EMPLOYMENT TRIBUNALS

Claimant: Mr Neil Wilson

Respondent: Aliaxis UK Limited

Heard at: Ashford **On:** 27 to 30 May 2025

Before: Employment Judge Jones KC
Mrs Judith Clelow
Mr William Dixon

Appearances:

For the Claimant: In person
For the Respondent: Mr Jeffrey Jupp, King's Counsel

JUDGMENT

The reserved, unanimous decision of the Tribunal is as follows:

1. The claim for unfair dismissal succeeds.
2. The direct disability discrimination claims fail and are dismissed.
3. The discrimination arising from disability claim succeeds in so far as it relates to the Claimant's dismissal.
4. The failure to make reasonable adjustments claim fail and is dismissed.
5. The harassment claim fails and is dismissed.

REASONS

Claims

1. The Claimant had brought the following claims:
   (1) Direct Disability Discrimination (**EqA 2010**, **s. 13**);
   (2) Discrimination Arising from Disability (**EqA 2010**, **s. 15**);
   (3) Failure to make Reasonable Adjustments (**EqA 2010**, **s. 20**);

(4) Harassment relating to Disability (**EqA 2010**, **s. 26**); and

(5) Unfair Dismissal (**ERA 1996**, **s. 94**)

(1) Direct Disability Discrimination

(a) The Law

(i) Disability

2. The Claimant alleges and the Respondent denies that the Claimant is a disabled person within the meaning of **EqA 2010**, **s. 6**.

3. A person has the protected characteristic of disability where they have a physical or mental impairment that has a substantial adverse effect on their ability to carry out normal day to day activities and which has lasted for more than 12 months or which is likely to do so **EqA 2010**, **s. 6** and **Sch 1**, **Para 2**.

4. A substantial adverse effect is one that has a more than minor trivial impact: **EqA 2010**, **s. 212**.

5. Normal day-to-day activities includes the person's ability to participate fully and effectively in working life on an equal basis with other workers: **EqA 2010**, **Sch 1**, **Para 5A**[1].

(ii) Direct Discrimination

6. Direct discrimination because of disability is prohibited by **EqA 2010**, **s. 13** which, so far as is presently relevant, provides as follows:

> "(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"

7. Assessing whether a person has been "less favourably treated" requires a comparison to be performed. The comparison may be performed either with an actual person or, where no suitable comparator exists, with a hypothetical comparator. In either case, the comparator must be someone whose relevant circumstances are not materially different to those of the complainant: **EqA 2010**, **s. 23**.

8. **EqA 2010**, **s. 23(2)** makes special provision in relation to disability cases providing that the "circumstances relating to the case" include a person's abilities. This means that the abilities of the complainant and their comparator must be the same. One does not simply select a non-disabled person as a comparator. That is because the protected characteristic for the purposes of **s. 13** is not "being disabled" but having a "particular disability": **EqA 2010**, **s. 6(3)(a)**. The question, therefore, is whether a complainant has been treated less favourably that an equivalently able comparator because of their particular disability.

9. In determining whether less favourable treatment was "because of" a protected characteristic the Tribunal must identify "the reason why" the Claimant was treated as he was: **Chief Constable of West Yorkshire Police v Kahn** [2001] HL 48, [2001] ICR 1065. That does not require, however, that the protected characteristic should be the

[1] This paragraph came into effect from 1 January 2024 but reflected the pre-existing position on authority.

sole or even principal reason for the less favourable treatment. The characteristic should not be any part of (in the sense of being a material cause) the reasons for the treatment in question: **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] ICR 1205 EAT.

(b) **What the Claimant Alleges**

(i) **Disability**

10. The impairment upon which the Claimant relies is myofascial dysfunction of the lumbar spine. Myofascial dysfunction is a pain disorder. This was a matter we clarified with the parties after the hearing. The evidence had proceeded on the basis that the Claimant had, to put it imprecisely, a bad back which caused him pain and which had the effect, at least at times, of significantly affecting his movement and which prevented him from being fit for work.

11. At a preliminary hearing held on 19 March 2024, the employment judge had recorded the impairment as "manual disinfunction of the lumbar spine". We concluded that this was a mistranscription. The word "disinfunction" does not exist. Manual dysfunction of the lumbar spine (as Mr Jupp had recorded it in his submissions) does not appear to be a recognised medical condition. "Myofascial dysfunction of the lumbar spine" by contrast, is a recognised clinical condition.

12. We concluded that "manual disinfunction" was a mistranscription of "myofascial dysfunction". The basis of our conclusion was that there were documents included in the bundle that expressly used the latter terminology when describing the Claimant's condition. "Myofascial dysfunction of the lumbar spine" is the condition that is set out in a letter from the Claimant's physiotherapist dated of 2 January 2023. It is also contained in the Claimant's Statement of Fitness for Work dated 17 March 2023.

13. The Claimant has confirmed that this is, indeed, the impairment upon which he relies. The Respondent's position is that, subject to certain conditions, they agree that we should treat the Claimant's alleged impairment as being myofascial dysfunction. The Respondent's conditions were set out in an email 30 May 2025 and were as follows:

    a. "the Tribunal are content that, notwithstanding that the focus of the cross-examination was on the unrestricted nature of the Claimant's movement, the case that the Claimant's movement on the videos showed an absence of pain and discomfort has been properly put to him.

    b. the Tribunal is content to record an additional submission of the Respondent to the effect that, had the Claimant had the level of pain and discomfort he asserted in his Unum application, then he would not have been moving as freely as he was in the videos put to him."

    The proposals, made by the Respondent's counsel Mr Jupp, were characteristically sensible so we were happy to adopt them of our own motion rather than determining whether it was open to the Respondent to insist upon them.

(ii) **Less Favourable Treatment**

14. The alleged treatment upon which the Claimant relies is:

    (1) On 20 June 2023: Dismissal;

    (2) On 16 March 2023: Being accused of fraud by Joanne Askham; and

(3) On 16 March 2023: Being told that he should resign and that, if he did, he would avoid being reported to the police or being called to a disciplinary hearing and dismissed.

(c) **What the Respondent Says**

(i) **Disability**

15. The Respondent denies that the Claimant is a disabled person. It alleges that has at least exaggerated the impact that any impairment may have on him.

(ii) **Less Favourable Treatment**

16. The Respondent accepts that the Claimant was dismissed. The Respondent denies that Mrs Askham accused the Claimant of fraud. The Respondent denies that the Claimant was threatened that if he did not resign he might be reported to the police or disciplined and dismissed.

17. The Respondent says that, in any event, a comparator would have been treated in the same way.

(2) Discrimination Arising from Disability

(a) **The Law**

18. So far as is presently relevant, **EqA 2010**, **s. 15** provides:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

19. Whether the treatment is a proportionate means of achieving a legitimate aim is for the Tribunal and not the employer to judge: **Chief Constable of West Yorkshire Police v Homer** [2012] UKSC 15.

20. In assessing whether treatment is proportionate, the Tribunal will apply the test in **Bank Mellat v Her Majesty's Treasury (No. 2)** ([2013] UKSC 39) one element of which is whether a "less intrusive measure could have been used without unacceptably compromising the achievement of the objective".

(b) **What the Claimant Alleges**

21. The alleged treatment upon which the Claimant relies is:

(1) Ms Jennings refused to allow the Claimant to go home in February 2023; and

(2) The Claimant's dismissal.

22. The "somethings" that is alleged to have arisen from his disability are:

(1) The Claimant's absence from work; and

(2) The Claimant's inability to perform his role due to pain.

(c) **What the Respondent Says**

23. The Respondent denies that Ms Jennings refused to allow the Claimant to go home on an occasion in February 2023 and says that no evidence was led by the Claimant on that issue.

24. In respect of the dismissal, the Respondent accepts that the Claimant was dismissed and that it was because of something arising from the Claimant's disability (the Respondent accepts that "by the date of C's dismissal R had the requisite knowledge"[2]) but says that the dismissal was a proportionate means of achieving a legitimate aim.

25. The aim relied upon in "managing sickness absence and acceptable levels of attendance".

(3) Failure to make reasonable adjustments

(a) **The Law**

26. The duty to make reasonable adjustments is imposed by **Equality Act 2010, s. 20** which, so far as is relevant provides:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> …"

27. **Section 21** makes a failure comply with the duty an act of discrimination:

> "(1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
>
> …"

28. **Schedule 8, pt 3, Para 20(1)** provides:

> "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know … that an interested disabled

[2] This is expressly accepted in the Respondent's closing argument, from which the quotation is taken.

person has a disability and is likely to be placed at the disadvantage referred to in the first … requirement."

29. Altering an employee's duties may be a reasonable adjustment. However, the duty to make reasonable adjustments will not normally extend to creating a new job for which the employer has no need **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664.

(b) **What the Claimant Alleges**

30. The "provision, criterion or practice" upon which the Claimant relies is the requirement that warehouse operatives should be able to perform the full range of tasks. The Claimant says that the PCP put him at a substantial disadvantage compared to someone without his disability because he was unable to comply with it.

31. The adjustment that the Claimant says the Respondent should have made is being given an office job.

(c) **What the Respondent Says**

32. The Respondent accepts that it imposed a requirement on the Claimant to "undertake all aspects of his role as a warehouse operative".

33. The Respondent further accepts that the requirement "placed C at a substantial disadvantage because he could not undertake his role."

34. The Respondent says that there was no "office job" available to which to appoint the Claimant and that it did not need such a job. On the contrary, it says that there was a recruitment freeze in place at the time. There were vacancies and the Claimant was provided with vacancy lists, but he made no application until after his appeal had failed, by which time his employment was at an end.

(4) **Harassment**

(a) **The Law**

35. **EqA 2010**, **s. 26** provides, so far as is presently relevant, as follows:

> "(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."

36. The conduct may "relate" to a protected characteristic even if the complainant does not possess it and where the alleged harassers know that he does not: **English v Thomas Sanderson Blinds Ltd** [2008] EWCA Civ 1421.

(b) **What the Claimant Alleges**

37. The treatment which the Claimant alleges amounted to harassment is as follows:

(1) Following the Claimant/arranging for the Claimant to be followed; and

(2) Lisa Jennings/Joanne Askham not believing the Claimant and not accepting his fit note.

38. The Claimant says that these matters had the effect of violating his dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(c) **What the Respondent Says**

39. The Respondent agrees that arrangements were made to follow the Claimant. Indeed, it relies on video made by the enquiry agents appointed to do so. However, it contends that the conduct did not relate to the Claimant's disability. It was done precisely because there was considerable suspicion about whether he was disabled.

