Neutral Citation Number: [2025] EAT 195

Case No: EA-2023-001072-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 December 2025

Before:

HIS HONOUR JUDGE TARIQ SADIQ

- -

Between:

MR NEIL DUKE **Appellant**

- and –

B & M RETAIL LIMITED **Respondent**

- -
- -

Mr Lee Bronze (instructed by USDAW) for the **Appellant**
Mr Stefan Brochwicz-Lewinski (instructed by Horsfield Menzies) for the **Respondent**

Hearing date: 25 September 2025

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JUDGMENT

SUMMARY

Disability discrimination – sections 19 and 20 Equality Act 2010
Unfair dismissal
Wrongful dismissal

The Claimant was disabled by virtue of a lung condition. He had received letters from Public Health England that he was deemed clinically extremely vulnerable to COVID as a result of his disability. He was required by the Respondent to attend work during the pandemic. The Claimant requested to be absent from work on furlough as a reasonable adjustment. This was refused by the Respondent, but the Claimant was given the option of remaining off work shielding on statutory sick pay. The Employment Tribunal ("the ET") dismissed his claims for indirect disability discrimination, failure to make reasonable adjustments, unfair dismissal and victimisation.

Held: upholding the appeal.

The ET had erred in (i) finding that the Claimant was not at a particular disadvantage regarding the indirect discrimination claim; (ii) in its approach to objective justification and indirect discrimination; (iii) reasonable adjustments; (iv) unfair dismissal and had failed to address the wrongful dismissal claim at all. The appeal was allowed and remitted back to a differently constituted ET to consider these claims.

HIS HONOUR JUDGE TARIQ SADIQ:

1. This is an appeal against the decision of the Manchester Employment Tribunal ("The ET"), chaired by Employment Judge Ainscough, whose reasons were promulgated on 25 August 2023 following a hearing over five days in December 2022. The ET dismissed the Claimant's claims for indirect disability discrimination, failure to make reasonable adjustments, unfair dismissal and victimisation.

2. The parties will be referred to as the Claimant and the Respondent as they were before the ET. The representation at the ET was the same as before the Employment Appeal Tribunal ("EAT"). The Claimant was represented by Lee Bronze of Counsel and Stephan Brochwicz-Lewinski of Counsel appeared for the Respondent. I am grateful for their assistance.

The Background

3. The Claimant was employed from July 2019 until his dismissal on 12 April 2021. At the time of his dismissal, he was employed as a Store Manager. At paragraph 7 of the Reasons, the ET found that the Claimant had initially been posted to a large Band 4 store, but at his request he had been transferred to a smaller store at a reduced salary.

4. Prior to the pandemic, the Claimant achieved the second highest category in the performance of his role as Store Manager and at paragraph 10 of the Reasons the ET found that prior to the pandemic the Claimant was performing at a more than satisfactory level, with no warnings and he was able to complete his tasks as Store Manager. The ET noted at paragraph 8 that the Claimant gave evidence that he was able to complete the tasks of Store Manager with reasonable adjustments.

5. Prior to the pandemic, the Claimant was the Store Manager of the Blackburn Store. It is common ground that the Claimant suffered from Sarcoidosis, Inducible Laryngeal Obstruction and lumbar disc degeneration – see paragraph 6 of the Reasons under the heading 'Claimant's disability'. The ET found that, as a result, during the pandemic the Claimant was deemed Clinically Extremely

Vulnerable. Pausing there, the ET found at paragraph 2 that the Claimant had a physical impairment which restricts his lung capacity and the Respondent accepted that the Claimant was disabled under the Equality Act 2010.

6. At the start of the pandemic, the Respondent closed all its stores for three weeks and the stores were allowed to re-open after the Government's decision that the Respondent's stores were essential. At paragraph 11 of its Reasons, the ET found that at this stage the Claimant had received notification from Public Health England that he was deemed clinically extremely vulnerable as a result of his disability, and therefore the Claimant shielded at home between March 2020 and 3 August 2020 and was paid furlough by the Respondent.

7. On 21 July 2020, the Claimant's GP produced a fit note for three months advising that the Claimant should either stay at home on furlough or work at a low tier store were there were low rates of COVID in the area.

8. At paragraph 14 and 15 of the Reasons, the ET found that the Claimant had been informed by the Government that the shielding advice was ending on 1 August 2020 and that there was a video call between the Claimant and his manager, Colin Rockliffe and a member of HR, and the Claimant was told that he was expected to return to work because he was no longer required to shield. It was agreed that the Claimant would require an individual risk assessment in his role and that the Claimant would work, super numerary, at the Preston store which was a low tier store at the time – see paragraph 16.

9. On 3 August 2020, there was a further conversation between the Claimant and Mr Rockliffe where the Claimant was asked about an individual risk assessment and it was agreed that the Claimant would remain in the Preston store until the rates (which I assume to mean the COVID rates) in Blackburn had dropped and the Respondent's COVID controls and processes were in place to make sure the store was safe – see paragraph 17 of the Reasons.

10. At paragraph 18, the ET record that a shielding risk assessment was completed on 6 August 2020, which was signed off on 7 August 2020, confirming that the Claimant was *'in a safe working environment.'* However, by 8 August 2020 the Claimant had reported back problems as a result of manual work he was performing after starting back at work on 5 August 2020 and asked to move to the Chorley store as a reasonable adjustment since he was concerned about the increase in infection rates in Preston, and the ET found that the Store Manager for Chorley was on secondment at another location and that *"..it suited everybody for the claimant to move to Chorley"*– see paragraph 20.

