continuing the claimant's reasonable adjustments (which the claimant accepted at this hearing is a repetition of (i) and (ii) above, and not now a separate required adjustment); and (iv) agreeing a flexible working arrangement for the claimant to have set days in order to maintain his productivity and absence management. The claimant confirmed at this hearing that these allegations relate to the circumstances as they arose at his third capability meeting with Mr Prior on 4 December 2023, and as at the appeal hearing with Mr Bellamy on 9 January 2024.
98. As for PCP1 and PCP2, the trouble which the claimant faces is that both of these PCPs and the first two suggested adjustments relate to the number of working hours, when on the claimant's own case the exact number of working hours did not cause any substantial disadvantage, and it was "not about the hours". Neither of these two PCPs gave rise to any substantial disadvantage to the claimant (when compared with non-disabled comparators) by reason of his two disabilities of OCD and/or stress For this reason we do not accept that the statutory duty to make such adjustments as may be reasonable was engaged in respect of the first two PCPs relied upon in the List of Issues.
99. The same point applies to the third PCP (the requirement to work the same amount of contractual hours each week) and the fourth suggested adjustment (agreeing a flexible working arrangement for the claimant to have set days). The claimant has not established that there was any substantial disadvantage caused to him when compared to non-disabled comparators by a requirement to work the same amount of contractual hours each week. We also reject this allegation for this reason.
100. In any event, with regard to the claimant requiring a structure and set days in advance, an adjustment had already been made and it was in place. As a matter of fact, at the end of his employment the claimant worked Monday and Tuesday one week, and Monday, Tuesday and Friday the next. These were set days. In addition, both Mr Prior and Mr Bellamy made the claimant offers of adjustments to work set days, with Mr Bellamy confirming that the claimant would usually be allowed to work his preferred days of Mondays, Tuesdays and Fridays in circumstances where he would always have at least four weeks' notice of the rota, and also four weeks' notice of any change. This clearly was intended to give the claimant stability and structure in circumstances where it was only the absence of the same which might possibly have given rise to any substantial disadvantage These offers were declined by the claimant.
101. We therefore conclude that the claimant's claim that the respondent failed to make reasonable adjustments is not well-founded and it is also hereby dismissed.

102. Discrimination Arising from Disability s15 EqA:

103. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

104. In City of York v Grosset, the Court of Appeal made it clear that s15(1)(a) EqA requires investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did the "something" arise in consequence of B's disability?

105. As confirmed by Simler P in Sheikholeslami v University of Edinburgh: "The approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, 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 arising 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 the light of the evidence (see City of York v Grosset).

106. In Robinson v Department for Work and Pensions the Court of Appeal emphasised the importance in a section 15 EqA claim of considering the thought processes of the putative discriminator, and also that "but for" causation does not suffice. The question of what amounts to "unfavourable" treatment was considered by the Supreme Court in Williams v Trustees of Swansea University Pension and Assurance Scheme. Lord Carnwath suggested that a relatively low threshold of disadvantage suffices to trigger the need for justification under section 15 EqA [at para 27].

107. In Basildon & Thurrock NHS Foundation Trust v Weerasinghe the EAT held that the fact that unfavourable treatment might be loosely related to a person's disability, or the context in which the disability was manifested, is not the same as showing that the treatment was the result of something arising out of the person's disability.

108. In this case the claimant relies upon one act of less favourable treatment, namely his dismissal. We have found (and it was never disputed) that the claimant was dismissed, and we find that this was clearly less favourable treatment.

109. The next question which arises is whether this less favourable treatment of dismissal occurred because of something arising in consequence of the claimant's disability. We find that this was the case, because the capability procedure applied to the claimant, and his subsequent dismissal for capability, arose in consequence of his sickness absence and his consequent inability to work his full contractual hours.

110. Given that the claimant suffered less favourable treatment because of something arising in consequence of his disability, the claimant will succeed in this claim unless the respondent is successful in arguing that the dismissal was justified as being a proportionate means of achieving a legitimate aim, and we now turn to the issue of whether this dismissal was justified in the context of section 15 EqA.

