EMPLOYMENT TRIBUNALS

Claimant: Mr J Adu

Respondent: Mitie Limited

Heard at: London Central (by CVP) **On: 23, 24, 25, 26 & 27 June 2025**

Before: Employment Judge Emery
Ms S Went
Ms N Sandler

REPRESENTATION:

Claimant: Mr N Adu (claimant's son)
Respondent: Mr M Mensah (counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

3. The complaint of a failure to make reasonable adjustments is well founded and succeeds.

REASONS

1. Reasons were provided at the hearing, and written reasons were requested.

The Issues

2. There was a discussion at the outset of the case on the liability issues. The claimant believes that he brought a claim of a failure to make reasonable adjustments as well as a s.15 claim, discrimination arising from disability. A reasonable adjustments claim is not referred to in the list of issues prepared at the Case management discussion on 2 September 2024.

3. The claim form has little detail. It states the claimant was told that because he could not stand for 10 hours, he would be dismissed. In his witness statement the claimant refers to a failure to make reasonable adjustments "such as transferring me to another location" but this was not done.

4. On reading the claim form, the tribunal were of the view that a reasonable adjustments claim can be made out. The respondent opposed any application to add this claim, arguing that it is not listed in the List of Issues prepared by the Judge at that hearing and that the respondent would be disadvantaged.

5. The tribunal concluded that it was in the interests of justice to allow a claim of a failure to make reasonable adjustments to proceed. There is little reference in the Case Management Order to the discussion about the claims; but on the face of the claim the claimant is arguing that there was a practice requiring security officers to stand for up to 10 hours a shift and he could not do so and was dismissed. The respondent accepts that significant periods of standing was a practice at least at certain work locations.

6. We did not consider that this amendment would add significantly to the time required for the hearing. The respondent's statements already deal with the 'practice' – for example see Mr Read's statement paragraph 8 which deals with the practice of standing for prolonged period; Mr Povey's statement addresses the adjustment of transfer to the CCTV officer role. The adjustments sought are evidential factors in the dismissal and s,15 claims also.

7. The Reasonable Adjustments issue was formulated at the outset of the hearing, and it was agreed that the respondent's witnesses could be asked questions on this by Mr Mensah at the outset of their evidence. In the event the only substantial disputed issue was whether the claimant was fit likely to be fit to return to work

Time limits

8. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 30th December 2023 may not have been brought in time.

9. Was the s15 EqA discrimination complaint made within the time limit in s123 of the EqA? The Tribunal will decide:

    a. Did any of the discrimination incidents occur before 30th December 2023?

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

    c. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

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

Unfair dismissal

10. The parties accept that the claimant was dismissed on the ground of long-term incapability.

11. Was that a potentially fair reason?

12. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

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

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

    b. The Respondent adequately consulted the Claimant; 10.3. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

    c. Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

d. Dismissal was within the range of reasonable responses.

Discrimination arising from disability – s.15 Equality Act 2010

14. The Respondent dismissed the Claimant on 4th January 2024, it is accepted that this is unfavourable treatment

15. Did the following things arise in consequence of the Claimant's disability:

    a. The Claimant's long term sickness absence between August 2021 and his dismissal in January 2024?

    b. The Claimant's inability to stand for a 10-hour shift?

16. Was the dismissal because of any of those things?

17. Was dismissal a proportionate means of achieving a legitimate aim? The respondent relies on the following aim:

    a. Ensuring that its business runs efficiently.

18. The Tribunal will decide in particular

    a. was the treatment an appropriate and reasonably necessary way to achieve that aim;

    b. could something less discriminatory have been done instead;

    c. how should the needs of the Claimant and the Respondent be balanced?

19. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

Reasonable adjustments - s.20 & 21 Equality Act 2010

20. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

21. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

22. A policy of requiring security guards to be reasonably fit and to stand for prolonged periods during shifts?

23. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that because of complications arising from his right knee operation the claimant was unable to stand for long-periods?

24. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

25. What steps could have been taken to avoid the disadvantage? The claimant suggests:

    a. Transfer to another location

    b. Adjusting shift pattern or hours

    c. Offering alternative duties such as operating cctv

26. Was it reasonable for the respondent to have to take those steps and when?

27. Did the respondent fail to take those steps?

Witness and additional bundle

28. The claimant gave evidence, as did a colleague on his behalf, Mr Jamshaid, who worked at Nuffield House, a site adjacent to the claimant's place of work, and who often worked closely with the claimant. On behalf of the respondent, we heard from:
    a. Mr Lee Read, Regional Account Manager who was the dismissing manager;
    b. Mr Justin Povey, Account Director who heard the claimant's appeal against dismissal

29. On the 3rd hearing day, the respondent produced a bundle of documents comprising HR notes between Mr Read and HR and Mr Povey and HR; we allowed these documents in, they appeared to be of significant evidential value, as outlined below.

The relevant facts

30. The claimant was employed by the respondent (and its predecessor companies) from 1 July 2006. The parties agree that the claimant was off work continuously from 5 September 2021 to the date of dismissal on 4 January 2024. The reason for this absence was arthritis in both knees and the consequent need for complete knee replacements.

31. The claimant's role was Security Officer. A significant dispute in the evidence was the extent the claimant needed to stand to do his role. The respondent points to the claimant's own comments in the November 2023 absence meeting - up to 10 hours a shift. The respondent points to core duties including being fit, remaining alert, conducting escorting duties, conducting internal and external patrols, floor walks, standing for extended periods of time.

