EMPLOYMENT TRIBUNALS

Claimant: Mr M Elkhouly

Respondent: Ikea Distribution Services Limited

Heard at: Cambridge Employment Tribunal (in person, in public)

On: 4 August 2025 (Tribunal reading day)
5 and 6 August 2025, 3* and 4 November 2025 (3 hearing days)
5 November 2025 (Tribunal deliberation day)

Before: Employment Judge Hutchings
Ms A. Buck
Mr D. Hart

Representation
Claimant: in person, supported by an Egyptian interpreter
Respondent: Ms Barrett, counsel

*Parties attended for a hearing day however, due to unforeseen circumstances, Cambridge County Court (where the Employment Tribunal is located) was closed on the morning of 3 November 2025 so the hearing could not take place.

RESERVED JUDGMENT

It is the unanimous decision of this Employment Tribunal that:

1. The complaint of unfair dismissal is not well-founded and is dismissed. The claimant was fairly dismissed.

2. The complaint of discrimination arising from disability is not well founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent, a company that operates warehouses and distribution centres, as a Warehouse Co-worker at Kingston

Park, Peterborough from 6 April 2020 until his dismissal, the respondent says by reason of capability, on 8 February 2024. ACAS consultation started on 16 February 2024 and a certificate was issued on 4 March 2024.

2. By ET 1 claim form dated 19 March 2024 the claimant made the following claims:

   2.1. Unfair dismissal (section 94 of the Employment Rights Act 1996 ('ERA'); and

   2.2. Discrimination arising from disability relating to a capability process starting in October 2021 and ending in February 2024 with the termination of the claimant's employment (section 15 of the Equality Act 2010 ('EqA').

3. By ET3 response form and Grounds of Resistance dated 21 May 2024 and Amended Grounds of Resistance dated 12 February 2025 the respondent resists the claims. The respondent asserts that the claimant was fairly dismissed following a length capability process as he was no longer able to do the role for which he was employed. The respondent accepts that the claimant is disabled for the purposes of section 6 EqA because of his lower back pain. The respondent does not accept that fibromyalgia was a separate condition also amounting to a disability. given the lack of medical evidence. The respondent asserts that it first knew about the claimant's back condition a short time before 22 September 2021 when the claimant obtained his first GP fit note relating to that condition.

4. Case management hearings before Employment Judge Gumbiti-Zimuto on 20 November 2024 and Employment Judge Andrew Clarke KC on 11 July 2025 clarified the legal basis of the factual complaints made in the claim form, and these are recorded in the list of issues below.

5. We note that several times during the hearing the claimant sought to raise claims which were not before included in this claim. The background as to why this matter arose is set out in the case management order of Employment Judge Andrew Clarke KC, which was sent to parties on 16 July 2025, and summarised below as context to the application to amend made by the claimant part way through this hearing.

6. In the ET1 claim form the claimant ticked the boxes in section 8.1 to indicate claims for unfair dismissal and disability discrimination. He alleged the dismissal to be because of his disability and to have been procedurally unfair. The respondent admits that he was a disabled person (at all material times) for the purposes of the EqA. In the section for additional information on the form ET1, the claimant complained that he had not been offered the opportunity to train for work other than picking, that heavy lifting had led to back problems and that Occupational Health had recommended that he be allowed to rotate between different kinds of work and this had not always been allowed.

7. At the case management hearing on 20 November 2024 a list of issues was produced. It included two issues as follows:

   "4.1.5 Subjecting the claimant to abuse from work colleagues arising from his inability to carry out the full range of his duties.

4.1.6 Failing to address the claimant's complaints about abuse from colleagues when those matters were raised with the claimant's line manager/supervisor/team leader.

8. That preliminary hearing also ordered that further particulars should be given of the matters referred to in those two very general issues. The particulars were to be given by 15 January 2025. The particulars subsequently provided by the claimant went beyond the matters referred to in the claim form. The claimant provided five pages of single spaced text in nine paragraphs.

9. In an amended ET3 served in February 2025, the respondent complained that the allegations of race discrimination and of disability discrimination contained in the claimant's Further Information document amounted to new causes of action, which in many instances lacked particularity and where the claims in question were presented far outside what would have been the primary limitation period had the Further Information document been a fresh ET1. The respondent correctly pointed out that the allegations related to events in 2021 and (predominantly) 2022. The respondent suggested that the claimant needed to make an application to amend the ET1 if these matters were to be considered as part of the claim, that it would oppose such an application to amend and that a further preliminary hearing should be listed to clarify the case and to deal with any such application. Nothing was done regarding the respondent's request for a further preliminary hearing, despite that request being repeated in correspondence, until the July 2025 case management hearing was listed. That hearing was to take place a little over three weeks before the final hearing was to commence on 4 August.