11. On 29 September 2020, the Claimant met with Mr Rockcliffe and was told that the Respondent wanted the Claimant to return as Store Manager in Blackburn or alternatively to Southport where there was a vacancy. The Claimant stated that he felt victimised and should not be at work. On 30 September 2020, he rejected the Blackburn and Southport offers and asked the Respondent to conduct a specific COVID risk assessment – see paragraphs 22-23 of the Reasons.

12. On 4 November 2020, the Claimant received a letter from Public Health England advising that, because he was deemed clinically extremely vulnerable, he should work from home if he could, or he should not attend work. The letter confirmed that it was advice and not a legal requirement and also referred to the use of Statutory Sick Pay, Employment Support Allowance or Universal Credit for those not attending work. The letter also suggested that the Claimant might be eligible for furlough. The ET found that at paragraph 26 that *'...this was not the Tribunal's understanding of the furlough scheme. The Coronavirus Job Retention Scheme was created to save jobs which might otherwise have been lost through redundancy because businesses were not operating during the pandemic."*

13. At paragraph 28 of its Reasons, the ET found that the Claimant's interpretation of the Respondent's statement from the July 2020 meeting that the Respondent would be following Government guidelines was that he would be allowed to shield at home whilst in receipt of furlough following receipt of the letter dated 4 November 2020.

14. An Occupational Health report dated 5 November 2020 stated that the Claimant was fit for work with reasonable adjustments, which included working at a store in a low tier area within a 40 minute drive (which I assume means from the Claimant's home) in light of his back condition, and that the Claimant should adhere to social distancing. The ET found at paragraph 30 that this report's opinion had not been formed by reference to the previous Occupational Health correspondence.

15. On 11 November 2020, the Claimant lodged a grievance which was followed by a more detailed grievance on 14 November 2020 in which he requested to be absent from work on furlough as a reasonable adjustment. At this stage, the ET heard evidence that the Respondent had decided to repay all furlough monies and opt out of the furlough scheme because it was making a profit during the pandemic – see paragraph 33 of its Reasons.

16. The outcome of the grievance on 7 December 2020 was that the grievance was not substantiated and that the Claimant could not remain at the Chorley store. He was offered a store in a tier one or two area, his previous role as Store Manager at the Blackburn store on either a full-time or on reduced hours, or one of the vacancies identified as part of the grievance outcome. He was also informed that he had the option of being absent from work on either annual leave or statutory sick pay.

17. On 13 December 2020, the Claimant appealed and asked to remain at the Chorley store or that he be provided with a role at a store in a low tier area within a 40 minute drive. On 15 December 2020, the Claimant's GP advised that he was not qualified to comment on what was good for the Claimant at work and reiterated that he should be working from home if possible.

18. The Claimant was informed that he should not return to the Chorley store and was granted special leave. He was told that there was no store within a tier one area within a 40 minute drive of his home. The Claimant refused to go to Blackburn, full-time or part-time, because of the COVID infection rates. There was discussion about the Deputy Store Manager role in Hyndburn which was

nearer to the Claimant's home and within an area with a lower infection rate, which the ET accepted was a role put to the Claimant – see paragraph 37 of its Reasons.

19. The Claimant's evidence was that his main concern about the Hydburn role was the high infection rate in the area and at paragraph 39 of its Reasons the ET found that the proposed reduction in salary was also a factor for the Claimant, stating:

> "The Tribunal determines that the proposed reduction in salary was a factor for the claimant. It was an issue for the claimant in the same way that the claimant did not want to be absent from work on Statutory Sick Pay. Whilst the Tribunal has not seen any evidence about the infection rates in Hyndburn at that time, it accepts that this was also a concern for the claimant."

20. On 16 December 2020 the Claimant agreed to return to work at the Blackburn Store as Store Manager and a risk assessment was carried out on 6 January 2021 which confirmed that the Claimant was able to socially distance use his own implements. The ET found at paragraph 41 that the Claimant did not raise any issues with the risk assessment and signed it.

21. On 5 January 2021, the Claimant received a further shielding letter from Public Health England advising him to shield from 5 January to 21 February 2021.

22. On 22 January 2021, the Claimant was informed that his grievance appeal was unsuccessful and he submitted a second grievance on 23 January 2021. On 17 February 2021, he was informed that his second grievance was unsubstantiated and the Claimant submitted an appeal against that decision on 18 February 2021, which was heard on 10 March 2021. On 23 March 2021, he was informed that his second grievance appeal had been unsuccessful.

23. In the meantime, on 22 March 2021, the Claimant took a COVID test which was positive which he reported to Mr Rockliffe. He reported that he had had close contact with all staff and that he had been in contact within two metres of staff for more than 15 minutes within 24 hours of the test. The Claimant also reported his positive test result to Test and Trace. The ET found at paragraph 53 that the *'transcript of the conversation between the claimant and Test and Trace records that the*

claimant reported that he has been in close contact with 30+ staff."

24. At paragraph 54, the ET noted that on 23 March 2021 the Claimant spoke with Test and Trace and that the transcript *'records that the Test and Trace agent recalled that the claimant had previously reported close contact with 40+ staff. The claimant did not correct this assertion."* At paragraph 55, the ET found that on 25 March 2021 Test and Trace contacted Mr Rockliffe and repeated that the Claimant had informed the service that he had been in close contact with 40+ staff and he informed the Respondent.

25. A disciplinary investigation meeting took place on 30 March 2021 about the Respondent's concern that the Claimant had failed to adhere to the social distancing guidance which had led to his infection and the Claimant was suspended from work.