32. The claimant argues that his role at his main site, Pegasus House, was "mainly sitting and standing"; he says he spent most of his shifts sitting at the front desk, standing when guests arrive and escorting guests to the lift. He says that he undertook 3 walking patrols per shift, which would involve checking the car park, checking the common areas, which would include using the stairs. For building evacuations, he was required to stand by the front door and ensure building occupants left as quickly and safety as possible

33. The claimant disagreed that he was required to stand for long periods in his main 'single site' role (i.e. one guard undertaking front-desk duties all shift). He says that in 'multi-site roles, including his main overtime role, he would be required to rotate to different locations in the building each hour, including front desk (where he mainly sat) and car-park patrol. He believes that hourly rotation is standard policy within the respondent at multi-site locations.

34. Mr Jamshaid agreed with the claimant's evidence; that working at Nuffield and Pegasus involved mainly front desk duties with little standing, that the walking was mainly undertaking patrols. He also said that in his long experience working with the respondent Security Officers could be accommodated to a role which they requested which more suited their needs.

35. Mr Read disagreed that the role involved "predominantly" sitting, that it can "ebb and flow" during the day, he accepted he did not know the exact proportion of sitting and standing. Mr Povey accepted that the role would not involve standing for up to 10 hours, but that in a busy building a good proportion of the day would be "up and down".

36. The claimant's left knee replacement took place in late 2021 and it went well. On 3 December 2021 the claimant had a welfare long-term meeting with his manager Mr Cutts. He said that the left knee was "feeling much better" but that he still needed his right need replacing, this was causing him pain and difficulty walking. He said he was "sitting at home unable to do very much" which was frustrating. He said he was visiting the consultant the following Monday to find

out when the right knee replacement would take place. Mr Cutts said that a few weeks before his estimated return date, Occupational Health would be asked to consider whether the claimant could return to his current role, whether adjustments were required, and whether there was a need for a phased return to work (127).

37. On 16 December 2021 the claimant was signed off for a further 3 months, on the basis he was awaiting surgery on his right knee (130).

38. An Occupational Health report was provided on 16 February 2022, saying that the claimant was unfit due to limited mobility while awaiting total right knee replacement, that he has "ongoing severe pain ... and limited mobility" as a consequence. The report mentioned the "lengthy waiting times" for NHS surgery and it was not possible to estimate a date for return, but that "the outlook appears positive", as a right knee replacement will "hopefully" lead to a positive outcome and improved mobility. The report states that the claimant is likely to be disabled under the Equality Act as the condition has lasted or is likely to last more than 12 months and it has significant impact on normal daily activities (131-2).

39. The next long-term absence meeting with Mr Cutts took place on 4 March 2022. The claimant did not have a date for his right knee surgery, he said that he is on the cancellation list, and the surgeon hopes to book him in "very soon", a pre-assessment has been undertaken. Mr Cutts informs him that provided the right knee replacement heals properly the intention would be to have a further OH review to consider a phased return and "light duties" (134-6).

40. The claimant had a right knee replacement in April 2022. Apart from Med3s there are no documents in the bundle for the period March 2022 – April 2023. The respondent's witnesses accept that it did not appropriately manage the claimant's absence during this period.

41. A further Occupational Health report was received on 27 April 2023. The report describes a "significant improvement' in the right knee, but that there had been some issues arising after surgery, including the wound re-opening, and current symptoms of swelling, pain on prolonged standing and walking, and not being able to walk longer than 10 minutes "he has limited mobility, mobilising with crutches for balance". The report states that the claimant accepts that these are "barriers" preventing his return to work. He had been discharged from physiotherapy and undertaking exercises at home and medical treatment "with good effects". The report states that the claimant remains vulnerable to flare-ups, the frequency severity and duration of which cannot be predicted; there was no return to work date, but "medical evidence suggests" that it may take up to 12 – 26 weeks for a full recovery "however this varies from person to person" (142-3).

42. The claimant was invited to a first formal meeting under the Sickness Absence procedure on 14 June 2023; its purpose was to consider support or adjustments which can be provided to facilitate the claimant's return to work (145). The claimant says he still has right knee pain and swelling, "I have some pain but otherwise I am ok." He says that when he goes out, he needs to walk with crutches. On returning to work, he says that he cannot walk for long or stand for long periods, he would need a walking stick while at work, "it I could sit that would be better." He says he cannot return to work at that point, but he was seeing his surgeon in September and that he wanted to return to work as soon as possible, he would prefer to return "a few days a week" (147-8).

43. On 13 July 2023, the claimant was invited to a further absence meeting, the purpose was to discuss health and progress and any adjustments which could be made; the letter for the first time states that long-term absence means that "if you are not able to return to work at all, at some point in the future, we may not be able to keep you on..." (150); he was unable to attend this meeting which was rearranged for 11 August 2023 (153).

44. The meeting was undertaken by Mr Read. The claimant said that his right knee was still causing pain, he was now using one crutch. He said that he could not come back and stand "on and off for 12 hours" he would need to sit and when moving would need support (a walking stick). He says he would not be able to return in September "I just need more time..." but that he could undertake some duties, "sitting down I would be ok".

45. The claimant is told that an option would be dismissal because Mr Read does not see that the claimant could return to work in his role, that there is no foreseeable date of return to work, but that he would discuss with HR, and would consider the claimant's length of service (154-6).

46. Mr Read is told by HR that because this was the second formal capability absence meeting, it is not appropriate to dismiss at this stage. The claimant was next contacted on 10 November 2023 and is invited to a further meeting; the letter states that he is at risk of dismissal (157-8).

47. At the meeting on 28 November 2023, the claimant is asked about his mobility, he says he has had a bone scan "and I cannot walk properly, I need one crutch... they may need to operate again". He is asked whether he could do his role on a 10 or 12-hour shift and responds "Honesty to stand 10 hours I cannot do it. I can stand a bit, sit and do the odd patrol...". He accepts he doesn't know when he can return to work, responding that he can walk unaided but a fall would be problematic (159-61).