40. The Respondent also agrees that Ms Askham did not believe the Claimant's fit note. She thought he was, to use the language of the Respondent's closing submission, "engaged in fraud".

41. The Respondent also contends that the Claimant's dignity cannot have been violated, nor can the necessary harassing environment have been created because the Claimant knew he was either exaggerating or outright fabricating his condition.

42. This element of the claim is also said to be out of time.

(4) **Unfair Dismissal**

(a) **The Law**

43. An employee has a right not to be unfairly dismissed conferred by **ERA 1996**, **s. 94**.

44. In order for a dismissal to be fair it must be for one of the potentially fair reasons set out in **ERA 1996**, **s. 98**. For present purposes two are relevant:

(1) Dismissal for capability within **ERA 1996**, **s. 98(1)(c)**;

(2) Dismissal for some other substantial reason within **ERA 1996 s. 98(2)**.

(b) **What the Claimant Alleges**

45. The Claimant alleges that the dismissal was unfair because he should have been given other work to do. There was no need to dismiss him.

(c) **What the Respondent Says**

46. The Respondent says that the Claimant had been absent from work for around 15 months; both the Claimant an Occupational Health Assessment suggested that he was not fit to resume his duties and that it was unlikely that he would be in the short term; in the circumstances, it was reasonable to terminate his employment. The reason was

either a reason relating to the Claimant's capability or it amounted to some other substantial reason.

47. The Respondent is not alleging that the Claimant was dismissed for malingering. The dismissing officer, the Respondent says, was persuaded that the Claimant had an impairment that made it impossible to resume his former duties. Whilst, the Director of HR for UK and EMEA, Joanne Askham, who initiated the process that resulted in his dismissal was personally persuaded that the Claimant was a malingerer and had potentially defrauded the Respondent of sick pay, she decided to leave that concern formally unaddressed.

48. The Respondent has a number of formal employment policies. It says that whether or not it followed the correct policy in dealing with the Claimant, the process that led to the Claimant's dismissal was a fair one.

(1) Findings of fact

49. The Respondent manufactures "plastic piping solutions". At the relevant time it operated a number of warehouses on a site in Lenham, Maidstone, Kent.

50. The Claimant was employed by the Respondent from 1 February 2021 as a warehouse operative. He was, after a period, assigned to work in the pipe warehouse. The Claimant reported to a senior warehouse operative called Ms Theresa Cornelius who, in turn, reported to Miss Lisa Jennings, the Warehouse Manager. At the relevant time Miss Jennings was not yet married. Her married name is Mrs Lisa Latter. It is her married name that we use below.

51. During the course of 2021, the Claimant alleges, he was bullied by a colleague who worked alongside him in the pipe warehouse. The Respondent organised a mediation meeting. The bullying allegations are not directly relevant to the claim, but the Claimant alleges that at this meeting, as part of an attempt to persuade his employer to move him to work in a different warehouse, he made them aware that he experienced back pain and that that meant he had difficulty picking pipes from storage for onward delivery to customers. The meeting was attended by Mrs Latter and Mr Martin Humphrey. Mr Humphrey is UK Logistics and Warehouse Manager.

52. Notwithstanding the Claimant's desire to be assigned elsewhere, he continued to work in the pipe warehouse.

53. Mrs Latter's unchallenged evidence was that around March 2022 the Claimant raised concerns that he was suffering from pain in his wrist. This resulted in the Claimant's weekly time in the pipe warehouse being reduced from 5 days a week to 3. In the two other days he completed work orders and picked fittings. Mrs Latter says that fittings often weigh more than pipes.

54. On 17 March 2022, the Claimant completed an incident card. The card said: "I think I have strained a muscle in my hand and I'm feeling pain, the reason of this is lifting heavy object all day everyday as I have already explained to my manager and my line leader, can someone look into this for me please". Mrs Latter told the Tribunal that an incident card was not the correct way to raise a question of injury (notwithstanding that the card invites the person completing it to place it in the "accident form postbox"). By this date, she told the Tribunal, and we accept, the boxes were gone and the forms were used for hazard identification.

55. Mrs Latter appears to have been very sceptical of the Claimant's account. She turned to Mr Humphrey and Mr Michael Stegeman, Employee Health and Safety Director, for advice, saying in an email:

> "I need support on this incident card.
>
> This is from neil wilson who is trying to find every opportunity to be removed from the pipe warehouse as he does not like the role nor the other warehouse operates who work there.
>
> Do I take this card and see if he reports it to a first aider as an accident.
>
> Do we Michael do a personal risk assessment on him doing the job?
>
> …"

They agreed to remove the Claimant from working with pipes until they could carry out a risk assessment.

56. The incident card resulted in a meeting attended by the Claimant, Mrs Latter and Ms Cornelius. Mrs Latter's original recollection was that it had been an in-person meeting but that a Teams meeting had been commenced on a computer with a view to recording and automatically transcribing what was said. Prompted by the Respondent's counsel to consider the content of a contemporaneous email she then told the Tribunal that the meeting had not be in person after all. Instead, she had been working from home and the meeting had been conducted over Teams. During the course of the meeting, the Claimant told Mrs Latter that he suffered from back pain and that he had done so in the past.

57. Mrs Latter already knew that the Claimant had experienced back pain because he had told her during the mediation in 2021. However, this was treated as a new development and resulted in a referral to an OH specialist. The Claimant was not examined until 4 April 2022

58. On 21 March 2022, the Claimant says he left work early. He says that he had an accident and that it caused him so much pain that he was reduced to tears. There is no formal record of any accident.

59. At 14:34 that day he sent an email to his manager, Mrs Latter, saying:

> "Hello Lisa just letting you know I have received a call from my doctor today as I already speak to my line leader, my doctor has advised me that I shouldn't lift anything heavy because it will make my back worse, and doctor also advise I should take time off work as I may have a slipped disc because of the type of work that I am doing and that's what causing the pain, can I finished a few hours early today as I have to pick up my prescription and can I have tomorrow as a emergency holiday please and thank you."

The email does not mention a specific accident, but it is consistent with something having happened which caused a material deterioration in his condition – specifically a worsening of his pain.

60. Mrs Latter's evidence was that she was aware that the Claimant had left early to collect a prescription, but that the Claimant had not explained why he needed one. There was no suggestion that he had suffered from an injury and, if there had been, she would have engaged the first aider, taken photographs and commenced a "root cause

analysis". The Claimant was insistent that Mrs Latter had seen him in pain. Mrs Latter denied the suggestion. Whilst we did not doubt that Mrs Latter was doing her best to help the Tribunal, we were concerned about the reliability of her evidence. In addition to her poor recollection of the circumstances of the meeting of 17 March 2022, the suggestion that all that she knew was that the Claimant needed to leave early to collect a prescription is very difficult to reconcile with what she was told expressly in the email quoted above. On balance, we prefer the Claimant's evidence and conclude that there was some kind of incident that day that led to a worsening of his back pain. That finding is consistent with his later suggestions to health professionals that there had been an accident (see for instance the Kent County Council Occupational Therapy Assessment performed on 11 April 2024).

61. On 5 April 2022, the Respondent was provided with a report from a Consultant Occupational Health Physician, Dr Cooper. The doctor had spoken to the Claimant on the 'phone. The report has a section entitled: "Relevant Medical History and Current Position" which says as follows:

> "Neil told me that he has been signed off sick for about two weeks. He said he has been developing gradual onset of increasing pain in his lower back and elbow. He did mention that in the past there was an episode when he had back pain, but it resolved with appropriate treatment and he has been fine until recently. The pain is central in his lower back and does not radiate down his legs. It was constant, but with rest and medication it is now easing.
>
> Neil had a telephone consultation with his GP and prescribed him Co-codamol tablets, which have been having the side effects of making him feel somewhat drowsy. He told me through the telephone call that he can now lean forward and bend and his back feels stiff when he does this, but it is not painful. He told me that he is able to twist sideways.
>
> He believes he could lift up to about 10kgs. He very much wants to come back to work, based on the advice of his GP who I gather has recommended a phased return with amended duties."

It seems that whilst the Claimant was hoping for amended duties he was holding himself out as keen to return to work. If he was trying to exaggerate his pain, he was making rather modest claims.

62. Dr Cooper advised that he thought it unlikely that the Claimant was a disabled person and recommending that the Respondent should carry out a "risk assessment for manual handling to see what [the Claimant could] safely manage without causing him an exacerbation of his symptoms".

63. On 6 April 2022, the Claimant underwent a manual handling risk assessment of all warehouse work functions. It was conducted by Mr Michael Stegeman. The Claimant was asked to perform each work task in turn. He was frequently asked whether he was feeling any pain. His position seems to have been that he had a consistent level of pain in his back. He is recorded as saying, for instance: "Same ache in back as usual" and "Neil states that he has lower back pain at all times – wakes up no pain, ache comes about just with walking, riding bike, even without lifting." He does not suggest that any particular task exacerbates his pain, although he says in respect of the first assessed task: "No pain on one item but expects pain if had to move 20 non stop." Again, the claims made in respect of his pain are consistent but relatively modest. In his oral evidence, the Claimant suggested that the pain he experienced was much

more significant than is reflected in the risk assessment. On balance, we preferred the documentary evidence to the Claimant's account where they differ. The records do not contradict his case that he was experiencing what one might call "background pain", nor that he thought repeating the tasks might worsen his condition, but given that he was by this point on painkillers and was photographed performing the tasks, we think it likely that the account he gave of his pain that day is as recorded. The Claimant's assertion that he was suffering from a constant background pain is also reflected in an email sent on 8 April 2022 by Mr Stegeman to Mr Humphrey and Mrs Latter:

> "Neil stated that he was not covered by a fit note and had no restriction applied by medical practitioners, however, he did mention some residual back pain – lower back ache as he termed it which he has suffered from for a number of years and which is virtually constant once he has been up and about for 'a while' – which seemed to indicate approximately 1 hour after rising."

64. In same email Mr Stegeman records his view that he did not see "from the results of the review, any issues in the role unless anything is subsequently specifically identified by a medical practitioner".

65. Despite the optimism, the Claimant was again signed off sick on 3 May 2022. The condition was identified as "back pain, elbow pain".

66. On 28 June 2022, the Claimant was referred to a physiotherapist. The referring doctor observed that the Claimant was treated with "a home exercise program and mobilisation" but that his symptoms were getting worse. An MRI scan was sought. It seems that the MRI report was not forthcoming until November 2022.