10. Employment Judge Clarke KC records in the case management order that it became clear to him, having spoken to the claimant, that the claimant had understood at the November 2024 case management hearing that the Employment Judge was requiring him to catalogue all and any complaints about how he was treated during his employment. The claimant had given no thought to the possible need to amend his claim and clearly (and understandably, as he is representing himself) had no knowledge of the legal principles involved in considering any such application. Employment Judge Clarke KC agreed with the respondent that the Further Information raised wholly new causes of action not dealt with in the claim form, and if an amendment was allowed, this would delay the final hearing as both parties would need time to disclosure additional relevant documents and update witness statements to address any added claims.

11. The record of the July 2025 hearing shows that Employment Judge Clarke sought to examine with the claimant how important it was to him to preserve the hearing dates in August and established that it was very important for him, more important than seeking to add the matters in the Further Information to his claim. Offered the choice between making an application to amend his claim (and thereby losing the August trial dates if it succeeded) and retaining the August trial dates, the claimant told Employment Judge Clarke he wanted to preserve the trial dates. The claimant suggested that he should be allowed to rely on the material in paragraphs 4 and 5 of the further information by way of background only to the claims already made; the orders record that the respondent reluctantly agreed.

12. In the circumstances discussed at the July case management hearing, the claimant did not make any application to amend his claim. For these reasons Employment Judge Clarke KC records in his case management order that:

    "Paragraphs 4.1.5 and 4.1.6 of the list of issues produced at the preliminary hearing in November 2024 are deleted from that list. The generalised allegations in those sub-sub-paragraphs are not contained in the claim form and absent a successful application to amend, those matters are not issues in the case."

13. However, at this hearing, when questioning the respondent's witnesses, the claimant sought to reference these allegations and it was clear to us, indeed he confirmed, that he was seeking resolution of these factual allegations. We explained to the claimant the reason why we could not determine these facts, referring the claimant to the August 2025 case management orders and the discussion he had with Employment Judge Clarke KC. The claimant confirmed this was an accurate reflection of the conversation he had with the Judge at that hearing.

14. Mindful that it is the right of any party to make an application to amend at any time until judgment is delivered by a Tribunal we explained that the claimant could ask to do so, and set out, in plain language, mindful the claimant is not represented, the basis on which we would consider any application. After a break to consider his position, the claimant made any application to amend his claim to include the complaints at paragraphs 4.1.5 and 4.1.6. Details of the application and our reply are below.

Evidence and procedure

15. The Tribunal had the benefit of a 418 page hearing file. The claimant represented himself with support from an Arabic interpreter. He requested continuous interpretation at the August hearing. At the November hearing the claimant requested interpretation only when he indicated. He spoke to us in clear English and we are satisfied that when he did not request interpretation at this hearing he understood what was being said, not least as he responded to the answers witnesses gave in response to his questions and to the directions of and guidance from the Tribunal.

16. The respondent was represented by Ms Barrett of counsel who called sworn evidence from:
    16.1. Dovile Venckute: it was agreed that this evidence was not relevant to the issues in dispute therefore there were no questions for this witness;
    16.2. Michael Halfhide: Team Leader Nights and the claimant's line manager from March 2020 to November 2022;
    16.3. Iiona Czarnuch: Team Leader;
    16.4. Stephen Baker: Fulfilment Operations Manager, IKEA's Customer Service Division;
    16.5. Lynne Bate: Fulfilment Integration Manager; and
    16.6. Peter Mewes: it was agreed that this evidence was not relevant to the issues in dispute therefore there were no questions for this witness;

17. The Tribunal took regular breaks (approximately every hour), starting at 10am and finishing no later than 4pm each day. On day 1 the claimant confirmed he did not require any additional adjustments for his back condition and he would

let us know if he required additional breaks. He did so on the afternoon of day 3 when he became upset during his cross examination of IC. We took a 20 minute break at this time, after which the claimant told us he felt able to continue

Claimant's application to amend the claim

18. On day 3, the claimant made an application to include paragraphs 4.1.4 and 4.1.5 from the draft list of issues. This was after his evidence had concluded. He did so because his questions for Ms Czarnuch focused on these allegations. For the reasons stated above we explained why these complaints did not form part of his claim. We explained to the claimant the matters the Tribunal considers in deciding whether to allow an amendment. Then we took a break of 15 minutes so the claimant could address these points.

19. In summary, the claimant told us the prejudice to him of not allowing the amendment was that these alleged events had caused him mental health issues and resulted in psychological ill health**.** The claimant explained to us that he did not pursue an amendment application at the July case management hearing as he had understood from Employment Judge Clarke KC that he could rely on these events as a complaint to be determined.