111. In considering the objective justification defence, the following key principles were set out by Lady Hale in Homer v Chief Constable West Yorkshire Police [paras 22 –

24]: (i) to be prepared a measure has to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so; (ii) if the measure goes further than is (reasonably) necessary to achieve the aim it will be disproportionate; and (iii) assessment of justification includes comparison of the impact of the act upon the claimant as against the importance of the aim to the employer. This expressly approves the judgment of the Court of Appeal in Hardys & Hansons plc v Lax.

112. Part of the process of determining whether the measure goes further than is reasonably necessary to achieve the aim is to consider whether the aim could have been achieved by any lesser measure – see Birtenshaw v Oldfield.

113. In in O'Brien v Bolton St Catherine's Academy [at para 45] Underhill LJ recognised that the severity of the impact on the employer or the employee's continuing absence is an important factor in determining the proportionality of dismissal. In addition, a substantial degree of respect should be afforded to the decision maker as to the employer's reasonable needs [at para 53]

114. In addition, the defence of justification does not fail merely because there is a less discriminatory means of achieving the legitimate aim in question (Kapenova v Department of Health). Budgetary considerations may justify discrimination if they are in combination with other reasons (Cross v British Airways plc and Redcar and Cleveland Borough Council v Bainbridge). It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc v Lax).

115. Indeed, a tribunal will err if it fails to take into account the business considerations of the employer (see Hensman v Ministry of Defence) but the tribunal must make its own assessment on the basis of the evidence then before it.

116. In this case the legitimate aim relied upon by the respondent and confirmed at this hearing is as follows: "There is a requirement for the business to operate the store effectively and profitably whilst giving consideration to the work-life balance of the whole of the team of employees". We find that this aim was legitimate. The next issue to be determined is whether the less favourable treatment of dismissal was a proportionate means of achieving that legitimate aim.

117. The respondent has explained that the store did not have the budget to recruit additional colleagues. The colleagues who were employed within the store were unable to continue to cover the claimant's requested hours at short notice, which had been the case historically. Asking other employees to cover the claimant's absences was causing increased stress and resistance from the other employees, and the respondent had incurred additional overtime costs. The claimant would not have been dismissed if he had been able to commit to the contractual hours in his contract of employment. The circumstances prevailing were that he had said that it was "not about the hours", but nonetheless remained unwilling to confirm when he definitely could increase from 17.5 hours per week back to his original 20. In addition, the respondent was unable to promise the claimant that he could work every single Monday Tuesday and alternative Friday for an indefinite period on a permanent basis, not least because the claimant would be required along with other employees to cover holiday absences. Nonetheless the respondent had offered a structured work rota on at least four weeks' notice in circumstances where the claimant's preference to work on Mondays, Tuesdays and alternative Fridays would be honoured if at all possible. In addition, Mr Bellamy offered at least four weeks' notice of any change to any notified rota.

118. The respondent only dismissed the claimant in circumstances where the claimant was unable to commit to work his contractual hours (even though on his own case the hours were not the problem and no substantial disadvantage was caused by reason of doing so), and where a structured rota was offered on four weeks' notice so as to meet the potential difficulty of the claimant not knowing what the structure was in advance. The respondent plainly considered non-discriminatory alternatives to dismissal. These were on offer to the claimant, but he declined to respond, let alone accept them.

119. Against this background we find that the dismissal of the claimant was a proportionate means adopted by the respondent of achieving its legitimate aim. Accordingly, we find that the claimant's claim under section 15 EqA is not well-founded and it is also hereby dismissed.

120. Unfair Dismissal s98(4) of the Act

121. Finally, we turn to the claim for unfair dismissal.

122. We have considered section 98 (4) of the Act which provides "…. 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".

123. In general terms there are two important aspects to a fair dismissal for long term illness or for injury involving long-term absence from work. In the first place, where an employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait longer for the employee to return (see Spencer v Paragon Wallpapers Ltd). In S v Dundee City Council the Court of Session held that the Tribunal must expressly address this question and balance the relevant factors in all the circumstances of the individual case. Such factors include whether other staff are available to carry out the absent employee's work; the nature of the employee's illness; the likely length of his or her absence; the cost of continuing to employ the employee; the size of the employing organisation; and, balanced against those considerations, the "unsatisfactory situation of having an employee on very lengthy sick leave".

124. The second important aspect is that a fair procedure is essential. This requires in particular consultation with the employee; a thorough medical investigation (to establish the nature of the illness or injury, and its prognosis); and consideration of other options, in particular alternative employment within the employer's business. An employee's entitlement (if any) to enhanced ill health benefits will also be highly relevant.