67. The Respondent had in place a Group Income Protection Policy with an insurer called Unum. The benefit available to an employee was equivalent to 70% of their salary payable for two years, until their return to work or until their 70th birthday, whichever came first. The benefit became payable after a "deferred period" of 26 weeks. In July 2022, Ms Tina Johnson (a Senior HR Business Partner), made Unum aware of the Claimant's circumstances.

68. The deferred period came to an end on 20 September 2022. However, the benefit did not become payable at that point as an application had not yet been accepted.

69. As part of the application process, the Claimant had to complete a questionnaire. A copy of the questionnaire was amongst the documents in the bundle. It is undated. In it, the Claimant is asked to describe his illness or injury and the symptoms that he was then experiencing. His response was:

> "Chronic pain in lower back. Severe pain in right arm elbow and wrist"

Underneath that description he has ticked a box to indicate that his symptoms were "constant".

70. He is also asked to say whether his condition is deteriorating, improving or stable. He selects stable and then says:

> "Pain fluctuates between discomfort to extreme on a daily basis".

His position, therefore, is much as described in the risk assessment, i.e. there is a constant level of background pain which may be described as discomfort but which can become much worse. The worsening is brought on by physical exertion. He says

in response to an invitation to comment on his then current ability to perform activities of daily living:

> "I cannot perform any action which requires lifting of weight or stretching exerting my body in any manner or I feel a lot of pain."

71. What one might expect in such circumstances is that, provided that the Claimant was not having to lift weight, stretch or exert himself, it would not be immediately apparent that he was in pain. He would have good days and bad days (as the pain fluctuated on a daily basis), so that if one caught him on a good day, it would not be obvious, if on a bad day then it might be. Of course, if he was having a bad day, one would necessarily expect that you would be less likely to catch him at all as he would be less likely to be out of his house and active.

72. The Claimant is asked what parts of his occupation he is unable to perform and he says:

> "No manipulation of any kind of possibly heavy objects. No over extension of back."

He claims to require a "complete change of duties" in order to enable him to return to work.

73. On 10 November 2022, the Claimant had his MRI examination. The report, summarising, found no physical abnormality. We had no expert evidence before us dealing with the question whether myofascial dysfunction would be expected to result in a physical abnormality detectable by MRI. In the absence of such evidence, we did not feel able to assume that it would.

74. On 21 December 2022, the Claimant attended an appointment at the Wye Physiotherapy Clinic. The appointment resulted in a report dated 2 January 2023 which records the MRI outcome and states that the Claimant has "completed a course of treatment for myofascial dysfunction of the spine". We note that the physiotherapist did not appear to consider that the MRI results ruled out myofascial dysfunction. The Claimant is recorded as still reporting back pain at times but also as having a full range of movement and "normal neurology". He was discharged from the physiotherapist's care.

75. The Claimant appears to have told the Respondent that he was feeling much better and that he might be ready to return to work soon. That is recorded in a letter to him from Ms Johnson dated 12 January 2023 in which he is invited to a meeting scheduled for 17 January 2023 to discuss a safe return to work.

76. On 17 January 2023, Ms Johnson wrote to the Claimant to confirm that his application had been accepted by Unum and that he would receive payments backdated to 20 September 2022. Ms Johnson also made Ms Joanne Askham, HR Director, aware.

77. On the same day the Claimant appears to have seen his GP complaining of backache. He was prescribed ibuprofen. On 26 January 2023 the GP referred the Claimant to a physiotherapist for wrist pain.

78. Ms Askham says that, consistent with her usual practice when a claim has been submitted to the insurer, she then checked Claimant's social media accounts. Ms Askham was very concerned by what she saw. We turn now to what she found.

79. There are two photographs taken on 23 July 2022. At that time the Claimant was covered by a fit note recording him as suffering from back pain. The first shows him in a vest lying on the sand at the seaside gazing into the camera with his eyebrows raised. The second shows him leaning against a railing on an esplanade holding a bottle of water. He has his right leg raised, with his foot resting on the lower bar of the railing. His facial expression is not a smile but nor, for what it is worth, does it indicate that he is in any particular pain. Neither picture told us anything useful about whether he had myofascial dysfunction of the lumbar spine, particularly since he has always been clear that his pain varies in intensity.

80. Ms Askham also discovered a video dated 14 December 2022 in which the Claimant sings into a microphone. It was suggested to him that the video showed him "moving freely". He seems to us to be moving rhythmically from foot to foot. He is not, in any meaningful sense, dancing. He is not moving energetically or particularly exerting himself. He is not having to bend over or lift anything. Putting it at its highest, you could not tell from the video that this was someone who was suffering from a long-term problem with back pain. Again, we are conscious that his position has been that he has good days and bad days.

81. There are two pictures of the Claimant, dated 21 December 2022, in which he is depicted sitting down on a seat on what appears to be a railway platform. They are both selfies. In one he smiles into the camera, sat with his legs crossed, with his left index finger pointing at the lens. In the other he is affecting a facial expression that one might describe as delighted surprise. Once again, it would be impossible to tell from the photographs whether or not he was unwell.

82. There are two more music videos that the Tribunal has been shown dated 1 and 8 January 2023. Again, neither shows him doing anything that might be thought likely to provoke back consider as part of pain. He is not shown bending or lifting. He is not static, so the videos would be inconsistent with a claim that he was essentially permanently immobile, but we do not understand that to be his claim.

83. The Claimant is, in his spare time, a music producer. Online, he refers to his business as "RVW Music Production" or as "Reggae Vibes". He sees himself as having a personal brand. That brand, it appears, is an upbeat positive one or at least it is not one that he considered would be enhanced by being visibly in pain. He suggests, therefore, that he made an effort when promoting himself and his music production business to appear healthy and happy. The point of that assertion is, we have presumed, to suggest that one must approach the pictures of his being in a very jolly frame of mind with some caution. He and Mr Webb, a friend who gave evidence to us, both suggested that the videos of the Claimant had been enhanced in some way by special video effects and techniques. It was by no means clear to us what it was said had been done beyond moving the camera to suggest a degree of movement that would otherwise have been absent. We decided to take the material at face value at least on first review and as we have made clear above, none of what Ms Askham saw at this point seems to us to be particularly compelling on the question of disability.

84. The Claimant submitted another fit note citing "back pain" on 1 February 2023.

85. At about this time Ms Askham instructed a private investigation company, TenIntelligence, to investigate two matters. The first was whether whilst absent from his work at the Respondent, the Claimant was working at a factory operated by a company called "SBE". The second was whether the Claimant really was unfit for work.

We were not shown the exact terms of the agency's instructions. However, Ms Askham apparently reached the decision to instruct them having carried out the search of the Claimant's social media. Ms Askham says that she always carries out this check. The aim is to avoid fraudulent claims. What she was not able to explain to the Tribunal's satisfaction was why this process of checking is only conducted after a claim is submitted. The investigation period ran from 8 February to 14 March 2023.

86. TenIntelligence made an interim report on 16 February 2023. They ruled out the suggestion that the Claimant was working for a competitor. In respect of his fitness, the report says:

> "One observation was at a pharmacy very close to SBE, then via KFC on Beaver Road; and the other observation was a 30-minute walk to and from Ashford town centre - to the Ashford Gateway Plus centre (approximately a 2-mile return journey). He was in this location for 20 mins (Footage attached).
>
> Unfortunately, as of yet, we have not observed the subject undertaking any activity that would definitively disprove his injury claims; however, we have noted that he walks at a relatively brisk pace (130 paces per minute = 4mph) and not at a pace of someone bearing significant injuries."

87. The report attached two videos. The first was 4 seconds long and showed the back of a man some distance from the camera crossing a footbridge. The man appears to be walking normally. It is impossible to tell from the video whether the subject is the Claimant, although he did not dispute that it was. The second clip is somewhat longer, at 38 seconds, it appears to show the same person shown in the first clip only on this occasion from an even greater distance away. If it is the Claimant, he appears to be walking at a "relatively brisk pace".

88. Both clips are dated 16 February 2023. However, those cannot be the dates on which the clips were created as by that date, the Claimant was in Jamaica (attending a family funeral), according to Ms Askham's undisputed evidence, from around 15 February 2023.

89. For reasons which Ms Askham does not explain in her evidence, she did not wait for the investigation to be concluded. On a date before 1 March 2023 (at which point the Claimant was still in Jamaica), she contacted Unum to raise concerns. The bundle of documents before us did not contain the initial communications. There is an email dated 1 March 2023 and timed at 06:15 from Ms Askham to an Adam Kingswood at Unum. However, it is clear that that cannot have been the first communication. It appears to be part of an ongoing conversation. It is unclear whether the other related emails have been disclosed. It is possible that the email follows on from oral conversations.

90. Mr Kingswood replied at 07:54 on the same day saying:

> "Our desktop surveillance has retrieved similar information and adds further weight to how we deal with this claim going forward.
>
> Many thanks again."

91. Ms Askham says that, on a date that she does not specify, Mr Kingswood told her that there were two options. Either Unum could keep paying the benefit but refer the claim to their fraud department for further investigation (which might lead to criminal

proceedings) or Unum could "cease the claim" and any concerns about fraud would be left to the Respondent to deal with.

92. The next day, Ms Askham told Unum to cease the claim. She did that without making any effort at all to contact the Claimant and to ask him to provide an explanation for the material that she had found. Nor did she ask him what his preferred course of action was. She took the decision on the basis that as he had children she "didn't want for him potentially to be taken down a criminal route". Her personal belief, as she confirmed to the Tribunal, was that he was a fraudster. The Claimant, attending a funeral in Jamaica and spending time with his family, had no idea that any of this was happening.

93. Given that Ms Askham believed that the Claimant was attempting to defraud the insurer, it followed that he was also trying to defraud the Respondent, since he had been claiming sick pay and making a claim under an insurance contract to which they were a party and in respect of which they paid the premiums. In those circumstances, one might have expected that she would take steps to initiate disciplinary proceedings. That, she told us, was one option. The alternative was, she told the Tribunal, to "deal with the Claimant's absence and return to work under the Company's capability procedure". In other words, even though she was personally convinced he was fit, to follow a procedure designed to deal with people who were not fit. This was not, we were asked to accept, because it provided a potentially easier path to termination but because it was "less punitive".