48. On 4 December 2023 the claimant's surgeon provided a Med3. It signs him off for 6 months. It states that he is "not fit to work". It also says that the claimant

"may benefit from ... workplace adaptations." Handwritten is the comment "May be able to undertake amended duties" (162).

49. The respondent's position is that this Med3 is saying that in six months' time the claimant may be fit to return with amended duties. We accept that there is some ambiguity in this Med3; but we also accept that the surgeon is suggesting that there is a relatively optimistic prognosis, that there is the prospect of the claimant being fit to return to amended duties. We accept that the Med 3 is ambiguous was to when that would be: now, or at some point in the future. But we conclude that a surgeon is unlikely to put 'amended duties' on a Med 3 if it was not meant as an indication to his employer that he could undertake amended duties in the foreseeable future.

50. Mr Read accepted that he did not seek an Occupational Health report at this time, on the basis that there was "no change" in the Med3's, that this Med3 was a definite "not fit to return". In evidence he accepted there was a "potential ambiguity" with this Med3, but he read this as saying that the claimant may be able to undertake amended duties in the future, once he is fit to return to work, potentially in 6 months' time.

51. The Tribunal notes that at the time Mr Read received the Med3, he did have amended duties in mind. On 5 January 2024 he is asked by HR whether he should consider a further OH report. He responds, enclosing and referring to the Med3, saying that the "amended duties part" would be difficult due to the nature of the role. He also says that he "does not see the value" of a further OH report as the claimant "cannot walk" that there would be "limited" suitable alternative roles (267). HR repeats the question, Mr Read responds that HR have said "OH would not be completed" [note – the notes we have do not say this]; "Also, it has been 2 years and he has no return. He cannot move without being aided and stand for any length of time..." (266).

52. The claimant's surgeon also wrote to his GP. His letter refers to "diffuse pain:" which has "improved marginally", that he walks with a stick. The letter says the scar has healed, he has full extension and no significant swelling; the scan was unremarkable. He does not recommend further surgery as the claimant "is continuing to improve...". On his job, the letter says that "realistically to get back this kind of work he would need to have changes in his workplace/amended duties", as he cannot do a role which is "on his feet all day" (204).

53. The claimant says that he called Mr Read immediately following the consultation with his surgeon, saying that his knee was improving and he would be able to return to work, but he says he was told a decision had been made to dismiss him.

54. The claimant points to the respondent's Sickness Absence policy, which suggests that an Occupational Health report is required before a decision to

dismiss is made, that dismissal could result “If ... from the Occupational health or medical reports there is no definite return to work date...”. It says that Stage 2 of the process requires an “OH report and prognosis” (100 and 103). Mr Read argued that he was “not advised” that this was the case.

55. On 11 January 2024 the claimant was informed by letter that his employment was being terminated on grounds of incapability for ill-health, his last date of employment the same day. He was given pay in lieu of notice and accrued holiday pay (164-5).

56. The claimant was given the right of appeal, and did so on 16 January 2024, saying he felt the decision was harsh and that the respondent failed to consider an alternative to dismissal, had failed to refer him to OH and failed to explore alternative roles (169).

57. At the 30 January 2024 appeal hearing, the claimant stated that the April 2023 OH report was no longer a true reflection of his health, that his knee was getting better, and he was able to do more each month, that by December 2023 it was “a lot different”. He said that he was fit to return to his role as a Security Officer. He accepted that he could not stand for 10 hours “but nobody is required to stand for 10 hours. He said that his role was in reception with a desk, chair, laptop, he completed forms and undertook patrols. He said he was “much better I can do my job ... I am getting better and better...”’. He said that he had been given a further sick note for six months and would be able to return to work in June 2024 (172-3).

58. In his evidence, the claimant says that he could have in fact returned with amended duties from December 2023, that he did not suggest a particular role apart from cctv operative, but that the respondent “is a big company”, that he suggested they transfer him to another role. He said that he could have returned at this time on shorter hours, starting at 2-3 hours a day. He says that the respondent has staff who cover for breaks that he could start in a cover role covering break for 2-3 hours, that he could have coped “coming back slowly”, that there were lots of other roles within the company he believed he could undertake.

59. The claimant says that he could have been sent back to OH in December 2023 as there was “a big improvement” in his health, that by this date he could return to a different role “with reasonable adjustments”. He denies that his comments at this meeting “were not realistic”, or that he made positive comments about his return because he wanted his job back; the claimant said he was realistic, that by December 2024 and into 2025 his knee was “much better". He says that a further OH report in January 2024 would have led to a definite return to work date to an adjusted role.

60. Mr Povey sought advice from OH; on 14 February and 4 March 2024 he is told that he should reconvene the appeal hearing: “This will allow you to gather further detail on the OH that was done previously and whether the employee believed that was relevant at the time. Also to understand if a new OH is required and if the employee believes they are fit to return back to their original role.”

61. The claimant was invited to a further meeting on 12 March 2024, its purpose was in part to “discuss OH options”. The notes record the claimant saying the following: “the first operation went well ... the second operation ... unfortunately hasn't gone well. I am still using a stick ... may need my right knee operated on again...”. He says that he wanted to return to work, preferably in a cctv operator role as he may find standing and walking “difficult”.

62. In evidence, the claimant says that his comment was about the history of his knee operations, not about the present, that this remark was misunderstood, that by March 2024 he fully knew he did not need a further operation. We note that the claimant was not given an opportunity to check or correct these notes prior to the decision – they were sent to him with the decision dismissing his appeal (189).

63. The Tribunal accepts that at this time the claimant did not need a further operation, that this comment is in the context of talking about both operations and how they went, that this transcript does not accurately capture that this was about the history of his condition rather than his current symptoms.

64. In response Mr Povey states that if he returned, the respondent “would consult and look for alternative roles...” but that he does not have the SIA licence to operate cctv. Mr Povey states that if his appeal is successful “I promise I will look at getting you back on an SIA course so you are able to complete duties”. (176-9).

