EMPLOYMENT TRIBUNALS

Claimant: Wayne Hammond

Respondent: ASDA Stores Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton (by video) **On:** 16 to 19 September 2025
17 October 2025 (Remedy)

Before: Employment Judge Gray

Appearances
For the Claimant: Ms Millin (Counsel)
For the Respondent: Ms Akers (Counsel)

LIABILITY JUDGMENT

The Judgment of the tribunal is that the complaints of constructive unfair dismissal and discrimination arising from disability fail and are dismissed and in respect of the complaint of failure in the duty to make reasonable adjustments it is found that there was such a failure in respect of the PPT training only and that it is just and equitable to extend time in respect of that complaint.

This claim has now been listed for a remedy hearing by VIDEO at 10am on the 17 October 2025 (to last up to 3 hours).

REMEDY JUDGMENT

The judgment of the tribunal is that in respect of the Claimant's successful complaint of failure in the duty to make reasonable adjustments in respect of the PPT training that could have reasonably been implemented by the 26 September 2019, the Tribunal awards compensation of £3,712, made up of £2,500 injury to feelings and £1,212 in respect of interest (2,213 days (to the date of this decision) = 6.06 years, so £2,500 x 8% x 6.06 = £1,212).

LIABILITY JUDGMENT having been delivered on the 19 September 2025 (and sent to the parties on the 3 October 2025), and written reasons having been requested by correspondence from the Claimant dated 17 October 2025 for the liability Judgment and for the Remedy hearing on 17 October 2025, in accordance with Rule 60(3) of the Employment Tribunal Procedure Rules 2024, the following reasons are provided:

REASONS

1. The Claim

2. By a claim form submitted on the 5 January 2024 (relying upon an ACAS certificate dated 5 November 2023 to 7 November 2023) the Claimant brought complaints of constructive unfair dismissal and disability discrimination (arising from and a failure in the duty to make reasonable adjustments).

3. There have been two case management preliminary hearings in this claim at which the list of issues (as set out in Annex A below) and the format and hearing timetable for this final hearing were confirmed.

4. This hearing

5. For reference at this final hearing the Judge was provided with:

    a. A liability bundle of documents of 580 pages (including index).

    b. A remedy bundle of documents of 150 pages (including index).

    c. A witness statement bundle including:

        i. A witness statement and supplemental statement of the Claimant.

        ii. A witness statement of Mark Hammond (the Claimant's father) on behalf of the Claimant.

        iii. A witness statement of Mark Williams (MW) on behalf of the Respondent.

        iv. A witness statement of Chris Thomas (CT) on behalf of the Respondent.

6. The hearing timetable was confirmed, and it was agreed that matters of liability would be determined first. Evidence concluded in the afternoon of day 3 on matters of liability and submissions were presented on the morning of day 4. Judgment was delivered in the afternoon of day 4. Determination of remedy

was listed for the 17 October 2025.

7. The issues

8. The list of issues was confirmed as set out in Annex A below, save that:

    a. Claimant's Counsel confirmed that the complaint of indirect disability discrimination had been withdrawn so did not require determination.

    b. By email dated 26 September 2024 the Respondent accepted that the Claimant is (and was at the relevant times) disabled in connection with hernias. The Respondent accepts that this has been a disability under section 6 of the Equality Act 2010 since January 2015.

    c. There was a time limit jurisdictional issue. The claim form was presented on 5 January 2024. The Claimant commenced the Early Conciliation process with ACAS on 5 November 2023 (Day A). The Early Conciliation Certificate was issued on 7 November 2023 (Day B) (a period of 2 days not including Day A). Accordingly, any act or omission which took place before 4 October 2023 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint. The Tribunal will need to determine whether:

        i. The discrimination complaints were made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

            1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

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

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

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

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

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

    d. At the conclusion of the Claimant's evidence on matters of liability, and before Respondent's evidence on liability commenced, the Respondent applied to amend its response to include four legitimate aims. It asserted

that there was reference to the aims in its witness evidence. The Claimant objected asserting it was too late to apply, and the Respondent would not be able to prove the aims it asserts. It was noted that the agreed list of issues provided this issue would be addressed in the Amended Grounds of Response as and when it is ordered. No such order was made so the Respondent applied now at the final hearing. For this reason, and it being permitted for the Claimant to be recalled if he wanted to give evidence on the legitimate aims (in the end he did not), the Respondent's application to include the four asserted legitimate aims in its defence was permitted.

9. It was confirmed that the Claimant had paid the deposits ordered by Employment Judge Livesey to continue with the complaints of something arising (2(a) and (c) from the list of issues) and the first reasonable adjustment PCP (1(a) from the list of issues).

10. <u>The facts</u>

11. The Judge found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties.

12. The Claimant commenced employment with the Respondent on 20 July 2015 and worked as an HGV Driver at the Avonmouth Distribution Centre.

13. It is not in dispute that the Claimant had problems at work as a result of a hernia in particular between 2018 and 2019. The Claimant describes (at paragraph 3 of his witness statement) … "I declared my hernia condition on the pre-employment health questionnaire completed on 17 July 2015. The condition significantly worsened in late 2018, and I underwent an operation on 15 September 2018. I stayed off sick until 20 May 2019 due to a further operation to repair the previously failed hernia repair. My original emergency hernia surgery was on 5 January 2015.".

14. The Respondent accepts that the Claimant is (and was at the relevant times) disabled in connection with hernias. The Respondent accepts that this has been a disability under section 6 of the Equality Act 2010 since January 2015.

15. As to knowledge of the condition there was no dispute that the Respondent witnesses had knowledge of the Claimant's hernia condition. Reference is also made to it in numerous Occupational Health (OH) reports.

16. As to knowledge of the substantial disadvantages, Respondent's Counsel submitted there was some dispute. About the disadvantage that the Claimant was not able perform all aspects of his role, the Respondent accepted it had knowledge of this as to the extent the Claimant was limited based on the position it understood as of February 2021. As to the disadvantage that the Claimant's disability required permanent adjustments to his role, the Respondent asserted that this requirement was not brought to its attention until

September 2023. Finally, as to the Claimant's inability to perform all aspects of his role and/or the application of the capability procedure placed him at risk of dismissal, the Respondent accepted it would be aware of this as it is an outcome of the capability procedure.

17. About the Claimant's hernia condition when it became a particular issue in 2018, there was a meeting between the Claimant and MW on 27 January 2018 in which the notes record (page 127), and as agreed by the Claimant in cross examination, there was nothing that could be done at that stage to help the Claimant. The Claimant is unable to lift, pull, or drive.