94. On 7 March 2023, Ms Johnson wrote to the Claimant at his home address. The letter invited the Claimant to an "absence review" meeting, fixed for 16 March 2023, which would be attended by Ms Johnson and Ms Askham. The purpose of the meeting is described as being to "discuss how you are and the likely length of your absence and what, if any, steps can be taken to assist you to return to work." That, of course, was notwithstanding that Ms Askham was, by this point, convinced that there was nothing seriously wrong with the Claimant, that he was capable of returning to work if he wished to, and that he was a fraudster. Why Ms Askham would want him to return to work in those circumstances was not really explained to us. She told us that she resolved to put her concerns about fraud entirely to one side. We did not, with respect to her, find that evidence credible.

95. The letter also informed the Claimant that Unum had "suspended [his] payments under the Group Income Protection benefit scheme at this time, subject to review". This explanation entirely omits the fact that it was Ms Askham, acting on behalf of the Respondent, who had raised concerns with Unum. The letter makes it appear as if a decision had been made by Unum, whereas it was Ms Askham who had decided to "cease the claim". It is further inaccurate in that nowhere in the limited correspondence between Ms Askham and Unum that the Tribunal has seen, nor in Ms Askham's evidence, is there any suggestion that the payments have been merely suspended or that there is any "review" planned. The Claimant is given no explanation at all as to why Unum are said to have decided to "suspend" payments.

96. During his time in Jamaica, the Claimant uploaded two videos. In both, he is engaged in the sort of very minor rocking from foot to foot that was observed on the earlier music videos. In one he is with his brother and a number of others at a food-covered table on a beach. In the other, he is standing by his mother who is dancing somewhat more energetically than the Claimant, but still in rather restrained way. Although these videos were put to the Claimant as if they were damning evidence of his alleged condition

being, if not an outright fraud, at the very least a significant exaggeration of his pain, we really could not see why they were thought to demonstrate that proposition. He is not, as he accepted, obviously in pain. Even discounting for the moment his broader explanation that he was always careful to conceal pain when filming himself, there did not seem to be anything in the videos to suggest that his account of a constant level of background pain that might be discomfort on some days and agony on others was untrue. This material is relied upon for the purposes of these proceedings only. By the date these videos were uploaded, Ms Askham had already determined to cease the insurance claim. They were not shown to anyone involved in the subsequent capability proceedings.

97. The Claimant returned to the UK on or about 14 March 2023. Waiting for him at the airport was TenIntelligence whose agent took three short clips of the Claimant. In the first he is seen emerging into the arrivals hall. He is pushing a suitcase on wheels. On watching the video, two things struck the Tribunal. The first is that the Claimant does seem to be walking freely. The long flight does not seem to have caused his back pain to flare up. In respect of that, the Claimant's position was that he was on pain medication at that point so that he was not experiencing a great deal of pain. He also suggested, we concluded improbably, that he was in some way aware that he was being observed and thus made an effort to leave in a hurry. Whilst we cannot rule out that the Claimant felt he was being observed, there is nothing at all in the video that suggests that. We were not prepared to accept the Claimant's evidence on that point.

98. The second thing that struck the Tribunal is that the bag did not appear to be a heavy one. We have all had experience of the recalcitrance of a heavy wheeled suitcase, this one moves freely across the floor without any apparent effort on the Claimant's part and he can be seen pushing it with his fingertips.

99. In the second video he is shown briefly using a moving walkway and in the third smoking outside a car park. Neither suggests that he is in particular pain at that moment, but nor do they demonstrate that he is free of pain. Neither shows him doing any of the things that he had identified as likely to aggravate his pain.

100. The videos were made after Ms Askham had decided on what course to take. They were not, therefore, directly relevant to the reasonableness of that course. Again, however, they were relied upon at the hearing to demonstrate that the Claimant was not a disabled person.

101. The meeting on 16 March 2023 began with the Claimant being assured that the meeting was an "informal welfare meeting". Given that Ms Askham had, on her evidence, resolved to commence formal capability proceedings, that is a surprising and not altogether straightforward way to characterise the meeting.

102. The Claimant was asked a number of questions about his condition. He describes having support from friends and family with his shopping and complains that he had had trouble walking from the gatehouse on the Respondent's premises to the meeting room. This, the Respondent suggests was not simply a question of his having a bad day, but a deliberate exaggeration of his difficulties.

103. The meeting notes suggest that the discussion then veered very sharply away from the question of the Claimant's wellbeing. Ms Askham is recorded as saying:

> "As outlined in our recent correspondence Unum have ceased the income protection payment for you following desktop surveillance which includes

> reviewing your social media posts which show you moving around freely. You have been seen walking quickly and freely and it doesn't appear that you are in discomfort."

This is the first time that the Claimant is given any explanation for why his payments have stopped. It is the first time that he is told that he has been under any kind of surveillance and the first time that it is suggested, implicitly, but clearly, that he has been acting fraudulently. He is next told that he has been observed leaving and entering the country.

104. On any reasonable view, these matters were not the sorts of matters that one might expect to be dealt with at an "informal welfare meeting". The Tribunal's conclusion was that the Claimant was ambushed, and deliberately so.

105. Ms Askham is recorded as saying "the surveillance builds a picture". This makes it clear to the Claimant that it is not simply Unum that considers he may have been exaggerating his condition. Ms Askham is making her own view clear.

106. The Claimant protests that he was "trying to hide his sickness from [his] fans" and that he edited his posts before putting them online. Ms Askham immediately counters by saying:

> "You have posted images of yourself whilst away and have been dancing and walking around. You were observed coming off a long-haul flight and collecting your case."

The Respondent's HR Director makes it plain that she does not believe him. There then follows an exchange in which the Claimant tries to make his case, indicating, for instance, that his suitcase was very light and replying to a suggestion that he has been observed walking two miles by saying that his physiotherapist had specifically recommended that he walk more.

107. Ms Askham tells him the following about the Unum claim:

> "Unum are making income protection payments for you and your actions have led them to take a decision to cease your claim for potential fraudulent claiming of payments under the group income protection scheme."

Again, Ms Askham omits any mention of her own role. The minutes do not record her making it clear that the surveillance to which the Claimant had been subject was at her behest. The suggestion that the Claimant's behaviour has been fraudulent is now explicit.

108. The meeting concludes with Ms Askham saying:

> "As your claim has ceased we need to progress this, and we will be writing to you next week inviting you to a formal meeting".

The minute does not record the Claimant being given any explanation as to what the meeting will be. Ms Askham says, and we accept, that the Claimant was told that it would be a capability meeting.

109. Although it is not dealt with in the minutes, both parties agree that Ms Askham set out a number of alternative ways forward. We have concluded that the intention was that the communication of those options should be "off the record". Ms Askham gives the following account in her witness statement:

> "I told the Claimant that … the Company had 3 options for dealing with his circumstances. Firstly, allow Unum to refer the matter to its fraud department which could lead to criminal proceedings. Secondly, agree to cease this claim and deal with the Claimant's circumstances under the Company's capability procedure, which I advised the Claimant could potentially lead to the termination of his employment as per the company policy … Thirdly, I suggested that if the Claimant did not feel the Company was the right place for him to return to work, he had the option of resigning."

The decision to cease the claim had by that point already been taken and Ms Askham's evidence is that she explained that. That being so, only the second and third options were realistically available by the date of the meeting. There was, of course, another option available: internal disciplinary proceedings. However, Ms Askham had already decided not to take that course.

110. The Claimant says that he understood that he was being accused of fraud and that the alternatives were resign or be dismissed by means of a disciplinary process. Ms Askham denies having presented him with any such dilemma.

111. The non-legal members on the Tribunal panel have between them a very great deal of experience of meetings at which so-called "difficult conversations" take place. What troubled them about this meeting was the following:

(1) The Claimant had not been given a truthful, or at least a wholly truthful, reason for the meeting – it was not an informal meeting focused on his welfare nor was it focused on "what, if any, steps [could] be taken to assist [him] in returning to work";

(2) Since the Claimant had only recently returned from Jamaica, he had very little notice of the meeting;

(3) The Claimant's attempts to make his case on the question of whether he had tried to defraud Unum were met by Ms Askham putting the case that the surveillance material called his account into question, which would have given any reasonable employee the (correct) impression that Ms Askham had been persuaded by that material that he was a fraudster;

(4) Of the options presented to the Claimant none of them explicitly involved his returning to work. That is a possible outcome of the capability process, but rather than stress that, Ms Askham instead made the point that it might result in the termination of the Claimant's employment;

(5) The Claimant had at no point suggested that he felt that the Respondent was not the "right place for him to return to work". He certainly wanted his duties altered, but he had never suggested that he was otherwise reluctant to work for the Respondent; and

(6) A reasonable employee in the Claimant's position would have understood that Ms Askham thought his options were to resign or face the prospect of capability proceedings that might very well result in his losing his job. The non-legal members also considered that any reasonable HR professional would understand that that is how the message would be received. The Tribunal concluded that however careful Ms Askham may have been about how what she had to say was framed, she did think he was a fraudster, did want him to

leave and was giving him, off the record, the chance to resign to avoid termination.

112. The Claimant did not resign and a capability process began. We were referred to a version of the capability procedure that the Respondent said that they applied. One of the non-legal members pointed out that the procedure contained the following provision:

> "This procedure will not be used where problems with an employee's performance result solely from long or short-term absence from work as a result of sickness. Such issues will be dealt with through a separate procedure."

113. After some confusion, we were shown a document entitled the Sickness Absence Policy and Procedure Manufacturing, Warehouse and Logistics which was said to be the policy applicable to the Claimant's particular circumstances, although it was accepted that it was not applied. The Respondent's position was that regardless of the specific terms of the two policies, the overall process was a fair one.

114. Ms Askham did not run the capability process herself. Instead, it was put into the hands of Mr Greg Rowe who was, at the relevant time, Warehousing and Logistics Manager. We were told that concerns about fraud were kept from Mr Rowe and that he was not shown the various social media posts and videos that had been collated by or on behalf of Ms Askham. Mr Rowe was, however, supported by Ms Johnson who had been at the meeting on 16 March 2023 and was, therefore, aware both of the posts and videos and her line manager's view of their significance. Ms Johnson's evidence was that she did not raise the allegations with Mr Rowe.