26. On 9 April 2021, the disciplinary hearing was held the charge being that the Claimant had failed to ensure that hat the store was COVID secure and had put his own safety and that of his colleagues at risk by not adhering to social distancing. The Respondent also alleged that the Claimant had failed to follow his own risk assessment and misled Test and Trace.

27. At the disciplinary hearing, the Claimant explained that his disabilities caused him to a have a lack of concentration and that this meant he was unable to adhere to social distancing. By a decision letter dated 16 April 2021, the Claimant was dismissed for (1) a lack of social distancing at the store; (2) failing to adhere to his own individual risk assessment; (3) misleading Public Health England, and (4) as a result of all of this, there being a direct link to the closure of the store.

28. The Claimant appealed and there was a final appeal hearing on 29 June 2021. On 1 September 2021, the Claimant was asked to consent to an Occupational Health referral so that the appeals officer, Audrey Lawson, would understand the impact of the lack of concentration on the Claimant's ability to social distance. On 6 September 2021, the Claimant refused to consent to the Occupational Heath referral on the basis that he no longer worked for the Respondent. On 8 October 2021, the Claimant's

appeal was dismissed.

The ETs Decision

29. The ET dealt with the law at paragraphs 70-86. Regarding the discriminations claims, save for referring to the burden of proof provisions regarding direct discrimination at [76]-[78], the ET did not direct itself by referring to any of the relevant legal authorities regarding objective justification or how the burden of proof operates in relation to indirect discrimination or reasonable adjustments claims as opposed to direct discrimination.

30. At paragraph 94, the ET considered the indirect discrimination claim over two time periods namely from July 2020 to December 2020 and the second period from December 2020 until the Claimant's dismissal in April 2021.

31. As regards the first period from July 2020 to December 2020, the ET found at paragraph 100 that the Respondent had applied a provision, criterion or practice ('the PCP') of requiring employees to continue to attend work during the pandemic. In relation to group disadvantage, at paragraph 102 the ET found that the PCP would have disadvantaged disabled managers who had a lung condition in the same way that the Claimant did, the ET stating *'That group would have had an anxiety that they were at high risk of a severe illness based on the GP and Public Health England advice."*

32. However, at paragraph 102 the ET found that the Claimant had not been put to a particular disadvantage and therefore decided not to go on to consider justification for this period. The ET stated:

> *"However, having made those finding we are of the conclusion that the claimant was not put at a particular disadvantage because he was able to work, in accordance with the GP advice, at a low tier store. We have therefore not gone on to consider justification for this period."*

33. Regarding the second period from December 2020 to April 2021, at paragraph 104 the ET

also found that the Respondent had a requirement for employees to attend work during the pandemic during this period and at paragraph 105 that this PCP had put disabled managers with a lung condition at a disadvantage when compared to non-disabled manages because they would have had anxiety about being at work and the high risk of a severe illness. Further, at paragraph 106 the ET found that from 16 December 2020 the Claimant had returned to Blackburn and he too would have been put at this particular disadvantage since *"The claimant took the view that he could better control his condition at Blackburn, but he was still concerned about being at work in a mid-high tier area.*

34. However, the ET went on to find that the Respondent's justification defence had been made out at paragraphs 107-111. It is best to quote these paragraphs in full:

> "107. The respondent had a legitimate aim of staffing concerns during the pandemic. This was an essential store. It was a store that the respondent admits was doing well out of the pandemic, it was making money, and the Tribunal took note of the fact that there was a recruitment need within the retail sector. There was a real staffing need in retail because of the pressure that was being put on this sector during the pandemic.
>
> 108. The Tribunal asked itself whether that staffing need and the need to incentivise people to come back to work (which the respondent says was also part of its legitimate aim) was proportionate. The Tribunal determines that it was proportionate for the respondent to maintain its position to pay statutory sick pay to those who chose to shield. The respondent wanted to incentivise people back to work.
>
> 109. The Tribunal was aware from the evidence provided by Victoria Jackson that the respondent did not think that this was a reasonable adjustment because it would have had a detrimental impact on the business.
>
> 110. We note that the respondent has tens of thousands of employees and that the terms and conditions are at the lower end of what is offered by an employer in the retail sector. It is likely that the workforce would have had diverse disability needs. There would have been a greater burden on the respondent had it offered full pay or furlough to those who were clinically extremely vulnerable.
>
> 111. Whilst there would have been a financial cost to the respondent, they would also have been a staffing issue because it is likely it would have lost a high number of staff and would not necessarily have been able to backfill those roles with any ease. For those reasons the indirect discrimination claim fails."

35. The ET also considered the reasonable adjustments claim over two time periods namely from (i) August 2020 to December 2020 and from (ii) December 2020 until the Claimant's dismissal in

April 20201.