65. The appeal outcome dated 1 May 2024 rejected the claimant's appeal. It says that the claimant would not be able to carry out his full duties, that the claimant's place of work was “very busy”; that his current health status was that he was unable to work, which meant he would be unable to fulfil his role. The claimant did not have the correct license to undertake a cctv role and there were no vacancies; that the decision on 28 November 2023 was taken based on the claimant requiring a second operation and the OH report of 27 April 2923 was therefore current; he did not feel a further OH review in November would have changed this decision.

66. Mr Povey accepted in his evidence that the date of this report was close to expiry of the 4 December 2023 Med3, that he could have sought OH advice; he said that he received “guidance” from HR, and that the current medical certificate said he was not fit to work.

67. Mr Povey's evidence was that he did not consider getting a further medical report or OH referral despite the claimant requesting this at the appeal hearing because although the claimant was saying he was willing to return to work, and did "allude" to feeling better, he could not stand for any duration, and "the medical evidence shows he was not capable" of returning. He said there was a difference between the claimant's "willingness" to return against the last Med-3 which signed him off to June 2024, that he "did not see how there would be a significant improvement" in his capability at the time of the appeal.

68. Mr Povey accepted that he referred to the prospect of another OH report in his discussions with HR. He says that it was after he consulted with HR that he decided not to proceed with a further OH report. He said that the claimant's Med3 had ambiguity, but that this was to be considered on the claimant's return to work, but that "maybe I should have clarified" what was meant by the Med3 comments.

69. There was significant evidence on potential reasonable adjustments. Mr Read accepted that there may be some amended roles available - "we could amend work, or location", but this was dependent on the claimant being fit to return to work. He accepted that there could be a reduction in shifts, perhaps starting 2 days per week and on reduced hours per shift "this could be actioned when we have a return-to-work date ... there are always vacancies on my team". The respondent would also have considered Access to Work. He accepted that when fit the claimant could have returned on "light duties" or "amended duties" as accepted by his predecessor (135).

70. One role the claimant mentioned at appeal stage was cctv operator. The claimant accepted he needed a license to operate cctv, but that he had cctv experience when working as a security guard in a police station, that he could have taken and passed that course without difficulty. Mr Read's evidence is that the previous cctv experience was not relevant as it was an internal cctv service, he accepted that once the claimant was able to return to work he could have been trained to become a cctv operator, that the respondent pays for employees to go on a cctv course to obtain the appropriate licence.

71. Mr Povey accepted that transfer to another role was "an option" that if the claimant had been fit to return, he would have considered other roles, including supporting the claimant to obtain a cctv licence; he accepts that this adjustment has been made for employees returning from sick leave in the past.

Closing submissions

72. Mr Mensah provided written closing submission and made oral submissions. The claimant made oral closing submissions. I refer to their submissions in the 'conclusions' section below.

The relevant law

73. As well as the cases cited by Mr Mensah and Mr Adu, we considered the following legislation and case law.

Discrimination arising from disability

74. s.15 Equality Act 2010

(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.

75. Case law on objective justification

a. *Chief Constable of Gwent Police v Parsons and Roberts UKEAT/0143/18*: once a prima facie case of discrimination arising from disability is shown the onus is on the employer to establish justification, which involves showing that the unfavourable treatment was a reasonably necessary and proportionate means of achieving a legitimate aim.

b. *Hensman v Ministry of Defence* EAT *[2014] EqLR 670:* when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

c. *City of York Council v Grosset [2018] EWCA Civ 1105:* the test of justification is an objective one to be applied by the tribunal; therefore, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, it is the ET which must make its own assessment. In addition, the EHRC Employment Code of Practice makes it clear that a link between failure to put in place reasonable adjustments and the unfavourable treatment in issue under EqA 2010 s 15(1)(a) may be an important factor to be taken into account when determining justification.

d. *Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918:* where a policy permits potentially different responses to any particular circumstance, for example the application of an absence policy, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim.

e. *Knightley v Chelsea & Westminster Hospital Foundation Trust [2022 IRLR 567:* If the Tribunal accepts the employer is pursuing legitimate aims when dismissing the claimant, the Tribunal must conduct the necessary balancing exercise to weigh up their discriminatory effect to determine the question of proportionality.

f. *Birtenshaw v Oldfield [2019] IRLR 946*: in assessing proportionality the Tribunal should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

g. *Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43*: the duty to make adjustments and the prohibition from discrimination arising from disability may be closely related. 'An employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence may have breached both duties.

h. *Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265:* Where there is a link between reasonable adjustments and s.15 unfavourable treatment, a failure to make those reasonable adjustments is to be considered as part of the objective justification balancing exercise.

i. Ali v Torrosian (t/a Bedford Hill Family Practice) UKEAT/0029/18: the authorities on the objective balancing exercise show that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim.

j. Department for Work and Pensions v Boyers EAT 0282/19: The proportionality assessment requires the tribunal to carry out an objective balancing exercise, between the needs of the employer, and the negative effect of the dismissal on the claimant.

k. O'Brien v Bolton St Catherine's Academy [2017] ICR 737: where sickness absence is the 'something arising in consequence' of disability, the impact on the employer of the continuing long-term absence will be so obvious that a general statement to that effect will suffice.

<u>Reasonable adjustments</u>

76. Equality Act s.20: Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises …

(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.