115. Logically, one of four possible situations may have arisen:

(1) The account given to us is untrue: Mr Rowe was aware of the allegations and was party to an effort to terminate the employment on grounds of capability thereby avoiding the need to investigate the question of fraud;

(2) The account given to us is untrue: Mr Rowe was aware of the allegations but that he was instructed to put that information to one side and did so;

(3) The account given to us is true: Mr Rowe was not aware of the allegations and the decision to keep him, as it were, in the dark was taken because it was expected that the Claimant would continue to argue that he was incapable, again avoiding the need to investigate the question of fraud; or

(4) The account given to us is true: Mr Rowe was not aware of the allegations and the decision to keep him in the dark was taken in the Claimant's best interests and with an open mind as to whether or not the process resulted in his retention.

We were urged to accept that the last of the possibilities is what actually happened. That has a consequence: the Respondent had, on its case, decided that its mind for the purposes of any decision about terminating the Claimant's employment was to be Mr Rowe and any person who subsequently heard any appeal.

116. A meeting took place on 13 April 2023. The Claimant was represented at the meeting by a trade union representative named Mick Simpkin. Mr Rowe did not give evidence. The Tribunal was told that he and the Respondent had parted company in what might be called difficult circumstances. However, we had notes of the meeting, the accuracy of which, the Respondent relied upon for the purposes of cross-examination. Right at

the outset of the meeting Mr Simpkin says that he understands that Unum have stopped payment but that there did not seem to have been any written notification of that. Mr Rowe's response is: "That is a different investigation to this meeting." It is unclear what investigation is being referred to and Mr Rowe was not available to explain. However, the most likely explanation is that:

(1) Mr Rowe *was* aware that Unum had stopped payments;

(2) Putting it at its lowest, Mr Rowe would necessarily have understood that Unum was not satisfied that the Claimant met the qualifying requirements for a payment; and

(3) He understood that there was something that required to be investigated but that fell outside his scope of responsibility.

Mr Simpkin specifically mentions that at the previous meeting on 16 March 2023 there had been mention of "potential fraud". Mr Rowe is not recorded as expressing any surprise at that suggestion. He says nothing about whether or not he had seen the minutes being referred to. Instead, he says: "From my point of view I have no reference to that. The meeting today is a capability meeting." None of this suggests that he was unaware that the Claimant had a suggestion of potential fraud raised with him, simply that it was not something that he was going to take into account. Of the logical possibilities identified above, the first and second are the only ones that the Tribunal considers are reasonably capable of being reconciled with the meeting notes.

117. Mr Rowe moved the discussion on to the Claimant's condition which he discusses by reference to the Unum questionnaire. The Claimant's position, summarising, was much as it had consistently been, i.e. that his pain varied but that it was aggravated by lifting. He made it clear that he could not return if he was to do "heavy lifting" and ultimately suggested that he was not fit to return.

118. Mr Simpkins sought to refocus attention on the cessation of payments. He says: "I don't believe we would be here today if the payments hadn't stopped." The Tribunal asked about this specifically. Mr Jupp, on behalf of the Respondent, accepted that if the Claimant had been entitled to payments it would have been a breach of contract to terminate his employment where that would have the effect of disentitling him to payment (by analogy with **Aspden v Webbs Poultry & Meat Group (Holdings) Ltd** [1996] IRLR 521).

119. Mr Rowe's response is: "I need to get feedback from our HR Director." In other words, he wanted to speak to Ms Askham. Mr Simpkins goes on to say that he wanted clarification over what had been meant by desktop surveillance and stresses that "potential fraud" is a "strong allegation". Mr Simpkins continued: "I don't know if it is the company or Unum that ceased the claim. In the 17th January letter it states that it would be subject to review but doesn't state for what reason. Did that take place and was that to continue or to cease claim."

120. The meeting is adjourned. Given that Mr Rowe immediately returned to the question of the fraud allegation when the meeting reconvened, the Tribunal infers that he done what he had proposed to do and spoken to Ms Askham. Neither Ms Johnson nor Ms Askham make any reference at all in their witness evidence to there having been a conversation with Mr Rowe as to what he should say in answer to Mr Simpkin's questions.

121. What he says is: “I have some more information. Unum make a decision on whether they accept or decline a claim. They are an insurance company. Following their review they came to a decision to stop your claim.” That cannot be described as the whole truth. It is true that Unum makes a decision whether to accept or decline a claim. It had decided to accept the claim. The cessation of payments arose because Ms Askham withdrew the claim. That is not mentioned even though Mr Simpkins had specifically raised a question about who had stopped the claim. Mr Simpkins is recorded as asking whether there is an appeal procedure and whether there had been a formal notification from Unum. No answer is recorded.

122. Mr Rowe then said that he would arrange an occupational health report. Mr Simpkins asked about the possibility of light duties, but Mr Rowe suggested that should await the OH report.

123. As matters stood, therefore, there were, in the abstract, four paths that might have led to avoiding dismissal:

(1) the Claimant returned to work;

(2) the Claimant returned to work in a different role;

(3) the Claimant’s insurance benefits were reinstated; and

(4) the Claimant remained unfit but the prognosis was sufficiently promising that the Respondent would be prepared to wait for his return.

It was unclear to the Tribunal how the third possibility would be achieved without the Respondent reversing Ms Askham’s decision to cease the claim.

124. After the meeting, Mr Rowe wrote to Ms Askham thanking her for her “input and advice” and passing on Mr Simpkins’s questions. Ms Askham does appear, therefore, to have been actively involved in the process behind the scenes. On 21 April 2023, Ms Askham wrote to Ms Johnson and Mr Rowe justifying the surveillance to which the Claimant had been subjected: “The level of surveillance used in regard to Mr Wilson was acceptable in order to prevent fraud as there was a strong suspicion from both Aliaxis and Unum”.

125. On 2 May 2023, the Claimant wrote to Ms Johnson, complaining, amongst other things, that his privacy had been breached; about the surveillance; about being threatened with the sack. It was Ms Askham who replied, pointing him to the formal grievance process.

126. The Claimant’s occupational health assessment was the following day, 3 May 2023. A report was issued two days later by Dr Ritesh Parekh. Dr Parekh notes that in a MED3 certificate dated 22 March 2022, the Claimant’s GP had advised against heavy lifting for fear of causing permanent damage to his back. The summary of the Claimant’s then current position includes the following:

> “He reports that, as compared to when he initially had the symptoms whereby, he was unable to mobilise, use the toilet, etc. he can manage this now and is able to walk a bit more. However, the pain, which is constant in his back and the right elbow, is ongoing and is not getting better at present. He has been given medication to help with pain as well as his mood recently, but reports that he has had some unpleasant side effects and the symptoms, mental health wise, can get overwhelming at times. He denies any thoughts of harming

himself or others. He reports that the pain from his lower back can go onto his buttocks. More so on the left-hand side and he can get some left thigh pain as well. The pain affects his sleep. He reports that, with the right hand, at times he struggled to brush his teeth. He can only lift a light shopping bag with the right arm and nothing heavy. He reports that more activity and pressure makes the symptoms worse. He reports that he is only able to sit for a short duration and standing up is also limited to a short duration. He can manage to walk 30 minutes or so.

Upon examination, he had pain in the front of the elbow in the middle, as well as in the bony prominence at the back of the right elbow. Upon assessment his back movements were slow and stiff. His straight leg raising was limited and he felt weak in the lower back muscle area, as well as in his legs.

He feels that he has been trying to be more active as advised by the physio but feels that this has been used against him by the people who have been conducting surveillance on him, from his perspective."

127. Dr Prakesh goes on to express an opinion on the Claimant's fitness for work:

> "Based on available evidence, in my opinion, Neil is not fit or capable to return to his role for the near future, such as at least the next 3 months, I estimate, until and unless he has further treatment to help improve his symptoms and day to day function."

The doctor goes on to say that he is "unable to identify any adjustments that would facilitate a safe and sustainable return to work for him, whilst maintaining his wellbeing." He says that he is "guarded" about the Claimant's ability to return to a" physically active and demanding role for the near, foreseeable future pending further medical input for his ongoing right elbow and back symptoms". He advises that it may be "pragmatic to assume that the Equality Act 2010 is likely to apply".

128. On 16 May 2023, the Claimant was invited to a "re-convened Capability Review Meeting" to be held on 22 May 2023. The purpose of the meeting was said to be:

> "to establish whether or not you are able to perform the role that you are currently employed in as a Warehouse Operative with Aliaxis UK Limited and whether or not you will be able to return to perform in this role in its entirety in the near future in line with the medical information we are in possession of. The latest PHC Occupational Health report will form the basis of our meeting, together with the daily activities questionnaire you completed for Unum. I will invite you to give us as much information as possible for me to consider any reasonable adjustments that may be appropriate for you to come back to work. We will also discuss any alternative vacancies that may exist within the business if this is appropriate, if this means you may be able to return to work in the near future. You have already been provided a list of current vacancies for consideration.
>
> Although we appreciate your health condition is no fault of your own, owing to your current medical condition, the length of time you have been absent from work and should there be no reasonable adjustments we can make or alternative roles to accommodate your return to work, a potential outcome of this meeting could be the termination of your employment."

What the letter does not raise as a possibility is that since the OH Report appeared to have confirmed that the Claimant was genuinely unfit to work, it might be possible to approach Unum and renew the application for payment of the benefit.

129. At the meeting Mr Rowe explored with the Claimant whether there had been any improvement in his condition. The Claimant's position was that, if anything, he had been a little worse since returning from Jamaica. He said: "It's still the same. The more I do the more pain I am in. I walk and get pain. I then slow down and speed up." He told Mr Rowe that he needed help from friends when his shopping bags were heavy.

130. Mr Simkin raised the question of an appeal to Unum and was told that the Claimant could raise an appeal by going through the Respondent's HR.

131. Mr Rowe then picked up certain points in the OH Report before Mr Simkin returned to the Unum appeal:

> "We have just had an interesting conversation with gentleman at Unum he said what has your employer said. He asked whether you had asked him to appeal.
>
> He has said Neil has to put in a request for the decision to be reviewed again and they would then come back to him
>
> So next stage is for Neil to appeal the decision. He then goes to complaints department afterwards. We request we hold onto your decision until Neil has had opportunity to appeal decision and the fact that there could be an improvement in 3 months."

The fact that Unum asked whether the Respondent had asked the Claimant to appeal is consistent with Unum's understanding being that the claim was ceased at the Respondent's request.