18. There is then a meeting between the Claimant and S A Jones on 6 October 2018 and it is noted that the Claimant … "… is not able to complete DD runs, GKNs, urban trailers or more than one run per day. His Operation should take place within one month of his pre-op after which his duties will be reviewed." (page 128).

19. An OH Report dated 13 December 2018 (page 463) confirms that the Claimant is not yet fit to return to work and there are no amended duties that can be suggested at that time.

20. The Claimant remains off work at this time.

21. It is then confirmed in a meeting note of 17 January 2019 that the Claimant is still unable to drive (page 129). The Claimant confirmed in cross examination that he could not return to work at that time.

22. It is then recorded on the 20 March 2019 (page 130) that the Claimant confirms he will be fit for work in 3 months.

23. The Claimant confirmed in cross examination that from the end of 2018 to March 2019, he was not at work and there were no adjustments available as he was not able to do the job while between the hernia operations.

24. This continued so that by May 2019 the Claimant had still not returned to work, (page 132).

25. In an OH Report dated 7 June 2019 (page 511) it confirms:

    a. "Following the original surgery Wayne was experiencing severe pain in his abdomen which required him to take very strong pain relief, but since his most recent surgery this pain has all resolved. He now has no restrictions in his everyday life, but as there is always a risk that a hernia can re-occur following surgery, Wayne needs to be very careful with any manual handling activities from now on, which he did seem very aware of today.".

    b. The Claimant is fit to return to work.

    c. "If operationally feasible I would advise that he is allocated trunk driving

duties for the first 4-6 weeks at least, and then could progress to single store deliveries, but avoiding multiple store drops in a day. Ideally this would be a long-term adjustment. He will no doubt have had regular manual handling training, so will be aware if any physical lifting and carrying tasks or pushing and pulling tasks are beyond his personal capabilities, so would likely seek assistance as necessary. It would then be a management decision if he was considered to need restricted duties over a prolonged period of time. I would not expect further related sickness absence in the near future."

26. Then in an OH Report dated 19 September 2019 (page 512) it confirms that the Respondent wants the Claimant to start working on the double decker lorry trailers again. The Claimant also refers to two occasions where he moved pallets manually where he considered the weight to be excessive. Although it is considered by OH that the Claimant can move cages and pallets manually (provided they are within the recommended weight regulations) it is recommended that the Claimant is trained up on the electric pump truck (PPT) to assist with the moving of pallets. The Claimant is advised that if any pallets are obviously overloaded, he should not attempt to move them himself.

27. In a further OH Report dated 19 November 2019 (page 514) it confirms the Claimant telling OH that at his recent return to work, management agreed with the Claimant a long-term adjustment to do one run a night and then to work the remaining few hours around the depot till the end of the night shift. He is still waiting for the pump truck training. The Claimant says he is now being pushed to do two runs and sometimes three a night and also work on the double decker runs. No further recommendations are made by OH.

28. MW confirms (paragraph 25 of his witness statement) that on the … "9 April 2020, I referred Wayne to the ill health capability meeting with Chris Thomas (Transport Operations Manager), as he was still unable to perform his full duties (page 176). This is because, as a Shift Manager, I did not have the authority to agree any permanent adjustments to duties.".

29. The meeting between the Claimant and CT is on the 1 May 2020 (pages 180 to 187 of the bundle and paragraphs 16 to 20 of CT's witness statement).

30. At page 181 of the bundle, it is recorded in the meeting notes that CT states in relation to the PPT training … "After reviewing the notes I can see that this should have been organised a while ago so apologies for that and I will ensure this happens promptly".

31. At paragraph 18 of CT's statement … "In this meeting, Wayne said that he had no pain in relation to his hernias anymore and believed he would be able to undertake full duties with the aid of a power pump truck training (including doing double decker trailer runs). He said he believed that this would enable him to carry out two store runs during his shifts. He confirmed he was not receiving any further medical treatment and was not on any medication.".

32. At para 19 of CT's statement … "Wayne did say that driving for 4 hours, such

as driving the route to Rochdale, would cause him discomfort due to the seat belt pressing on the area he had received his operation on for a long period. He also said that pulling the curtains on GKNs was still an issue because they were stiff and you had to reach upwards, which put pressure on his hernia.".

33. It is then on the 6 May 2020 that the Claimant completes the PPT training (page 188).

34. About the delay in the PPT training (which was recommended by OH in its report dated 19 September 2019) MW confirmed that it was training that needed to be organised with another depot as they did not do it on site (because of the types of goods each site handled). When asked to accept the delay was unfavourable treatment MW confirmed that he was not willing to answer that question. When subsequently asked why that was by the Judge, he confirmed it was because he thought there may have been a delay because of COVID.

35. The OH Report dated 2 July 2020 records … "Wayne did not report any change in his health situation since the last occupational health report and he reports to be coping with his usual contracted hours and duties with some flexibility to help him manage symptoms.". The Claimant reports to be coping pushing cages and using the power pump truck within no increase in symptoms. The Claimant reports being able to manage to drive for prolonged periods but on occasion if the seat belt causes discomfort he needs to stop driving for a short period. The Claimant confirms he is manging with and prefers 3 x 12 hour shift work pattern (instead of 4 x 9 hours).

36. The OH Report records … "With regards reasonable adjustments, Wayne will continue to require flexibility to stop driving to stretch and mobilise as required to ease any discomfort if the seat belt presses on the lump. He tells me the journey to Rochdale is approximately 4 hours, 25 minutes drive with no opportunity to stop on route, and therefore he is not currently suited to drive this journey.".

37. Further … "He will also need to continue using the power pump truck to reduce need for manual handling and only push cages within his limitations. If he is physically unable to manage a load he should ask for assistance rather than straining which could cause further injury.".

38. It is not in dispute that several adjustments were made as result of the Claimant's hernia condition. The Claimant confirmed during cross examination that after he completed his PPT training on the 6 May 2020 that all the reasonable adjustments he was seeking at that time were in place.

39. As in confirmed by CT there are three ongoing adjustments for the Claimant (paragraphs 25 to 29 of the statement of CT and notes from a meeting on the 5 February 2021 (pages 191 to 196)). These are:

    a. Avoidance of the long round trips to Rochdale;

    b. Avoidance of curtain sided lorries;

c. Avoidance of petrol station deliveries.