77. Case law on reasonable adjustments

a. *Sheikholeslami v University of Edinburgh [2018] IRLR 1090*, *EAT:*

> "It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. This … is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP."

b. The EHRC Code of Practice states: "Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

c. *Archibald v Fife Council [2004] UKHL32:* the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. … that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled.

d. The EHRC Code of Practice on Employment (2011) para 6.28 factors which might be taken into account when deciding on adjustments:

   i. 'whether taking any particular steps would be effective in preventing the substantial disadvantage;
   ii. the practicability of the step;
   iii. the financial and other costs of making the adjustment and the extent of any disruption caused;
   iv. the extent of the employer's financial or other resources;
   v. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

vi. the type and size of the employer."

e. The Code para 6.33 examples of reasonable adjustments:

i. allocating some of the disabled person's duties to another worker;
ii. transferring the worker to fill an existing vacancy;
iii. altering the worker's hours of working or training;
iv. assigning the worker to a different place of work or training or arranging home working;
v. acquiring or modifying equipment;

f. *Royal Bank of Scotland v Ashton [2011] ICR 632*: "to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination, [the Employment Tribunal] must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial … viewed in comparison with persons who are not disabled.' The EAT stated that the examination on whether adjustments should reasonably have been made "should be an objective analysis of the practical result of the measures which could be taken."

g. *Smith v Churchills Stairlifts plc [2005] EWCA 1220*: The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly.

h. *Jennings v Barts and the London NHS Trust [2013] EAT EqLR 326*: It is a "straightforward factual analysis of the evidence provided" to determine whether the adjustment contended for would have been reasonable to put in place.

i. *Garrett v Lidl Ltd [2010] All ER D 07 (Feb) EAT:* employers are able to conclude that the best adjustment may be transferring the employee to a different place of work, even though the claimant did not want to move (where there was a mobility clause in the contract).

j. *Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10*: when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring.

k. *Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960:* if a suitable vacancy is identified during a reorganisation, it may not be

sufficient for an employer to ensure the employee was given an interview; the more favourable treatment could be to offer them the role.

Unfair dismissal

78. Capability dismissals

a. BHS v Burchell test - Graham v Secretary of State for Work and Pensions (JobCentre Plus) [2012] EWCA Civ 903: - applied to long-term sickness absence cases by DB Schenker Rail (UK) Ltd v Doolan [2010]: the employer must show:

- It had a genuine belief that ill-health was the reason for dismissal;
- It had reasonable grounds for its belief;
- It carried out a reasonable investigation.

"36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. … In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice."

b. Spencer v Paragon Wallpapers Ltd [1976] IRLR 373: "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?'

c. Merseyside and North Wales Electricity Board v Taylor [1975] IRLR 60, [1975] ICR 185: "… when one comes to consider the circumstances of the case, as to whether they make it reasonable or unreasonable to act upon his incapacity and to dismiss him, it cannot be right that, in such circumstances, an employer can be called upon by the law to create a

special job for an employee however long-serving he may have been. On the other hand, each case must depend upon its own facts. The circumstances may well be such that the employer may have available light work of the kind which it is within the capacity of the employee to do, and the circumstances may make it fair to at least encourage him or to offer him the chance of doing that work, even if it be at a reduced rate of pay'.

d. Garricks (Caterers) Ltd v Nolan [1980] IRLR 259: the employer acted unreasonably in not giving sufficient consideration to finding the employee a job in circumstances where although he was not fit enough to do shift work, he could have done a day job. "Clearly employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent. What is reasonable is very largely a question of fact and degree for the industrial tribunal'.'

Conclusions on the evidence and the law

79. We considered the medical evidence. The 27 April 2023 report makes it clear that the claimant should make a “full recovery” in 12-26 weeks, although this can vary.

80. By 11 August 2023, the claimant says “nothing changed” since the absence meeting in June 2023, but that he is now using one crutch and not two. He says he cannot stand “on and off” for 10-12 hours but that he can move with support, that a role involving sitting would be okay. Mr Read’s initial rationale for seeking to dismiss the claimant after this meeting was because the claimant would not be able to return “Anytime soon” and may not be able to move without a stick when he did return.

81. We conclude that the 11 August 2023 meeting conveys a disappointing position on the claimant's health, that it appears that his recovery is not as fast as envisaged by OH, but the claimant did suggest he could return to a role involving sitting. We accept that the claimant was, on this account, unlikely to be fit to return to work by October 2023.

82. By 10 November 2023 the claimant was still not fit to return, and Mr Read has had “several chats” with the claimant. Mr Read does not feel a return is possible, that “dismissal on medical grounds is the way to proceed.”

83. By 28 November 2023 the claimant accepts that he can’t stand for 10 hours, that he can stand, sit and do the odd patrol but can’t stand “for too long”; he would prefer to use a stick at work.

84. We accept that there is ambiguity in the claimant's position. He is saying he wants to return to work, but that there is a limit to what he can do at work. His union refers to an alternative role or a further OH report.

85. But we also consider that the ambiguity relates to prognosis, when the claimant will be fit to return to work. There was no medical evidence to suggest when this would be, if at all, and what duties he would be able to undertake. These questions are, we conclude, ones which only Occupational Health or the claimant's treating doctor could have properly answered.

86. Mr Read accepts at the 28 November 2023 meeting that a OH review is a potential option, he says that he will look to review with OH again after discussing with HR.

87. However, in his note to HR Mr Read says that he is "not sure" he can see the value of a further OH meeting; that he thinks alternative roles would be limited.

88. The Tribunal concludes that there are several conditional statements in Mr Read's note to HR: 'not sure', 'I think'. There is nothing about potential prognosis. We conclude that Mr Read is unsure about the position because these issues are in fact questions for Occupational Health. Mr Read is, we consider, making an assumption for which there is no current medical evidence. It also discounts the relatively optimistic prognosis in the April 2023 OH report.

89. We note also HR's repeated suggestions of a further OH report, and Mr Read believing, it appears wrongly, that this had been discounted at an earlier stage by HR.