132. In response to Mr Simkin's request that the capability decision be deferred to await the outcome of the Unum appeal, Mr Rowe said that he was willing to wait 30 days. Mr Simkin asked about the possibility of the Claimant being assigned to light duties. The response was to say that there were some "live roles that [were] available". We understand that to mean that rather than looking at whether the Claimant's role could be adjusted for a period to allow for light duties, the Respondent's position was that if the Claimant wanted to return to work doing anything other than his full role, he would need to take up an existing vacancy in another role. The Claimant was told about 10 roles only two of which were at Lenham, the site at which he worked. The remainder were in Huntingdon.

133. We have not had sight of the appeal made to Unum. However, judging by Unum's letter of response, it appears to have raised much the same points in much the same language as the Claimant's email of 2 May 2023 referred to above. Whereas, for instance, the email had accused the Respondent of threatening to sack him, the Unum's response letter of 31 May 2023 includes as an allegation "Mr Wilson advised Unum threatened to sack him". Understandably, the allegation bemused the Unum investigator who points out in his letter that the Claimant was not employed by Unum. The greater part of the Claimant's appeal appears to have been addressed to having been surveilled. This causes further confusion because it does not ever seem to have been explained to the Claimant precisely who did what by way of investigation. While the Claimant complains about being followed, Unum, again understandably, points out that it simply performed a desktop investigation using publicly available material.

134. What the Claimant should have been saying was: "I meet the criteria for payment. An OH report confirms that I am not fit for work". However, even if he had done so, it is not clear that that would have helped him. The reason is that Unum are clear that the reason that they stopped the payment was because the Respondent had instructed them to do so. So whilst the allegation that they had breached the Claimant's privacy is rejected on the basis that Unum had a "duty to investigate the concerns raised about [the Claimant's] activities on behalf of [the Respondent]", on the question of the cessation of payment, what is said is:

> "Aliaxis Holdings Limited are the policyholder. If we are instructed to cease benefit by the policyholder, then we are obliged to do so."

Indeed, Unum are careful to say that they are not casting doubt on the Claimant's account of his ill-health:

> "… it is important to note that this decision is not intended to dispute Mr Wilson's diagnosis, nor is it seeking to diminish the symptoms that he experienced. Rather, my decision [to reject the appeal] is centered on the insurance contract."

The letter goes on to say:

> "At no time have we advised [the Claimant] that we suspect him of committing fraud …"

135. Unum having rejected the Claimant's appeal, Mr Rowe then issued is capability process outcome letter dated 20 June 2023. The proffered reason for dismissal is to be found in the following paragraphs:

> "You have already been absent from work for approximately 15 months and there has been very little improvement to your condition, so on this basis I can only conclude that this will remain the case for the foreseeable future. I therefore have taken the decision to terminate your contract of employment on the grounds of capability due to your ongoing medical condition and the fact that you are unable to fulfil your contractual obligations in your role of Warehouse Operative."

The letter suggests that 20 June 2023 is the last day of the Claimant's employment. He received the letter the following day, so that the effective date of termination was 21 June 2023.

136. We asked why the Respondent did not approach Unum to say words to the following effect: "Nothwithstanding that we instructed you to cease the claim, we have now had the benefit of a further OH report and are satisfied that that the Claimant really is unfit to work. We would like, therefore, to renew the claim for benefit". The answer that the Tribunal received boiled down to saying that Ms Askham was convinced that the Claimant was a fraudster. She had had the benefit of seeing material that she had deliberately withheld from Mr Rowe and from the OH specialist. Ms Askham was not prepared to rescind her instruction to the insurer and it was not reasonable to expect that she should. That left the Claimant in a position where he was not going to remain in employment to collect insurance benefit because Ms Askham was convinced he was fit, instead he was going to have his employment terminated because Mr Rowe was convinced that he was not fit.

137. The Claimant then appealed the decision to dismiss him. His grounds of appeal are set out in his appeal letter as follows:

> "I'm appealing against the decision of the terminate of my contract of employment on the grounds Of capability due to my disability.
>
> Is there any office job I could do due to my disability. I did mention the Tina Johnson that the government will support me coming in work
>
> Due to my capable of what I can do and extra support.
>
> As I hope that my injury doesn't leave me out of employment.
>
> I'm willing to learn new job role within the company, I would be grateful to know that I still have the opportunity to do so and opportunity to grow within the company."

138. The appeal was entrusted to Mr Martin Humphrey, who is UK Logistics and Manager. A meeting was arranged for 5 July 2023. The meeting in fact took place on 11 July 2023. The Claimant was again accompanied by Mr Simkin. Mr Humphrey was assisted by Ms Johnson.

139. The Claimant sets out the matters that he thinks are unfair. They included the original meeting with Ms Askham on 16 March 2023 which he says was "stressful and threatening as [Ms Askham] was saying [that he] was lying and not in pain". He goes on to stress that it was the Respondent and not Unum that was investigating him and the Respondent which told Unum to stop paying him.

140. Mr Humphrey's response is: "I believe this has already been discussed and documented. We had an occupational health report. This is you coming in now on the back of the capability termination. You had the right to appeal. This is about your ability to do your contractual work and your opportunity to bring something new to the table." It is not immediately clear what Mr Humphrey means, but he appears to be saying that if the Claimant is to succeed in his appeal he must raise a point that has not already been considered by Mr Rowe.

141. The Claimant then suggests that he could work in the office "and do emailing, paperwork". Mr Rowe's position was that that would involve creating a new job and that he could not do that. He pointed out that the respondent had lost a big client and that there was a recruitment freeze in place.

142. The Claimant also raised the possibility of having his benefit reinstated until he got better. Mr Humphrey rejects that saying, incorrectly, "this was a decision reached by the insurance company". Ms Johnson, who knew what had actually happened does not correct him, but the Claimant does: "It wasn't Unum who stopped the claim it was [the Respondent]". Mr Humphrey does not appear to respond to that point. Instead, he returns to the question of the Claimant's fitness for work. He asks about the Claimant's rehabilitation and is told that the Claimant is waiting to go to as pain clinic.

143. Mr Simkin made the point, on the Claimant's behalf, that had the "insurance … not been stopped there [was] a good certainly [that they] would not be sitting [in the meeting]."

144. On 13 July 2023 the Claimant was sent another list of vacancies.

145. By a letter sent the next day, Mr Humphrey informed the Claimant that his appeal was unsuccessful:

> "After careful consideration of all the surrounding circumstances of your case I can confirm that having made no application for any of the roles that were previously provided to you at the time of your termination, I have decided that the organisation will uphold the decision to dismiss you due to capability. Your dismissal will be effective from the original date communicated to you in the dismissal letter dated 20 June 2023."

The decision, the Claimant was told, was final.

146. On 18 July 2023, the Claimant applied for the role of EHS Manager at the Lenham site. The role profile stipulated for minimum qualifications that it appears the Claimant did not have. He was not appointed.

147. As will be seen from the findings above, we had difficulty accepting the evidence of a number of witnesses at times. We have reminded ourselves that recollections can fade and that memory can and usually does involve the construction of a narrative rather than the creation of an accurate mental snapshot. We also reminded ourselves that even where a witness says something that they know to be untrue that does not mean that they are lying about everything. Where we have had concerns about oral evidence, we have tested it wherever possible against the contemporaneous written evidence. We have relied on inherent probability (assessed with the assistance of the very considerable experience of the non-legal members) and a witness's manner only where necessary and never as a decisive factor. Where we have preferred one account over another we have said why.

(2) Unfair Dismissal

(a) The Reason for Dismissal

148. Notwithstanding Ms Askham's conviction that the Claimant was fit for work and her apparent direct involvement in at least the initial capability process, we concluded that both Mr Rowe and Mr Humphrey genuinely believed that the Claimant was incapable of performing the warehouse work that he had performed prior to his sickness absence and that he was unlikely to be fit to return for a considerable time. Given that the Claimant's position was that he was unfit to return and that that was also the opinion of the OH specialist, it is wholly unsurprising that the two decision-makers reached that conclusion. The Tribunal also found Mr Humphrey's account of what he believed to be credible.

(b) Reasonable Grounds and Reasonable Investigation

149. As observed immediately above, the Claimant's own position and the conclusions reached by Dr Prakesh provided a reasonable basis for a conclusion that the Claimant was likely to be unfit for work for the foreseeable future.

150. We gave anxious consideration as to whether, given that both Mr Rowe and Mr Humphrey were aware that Unum had stopped payments and that the Claimant was maintaining that he had been accused of fraud, both men should have made an effort to discover whether there was other material relevant to the Claimant's condition that was relevant to their decision.

151. Mr Jupp's position, on the Respondent's behalf is that by ensuring that the question of fraud was not investigated the Respondent was doing the Claimant something of a favour. Had that material been looked at, at best it would have left the conclusion that he was unfit for work undisturbed, at worst it would have led to a dismissal for dishonesty and the possibility of police action.

152. It is worth, we consider, dwelling for a moment on that possible "best" outcome. Assuming for the sake of argument that the surveillance material had been put before the decision-makers, it would also have had to have been included in the instructions to Dr Prakesh. It is, we think, entirely possible that Dr Prakesh's view would have been that the material was not inconsistent with the condition that the Claimant describes himself as having. Our own review of the material did not clearly suggest to us that he was fit for work. The decision-makers would also have had the Claimant's explanations available to them. Why does any of that matter? Does it not simply end at the same conclusion that he was genuinely unfit? The answer, we think is yes and no. Yes, the decision-makers would have reached the same conclusion. No, because Ms Askham would then have had an expert medical opinion on the question upon which she had already closed her mind. Why might that have made a difference? Because the decision as to whether to maintain the instruction to Unum to cease payment remained in her control and resumption of payment was one path to avoiding dismissal.

153. Having dwelt on that issue, it does not, we think, determine whether there was a reasonable investigation into the Claimant's circumstances by the decision-makers. The reason for that is that we accept that they were instructed to focus solely on the question of capacity and because they had not themselves seen the material, they had no reason to think that it might do anything other than harm the Claimant's case. They were the mind of the company for the purposes of reaching a decision under the capability process.

(c) Was there sufficient consultation?

154. The process involved four meetings. The first was the meeting with Ms Johnson and Ms Askham on 16 March 2023. The Tribunal has set out above its criticisms of the meeting. The Tribunal concluded that the meeting was an unfair one. We do not accept that Ms Askham was looking to find ways to facilitate the Claimant's return to work. We find that she considered the Claimant was a fraudster and that this meeting was the moment at which it was going first to be communicated to him that, putting matters as low as we can, his condition was viewed with considerable scepticism. Nor did we think that that describing the meeting as an "informal welfare" meeting was a fair and accurate description. We understand how the Claimant interpreted what he was being told as indicating that Ms Askham considered he might be a fraudster and that if he did not resign he would face a capability process that might result in his dismissal. However, although the prelude to a process that resulted in the Claimant's dismissal, the meeting is, we consider, too remote a part of the decision-making process to have rendered the dismissal itself unfair.