36. As regards the first and second periods, the ET found that the PCP applied was that all employees were required to work during the pandemic – see paragraphs 112 and 115, and that the Claimant had suffered a substantial disadvantage over both periods because in relation to the first period at paragraph 113 he was *'anxious about working in Blackburn and being exposed to Covid due to the high rates in Blackburn'* and regarding the second period at paragraph 116 *'The claimant suffered the same substantial disadvantage in that he had anxiety because he was at higher risk of severe illness compared to non-disabled people."*

37. However, as regards the first period the ET found that the Respondent had made a reasonable adjustment by allowing the Claimant to work at the Chorley store for the period up to 15 December 2020, stating at paragraph 114: *'The respondent allowed the claimant to move to Chorley in a supernumerary role. The Tribunal determines that this was a reasonable adjustment up until and including 15 December 2020."*

38. Regarding the second period, the ET found at paragraphs 117 to 118 that the Respondent had made a reasonable adjustment by allowing all staff who wanted to shield to take sick leave with statutory sick pay:

> "117. The claimant contended that a reasonable adjustment would be allowing him to stay at home on furlough. However, by this stage the respondent was no longer subscribing to the furlough scheme and the Tribunal does not conclude that it was reasonable to ask the respondent to re-join the furlough scheme in order to facilitate the claimant or any others who were clinically extremely vulnerable to stay off work. The respondent had taken a decision to pay back the furlough, it was doing well out of the pandemic, and it would have had quite a severe reputational damages if the respondent had rejoined the furlough scheme.
>
> 118. The contract of employment provided that the respondent would pay statutory sick pay, if an employee was off sick. The respondent extended the payment of statutory sick pay to those who wanted to shield during the pandemic. The Tribunal determines that this was a reasonable adjustment. Those who want to shield were not sick, but the respondent allowed them to stay off work without consequence during the pandemic."

39. Regarding the second PCP, requiring the Claimant to return to his base store in Blackburn, which the ET found applied from December 2020, the ET found that this PCP was applied to the Claimant and all staff at the Blackburn store – see paragraphs 119-121, and that the Claimant was at a substantial disadvantage *'because he would have had anxiety that he was at high risk of severe illness going back to Blackburn which had high rates of Covid.'*

40. However, at paragraphs 123-129 the ET found that it was a reasonable adjustment for the Respondent to allow the Claimant to shield at home in receipt of statutory sick pay. Paragraphs 127-129 read as follows:

> "127. The claimant said he wanted to stay in Chorley, albeit he was supernumerary by this stage. This would have led to an additional financial burden for the respondent. The Tribunal heard evidence that it was not possible to move the Chorley manager during the pandemic.
>
> 128. The Tribunal also heard evidence that Chorley was a Band 3 store. The claimant had chosen to work in a Band 1 store (which was Blackburn), because of his disability. The Tribunal determines that a move to a Band 3 store would have had a detrimental impact on the claimant for different reasons, because of his disability. The respondent also provided evidence that Chorley was a harder store to manage and the pandemic. It had two exits and two entrances and there was an increased footfall in a bigger store.
>
> 129. The Tribunal determines the move to Chorley at that stage was not a reasonable step to take to avoid the substantial disadvantage to the claimant. It was reasonable for the respondent to allow the claimant to shield at home in receipt of statutory sick pay. This was a reasonable adjustment to negate the substantial disadvantage of the claimant's anxiety about being at work."

41. Regarding the unfair dismissal claim, it was common ground that the Test and Trace transcripts were not available to the Respondent during the investigation or the disciplinary hearing – see paragraph 142.

42. At paragraph 149, the ET concluded that Mr Wilkinson, the dismissing officer, had a genuine belief that the claimant had endangered the health and safety of his colleagues and had serious and wilful disregard for health and safety rules which amounted to gross misconduct, and that it was reasonable for Mr Wilkinson to discount the Claimant's explanation of a lack of concentration.

43. At paragraph 51, notwithstanding the store closure allegation which was dealt with separately in the appeal process, the ET decided that it was within the range of reasonable responses for Mr Wilkinson to dismiss the Claimant.

44. The ET found at paragraph 158 that the appeal had been conducted as a rehearing. At paragraph 159, the ET decided that Miss Lawson, the appeals officer, did not accept that a lack of concentration stopped the Claimant from socially distancing. Although she did not have the Test and Trace transcripts in which the Claimant said 30+ colleagues, she did have the report that Mr Rockliffe had been told it was 40+ and she did have the transcript by this stage in which it was put to the Claimant that he had said 40+. Accordingly, the ET concluded that it was within the range of reasonable responses for the appeals officer to uphold the Claimant's dismissal.

The Grounds of Appeal

45. By a Preliminary Hearing decision on 17 July 2024, Judge Stout allowed the following Amended Grounds of Appeal to proceed to a full hearing.

46. Ground 1: Indirect discrimination: Disadvantage. The ET erred in concluding at paragraph 102 of its Reasons that the requirement for the Claimant to attend work did not, during the period between July 2020 in December 2020, amounted to particular disadvantage, namely being anxious that he was at high risk of a severe illness and/or being at high risk of a severe illness. The ET failed to take account of the following:

(1) the Claimant continued to be at high risk of a severe illness from the pandemic during this period when compared to those who did not suffer from a lung condition. The Claimant was at increased risk throughout this period but particularly after 31 October 2020 and the Claimant was advised by the Government to shield.

(2) the GP fit note dated 21 July 2020 recommended that the Claimant should remain on furlough and, only if that was not possible, that he should work in areas of low COVID prevalence.

(3) at the welfare video call on 24 July 2020 and in his grievance on 14 November 2020 the Claimant asked to be placed on furlough, thus indicating that he considered himself to be at a disadvantage in being required to work.

The ET's conclusion is also inconsistent with its conclusion in paragraph 113 of its reasons that the Claimant was placed personally at a disadvantage during this period.

47. Ground 2: Indirect discrimination: Justification. The ET erred in concluding at paragraphs 107 to 111 of its reasons that the indirect discrimination was justified. In particular:

(1) the ET erred in failing to direct herself that the burden of proof was on the Respondent show justification.

(2) the ET erred in concluding that there would be a financial cost to the Respondent if it offered furlough or full pay to vulnerable staff who had been advised to shield, without the Respondent producing cogent evidence as to the potential cost.