90. The 4 December 2023 Med3 clarified one issue by suggesting that the claimant was still not fit for work. However, this certificate was also clear evidence that the claimant's prognosis was improved such that a return to work with amended duties was foreseen as at least a prospect.

91. While his employer did not see the claimant's surgeon's report on 4 December 2023, we conclude that this is a relatively favourable report on the claimant's prognosis. His recovery is progressing, albeit slowly, there is no need for surgical intervention, that he should continue his rehabilitation with exercise and physiotherapy.

92. One of the Tribunal's non-legal Members is an experienced and qualified physiotherapist, albeit not now practicing. We are therefore able to say with confidence that the surgeon's letter demonstrates a surgically successful operation; that the treatment being recommended is normal treatment at this stage post-operation, and that the prognosis is positive – that the surgeon believes there are likely to be continuing improvements. The surgeon saying he

would like to "keep an eye" on the claimant does not suggest any concern about the rate of recovery.

93. We conclude on the basis of this report that the Med 3 dated 4 December 2023 means the following: the claimant is not fit to return to his current role as a Security Officer; that consideration should be given to adjustments which can be made for the claimant's prospective return; that the claimant could be fit to return to work in the foreseeable future with adjustments.

94. We appreciate that the respondent did not see this report at the time. But we consider the Med3 should have been a trigger for an OH report, because of the clear suggestion that adjustments should be considered. The tribunal's professional knowledge of such issues means that we can conclude that the Med3 would not have mentioned adjustments if the prognosis was uncertain or poor with no foreseeable return to work date.

95. In saying this, we also note that the respondent's policy states that an up to date OH report should be sought at the stage 2 hearing. This was not obtained before dismissal.

96. Had an OH report been sought, we consider that the claimant would have provided his surgeon's report and most recent Med3 to OH. We conclude that an OH report at that time (end December 2023/ beginning January 2024) would have given serious consideration to a return-to-work date and the necessary adjustments or potential alternative role to achieve this.

97. These were questions being asked by HR to Mr Read and Mr Povey; to consider seeking a further OH report; whether consideration should be given to the Union's request to "explore other roles". We conclude that Mr Read based his decision to dismiss on his view of the claimant's prognosis and on a Med3 which he now accepts may be ambiguous.

98. We have not heard from HR. We can see that HR was keen not to press the issue or to make any decision for Mr Read. But HR does have knowledge and experience, and there is a rationale for its questions to Mr Read and Mr Povey. As we say above, we find one some of Mr Read's reasoning to HR to be mystifying – HR had not suggested that an OH report was not required, they were suggesting the opposite.

99. We also accept that at the meetings with Mr Read the claimant was saying he was in pain and still having difficulty walking, that this is the basis of Mr Read's views. But, by early December 2023, his surgeon is suggesting reasonable adjustments in a Med3 and medical report. The medical evidence in the 4 December letter contradicts the respondent's conclusions on prognosis.

100. We conclude that a referral to OH may well have clarified the issue, whether the Med3 was correct in asserting that while the claimant was not at that time fit to return to his role as a Security Officer, he may be fit to return potentially in the foreseeable future with adjustments. It was for OH to suggest adjustments and to clarify any medical ambiguity.

101. The failure to do seek an up to date OH report means that the Tribunal must consider what adjustments, if any, may have been reasonable, and if so when they could have been made.

102. The claimant's managers at various times mention a phased return, light duties, adjusting shift patterns, and Mr Read agreed that these are the kind of adjustments which would have been considered had the claimant been able to return to work.

103. Had a referral to OH been made, we consider that these are the kinds of adjustments which could have been considered, along with the cctv role. Based on the medical evidence we have seen, we conclude that it is possible that at this meeting OH would have been able to suggest a potential date for the claimant's phased return to start.

104. Mr Povey accepted in his evidence that had a positive OH report been provided which had a return date, he would not have upheld the dismissal. We conclude that at the first appeal hearing the claimant is clear that he is fit to do at least some of his duties (172), that he can do more each month, and that his condition is better than it had been in April 2023, he does not need a further operation. He is clear that he would be fit to return to work by June 2024. However, Mr Povey's evidence was that he did not know the claimant believed he would be fit to return to work by June 2024.

105. As with Mr Read, HR's advice is to consider a further OH report, and to consider the claimant's case on returning to work with adjustments. Mr Povey decided not to seek a further OH report, and we do not accept from Mr Povey's evidence that this was a reasonable stance to take. His reasoning for not doing so is based on his second meeting with the claimant. We accept that at this meeting the claimant appears to be much less positive than he was at the first appeal meeting, but he says that this is a misunderstanding of what he was saying, and critically he was not given the opportunity to check the meeting notes prior to the appeal decision.

106. Based on a very brief and according to the claimant an inaccurate summary of the meeting, Mr Povey makes his decision not to refer the claimant to OH. This decision ignores the fact that the claimant had been seeking an OH report because his prognosis was positive. Despite the guidelines offered by HR, Mr Povey does not ask questions about OH and what an OH report may achieve. Mr Povey argues that the claimant was signed off until June 2024; but this was

known prior to the second appeal meeting, and it had still been HR's recommendation that a further OH report be considered.

107. We conclude that the issue of a further OH report was a relevant issue because of HR's advice, the Med3 and the claimant's comments about roles he may be able to undertake. We conclude that an OH referral at the appeal stage is likely to have given clarity on the claimant's potential return to work and the kind of role he would be fit to undertake.

108. The respondent's witnesses accept that the cctv officer was a feasible option had the claimant been fit to return to work. But no thought was given about seeking to return the claimant to a cctv officer role.

109. The decision was taken not to uphold his appeal in May 2024 and at that time there was no basis for concluding that the claimant would not be fit to return to a role with adjustments potentially in the near future, including a role which meant he could sit for the majority of his role such as a cctv officer.