155. The other three meetings, on 13 and 18 April and 11 July 2023 are not ones in respect of which the Claimant raises any material complaint. We are satisfied therefore that there was adequate consultation with the Claimant about his condition by the decision-makers.

(d) Was there sufficient effort to consider alternatives to dismissal?

156. The Tribunal accepts that was not incumbent on the Respondent to create a job it did not otherwise require in order to keep the Claimant in employment. That would be true even in the absence of a hiring freeze. The evidence before us did not suggest that a desk job was available or that one could have been reasonably created by reallocating duties.

157. Nor did the Tribunal conclude that any of the vacancies that were identified as needing to be filled were ones into which he should have been slotted. We accept that, contrary to his case, the Claimant only applied for a vacancy once his employment had already ended.

158. There was one other alternative to dismissal: the resumption of the Unum payments, which would have allowed him a further period of rest and treatment within which potentially to recover. No-one suggested to us that it would have been appropriate to dismiss the Claimant had the payments still been in place. However, we would not have accepted such a suggestion if it had been made. The effect of dismissal would then have been to disentitle the Claimant from the financial support at precisely the moment it was needed and within the period covered by the insurance terms.

159. We consider that any reasonable employer would, on receiving the OH report, have approached the insurer with a view to resuming payments. The Respondent's arguments to the contrary have, to the Tribunal's mind, more than a hint of wanting to have their cake and eat it. We test it this way: what would have happened had Ms Askham not entertained her conviction that the Claimant was a fraudster? What if the capability process had followed the course it had, with a reference being made to Dr Prakesh for a report and reliance being placed on his conclusions? The answer is that the Respondent (acting through Messrs Rowe and Humphrey) would have concluded that the Claimant was unfit for the immediately foreseeable future and the insurance claim would likely have been left undisturbed. Unum would have had the reassurance of the OH report. That answer is significant because the Respondent resolved to apply the capability process as if Ms Askham's concerns did not exist. The decision-makers were instructed to leave any concerns about fraud to one side. It follows that, having decided that he was incapable, that should have led to the insurer being told so.

160. But, it is said, the Claimant was given the time to make an appeal and that appeal was rejected. That is not an answer to the potential unfairness of the Respondent's approach. The Claimant's appeal was always bound to fail. In part that was because, having been given an account of events that minimised Ms Askham's involvement, he was making a series of ill-founded criticisms of Unum's supposed involvement in his being surveilled. More importantly, however, it was bound to fail because unless and until the Respondent asked Unum to, the insurer could not reinstate the payments. However powerfully the Claimant made his case on entitlement, Unum could not do what he wanted them to. Whilst the Respondent, through Ms Johnson, took on the task of explaining the appeal procedure to the Claimant, there is no evidence that she ever made clear that, in practice, he would first have to change Ms Askham's mind.

161. If the Respondent, through Ms Askham, was closing off one alternative to dismissal, was that unreasonable? The Tribunal concluded that it was, for two independent reasons:

    (1) Having elected to determine whether the Claimant should remain in employment by reference to capability alone, it was unfair to close off a non-dismissal course by reference to concerns about fraud; and

(2) Even if it had been reasonable to take the concerns about fraud into account, that should not have been done without:

(i) the Claimant being made aware of it;

(ii) the Respondent being transparent with the Claimant about its concern, the precise material it had in its possession; and Ms Askham's involvement;

(iii) the Claimant being given an opportunity to address the concerns; and

(iv) Dr Prakesh being given an opportunity to comment on the material and its impact on his assessment.

(e) Conclusion

162. The Tribunal concludes that the Claimant's dismissal was unfair. It was not open to the Respondent to dismiss on grounds of capability without:

(1) exploring whether, in the light of its conclusion that the Claimant was unfit for work, payments from the insurer should be reinstated; alternatively

(2) giving the Claimant a proper opportunity to understand and meet the allegations and putting them before Dr Prakesh for consideration.

(3) Disability Discrimination

(a) Was the Claimant disabled at the relevant time?

(i) Did the Claimant have a relevant impairment?

163. The Tribunal finds that the Claimant had, at the relevant time, a physical[3] impairment. Specifically, the Claimant had myofascial dysfunction of the lumbar spine. The impairment is a pain condition. The Claimant's core case has, we consider, been consistent: he suffers from a background level of pain experienced as discomfort and controlled by painkillers which is aggravated by physical exertion, including bending and lifting and which, once aggravated, is significantly debilitating.

164. In cross-examination, the Respondent placed considerable weight on MRI results which identified no physical abnormalities. However, that is to assume that myofascial dysfunction would be observable by means of an MRI. We have no medical evidence available to us on that point (although it was open to the Respondent to lead it had they wished to). We are discouraged, by authority, from performing our own research and have not done so. In those circumstances, we do not feel comfortable speculating that a clear MRI would rule out the existence of myofascial dysfunction.

(ii) Did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

165. In approaching this question, the Tribunal must have in mind that the Claimant was, throughout the relevant period, taking painkilling medication. The Tribunal must ask itself what the impact would have been had he not been taking the pain medication.

[3] Although, we do not think the analysis would differ if it were better classified as a mental or mixed physical and mental impairment.

Again, we had no medical evidence. All that we are able to conclude is that without painkillers, the Claimant would likely have experienced more pain, but the Tribunal cannot be more precise.

166. The Tribunal also bears in mind that, on the Claimant's own account, whilst pain is constant, it varies in intensity, being a discomfort on some days and an extreme pain on others. There may be a substantial adverse effect even if the intensity of the effect varies over time. In other words, if the condition is one which results in good days and bad days, there is no requirement that every day should be a bad day before the necessary effect can be established. There are many conditions readily recognisable as disabilities in which the impact will be intermittent. One example would be epilepsy. Another might be clinical depression, where an employee may experience depression in bouts. The question is whether the impairment has a substantial adverse effect on the Claimant's normal day-to-day activities and not whether it does so every day. It is possible to conceive of cases in which the effect is so fleeting and/or so infrequent that it might be possible to characterise the effect as trivial. It is necessary to turn, therefore, to what the Claimant and others have to say about the impact of his condition.

167. There was significant evidence in support of the Claimant's case that his impairment had the necessary significant adverse effect. Included in the bundle was a disability impact statement. The Claimant says that he has difficulty sleeping as a result of his pain. He says that it can become difficult "at times" to walk. When his walking is affected he has had to resort to using a stick. Use of a stick is mentioned in a written statement submitted in support of the Claimant by a Mr Nomore Sithole. The Claimant says that he has difficulty lifting heavy shopping bags and has had to rely on help from friends. One such friend, Mr Webb, gave evidence in person at the Tribunal and confirmed that he does shopping for the Claimant from time to time. He also gave evidence of having seen a reduction of the Claimant's ability to participate in physical activities. It was suggested that Mr Webb was a good friend; that he was invested in the outcome to these and possibly other injury-related proceedings; and that he was reliant on what the Claimant told him. The implication was that he was not telling the truth. Mr Webb certainly gave the impression of wanting to support the Claimant's case, but the Tribunal did not consider that he was giving untruthful evidence. It accepted that from time to time the Claimant felt unable to go shopping and that Mr Webb would do it for him. It is difficult to accept that he would do so if he did not genuinely believe that the Claimant needed his help.

168. The existence of a substantial adverse impact is also supported by the aids of which the Claimant made use. In addition to his walking stick, he also made uncontradicted reference to use of a bath lift and a raised lavatory seat.

169. In addition, consistent with his impairment having a substantial adverse effect on him is his commitment to treatment. He is recorded as having undergone a variety of treatments and attended a pain clinic. It is, again, difficult to see why he would do those things if his pain was having only a trivial impact on his ability to carry out normal day-to-day activities.

170. Against this evidence is the surveillance material obtained by the Respondent. However, as we have made clear in our findings of fact above, we did not consider that any of it (whether looked at separately or cumulatively) had the effect of preventing the Claimant from establishing on a balance of probabilities that the relevant adverse impact existed.

(iii) Was any effect "long term"?

171. The Respondent has conceded this issue in principle with effect from 1 March 2023 if the Tribunal is otherwise satisfied that there was the necessary adverse impact.

172. That concession would mean that the period conceded would encompass all of the disability discrimination claims with the exception of the harassment claim in respect of the surveillance. For the reasons we give below we do not think that that amounted to harassment. The issue, therefore, is not materially in dispute.

(iv) Conclusion

173. The Tribunal concludes that the Claimant was a disabled person for the purposes of **Equality Act 2010**, **s. 6** at the relevant time.

(b) Direct Disability Discrimination (EqA 2010, s. 13)

(i) Dismissal

174. There is no dispute that the Claimant was dismissed.

175. Was the Claimant dismissed because of his particular disability? The Tribunal concludes that he was not. The appropriate comparator would be someone whose relevant circumstances, including their abilities, was not materially different. That would be someone who was similarly incapable of performing their job duties and who the employer believed would continue to be incapable of doing so for the reasonably foreseeable future. We do not consider that the comparator would have been treated any differently by Mr Rowe and/or Mr Humphrey. Would Ms Askham have blocked the possibility of resubmitting a claim to Unum? The relevant circumstances would have to include her believing that the comparator was seeking to behave fraudulently. Again, we think that the comparator would not have been treated more favourably.

(ii) Wrongly accusing the Claimant of fraud during the meeting on 16 March 2023

176. The Tribunal has concluded that this case fails first on its facts. We do not accept that Ms Askham expressly accused the Claimant of fraud. It is true that Ms Askham was personally convinced he was a fraudster. It is also likely, we consider, that having been brought at short notice into a meeting that raised the prospect of Unum investigating fraud, the Claimant reasonably concluded that he was being accused. However, we find that Ms Askham was careful not to go as far as making an express accusation.

177. In any event, even if Ms Askham is to be treated as having implicitly made the accusation the "reason why" would have been because she believed the accusation was well-founded and not because the Claimant was disabled. Ms Askham would not have made the allegation because the Claimant was a disabled person, she would have made it because she was convinced that he was not. In the circumstances, it was unnecessary also to consider whether or not the claim was in time – the claim was bound to fail in any event.