(3) the ET erred in concluding that incentivising its staff back to work was a legitimate aim. The Claimant contends that the incentivising vulnerable staff who had been advised to shield back to work was not a legitimate aim.

(4) The ET erred in concluding that requiring its staff to come back to work or, if choosing to shield, take sick leave and statutory sick pay was a proportionate means of achieving its aim. This policy had a disproportionate and discriminatory impact on those vulnerable staff who had been advised to shield.

48. Ground 3: Reasonable Adjustments. The ET erred in concluding at paragraphs 114, 117 to 118 and 123 to 132 that the Respondent had made reasonable adjustments by allowing the Claimant to work in the Chorley store for the period up to 15 December 2020 and by allowing all staff who wanted to shield to take sick leave with statutory sick pay. In particular:

(1) the ET erred in failing to direct itself that, PCPs and substantial disadvantage having been proven, the burden shifted to the Respondent to prove that it had taken reasonable steps to avoid the disadvantage.

(2) the ET erred in failing to consider whether it would have been a reasonable adjustment for the Respondent to allow the Claimant to take sick leave on full pay or furlough.

(3) the ET erred in concluding that it was a reasonable adjustment to allow the Claimant, if he wished, to take sick leave on statutory sick pay without making an assessment of the loss to the Claimant of taking sick leave on statutory sick pay and the cost to the Respondent of allowing the Claimant take sick leave on full pay or furlough.

(4) The ET erred in concluding that it would not have been a reasonable adjustment for the Claimant to remain at the Chorley store after 15 December 2020 without making a meaningful assessment of the cost to the Respondent of allowing the Claimant to remain at Chorley and/or how that cost could be mitigated.

49. Ground 4: Unfair Dismissal. The ET erred in concluding that it was reasonable for the Respondent to find that the Claimant had misled Track and Trace by informing it that he had been in close contact with 40+ members of staff when he had in fact been in close contact with only 30+ members of staff, when the Respondent had not obtained the transcript of the Claimant's telephone call with Track and Trace. The Respondent could have asked the Claimant to apply for the transcript

and could have postponed the disciplinary and appeal hearings until the transcript had been obtained. In the circumstances, it was perverse for the ET to conclude at paragraph 142 of its reasons that the transcript was '*not available'* to the Respondent during the investigation of the disciplinary hearing.

50. The second limb of Ground 4 is that the ET erred in concluding that the Respondent had acted within the range of reasonable responses. In particular, the ET failed to take into account:

(1) whether the Respondent had given appropriate credit for the Claimant's previous good service.

(2) whether the Respondent had taken proper account of the lack of training that the claimant had received in COVID safety measures.

(3) whether the Respondent had considered other sanctions such as a final written warning and the reasons why the sanctions had been rejected.

51. Ground 5: Wrongful Dismissal. The ET failed to determine the claim for wrongful dismissal including whether the Claimant acted in repudiated breach of contract.

The Law

52. So far as the claim of indirect discrimination are concerned, section 19 EqA provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
> (3) The relevant protected characteristics are—

age;
disability;
…"

53. As for the duty to make reasonable adjustments, by section 20(3) EqA, this is explained as a requirement that arises:

> "…where a provision, criterion or practice of [the employer]'s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, …."

54. In respect of both forms of claim, there is an initial burden on a claimant to establish that the relevant PCP caused substantial disadvantage - see **Project Management Institute v Latif** [2007] IRLR 579, at paragraphs 44-45, in which Elias P (as he then was) observed, at paragraph 45, that establishing the PCP and demonstrating the substantial disadvantage: "are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant."

Disadvantage

55. In a claim of indirect discrimination, the PCP must place the group with which the claimant shares the protected characteristic in question at a "particular disadvantage" compared to groups that, absent the protected characteristic, were not in materially different circumstances, albeit not every member of the group needs to be placed at a disadvantage insofar as the group is proportionately disadvantaged - see the discussion in **Essop v Home Office; Naeem v Secretary of State for Justice** [2017] UKSC 27 at paragraphs 25-27). "Particular" in this context is not intended to connote a disadvantage that is required to meet a certain level of seriousness but simply makes clear that it is a disadvantage for those with the relevant protected characteristic who are disadvantaged – see **McNeil and ors v Cmmrs for HMRC** [2019] EWCA Civ 1112 at [16].

56. In **Cowie v Scottish Fire and Rescue Service** [2022] EAT 121, the EAT followed the same approach to determining disadvantage in "unfavourable treatment" under s15 of the EqA and disadvantage for indirect discrimination under s19 of the EqA on the basis that broadly the same approach can be adopted to both terms bearing in mind the observations of Lord Carnwath in **Williams v Trustees of Swansea University Pension & Assurance Scheme** [2018] UKSC 65 at paragraph 27:

> "27. …in most cases ... little is likely to be gained by seeking to draw narrow distinctions between the word unfavourably in s15 and analogous concepts such as disadvantage or detriment found in other provisions, nor between an objective and a subjective/objective approach. While the passages in the [EHRC] Code of Practice ... cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section."

Reasonable Adjustments

57. Section 20(3) EqA provides that, where a PCP puts a disabled person at a substantial disadvantage compared to those who are not disabled, there is a duty upon an employer:

> "… to take such steps as it is reasonable to have to take to avoid the disadvantage."

58. The duty thus imposed by section 20(3) necessarily requires that the disabled person be treated differently in recognition of their particular needs - see per Lady Hale at paragraph 47 **Archibald v Fife Council** [2004] UKHL 32).