110. Mr Povey stated that a return to work date would have been a decisive factor in changing his decision. We conclude that he relied on his mistaken interpretation of what the claimant was saying about his condition, including his mistaken belief that the claimant had said he may require a further operation, without considering whether at the end of his Med3 the claimant would be fit to undertake his role with adjustments or an alternative role.

Claim of a failure to reasonable adjustments

111. The respondent accepts that it had a policy – a requirement for Security Officers to be relatively fit and able to stand for prolonged periods. The respondent accepts that this policy puts the claimant at a disadvantage, and it would put employees with a similar condition at the same disadvantage.

112. A precondition to any adjustments would have been a referral to Occupational Health. The respondent accepts the claimant was disabled during his employment. For the reasons set out above, the respondent failed to take the opportunity to refer the claimant to Occupational Health prior to dismissal and prior to dismissing the appeal.

113. The claimant contends, and the Tribunal accepts, that by the surgeon's reference to adjustments in December 2023 there was a clear prospect that the claimant would be able to return to work at the latest by the end of this certificate.

114. We also conclude that the claimant may have been able to return to work to a sedentary role at an earlier date, but this is an issue which would have been considered by OH. We note that the Absence Policy says that if an employee

wants to return earlier, this may be facilitated; adjustments should be discussed "alternatively an opinion may be sought from Occupational Health" (94).

115. We conclude that the respondent dismissed the claimant without properly considering the evidence that suggested he could be fit for work with adjustments in the foreseeable future, also being aware that the claimant was disabled.

116. The respondent does not accept that transfer to another location was a reasonable adjustment. There was no role identified where the claimant would not be required to be fit or stand for prolonged periods of time, and this would not have resolved the issue.

117. We accept that the claimant was not standing for long periods of time during his role at Pegasus House. Also, this role was, it was agreed, no longer available because of site refurbishment. This means that the claimant would in any event have needed to be transferred to another role.

118. Given this, we see no reason why consideration could not have been given to transferring the claimant to a role which involved either mainly reception duties or to a cctv role. The parties agree that these are the kinds of feasible adjustments which have been made for employees in the past. There are, say the respondent's witnesses, always roles available.

119. We consider that there is some prospect of this adjustment being feasible, of enabling the claimant to return to work.

120. The claimant also suggests an adjusted shift pattern – for example in June 2023 he suggests 2 days a week (148). The claimant says he could maintain 3 patrols a day in a reception type role. Without an OH report it is difficult to say what adjustments could be recommended. We conclude that there is at least some prospect of a phased return starting at 2 days a week on reduced hours succeeding in returning the claimant to work.

121. The respondent's position is that the claimant needed to be fit to undertake a cctv role. We don't accept this, it is a role which is predominantly sedentary, undertaken sitting down. The respondent's witnesses accepted that this could be a feasible role for which the claimant could be trained. We do not accept the respondent's argument that no suitable cctv role could have been identified on a potential return to work by June 2024.

122. In making these points, we accept that over two years is a long time for the claimant to be off work, we can accept the force of the respondent's argument. This length of absence is in part because of the post-Covid restructuring of the commercial tenancy sector in London. It was clearly a very busy time for the respondent, and we can see why there were delays in the claimant's case, which

to some extent benefited him because he remained an employee with no active steps for over a year to manage his absence.

123. But we also conclude that where there is evidence which strongly suggests that an adjustment may succeed, notwithstanding that this adjustment is considered at the end of such a lengthy absence, this evidence must be taken into consideration. We conclude that such an adjustment should not be discounted if it may well succeed, if an OH report was able to say that it could be adopted at a certain date in the foreseeable future. And the Med3 and medical report strongly suggests that a foreseeable date of return could be contemplated.

124. To reiterate, this is clearly the kind of situation where an OH report is needed – to cut through any confusion. The underlying medical evidence showed a good prognosis. Had OH seen this evidence we consider that there is a real prospect that OH would have given a tentative return to work date and suggestions of adjustments to make on return. Mr Povey is told on appeal to "weigh up" the risks; he is advised of the option of an OH referral if he wanted to reinstate.

125. To conclude, the reasonable adjustments sought were all ones which had some prospect of enabling the claimant's return to work, at the latest by 4 June 2024; that an OH report would likely have concluded this based on the Med3 and medical report dated 4 December 2023.

126. The respondent's case is that this claim is potentially out of time; they say this based on the Med3 of 4 December 2023 being the date adjustments should have been made. We conclude that the respondent was considering whether to consider adjustments throughout the dismissal and appeal process. For example, on 5 January 2024 Mr Read is asked by HR to consider again an OH referral, and says he is not going to do so, notwithstanding the "amended duties part" because, he says, adjustments would be difficult to achieve.

127. We therefore find that the question of whether to consider adjustments was under active consideration by the respondent up until 5 January 2024. This question was also under active consideration at the appeal stage. There were continuing 'acts' by the respondent well within three months of the claim being made including ACAS conciliation. This claim is therefore within time.

<u>Claim of discrimination arising from disability</u>

128. The respondent accepts that the claimant's sickness absence arose in consequence of his disability and that his dismissal was unfavourable treatment.

129. The Tribunal accepts the respondent's legitimate aim – ensuring its business runs efficiently. The respondent relies on the fact that the claimant had been off work for over 2 years at the date of dismissal. We accept that this is a very long time and is a factor the respondent may take into account.

130. We accept that when assessing proportionality, we should give a substantial degree of respect to the respondent's judgment about what is reasonably necessary to achieve the legitimate aim. We also note that in considering the reasonably necessary test we can consider whether a lesser measure may have served that aim.

131. But we saw no evidence of "significant disruption" to the respondent's business, a factor the respondent asserts in its defence on proportionality. We say this particularly given the claimant's role at Pegasus House no longer existed and so there can have been no disruption to performing that role. We were not given evidence that his absence meant a role was unfilled, or that other staff were required to reorganise their roles.