40. A factually disputed matter in the evidence presented to this hearing was the Claimant asserting during cross examination that he and his union rep had in 2020 requested the adjustments be made permanent. The Respondent's evidence on this was the Claimant had not requested this until September 2023.

41. No meeting notes were identified by the Claimant from this time confirming a request for permanent adjustments was made at that time. The Claimant in his witness statement does say … "On 20 November 2019, Andy Murray (GMB) stated that adjustments could be made permanent" (paragraph 8). The Claimant did refer to this note in his oral evidence (page 164). It is a comment that adjustments could be made permanent not a request that they should be.

42. There are then no issues until April 2023 when the Claimant has to have time off work as a result of back pain / sciatica.

43. Evidence was provided that as at the 6 June 2023 the Claimant was not fit for work (paragraph 28 of MW's statement) …. "On 6 June 2023, following the end of his current fit note, Wayne came into work. However, during his return to work interview with Keith Mitchell (Transport Shift Manager (Nights)) he confirmed he was still experiencing pain in his legs and could not move cages. This was a concern because it would not be safe for Wayne to drive particularly operating the brake and accelerator pedals whilst experiencing leg pain. We could not accommodate any alternative duties that did not involve driving or the movement of cages, and so Wayne was unable to return to work at that time. Mr Mitchell referred him to Occupational Health for advice on his current condition and capabilities (page 203).".

44. The OH Report dated 28 June 2023 (page 545), records that the Claimant has been absent from work since 27 April 2023 due to a trapped nerve with pain in his back leg. The Claimant states that he has consulted his GP but is still awaiting a formal diagnosis. The Claimant states that he is not having any issues with his hernia at present. The report confirms that the Claimant is not currently fit for work for his current role. It recommends that when the Claimant does return to work he should do so on a phased return. Further, that a manual handling risk assessment be carried out to determine which driving and manual handling tasks the Claimant can perform. It is recommended if operationally feasible that the Claimant work with a buddy to help reduce his workload. Also, when he returns to assist with drowsiness caused by his pain medication he should do day shifts if operationally feasible.

45. As to the hernia the Report states that as previously agreed with management the Claimant should avoid lifting heavy loads to manage his hernia.

46. On the 20 July 2023 there is a meeting between the Claimant and MW (pages 216 to 221), referred to in paragraph 34 of the statement of MW … "On 20 July 2023, I had another welfare meeting with Wayne (pages 216 221). Wayne confirmed he still had constant back pain, numbness in his right foot and

shooting pains down his right leg. He confirmed his current medication caused tiredness and brain fog as side effects. He said his GP believed he had sciatica, and an MRI scan should be able to confirm this Wayne said he would come back to work on the expiration of his fit note on 31 July 2023 if he could However, he was not sure if he would be able to pull or push cages (which can weigh up to 450kg). He thought he may need to do lighter cages only. He said he could not do tail lift work (due to bending down to pull the sides up on the tail lift as described in paragraph 8 above), trunking work (i.e. driving to ASDA's Rochdale site, due to the length of the journey and the pressure from the seatbelt on his abdomen) or drive rigids (due to these using tail lifts) due to his previous issues with his hernias.”.

47. There is then a further meeting between the Claimant and MW on the 30 August 2023 (pages 223 to 227). This is also addressed in paragraphs 39 to 42 of MW’s statement.

48. At paragraph 41 … “Wayne requested that he return to work on a rehabilitation plan on Saturday 2 September 2023, working four shifts during that week, with a buddy on his first two shifts. He explained that he had two weeks' annual leave booked following this, so it could be a 'test"."

49. MW then refers the matter to CT as part of the ill health capability process (paragraph 43), because although the discussion was about hernia adjustments that was not the reason for the Claimant’s current absence. MW was also concerned for the Claimant’s welfare as the Claimant was still in pain without a formal diagnosis. There had also been changes to operational needs.

50. MW also confirmed in his oral evidence that there were no details of the previously agreed long term reasonable adjustments on the Claimant’s file and that he only had authority to approve adjustments for a limited duration, he believed a period of 4 to 6 weeks.

51. The Respondent’s Managing Sickness Absence – Long Term Sickness and Ill Health Capability policy refers to applying to employees who are sick for three weeks or longer (page 117). This policy does therefore apply to the Claimant.

52. Chronologically there is a GP Fit note dated 5 September 2023 (page 275) which signs the Claimant as maybe fit for work (for the period 1 September 2023 to 1 October 2023) taking account the following advice … “Suffering with Sciatica which is improving. Could now return to work on light duties with a phased return including reduced hours to start with if needed.”. The reason for absence is stated to be “Lumbar radiculopathy (Sciatica)”.

53. There is then a letter from the Claimant’s GP dated 8 September 2023 (page 233). It confirms that the Claimant has been off work for the last few months because of back pain with sciatica. It states that this has now improved sufficiently so that the Claimant is now fit to return to work. The letter refers to it being understood there is a longstanding agreement for reasonable adaptations to the Claimant’s working pattern because of his longstanding

problems with recurrent incisional abdominal hernia. The letter refers to the Claimant previously working with adaptations to allow him to avoid heavy lifting and awkward pushing of heavy loads. It states that the Claimant is disabled under the Equality Act 2010 because of the recurrent abdominal hernia and should be offered ongoing support. It states … "Now that he is recovered from his back pain and is fit for work he will need to return under the same conditions as previously agreed as his other medical conditions are unchanged.".

54. There is then the capability meeting with CT on the 22 September 2023.

55. CT does not permit the Claimant to return to work at the meeting on the 22 September 2023, adjourning that meeting so he can consider what the Claimant has told him, in particular that the amended duties relating to his hernia need to be made permanent. The notes of the meeting record that CT accepted that the business had supported the Claimant over 5 years but that the Claimant had "not requested that these were a permanent restriction until today" (page 248). CT adjourned the meeting, stating that he needed to consider the issue (page 249).

56. CT explained in his oral evidence that he also wanted to follow up matters as set out in his adjournment note (page 254). That was to check the hernia is not causing sciatica and whether the sciatica is still causing issues. Also, why the amended duties referred to in the fit note are for sciatica (page 275). CT notes that he also needs to clarify the hernia adjustments referencing the GP letter dated 8 September 2023 which refers to the Claimant avoiding heavy lifting and awkward pushing of heavy loads (page 233).