(iii) Threatening the Claimant by telling him that he should quit his job and he wouldn't be reported to the police or called to a disciplinary hearing

178. There is no reference in the minutes of the meeting to the Claimant being threatened with disciplinary proceedings. Ms Askham had specifically decided not to pursue a disciplinary course.

179. The non-legal members, who are very experienced in such matters, took the view (with which the Employment Judge concurred) that Ms Askham's intention was to drop a very clear hint that the Claimant might prefer to resign rather than undergo either an Unum investigation or a capability process.

180. However, the claim cannot clear the causation hurdle. Again, Ms Askham's "reason why" was not the Claimant's particular disability – she did not believe that he was disabled.

(iv) Conclusion

181. The Claimant's direct disability discrimination claims fail because in each case the facts that he was able to establish were not ones from which the Tribunal could conclude that he had been treated less favourably because of his particular disability.

(c) Discrimination Arising from Disability (EqA 2010, s. 15)

(i) Dismissal

182. The reason for the Claimant's dismissal, we found above, was the Claimant's incapacity for work. That incapacity arose from his disability. This was the subject of a specific concession by the Respondent:

> "It is accepted that the dismissal is unfavourable treatment and that it arises from [the Claimant's] disability. The issue is whether the dismissal was justified …[4]"

183. The Respondent contends that the dismissal was a proportionate means of achieving a legitimate aim. The aims identified are "managing sickness absence" and maintaining "acceptable levels of attendance". The Tribunal accepts that those overlapping aims are legitimate. It also accepts, in principle, that a policy of dismissing those who have been absent incapable and in respect of whom there is no real prospect of their returning to work is capable of being, in appropriate circumstances, a proportionate means of achieving those aims.

184. However, one significant circumstance in this case is the existence of the Unum policy. A policy of dismissing those who are absent incapable is not, we consider, proportionate where there exists an insurance policy that will cover affected employees. Applying, as we must, the **Bank Mellat** test, one of the matters we have to consider is whether there was a "less intrusive measure could have been used without unacceptably compromising the achievement of the objective". We have concluded that there was. Having resolved to determine the question of the Claimant's continued employment on the basis of capability alone, and given the very significant adverse impact that a decision to dismiss the Claimant would have on him (i.e. he would lose not only his job, but his access to the insurance benefits upon which he depended), we have concluded that a less intrusive approach would have been to have contacted Unum providing them with a copy of Dr Prakesh's report and the

[4] Respondent's closing submissions Paragraph 52.

Respondent's conclusion that the Claimant was genuinely incapable and to have invited Unum to resume payments. It is possible that Unum would have wanted to perform its own investigation before resuming payments, but the Unum appeal outcome letter is careful to say that (notwithstanding its own desktop exercise) the Claimant's diagnosis is not disputed. We do not consider that the reasonable needs of the employer would be in any way compromised by this less intrusive approach.

185. At times the Respondent's case, as developed orally by Mr Jupp, appeared to be that this should be treated as a case in which insurance was not available because the Respondent had already given instructions to cease payment and, in the light of Ms Askham's suspicions, it would have been unreasonable to have expected her to approve the resumption of payments. That is, in effect, to redefine the aim as managing the sickness absence or maintaining acceptable levels of attendance of employees the Respondent does not in fact believe to be sick.

186. In the light of the express concession set out above, we do not consider that this argument is available to the Respondent. It repudiates the concession that the unfavourable treatment was because of something arising from the Claimant's disability.

187. Another less intrusive measure which might, in principle, be available would be to move the Claimant to a job that he was capable of performing or adjusting his job so that he could return to it without risk of aggravating his condition. However, for the reasons given above when dealing with the unfair dismissal claim, we have not found that any such alternative or modified job was available.

(ii) Refusing to Allow the Claimant to go home in February 2023

188. It is unclear what is being referred to in this allegation. In February 2023 the Claimant was already absent from work. This was not a matter that was clarified or developed in the Claimant's evidence and accordingly the claim fails. For that reason it is unnecessary to consider whether or not the claim was made in time.

(iii) Conclusion

189. The Claimant's dismissal was an act of unfavourable treatment because of something arising from his disability.

(d) Failure to Make Reasonable Adjustments (EqA 2010, s. 20)

190. The Respondent accepts that it imposed a "provision, criterion or practice" consisting of a requirement that the Claimant should be able to perform all aspects of his job. It is also explicitly accepted in the Respondent's closing submissions that if the Claimant was disabled at the relevant time (which the Tribunal has found he was) the requirement placed him at a substantial disadvantage.

191. Logically, the disadvantage created by the requirement might be removed or reduced by not requiring that the Claimant perform *all* aspects of his job. In other words, the job might be modified by requiring that only certain aspects be performed. That might mean doing less lifting and that might, in turn, mean either removing some or all of the lifting tasks or reducing the number of days on which the Clamant was required to perform them. The Respondent had, to its credit, already taken steps in that direction, reducing the number of days in which the Claimant had to work in the pipe warehouse.

192. However, the Claimant's case has been that what was required was a "complete change of duties". This was the position set out in the Unum questionnaire, as well as being confirmed in his capability meetings and in evidence during the Tribunal hearing. That would require not an adjusted job but a different job. The Tribunal accepted that there was no existing "office job" into which the Claimant could be slotted and that the duty to make reasonable adjustments did not stretch to creating a new role for which the Respondent had no use.

193. There was a dispute of fact as to whether the Claimant had applied for any of the existing vacancies before his employment came to an end. We resolved that factual dispute in the Respondent's favour.

194. At the hearing the Claimant told the Tribunal that he had applied for a position as Employee Health and Safety Manager. The Claimant led no evidence that suggested that he was suited to that position. It had as a minimum requirement, for instance, a "NEBOSH Diploma in Health and Safety Management". The Claimant did not suggest that he had that qualification. The Tribunal did not conclude that appointing the Claimant to the position of EHS Manager would have been a reasonable adjustment.

195. The Tribunal concludes that there was no failure to make reasonable adjustments.

(e) Harassment (EqA 2010, s. 26)

(i) Subjecting the Claimant to Surveillance

196. The Respondent accepts subjecting the Claimant to surveillance. The Respondent alleges that the claim is out of time. The last day of surveillance was on 14 March 2023. The Claimant contacted ACAS only on 9 August 2023, by which point, the time limit had expired. The Claimant advanced no positive case as to why it would be just and equitable to extend time. That being so, the Tribunal does not extend time and the claim fails for want of jurisdiction.

197. Had the Tribunal felt it appropriate to extend time, it would have dismissed the claim in any event. We accept that it is appropriate for an employer to perform a social media check. Whilst we do not accept that the material produced by the surveillance established that the Claimant was not genuinely disabled, we note that in answer to a question from the Employment Judge the Claimant accepted that anyone seeing the material produced by TenIntelligence would not immediately appreciate that he was suffering from a physical impairment. In those circumstances, the Tribunal would have found that initiating surveillance was a reasonable course of action. It was not related to the Claimant's disability. Rather it arose from a suspicion that he lacked the relevant protected characteristic and, further, it was not reasonable for the surveillance to have the necessary harassing effect.

(ii) Ms Latter and/or Ms Askham refusing to accept the Claimant's fit notes

198. This claim fails on its facts. The Tribunal was not satisfied that either Mrs Latter or Ms Askham had failed to accept any fit note submitted by the Claimant.

(iii) Conclusion

199. The Claimant's harassment claims fail. The first claim fails because it is time-barred. The second fails on its facts.

(4) Polkey/Chagger and Next Steps

200. The Claimant having succeeded in two claims: unfair dismissal and discrimination arising from disability, there will need to be a remedy hearing if remedy cannot be agreed. We have been asked, however, to make Polkey/Chagger findings as to whether the Claimant would have suffered loss (and, if so, to what extent) had matters been dealt with fairly and in a non-discriminatory way.

201. Each of the successful claims relates to the dismissal and the core complaint is the same in both cases, namely that there was a failure on the part of the Respondent to go back to Unum and to indicate that it had now satisfied itself, having obtained further OH input, that the Claimant was genuinely incapable of work.

202. Notwithstanding the insurer's stated position that it was not disputing the Claimant's diagnosis, there is at least a chance that Unum would have insisted on investigating the Claimant's position itself and a chance that it would have rejected the claim. Without hearing from Unum about how it would likely have proceeded and in the absence of evidence of how comparable cases have been dealt with, the Tribunal has been unable to make a precise estimate of the prospects that a fair and non-discriminatory process would have resulted in a rejection of the insurance claim and a subsequent lawful dismissal on grounds of incapacity. We are satisfied that the probability of such an outcome is higher than zero, but doing the best we can, we estimate it at 20%. That means that the Claimant would have received 80% of 70%[5] (or 56%) of his pay until 19 September 2024. At that date the Claimant would have received two years of benefits and his entitlement under the Unum scheme would have ceased.

203. Had the Claimant wanted to be paid for any period after 19 September 2024, he would have had to return to work. On the Claimant's own evidence, that would have been impossible. Included in the bundle is a fit note dated 14 August 2024 certifying that his elbow and back pain would make him unfit for work for a further 3 months. There is no indication in his evidence that he ever recovered sufficiently to resume work. Indeed, his statement for the Tribunal hearing says that his current condition is that "most days [he is] indoors feeling housebound due to constant pain".

204. We think it certain that the Respondent would have commenced that capability process ahead of 19 September 2024 with a view to ensuring that any contractual notice required terminated on or about that date if the Claimant were not fit to return. We also conclude that the Claimant would inevitably have maintained that he was not fit to return. The Respondent, we conclude, would have been certain to have terminated his employment at that point.

205. The Respondent also contends that the Claimant's award should be reduced on grounds of contributory fault. The fault is said to consist of the Claimant exaggerating his condition. We did feel, at times, that the Claimant had, to put it neutrally, pitched the impact of his disability as high as he could. However, even if we were to assume (which we do not) that he had deliberately over-stated his condition, we do not see how that would permit a contributory fault reduction. The Claimant was not dismissed for exaggerating his condition. Both the Respondent and the Claimant agree (both for the purposes of the unfair dismissal and discrimination arising from disability claims) that he was dismissed because of an incapacity arising from his disability.

[5] The insurance contract entitled him to receive 70% of his pay.

Exaggeration would only have contributed to the dismissal if there was some realistic prospect that without it, he would not have been dismissed. Neither party is suggesting that. It follows that the Tribunal concluded that no reduction should be made for contributory fault.

EJ Jones KC

29 July 2025

Judgment sent to the parties on

6 August 2025