59. As Lord Toulson observed at paragraph 83 of **FirstGroup Ltd v Paulley** [2017] UKSC 4; [2017] IRLR 258, the concept of "reasonable adjustments" for these purposes is "intensely practical", requiring an objective assessment of how the step(s) proposed would have been effective to enable the disabled person to work, albeit that it will suffice if there was a prospect of the disadvantage being alleviated even if the adjustment in question would not have been completely effective – see **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160 CA, per Elias LJ at paragraph 66.

60. Although the EqA does not set out a mandatory list of factors that are to be taken into account (in contrast to the position under the Disability Discrimination Act 1995), the EHCR Employment Code lists matters that might be relevant to the ET's assessment, as follows:

> "whether taking any particular steps would be effective in preventing the substantial disadvantage;
>
> the practicability of the step;
>
> the financial and other costs of making the adjustment and the extent of any disruption caused;
>
> the extent of the employer's financial or other resources;
>
> the availability to the employer of financial or other assistance to help make an adjustment …; and
>
> the type and size of the employer."

61. When it comes to the ET's assessment of proportionality, an employer cannot simply rely upon generalisations to show that the treatment is a proportionate means of achieving a legitimate aim – see paragraph 42 of **DL Insurance Services Ltd v O'Connor** UKEAT/0230/17/LA and paragraph 119 of **CHEZ Razpredelenie Bulgaria AD v Komisia za zashitita ot diskrimatsias** C-83/14.

62. Regarding detriment, the test is whether a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he had to work. It is not necessary to demonstrate some physical or economic consequence – see paragraphs 34-35 of **Shamoon v Chief Constable of Royal Ulster Constabuulary (Northern Ireland)** [2003] UKHL 11.

Objective justification

63. As provided by section 19(1)(d), it will not amount to indirect discrimination if the employer can demonstrate that the PCP is a "proportionate means of achieving a legitimate aim".

64. In **Chief Constable of West Yorkshire Police v Homer** [2012] UKSC 15, at paragraphs 19-20, Lady Hale explained the approach that is to be adopted in considering whether an employer has demonstrated that an otherwise indirectly discriminatory measure is justified; in summary:

> (i) the employer must show that the objective of the measure corresponds to a real need;
>
> (ii) the means used must be appropriate with a view to achieving that end;
>
> (iii) the means must be reasonably necessary (and see per Mummery LJ in **R(Elias) v Secretary of State for Defence** [2006] 1 WLR 3213 CA).

65. Furthermore, as has been emphasised in the case-law, in determining whether the means adopted is "proportionate", the ET is required to ask a further question, (iv), and to consider whether the steps complained of strike a fair balance between the employer's need to accomplish the aim and the discriminatory effect of the measure or treatment in question (see paragraph 22 of **Homer** and paragraph 28 of **Aster Communities Ltd v Akerman-Livingstone** [2015] AC 1399 SC). Further, the more serious the adverse effect, or unfavourable treatment, the more cogent must be the justification for it - see per Elias J (as he then was) at paragraph 10 of **MacCulloch v ICI** [2008] IRLR 846 EAT, guidance that was subsequently approved in **Lockwood v DWP** [2013] EWCA Civ 1195). Moreover, the objective nature of the assessment required means that it is not enough that the reasonable employer might consider the PCP or treatment justified; the ET itself has to weigh the real needs of the undertaking against the discriminatory effects of the requirement – see **Hardy & Hansons plc v Lax** [2005] ICR 1565 CA at paragraphs 31 and 32, cited in **MacCulloch** at paragraph 10(4) and **Homer** at paragraph 20).

66. Where the ET fails to demonstrate that it has approached the issue of justification in the structured way thus identified, and addressed each of the questions raised, the conclusion reached will be rendered unsafe, see paragraph 26 of **Homer**. As the EAT (Judge Barry Clarke presiding) observed in **Department for Work and Pensions v Boyers** [2022] IRLR 748, at paragraph 30:

> "… the EAT can interfere where, upon appropriate scrutiny of the ET's reasoning, the balancing exercise required by s 15(1)(b) EqA does not appear to have been carried out. Where it has been carried out, the EAT cannot interfere unless the ET's analysis can properly be characterised as perverse."

67. An appeal to the EAT does not, therefore, provide a means of re-litigating the facts. A perversity challenge:

> "ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached:" per Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634 CA.

The Amended Grounds of Appeal

Ground 1 – Indirect Discrimination and Disadvantage

68. Ground 1 is that the ET's finding regarding particular disadvantage at paragraph 102 that the requirement for the Claimant to attend work between July 2020 in December 2020 did not put the Claimant at a particular disadvantage, was perverse and/or the ET failed to take account of certain relevant factors.

69. The test for particular disadvantage is a relatively low threshold, which would be sufficient to trigger the requirement for justification under section 19 of the EqA - see **Williams v Trustees of Swansea University Pension & Assurance Scheme** [2018] UKSC 65. Here, there was no consideration of the low threshold requirement by the ET at all in its Reasons and I am satisfied that it lost sight of the low threshold requirement when considering particular disadvantage.

70. The ET accepted that the Respondent's PCP namely requiring employees to continue to attend work during the pandemic disadvantaged managers who had a lung condition, and that the group

would have been anxious that there was a high risk of a severe illness. However, the Claimant continued to be at a high risk of a severe illness from the pandemic because of his lung condition July 2020 to December 2020 compared to those who did not suffer from a lung condition. He received notification letters from Public Health England that he was deemed clinically extremely vulnerable as a result of his disability and was advised by the Government to shield in November 2020 - see paragraphs 11 & 20.