57. Reference was also made in the oral evidence to page 243 of the 22 September 2023 meeting notes, where the Claimant makes reference to avoiding multiple store drops. In cross examination the Claimant confirmed that he was seeking that at that time (in 2023). CT confirmed in his oral evidence that he saw that reference by the Claimant as not being clear and thought the Claimant had gone backwards as he had been completing multiple drops before his absence due to back pain / sciatica. CT confirmed that he therefore wanted to clarify what the Claimant could and could not do, and wanted the medical evidence to support that.

58. In his witness evidence (paragraph 43) CT also refers to there being an increase in petrol station deliveries (an additional 40), which may make the long-term adjustment of excluding the Claimant from petrol station deliveries no longer reasonable for the Respondent's business. CT confirmed in his oral evidence that he did not see an issue with the others, i.e. Rochdale and curtains.

59. CT does also highlight double decker runs being a consideration (paragraph 48) as now raised by the Claimant and it not being an issue before.

60. The ill health capability meeting reconvenes on the 4 October 2023 (pages 258 to 272). Medical consent forms are provided to the Claimant, and it is agreed

that medical evidence would be obtained.

61. The Claimant is informed that no decision had yet been made as to whether the Respondent could sustain permanent adjustments and whether the adjustments requested remain reasonable (paragraph 71 of the statement of CT). This position is recorded in the meeting notes (pages 270 and 271). I also note from the meeting notes (page 269) that the Claimant confirmed he would prefer one run.

62. The process was then adjourned whilst the further medical evidence was obtained.

63. Chronologically there is a further GP Fit note dated 5 October 2023 (page 278) which again signs the Claimant as may be fit for work with adjustments referring to the reason for absence as Lumbar radiculopathy as the previous fit note.

64. Before the further medical evidence was obtained, the Claimant resigned.

65. The employment was terminated with the Claimant resigning with immediate effect by letter dated 4 November 2023 (pages 289 to 290).

66. In the letter the Claimant refers to the Respondent failing to keep the restrictions in place that he had for the last three years to help him keep his job. Also, moving the Claimant from a rehabilitation plan to an ill health capability process.

67. The Claimant also raises a grievance by letter dated 4 November 2023.

68. It is then by claim form submitted on the 5 January 2024 that the Claimant commenced these Tribunal proceedings.

69. The Claimant did not provide an explanation as to why he did not submit his claim before he did in his witness statement. When asked about the matter in oral evidence his responses were inconsistent. He accepted in cross examination with reference to a meeting on the 22 September 2023 that he had been speaking with ACAS and EASS at that point (page 244). When asked about matters in re-examination he said that he had not contacted ACAS until after his resignation (4 November 2023). What does appear genuine, as also articulated by the Claimant, is a desire to work and the Claimant not appreciating he was a disabled person within the meaning of the Equality Act (which the Claimant alludes to being an understanding recently reached at the meeting on the 22 September 2023 (page 244). This does explain the delay in making a claim.

70. During the hearing the Respondent was permitted to amend its response so that it could assert that it relies upon the following asserted legitimate aims which it submitted were referred to in general terms in the witness statements of MW and CT (Paragraphs 1, 10, 13 and 35 of MW and 2 and 21 of CT):

    a. Upholding the Respondent's duty of care to the Claimant and other road

users as to H&S.

b. Ensuring Respondent colleagues are medically fit to undertake a safety critical role.

c. Requiring Respondent colleagues to attend their contractual role on a regular basis.

d. Managing long term capability absence to save cost and management time to allow the Respondent to plan its work force and operational needs with certainty.

71. I accept that these asserted aims are all legitimate.

72. The Law

73. **Discrimination**

74. The Claimant is alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA").

75. The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges arising from disability and failure in the duty to make reasonable adjustments.

76. The protected characteristic relied upon is disability as set out in sections 4 and 6 of the EqA.

77. The Claimant's disability reason is not in dispute, and it is accepted that he is a disabled person within the meaning of section 6 of the EqA for the times material to this claim.

78. The Burden of proof

79. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

80. In respect of the burden of proof, there is a two-stage process for analysing the complaint. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a prima facie case of discrimination following an assessment of all the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons (***Igen -v- Wong [2005] EWCA Civ 142*** as affirmed in ***Ayodele***

-v- CityLink Ltd [2018] ICR 748).

81. We also note the recent decision of ***Efobi v Royal Mail Group Ltd (2021) ICR 1263*** which confirmed that the reverse burden of proof remains good law under the EqA.

82. Also, considering ***Madarassy v Nomura International Plc [2007] ICR 867***, Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination".

83. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the Respondent had committed an unlawful act of discrimination (***Madarassy***). "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

84. In ***Igen*** the Court of Appeal cautioned tribunals 'against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground' but made it clear that a finding of 'unexplained unreasonable conduct' is a primary fact from which an inference can properly be drawn to shift the burden.

85. **Discrimination arising from disability (Section 15 Equality Act 2010)**

86. Section 15 of the Equality Act states:

> ***15 Discrimination arising from disability***
>
> ***(1) A person (A) discriminates against a disabled person (B) if—***
>
> ***(a) A treats B unfavourably because of something arising in consequence of B's disability, and***
>
> ***(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.***
>
> ***(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.***

87. The Tribunal reminds itself that the correct approach to the operation of section 15 was set out at paragraph 31 by Simler P in the case of ***Pnaiser v NHS England [2016] IRLR 170***. In essence, as summarised by Harvey at Q [1468], the position is:

    (1) Was there unfavourable treatment and by whom?

    (2) What caused the impugned treatment, or what was the reason for it?

    (3) Motive is irrelevant.

    (4) Was the cause/reason 'something' arising in consequence of the claimant's disability?

    (5) The more links in the chain of causation, the harder it will be to establish the necessary connection.

    (6) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

    (7) The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

    (8) It does not matter in which order these matters are considered by the tribunal.

88. At paragraph 31(b) of ***Pnaiser***, Simler P emphasised the focus of the analysis to be on the state of mind of the alleged discriminator as to the underlying reason for the allegedly unfavourable treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but it must have at least a significant (or more than trivial) influence on the mind of the person alleged to have caused the unfavourable treatment.

89. In terms of knowledge, there need only be actual or constructive knowledge as to the disabilities themselves, not to the causal link between the disability and its consequent effects which led to the unfavourable treatment.

90. Claimant's Counsel referred in her closing submissions to ***O'Brien v Bolton St Catherine's Academy [2017] IRLR 547***. Also, to ***Trustees of Swansea University Pension and Assurance Scheme 2 Swansea University v Williams [2015] IRLR 885***, where a person may be said to have been treated unfavourably if they are not in as good a position as others generally would be.