125. The importance of full consultation and discovering the true medical position was stressed by the EAT in East Lindsay District Council v Daubney. Mr Justice Phillips stated: "Unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done … Only one thing is certain, that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done"

126. Other matters relevant to the consideration of fairness include efforts made by the employer to consider whether the claimant could be redeployed to other suitable employment (see for instance Garrick's (Caterers) Ltd v Nolan). When considering the fairness of a dismissal, the Tribunal must consider the process as a whole: Taylor v OCS Group Ltd. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, see Adeshina v St George's University Hospitals NHS Foundation Trust.

127. In this case we find that the reason for the claimant's dismissal was capability because the claimant remained unable to complete his full contractual duties and/or his contractual hours of work. This is a potentially fair reason for dismissal under s98(2)(a) of the Act.

128. At the time Mr Prior took his original decision to dismiss, the respondent had obtained and considered three Occupational Health referrals and reports, and it had

also raised and considered subsequent questions on those reports. The respondent had arranged three capability welfare meetings with the claimant under its procedure. There had been constant consultation with the claimant throughout this process, and consideration of, and implementation of, various adjustments to his working arrangements, for a period of nearly two years.

129. If we have one criticism of the respondent's procedures and treatment of the claimant during this process it is this. It would have been preferable in our opinion for Mr Prior to have waited longer for the claimant to have confirmed his position after the meeting on 4 December 2023 which Mr Prior had adjourned overnight to allow the claimant to consider his options. However, our opinion as to what might be preferable is not the appropriate test.

130. It is clear to us in any event that further delay would not have made any difference. This is because despite confirming that it was "not about the hours" the claimant repeatedly failed to confirm when he would be able to undertake his contractual hours of 20 hours per week. The latest OH report had suggested that the claimant should be able to do so within three to six months, without saying why this was the case. Over one month had elapsed since that suggestion by the time of the dismissal meeting, and over four months had elapsed by the time of the appeal hearing. The claimant was unable to explain why he could not resume his full contractual hours, or when, at either of these meetings, after two years had elapsed from the initial agreement for him to work reduced hours. In addition, the claimant was unable to explain to the respondent throughout this process why he needed to work his preferred hours of Mondays and Tuesdays, with alternate Fridays subsequently added. He remained unable to provide reasons to this Tribunal. Although the claimant's GP fit notes had initially suggested an altered working structure of Monday and Tuesday, no reason was given as to why these specific days were required. It is notable that the OH advice never suggested that any specific days might be required. The whole point was that the claimant's OCD caused him unnecessary stress unless he had a working structure which was not liable to unnecessary disruption or unscheduled changes. The offer made by Mr Prior gave this degree of structure on at least four weeks' notice. The offer by Mr Bellamy was an improved offer to the extent that he would increase the contractual minimum requirement for one week's notice of any changes to a further four weeks' notice. The respondent was never provided with an explanation as to why this was not an acceptable adjustment or solution to the claimant's difficulties, nor why he was unable to return to work on this basis. He did not respond Mr Prior's offer, but rather chose to appeal the dismissal decision immediately. He did not respond to Mr Bellamy's improved offer when Mr Bellamy was seeking to retain the claimant in employment.

131. Although the claimant suggests that it was only a peremptory investigation, nonetheless Mr Prior did consider whether any alternative employment was available, and there was none. Given the claimant's role it was not suitable for home working. In addition, the claimant wished to remain working at the Exmouth store. Mr Bellamy had considered the matter in detail afresh at the appeal hearing, and he made an improved offer of working conditions to the claimant in the hope of being able to retain him in employment. We find that the respondent had considered and exhausted all reasonable and necessary alternatives to dismissal. In addition, its decision could not be said to have been tainted by any unlawful discrimination.

132. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether 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.

133. Against this background, and notwithstanding the large size and administrative resources of this respondent, we find that the claimant's dismissal was within the band of reasonable responses which were open to the respondent on the facts of this case, and that his dismissal was fair and reasonable in all the circumstances of the case. Accordingly, we find that the claimant's claim for unfair dismissal is not well-founded and it is hereby dismissed.

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Employment Judge N J Roper
Dated 10 July 2025

Judgment sent to Parties on
25 July 2025

Jade Lobb
For the Tribunal Office

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