71. In addition, the Claimant's GP fit note dated 21 July 2020 recommended he should remain on furlough and, if that was not possible, he should work in areas of low COVID presence. At paragraph 102, the ET failed to quote the GPs advice in full and did not refer to any Occupational Health recommendations at all.

72. The Claimant also relies upon the evidence at the welfare call on 24 July 2020 and in his grievance dated 14 November 2020 that he asked to be placed on furlough, thus indicating that he considered himself to be at a disadvantage in being required to work. In the ET3 at paragraph 16, the Respondent accepted at the welfare call that the Claimant stated that he wanted to remain on furlough, and in his November 2020 grievance the Claimant had requested to be absent from work on furlough as a reasonable adjustment - see paragraph 32 of the ET reasons. However, the ET made no mention of this in paragraph 102.

73. Then there is the point that the ET's conclusion at paragraph 102 is inconsistent with its finding at paragraph 113 of its reasons that the Claimant was placed at a substantial disadvantage regarding the reasonable adjustments claim during the same period August 2022 December 2020 regarding working at the Blackburn store. There was evidence before the ET, but not considered by the ET, that at the Claimant's grievance hearing on 18 November 2020 he was saying that his health was getting worse.

74. For all these reasons, I am satisfied that Ground 1 succeeds. The decision was perverse and

meets the high threshold of an overwhelming case that the ET reached a decision not reasonably open to it on a proper appreciation of the evidence and the law, and/or the ET failed to take account of relevant matters.

Ground 2 - Indirect Discrimination and Justification

75. Ground 2 is that the ET erred in law regarding its approach to objective justification in respect of the indirect discrimination claim and the decision regarding the second period from December 2020 to April 2021.

76. The first criticism is that the ET erred in failing to direct herself that the burden of proof was on the Respondent to show justification. It is common ground that the ET failed to give itself a direction as to how the burden of proof works regarding indirect discrimination and reasonable adjustments (as distinct from direct discrimination). By itself, that does not amount to an error of law but taken together with the other grounds of appeal regarding justification in particular the lack of any self-direction whatsoever regarding the legal authorities in respect of justification, it does suggest that the ET failed to grasp the nature of the burden on the Respondent.

77. This brings me to the numb of Ground 2, that the ET failed to conduct a proper proportionality assessment regarding the indirect discrimination claim. The ET failed to direct itself to any of the relevant legal authorities including Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15, Bank Mellat v HM Treasury No2 [2013] UKSC 18, Hensman v MOD UKEAT 0067/14/LA and Hardy & Hansons Plc v Lax [2005] ICR 1565, CA.

78. In addition, at paragraphs 107-111 the ET erred in its approach because it simply did not refer, let alone analyse, the balancing exercise between the Respondent's purported legitimate aims and the discriminatory impact of the measure in question. The ET's reasons at paragraphs 107 to 111 focus on the Respondent's aims, rather than the discriminatory impact on the Claimant. There is no reference at all to the impact of the policy on those disadvantaged like the Claimant who had been

advised to shield.

79. Regarding the financial cost point, I agree that the ET erred in concluding at paragraphs 109-110 there would be a financial cost to the Respondent if it offered furlough or full pay to vulnerable staff who had been advised to shield. The only evidence about financial costs was in the re-examination of Annette Beacham, the Respondent's witness, who said; "We had up to 400 colleagues on SSP who were shielding, who were staying at home on SSP due to that shielding letter" – see the parties agreed note of the evidence. This evidence was given for the first time in re-examination and is hardly cogent evidence as to the potential costs to the Respondent. Indeed, Mr Brochwicz-Lewinski for the Respondent, conceded that no details regarding financial cost had been led by the Respondent at the ET hearing and the costs issue had not been dealt with by the Respondent in its witness statements.

80. In respect of the need to incentivise staff back to work as a legitimate aim, there was no proper assessment by the ET whether the impact of the policy on those disadvantaged by it including the Claimant was disproportionate in circumstances where the Claimant was vulnerable by virtue of his lung condition and had been advised to shield.

81. Further, the ET relied upon generalisations regarding the Respondent's legitimate aims when it referred to generalised concerns regarding "staffing concerns" and "staffing needs" in the retail sector at paragraphs 107 and 108, and "staffing issues" of losing a higher number of staff without being able to backfill those roles with ease or without any difficulty during the pandemic – see paragraph 111.

82. In respect of the ET's finding at paragraph 108 that it was proportionate to require staff to return to work, or, if choosing to shield, to take such leave on statutory sick pay, for the reasons given above there was no proper and/or balanced assessment of the Respondent's legitimate aims and the discriminatory impact of the measure. The parties agreed note of the evidence is that the Claimant

would have received statutory sick pay of £95 per week and therefore would have suffered a significant loss of pay. The ET failed to consider this point at all in its Reasons regarding justification at paragraphs 107-111.

83. Accordingly, the ET erred in law regarding its approach to justification and therefore Ground 2 succeeds.

Ground 3 – Reasonable Adjustments

84. Ground 3 challenges the ET's conclusion had made a reasonable adjustment allowing the Claimant to work in the Chorley store for the period up to 15 December 2020 and by allowing all staff who wanted to shield to take sick leave with statutory sick pay.

85. The first criticism is that the ET erred by failing to direct itself that, the PCPs and substantial disadvantage having been proven, the burden shifted to the Respondent to prove that it had taken reasonable steps to avoid the disadvantage. Again, it is not in dispute that the ET did not direct itself regarding how the burden of proof operates in a reasonable adjustment claim. As a matter of law, it is correct that the burden of proof is on the Respondent to show that no reasonable adjustment or further adjustment should be made – see paragraph 46 of **Project Management Institute v Latif** [2007] IRLR 579.