132. We do not accept a further proportionality factor relied on by the respondent, that there was "no indication" of when or if the claimant would return to work. We say this because the Med3 and the medical reports strongly suggest that a return to work on a specific date was contemplated by his treating surgeon.

133. We do not accept the respondent was unable to consider adjustments. The issue of adjustments is explicitly raised in the Med3. There was a prospective return to work date. The surgeon's medical report would have been available to OH, who could also have considered adjustments and a return date.

134. We therefore only accept one argument on proportionality, the length of the absence. We do not consider that the length of the absence alone is enough to justify dismissal. Given the medical evidence and the prospect of what OH would say had a report been commissioned, we do not consider that dismissal was a "reasonably necessary" way of meeting the legitimate aim.

135. A more reasonable – proportionate - approach which would equally have met the legitimate aim was to have consulted with OH about potentially returning to work, the date, and the type of role the claimant could undertake.

136. We stress that if a sedentary role like cctv operative was recommended at this stage by OH, there is a strong prospect that OH could also have recommended an earlier return to work date, perhaps to undertake the training.

<u>Unfair dismissal</u>

137. We accept that two years off work is a long period, and this is an important factor to consider in the 'range of reasonable responses' test. We also accept that the respondent had a genuine belief in the claimant's inability to return to work. We accept Mr Mensah's request that we not let any sympathy for the claimant affect our decision, that we must not substitute our view for that of a reasonable, similarly sized and resourced employer.

138. We conclude that up until the 28 November 2023 meeting the process was reasonable, even though Mr Read mistakenly believed he could dismiss at an earlier stage. We do not find that this revoked internal decision in any way impacted on the later process.

139. By 28 November the respondent was aware that he had a meeting with a surgeon, Mr Read was worried that that claimant could not walk properly. The claimant agreed he could not stand for 10 hours, but he says he could stand, sit and do the odd patrol. He is worried about falling, this is the case with many older people after surgery.

140. However, none of this goes to the actual prognosis, which can only be provided by a doctor. In fact, the prognosis was relatively positive. In addition, the claimant was saying that he could do much of his role, including reception and patrols. Mr Read says he will review OH with HR. HR then suggests a further OH report, but Mr Read's view is that he is "not sure" whether there is value in another report (267). This means what it says – he is not sure – he does not know for sure whether a report is required or not.

141. When Mr Read sees the Med3, his immediate response is that "the amended duties part will be difficult due to the nature of the role". We accept that this may be the case for the security officer role, but it does not address the fact that during his evidence Mr Read said he would give all opportunities to reasonable adjustments including a change of role; it also contradicts the claimant's previous line manager's position that amended duties and a phased return was possible (135).

142. We conclude that the only reasonable reading of the Med3 is that the claimant has been signed off for six months; that adjustments should be considered because the claimant may well be fit to return by the expiry of this certificate. Mr Read was "not sure", and we consider that it was not within the range of reasonable responses, given this evidence, to decide to dismiss without further clarity on whether the claimant would be fit to return, when, and which adjustments should be considered.

143. With a foreseeable return to work date and with medical evidence suggesting this via the Med3, it was outside of the range of reasonable responses not to make further enquires, with the surgeon or with OH, before making the decision.

144. In reaching this conclusion, we note the clear steer from HR, which asks the OH question on several occasions. We do not consider that HR would have raised this issue on several occasions unless this was a real issue of concern. The failure to refer to OH despite clear steers from HR, led to what we consider to be a conclusion outside of the range of reasonable response that there was no date of return and that adjustments were unlikely to succeed. These conclusions

were outside of the range of reasonable responses as they were conclusions which were contrary to the available evidence.

145. We also note the Absence policy, that an OH report is recommended at the second absence stage. None was sought at the second or final stages. Given the ambiguity in the evidence available to the respondent at this time, this was a breach of the policy which takes the decision outside of the range of reasonable responses; there was an unreasonable failure to obtain an OH report to gain more information on a return date and potential adjustments.

146. At appeal, Mr Povey accepted that he was prepared to reinstate if there was new evidence, and HR again suggested a potential OH report to discuss adjustments and a return date. But the second very short meeting with the claimant leads Mr Povey to conclude the opposite. In his evidence Mr Povey said that had there been a return date in, say, June 2024, he would have reinstated the claimant and consulted on the next steps to return him to a role.

147. There are material inaccuracies in the notes of the second appeal meeting which led Mr Povey to believe the claimant's health was worse than it actually was. The failure to give the claimant the notes to check before this decision was a critical error outside of the range of reasonable responses, as this significant inaccuracy had a major effect on Mr Povey's decision.

148. The appeal letter also contains significant inaccuracies and omissions based on the evidence we have heard. For example, the fact that the claimant's original role had by now disappeared, meaning he would have to be relocated to a new role, was not considered. We now know that the respondent could have assisted the claimant to gain cctv licence, also that there were always vacancies. Instead, the fact that the claimant could not carry out his security officer role was the only factor considered – i.e. no consideration of amended duties, or of a new role. The letter also suggests that the OH report was current at dismissal, "and that there were no further changes" to his health. But this is based on a report which was now nearly a year old, and the medical situation had changed. Again, these inaccuracies are material, and they take the appeal decision outside of the range of reasonable responses.

149. We conclude that Mr Povey based his decision on his interpretation of the medical evidence and his view on the claimant's health, and not on the medical evidence, and he unreasonably failed to seek an up-to-date medical report to provide an update on prognosis and potential adjustments. In the circumstances it was outside of the range of reasonable responses to make that decision based on that evidence.

Approved by:

Employment Judge Emery

22 September 2025

Judgment sent to the parties on:

1 October 2025

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For the Tribunal:

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