91. Further, reference was made to when determining whether there was unfavourable treatment arising from, or in consequence of an employee's disability, it requires an investigation of two distinct causative issues (***City of York Council v Grosset [2015] IRLR 746***):

a. first, did the employer threat the employee unfavourably because of an identified 'something'?

b. Secondly, did that 'something' arise in consequence of the employee's disability?

92. It was also noted that it is for the employer to prove justification. They must do so with evidence which is more than mere generalisations. ***EHRC Employment Code of Practice*** (para 5.12). ***PL Insurance services v O'Connor (UKEAT/0230/17/LA***. Further, in discrimination arising from disability, the question is whether the treatment is justified, rather than the provision, criterion or practice, ***Birtenshaw v Oldfield [2019] IRLR 946***. If there were such less discriminatory alternative means, then the employer's treatment will not have been proportionate, so will not be justified, ***Birtenshaw v Oldfield [2019] IRLR 946***.

93. As to unfavourable treatment I was also referred to ***Williams v Trustees of Swansea University Pension and Assurance Scheme and another [2018] UKSC 65*** by Respondent's Counsel. The Tribunal are required to answer the following questions: 1) what was the relevant treatment; and 2) whether it was unfavourable treatment. In Williams, the court considered the further guidance provided by the EHRC code in that the person "must have been put at a disadvantage", the term being broadly analogous to the concept of disadvantage and detriment.

94. **Reasonable adjustments**

95. Section 20 of the Equality Act states:

> ***(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.***
>
> ***… (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put to a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.***

96. ***Paragraph 20(1) of Schedule 8 to the EqA*** provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know

and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid — ***paragraph 20(1)(b)***.

97. There is guidance in the case authority of ***Environment Agency v Rowan [2008] IRLR 20, [2008] ICR 218*** as to what needs to be found in such claims, namely that in order to make a finding of failure to make reasonable adjustments there must be identification of:

    a. the provision, criteria or practice applied by or on behalf of an employer; or

    b. the physical feature of premises occupied by the employer;

    c. the identity of non-disabled comparators (where appropriate); and

    d. the nature and extent of the substantial disadvantage suffered by the claimant.

98. Claimant's Counsel submitted that where it is alleged that an employee has failed to make reasonable adjustments, the tribunal must identify the following ***(Fareham College v Walters [2009] IRLR 991***):

    a. The relevant PCP applied by the employer.

    b. The identity of the non-disabled comparators where appropriate.

    c. The nature and extent of the substantial disadvantage suffered by the Claimant.

99. I was also referred to ***Lamb v The Business Academy Bexley UKEAT/0226/16*** by Respondent's Counsel in which the EAT stated … "The phrase 'PCP' is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions.".

100. Time Limits

101. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.

102. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

103. Section 123(3)(b) of the EqA, failure to do something, is to be treated as occurring when the person in question decided upon it. Where there is no evidence to the contrary, s.123(4) of the EqA 2010 provides a default means by which the date of the 'decision' can be identified, either when there is an inconsistent act or alternatively the expiry of the period in which the employer might reasonably have been expected to do it.

104. An ongoing situation or continuing state of affairs amounting to discrimination was considered in ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96***. It is not sufficient to rely on an alleged overarching or floating discriminatory state of affairs without that state of affairs being anchored by discrete acts of discrimination.

105. Claimant's Counsel submitted that in considering whether or not a number of incidents amount to conduct extending over a period, a relevant, but not conclusive factor is whether or not the same or different individuals were involved in those incidents, ***Aziz v FDA [2010] EWCA Civ 304***.

106. Further, a decision to commence a disciplinary process creates a state of affairs and is therefore, an act extending over a period, not a one-off act. This is because once the process is initiated; the employer may subject the employee to further steps under it from time to time. Accordingly, each step is not an isolated or unconnected act, ***Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA***.

107. The following principals are noted from the cases of ***British Coal v Keeble [1997] IRLR 336***; ***Robertson v Bexley Community Service [2003] IRLR 434 CA***; and ***London Borough of Southwark v Afolabi [2003] IRLR 220***;

108. Noting the factors from section 33 of the Limitation Act 1980 which are referred to in the ***Keeble*** decision:

a. The length of and the reasons for the delay.

b. The extent to which the cogency of the evidence is likely to be affected by the delay.

c. The extent to which the parties co-operated with any request for information.

d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.

e. The steps taken by the claimant to obtain appropriate professional advice.

109. Noting that the Court of Appeal in the ***Afolabi*** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should

not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

110. It is also clear from the comments of Auld LJ in ***Robertson*** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard … "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

111. Claimant's Counsel submitted that there is no principle of law which dictates how generously or sparingly the power to extend time is to be exercised, ***Chief constable of Lincolnshire Police v Caston [2010] IRLR 327***. Consideration should also be given to whether the prejudice caused to one party by extending time outweighs the prejudice to the other caused by refusing to do so, ***British Coal v Keeble [19971IRLR 336***.

112. Further, that the Court of Appeal held that since an Employment Tribunal's discretion in determining whether or not it is just and equitable to extend time is very wide, it is entitled to take into account anything it considers relevant, ***Robertson v Bexley CC [2003] IRLR 434***. The Court of Appeal also held that there is no requirement for the Employment Tribunal to be satisfied that there was a good reason for the delay. Time may be extended even in the absence of an explanation of the delay from the Claimant, ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050***.

113. Constructive Unfair Dismissal

114. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

115. If the Claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

116. With regard to trust and confidence cases, Dyson LJ summarised the position in ***Omilaju v Waltham Forest London Borough Council***: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

117. The judgment of Dyson LJ in Omilaju has been endorsed by Underhill LJ in ***Kaur v Leeds Teaching Hospital NHS Trust [2018] 4 All ER 238***. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.

118. The Court in Kaur offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? If so, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign. (5) Did the employee resign in response (or partly in response) to that breach?

119. Respondent's Counsel submitted that in ***Woods v WM Car Services (Peterborough) (1981) ICR 666 (EAT)***, the matter was expressed in these terms: "To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.".

120. Further, whereas the reasonableness or otherwise of the employer's action may well be evidence as to whether there has been a constructive dismissal, it is clear that the test remains contractual ***(Lewis v Motorworld Garages Limited (1985) IRLR 465***, and ***Abbey National Plc v Robinson [unreported - Appeal No: EAT/743/99***).