86. Ground 3.2 is that the ET erred in failing to consider whether it would have been a reasonable adjustment to consider whether it would have been a reasonable for the Respondent to allow the Claimant to take sick leave on full pay or furlough [my underlining]. Here, the reasonable adjustment to take sick leave on full pay was not a matter before the ET and was not included in the agreed list of issues. Therefore, this new point has been raised impermissibly on appeal. Further, the ET did consider whether it was a reasonable adjustment to allow the Claimant to remain on furlough at paragraph 117. Accordingly, Ground 3.2 fails.

87. Ground 3.3 needs to reflect the fact that the reasonable adjustment of allowing the Claimant to take sick leave on full pay was not a matter before the ET. Therefore, the question is whether the ET erred in concluding that it was a reasonable adjustment to allow the Claimant, if he wished, to take sick leave on statutory sick pay without an assessment of the loss to the Claimant taking such sick leave on statutory sick pay and the cost to the Respondent of allowing the Claimant to remain on furlough.

88. As stated above, the Claimant would have received statutory sick pay of £95 per week and therefore would have suffered a significant loss of pay. This issue was not addressed at all by the ET in its Reasons at paragraphs 117 to 118. Indeed, the ET found at paragraph 118 that there would have been "no consequence" for the Claimant or remaining off sick in order to shield which is clearly a perverse finding.

89. Further, the duty subsists until the disadvantage is removed or all reasonable adjustments have been made. Here, the Claimant was still clearly suffering a substantial disadvantage being only on receipt of statutory sick pay. Nonetheless, the ET erroneously concluded that just because one adjustment had been implemented, that was sufficient, which is plainly perverse.

90. Moreover, the ET's reasons for rejecting the Claimant's claim that putting him on furlough would have been a reasonable adjustment relates to the workforce as a whole - see paragraph 117. There was no reference to the cost to the Respondent of allowing the Claimant to remain on furlough. At paragraph 117, the ET's reasons were limited to "quite severe reputational damages if the Respondent had rejoined the furlough scheme." Again, this relates to the workforce as a whole, not the Claimant in particular, if he was allowed to be furloughed as a reasonable adjustment.

91. In addition, it is common ground that the ET failed to consider in its Reasons the first instance case of **Devaney v Porthaven Care Homes No2 Ltd** ET Case No: 2304184/2020, a decision of the London South ET dated 15 June 2022, which was relied upon by the Claimant at the ET hearing.

92. That was also a case where the claimant, who was disabled by reason of Crohns's disease, was issued with the same shielding letters from the Government as this Claimant because she was clinically extremely vulnerable to COVID due to her disability. The respondent also refused to allow the claimant to be furloughed as a reasonable adjustment but paid those who did not wish to work during COVID statutory sick pay, which is the same claim for reasonable adjustments in this case.

93. At paragraph 59 of **Devaney**, the ET found that it would have been a reasonable adjustment for the respondent to allow the claimant to be on furlough. At paragraphs 61 to 65, the ET held that the Court of Appeal decision in **O'Hanlon v Commissioners of Revenue and Customs** [2007] EWCA Civ 283 about extensive paid sickness absence being a disincentive to a full return to work was distinguishable on the basis inter alia that the claimant was not off work on long term sick leave and the incentivising effect of financial losses was irrelevant to the claimant who was reasonably unwilling to attend work. The case of **Devaney** has not been appealed successfully or at all.

94. In this case, the ET's failed to consider the similar case of **Devaney** in its Reasons. Although not binding on the ET, the ET was obliged to consider it as part of its overall decision-making process since it was relied upon by the Claimant. The ET failed to do so which was irrational and also amounted to a failure to consider a relevant matter.

Ground 4 – Unfair Dismissal

95. The first limb of Ground 4 was not pursued by the Claimant at the appeal hearing. The second limb of Ground 4 is that the ET erred in concluding that the Respondent had acted within the range of reasonable responses by failing to take into account of (i) the Claimant's previous good service; (ii) his lack of training in COVID safety measures, and (iii) other sanctions such as a final written warning and reasons why other sanctions had been rejected. Therefore, this is a perversity challenge and that the ET's decision was not **Meek** compliant.

96. The ET's reasons at paragraphs 142 to 160 fail to deal with these three matters at all. The

training point and the issue regarding lesser sanction were matters that were included in the agreed list of issues before the ET. Previous service was a matter which the ET should have considered in any event. Moreover, nowhere does the ET explain in its Reasons why the Claimant's alleged misconduct amounted to gross misconduct, which overlaps with Ground 5.

97. Accordingly, Ground 4 succeeds.

Ground 5 – Wrongful Dismissal

98. It is common ground that the ET failed to deal with the wrongful dismissal claim at all which is a clear error of law. The ET simply failed to address this claim in its Reasons. This is inextricably linked to Ground 4.3 and unfair dismissal since the ET's failure to decide whether the Claimant's alleged misconduct amounted to gross misconduct has a direct bearing on the question whether the dismissal for the reasons given by the Respondent was fair in all the circumstances.

99. Accordingly, Ground 5 succeeds.

Disposal

100. Given the extent of the errors of law which have been upheld including perversity, it would not be appropriate to remit this case back to the same ET. In the circumstances, the case will be remitted to a differently constituted ET to consider the claims for indirect disability discrimination, reasonable adjustments, unfair dismissal and wrongful dismissal.

101. I hope that this will not be necessary given the costs and time already spent on this case.