121. Also, the seminal case on constructive dismissal is still ***Western Excavating (ECC) Ltd v Sharp (1978) ICR 221***, which is essentially authority for the proposition that an employee alleging constructive dismissal must show that the employer committed a serious breach of the contract of employment, that he resigned in response to that breach, and that he did not delay or acquiesce in relation to the breach, or affirm the contract notwithstanding the breach. Although the Western Excavating test has been the subject of criticism, the above test remains good law. This was also referred to by Claimant's Counsel.

122. Claimant's Counsel submitted that the test for whether there has been a breach is objective. The fact that an employer may genuinely but subjectively believe that there has been no repudiatory breach is therefore irrelevant, ***Millbrook Furnishing Industries v McIntosh [1981] IRLR 308***.

123. Also, the employee could allege breach of an implied term, often the implied duty to maintain trust and confidence. If so, the employee must show that the employer has, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them, ***Mahmud v BCCI [199711RLR 462***.

124. The Decision

125. It is not in dispute, and I accept that the Claimant is a disabled person within the meaning of the Equality Act 2010 at times material to this claim by reason of hernia.

126. Considering then whether the Respondent was aware or ought to have reasonably been aware that the Claimant was disabled at the material times.

127. The Respondent witnesses accepted an awareness of the Claimant's hernia condition and based on the evidence presented (including the extensive OH reporting) I accept the Respondent had knowledge of the Claimant's disability.

128. In submissions Respondent's Counsel clarified that there is a limited dispute as to knowledge of the substantial disadvantages. Considering then each of the disadvantages the Claimant asserts:

a. That he was not able perform all aspects of his role. About this the Respondent accepted it had knowledge of this as to the extent the Claimant was limited based on the position the Respondent understood

as of February 2021 (i.e. the Claimant not being required to do the Rochdale run, pull vehicle curtains and deliver to petrol stations).

b. His disability required permanent adjustments to his role. About this the Respondent asserted that this requirement was not brought to its attention until September 2023. I accept this, based on the facts found in this claim.

c. An inability to perform all aspects of his role and/or the application of the capability procedure placed him at risk of dismissal. As the Respondent accepts, it would be aware of this as it is an outcome of the capability procedure.

129. Considering then the discrimination arising from disability complaints (section 15):

130. Did the following "somethings" arise from the Claimant's disability … "The inability to carry out his role in full/perform all aspects of his role"?

131. The Claimant was unable to carry out his role in full / perform all aspects of his role because of his hernia. There were three long term adjustments made from February 2021, being the Claimant not having to do the Rochdale run, pull curtains or deliver to petrol stations, elements of his role.

132. Did the Respondent treat the Claimant unfavourably in any of the following respects because of the Claimant's inability to carry out his role in full/perform all aspects of his role?

a. The failure to and / or unreasonable delay in implementing the reasonable adjustments prior to February 2021. There was a delay in the implementing of the PPT training (recommended in the OH Report dated 19 September 2019), which led to a delay in the Claimant being able to carry out the pallet aspect of his role without colleague assistance. It has been explained that the reason for the delay was the Claimant's work site did not use the PPT due to the types of goods handled there so training had to be done at another site. It was also suggested that COVID may have caused a delay. The delay is not therefore caused by the Claimant's inability to carry out his role in full / perform all aspects of his role.

b. Failure to permit the claimant to return to work with the existing adjustments after April 2023.

i. OH confirm that the Claimant is not fit for work in the report dated 28 June 2023 (page 545). This is consistent with the understanding of Keith Mitchell of the Respondent at the beginning of June 2023.

ii. It is at a meeting with MW at the end of August 2023 that the Claimant expresses an intention to return to work on the 2

September 2023.

iii. This was not permitted, MW referring the matter to CT as a capability ill health process.

iv. This happens because the Claimant is seeking adjustments of a duration beyond that which MW can authorise in line with the Respondent's policy and there is no note on the Claimant's file confirming the long-term adjustments CT had confirmed with the Claimant in February 2021.

v. CT does not permit the Claimant to return to work at the meeting on the 22 September 2023, adjourning that meeting so he can consider what the Claimant has told him, in particular that the amended duties relating to his hernia need to be made permanent. CT also wants to follow up on matters identified in his adjournment note (page 254) that is to check the hernia is not causing sciatica and whether the sciatica is still causing issues. Also, why are the amended duties referred to in the fit note for sciatica (page 275). He also needs to clarify the hernia adjustments; the GP letter dated 8 September 2023 referring to avoiding heavy lifting and awkward pushing of heavy loads (page 233).

vi. At the reconvened meeting on the 4 October 2023 these issues are explored, and it is agreed that further medical evidence will be obtained. The Claimant is told that no decision has yet been made on whether the adjustments would be made permanent.

vii. In evidence (paragraph 43) CT also refers to there being an increase in petrol station deliveries, which may make the long-term adjustment of excluding the Claimant from petrol station deliveries no longer reasonable for the Respondent's business. CT confirmed in his oral evidence that he did not see an issue with the others i.e. Rochdale and curtains. CT does also highlight double decker runs being a consideration (paragraph 48) as now raised by the Claimant and it not being an issue before.

viii. I accept from the evidence presented that it is not simply a situation of the Claimant asking the Respondent if he can return to work with only the three long term adjustments he had in place before (i.e. Rochdale, curtains and petrol stations), and the Respondent not permitting that. The Claimant is seeking more than that, and the fit note dated 5 September 2023 signing him as fit in the period 1 September 2023 to 1 October 2023, seeks adjustments for sciatica (page 275). The reason for absence is said to be Lumbar radiculopathy (Sciatica). This continues with the fit note dated 5 October 2023 (page 278).

ix. There is not therefore a failure to permit the Claimant to return to work with the existing adjustments after April 2023, as the Claimant does not want that, he seeks more than his existing adjustments (the long-term adjustments in place since February 2021) and the more being sought prevents the Claimant's return. The refusal to return in this context was not done because of the Claimant's inability to carry out his role in full / perform all aspects of his role. It was because the Respondent wanted to properly understand the position in view of the Claimant's requests.

c. Refusing to implement the existing adjustments as permanent adjustments. There was no refusal to implement the existing adjustments in this way, it was under consideration. That is clear from notes at pages 271 and 272. The notes are consistent with what CT says in evidence.

d. The application of the capability process carrying the risk of dismissal.

i. It does carry such a risk.

ii. I accept the legitimate aim of Managing long term capability absence to save cost and management time to allow the Respondent to plan its work force and operational needs with certainty. The sickness absence policy is in place to manage long term sickness (3 weeks or longer) (page 117). The policy provides for a process and the Claimant had representation through that process so I find that following the process, which would need to carry a risk of dismissal to be effective, is a proportionate means of achieving that legitimate aim.

133. For all these reasons the complaints of discrimination arising from disability fail and are dismissed.

134. Considering next the complaint of there being a failure in the duty to make reasonable adjustments (sections 20 and 21):

135. The Claimant relies upon three asserted Policy, Criterion or Practice (PCP):

136. The first is requiring 6 monthly medical / Occupational Health reviews for all reasonable adjustments and/or not allowing permanent adjustments. The Claimant's case as confirmed in cross examination was that he should have been subjected to this policy of 6 monthly reviews, rather than he was subjected to it to his significant disadvantage. He has therefore not proven the PCP in the way asserted in the list of issues. Further, as no decision was made against permanent adjustments in this case, it was under consideration, so it has not been proven based on the evidence presented to this Tribunal that there was a

PCP of not allowing permanent adjustments.

137. The next is the requirement for the Claimant to carry out his role in full / perform all aspects of his role. This PCP was in place and is consistent with the Respondent's asserted legitimate aims, but it is subject to a caveat of adjustments being possible to exempt the Claimant from carrying out his role in full. Adjustments were made and were in operation i.e. avoiding Rochdale, curtains and petrol station deliveries. The Claimant sought to extend these, which were then subject to review and further medical and OH input, but before that process could be concluded the Claimant resigned. There is therefore no failure in the duty in this respect.

138. There was though a delay in providing the PPT training (2019/2020). This delay does prevent the Claimant from performing all aspects of his role, without seeking assistance from colleagues. Was that delay unreasonable? It would appear so, CT does apologise for it and offers no justification for the delay.

139. The third is the application of the capability element of the sickness policy related to managing disability related absences. This was applied so needs to be considered in the context of the substantial disadvantages asserted. The relevant one for this PCP is the Claimant's inability to perform all aspects of his role and/or the application of the capability procedure placed him at risk of dismissal.

140. The Respondent accepts that the Claimant was placed at this disadvantage and that the Respondent had knowledge of this.

141. The Claimant had long term adjustments in place since February 2021, and these had meant he was not placed in the capability procedure. That situation arose after April 2023 following absence for back pain / sciatica and then the Claimant's request to broaden the existing adjustments including for them to be made permanent.

142. An inability of an employee to perform all aspects of their role will inevitably carry a risk of dismissal. It would not be reasonable in my view to remove that risk from a sickness management policy. There is though more to the sickness management performance policy than simply non-performance equates to dismissal. That has been demonstrated across the course of Claimant's employment. As already noted, no decision had been made in the Claimant's case before he took the decision to resign. There is therefore no proven failure in the duty in this respect.

143. Time limits are relevant to the element of disability discrimination I have found, being the failure in respect of the PPT training.

144. The OH Report dated 19 September 2019 (page 512) recommends the PPT training. It does not happen until 6 May 2020. The matter is therefore significantly out of time and not connected to any complaints in time, as they have not been proven.

145. As to the reason for the delay the Claimant asserts, he was focusing on wanting to work and did not appreciate he was disabled within the meaning of the Equality Act. The Respondent does not assert any evidential prejudice, and I note that MW did not want to answer the question about it being less favourable rather than he could not answer the question.

146. Therefore, I consider it is just and equitable, when weighting all the relevant factors to allow this complaint to proceed.

147. Considering the complaint of constructive unfair dismissal and whether the Claimant constructively resigned as a result of the Respondent's breaches of contract and/or breach of the implied term of mutual trust and confidence.

148. The Claimant asserts as a breach the Respondent failing to maintain and/or make permanent the existing adjustments. However, this matter has not been proven as the Claimant asserts so it cannot be relied upon as a breach of contract.

149. The Claimant also asserts a failure to delay the application of the capability procedure and/or refer the Claimant to Occupational Health before the application of the capability procedure placing him at risk of dismissal.

150. The Respondent actioned the capability process as it understood it needed to in order to explore the variation to adjustments.

151. That procedure can then require there to be medical evidence input which is what the Respondent was seeking to do

152. I therefore do not find what happened to be sufficiently serous to entitle the Claimant to resign and claim constructive unfair dismissal.

153. Even if subjecting the Claimant to the process before getting further Occupational Health reports could be, then based on the facts found I find that the Repondent had reasonable and proper cause for doing so.

154. The Judgment of the tribunal is therefore that the complaints of constructive unfair dismissal and discrimination arising from disability fail and are dismissed and in respect of the complaint of failure in the duty to make reasonable adjustments I find that there was such a failure in respect of the PPT training only and that it is just and equitable to extend time in respect of that complaint.

155. <u>Remedy matters</u>

156. Matters of remedy were determined at a Remedy Hearing on the 17 October 2025.

157. In advance of the Remedy Hearing the Claimant had submitted an updated Schedule of Loss seeking £15,000 in injury to feelings (having previously sought £40,000 for all matters), as well as a 10% Simmons v Castle uplift.

158. At the start of the hearing Claimant's Counsel confirmed that the Claimant did not seek the 10% uplift as that is already reflected in the updated Vento bands but did seek interest.

159. As to when the adjustment should have reasonably been made, Claimant's Counsel asserted that it should have been made from the 26 September 2019 (within 7 days of the Occupational Health report).

160. Respondent's Counsel submitted that injury to feelings would be in the region of £2,000 to £2,500 as it is part of the whole and there were other reasons why the Claimant was at risk of dismissal. Counsel also submitted that the adjustment should have reasonably been made from November 2019.

161. The remedies available to the tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate recommendation. In addition, the tribunal may also award interest on any award pursuant to section 139 of the EqA.

162. In respect of claims presented on or after 6 April 2023 and before 6 April 2024, the Vento bands are as follows (based on the Presidential Guidance Sixth Addendum dated 24 March 2023): a lower band of £1,100 to £11,200 (less serious cases); a middle band of £11,200 to £33,700 (cases that do not merit an award in the upper band); and an upper band of £33,700 to £56,200 (the most serious cases), with the most exceptional cases capable of exceeding £56,200.

163. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations").

164. Under interest regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under interest regulation 3 the interest is to be calculated as simple interest accruing from day to day.

165. Under interest regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation.

166. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation.

167. Following the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 the rate of interest payable is 8%.

168. The Tribunal are reminded that any award of remedy is discretionary, and a finding of discrimination does not automatically mean that an award of compensation must be made. Determination as to whether to make an award must be considered on the facts of the individual cases.

169. If the Tribunal decide to exercise their discretion to make an award, s. 124(6) and s. 119(2) EqA 2010 confirm that determination of the award ought to follow tortious principles.

170. The explanation as to the applicable bands in ***Vento v Chief Constable of West Yorkshire Police /2002] EWCA Civ 1871*** is:

"[65] Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.

i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

il) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

ill) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

[66] There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

[67] The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.

[68] Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."

171. Reminding myself of relevant facts in this claim (as set out above, in particular at paragraphs 26 to 33).

172. Occupational Health suggests the adjustment in their report dated 19 September 2019 (page 512). It is not done by the 19 November 2019 Occupational Health report (page 514).

173. It is raised as not having been done at the meeting on the 20 November 2019 (page 164) and then again at the 1 May 2020 meeting (page 181). It is then implemented on the 6 May 2020.

174. As the adjustment was possible within 5 days of the meeting on the 1 May 2020, I accept what Claimant's Counsel submits that it is something that could reasonably have been done within 7 days of the Occupational Health report so by the 26 September 2019.

175. As to the injury to feelings quantification, the Claimant had valued injury to feelings for his whole claim at £40,000 (page 402).

176. The Claimant did not complain about the PPT training issue at the time. The focus of the Claimant's evidence, as reminded at this Remedy Hearing, was about deliveries to petrol stations, as set out at paragraph 14 of his witness statement.

177. This is though still a failure on the part of the Respondent, and I accept it would cause upset as part of the reason the Claimant felt unable to perform his full duties. Considering the valuation of injury to feelings in the context of the facts found I consider it reasonable to award £2,500 in line with that submitted by Respondent's Counsel, together with interest.

178. The judgment of the tribunal is therefore, that in respect of the Claimant's successful complaint of failure in the duty to make reasonable adjustments in respect of the PPT training that could have reasonably been implemented by the 26 September 2019, the Tribunal awards compensation of £3,712, made up of £2,500 injury to feelings and £1,212 in respect of interest (2,213 days (to the date of this decision) = 6.06 years, so £2,500 x 8% x 6.06 = £1,212).

Approved by:
Employment Judge Gray
Dated: 6 November 2025

Sent to the parties on
17 November 2025

Jade Lobb
For the Tribunal Office

ANNEX A – LIST OF ISSUES

S.6- Disability

1. Was the claimant, at the material times, disabled within the meaning of s.6? The claimant contends they were disabled by way of:

    a. Hernia

2. Was the respondent aware or ought the respondent to have reasonably been aware of that the claimant was disabled at the material times?

3. What were the material times?

S.15- Discrimination Arising from Disability

1. Did the following "somethings" arise from the Claimant's disability:

    a. The inability to carry out his role in full/perform all aspects of his role.

2. Did the respondent treat the claimant unfavourably in any of the following respects because of the "somethings" listed above:

    a. The failure to and / or unreasonable delay in implementing the reasonable adjustments prior to February 2021;

    b. Failure to permit the claimant to return to work with the existing adjustments after April 2023.

    c. Refusing to implement the existing adjustments as permanent adjustments;

    d. The application of the capability process carrying the risk of dismissal.

3. If so, can the respondent show that this treatment was a proportionate means of achieving a legitimate aim? (This will be addressed in the Amended Grounds of Response as and when it is ordered)

~~(S.19- Indirect Discrimination – The claimant is to consider whether to pursue this claim – see attached CMO) [*WITHDRAWN*]~~

~~1. Did the respondent have the following PCPs~~

    ~~a. 6 monthly reviews for all reasonable adjustments and not allowing them to be permanent~~

    ~~b. Sickness policy~~

~~2. Did the respondent apply the PCP to the claimant?~~

~~3. If so did the PCP put the claimant at a particular disadvantage as a result of disability?~~

~~a. The claimant contends that the disadvantages were:~~

~~i. The amount of time it took to implement reasonable adjustments, which resulted in stress and financial hardship.~~

~~ii. Threat of dismissal for sickness absence, even though willingness to return.~~

~~4. Did the PCPs or would the PCPs put other people with whom the claimant shares the PC of disability at the particular disadvantages above?~~

~~4. If so, can the respondent show that this treatment was a proportionate means of achieving a legitimate aim?~~

S.20/21- Failure to Make Reasonable Adjustments

Policy, Criterion or Practice

1. The Claimant relies on the following PCPs:

a. Requiring 6 monthly medical / Occupational Health reviews for all reasonable adjustments and/or not allowing permanent adjustments;

b. The requirement for the claimant to carry out his role in full/ perform all aspects of his role;

c. The application of the capability element of the sickness policy related to managing disability related absences.

2. Were these PCPs applied to the Claimant?

3. If so did these PCPs put the Claimant at a significant disadvantage due to their disability, namely:

a. The claimant was not able perform all aspects of his role;.

b. The claimant's disability required permanent adjustments to his role;.

c. The claimant's inability to perform all aspects of his role and/or the application of the capability procedure placed him at risk of dismissal.

4. Did the respondent know, or could it have reasonably known that the Claimant was likely to be placed at that disadvantage due to their disability?

5. Would the following adjustments have alleviated the disadvantages:

a. Not being required to pull the curtains on curtain sided lorries when completing a 'GKN' pallet run.

b. Not being required to complete drop off / deliveries to Rochdale.

c. Not being required to complete drop off / deliveries which used a specific type of lorry tail lift.

d. Not required to complete double decker lorry runs.

e. Allowing adjustments to be permanent

f. Delaying and/or obtaining further medical evidence before the application of the capability procedure and/or delaying placing him at risk of dismissal.

6. Were any of these adjustments made by the respondent and, if not, would it have been reasonable for them to have made them?

S98 ERA 1996 Constructive Unfair Dismissal

1. Did the Claimant constructively resign as a result of the Respondents breaches of contract and/or breach of the implied term of mutual trust and confidence namely:

a. Failure to maintain and/or make permanent the existing adjustments;

b. Failure to delay the application of the capability procedure and/or refer the claimant to Occupational Health before the application of the capability procedure placing him at risk of dismissal.

Remedy

1. What remedy, if any, should the tribunal award? Should the tribunal consider

a. an award for injury to feelings?

b. compensation for lost earnings (including future loss of earnings) / pension benefits / other financial losses?