20. Ms Barrett opposed the application on behalf of the respondent, telling us, in summary that we must taken into account the Tribunal's overriding objective (rule 3 of the Employment Tribunal Procedure Rules 2024) and consider that the claim form contained no mention of anything remotely related to allegations the claimant seeks to add, hence the amendment was substantive. Ms Barrett told us that the allegations relate to events said to have occurred in 2021 and 2022 and have been raised long after the applicable time limit elapsed and while loosely related to disability, they have nothing to do with the ill-health capability dismissal process and therefore it does not appear they could form part of a continuing act in relation to the dismissal which occurred two years later. Ms Marti addressed the balance of prejudice, telling us it favoured the respondent as the respondent would need time to investigate events alleged to have happened 3 – 4 years ago and memories will have faded and people moved on.

21. We took a 15 minute break to consider our decision. We unanimously agreed to refuse the claimant's application to amend, giving parties oral reasons at the hearing, which are summarised below.

22. The Tribunal has an inherent power to allow an application to amend at any time up until judgment is delivered on the application of any party. When considering whether to do so, we must have regard to the overring objective to deal with cases fairly and justly. Guidance is provided in the Presidential Guidance on General Case Management, Guidance Note 1. Further guidance is provided in case law and, in particular, in the cases of Selkent Bus Co Ltd v Moore [1996] ICR 836, Abercrombie v Aga Rangemaster Ltd [2014] ICR 209, Chandhok v Tirkey [2015] ICR 527 and Vaughan v Modality [2021] ICR 535. We noted that the claim, as set out in the ET1, is not something just to set the balling rolling which can be added to at a later stage merely on a party's say so. When considering an application to amend, the Tribunal should take into account all relevant factors such as the nature of the amendment, the applicability of time limits and the reason for the delay in making an application to amend. Its focus, however, should be on the extent to which the new

pleading is likely to involve substantially different areas of enquiry than the old and, most importantly, the practical consequences and relative prejudice to each party of allowing or refusing the amendment.

23. We agree with the respondent that the complaints in paragraphs 4.1.4 and 4.1.5 are not foreshadowed in the claim form and that they relate to alleged events 3-4 years ago. Furthermore, the specifics of the allegations now provided by the claimant are limited. Therefore, were the amendment allowed, a further case management hearing would be required to identify the details of these complaints. This would result in this hearing being adjourned at a point when the claimant has completed his oral evidence and we are part way through the respondent's. In our judgment this would be contrary to the overriding objective of the Tribunal, in particular to avoiding delay and saving expense, particularly as, the claimant told Employment Judge Clarke in July 2025 that he did not want to amend his claim, but has bow change his mind. Indeed, we consider there is a prejudice to both parties of this approach; it is in the interests of both parties

Relevant law amendment applications

24. In the case of Selkent Bus Company Limited v Moore [1996] ICR 836 the Employment Appeal Tribunal ("EAT") set out the test to be applied by a Tribunal in deciding whether to exercise its discretion to grant an amendment. It said the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The EAT in Selkent also set out a list of factors which are certainly relevant, which are usually referred to as the "Selkent factors". In brief they are:

    24.1. The nature of the amendment i.e. whether the amendment sought is one of the minor matters or is a substantive alteration pleading a new cause of action;

    24.2. The applicability of time limits. If a new complaint of cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended; and

    24.3. The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the rules for making amendments, but delay is a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made (for example the discovery of new facts or new information).

25. In the case of Vaughan v Modality Partnership UKEAT/0147/20/BA the EAT reminded parties and Tribunals that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequences of allowing or refusing the amendment. That balancing exercise is fundamental. The Selkent factors should not be treated as if they are a list to be checked off.

26. Although Selkent says it is essential for the Tribunal to consider whether a complaint is made out of time and if so whether the time limit should be extended, in Galilee v Commission of Police of the Metropolis [2018] ICR 634 the EAT held it is not always necessary to determine time points as part of an amendment application. A Tribunal can decide to allow an amendment subject to limitation points being determined at a later stage in the proceedings, usually at the final hearing. That might be the most appropriate route in cases where there is alleged to be a continuing act and the Tribunal needs to make findings of fact on this issue.

27. The assessment of the balance of injustice and hardship may include an examination of the merits but there is no point in allowing an amendment if it will subsequently be struck out. That extends to cases not only which are utterly hopeless but also to ones where the proposed claim has no reasonable prospect of success. The authority for that is Gillett v Bridge 86 Limited [2017] 6 WL UK 46.

List of issues

28. Below is the list of issues was finalised at the July 2025 case management hearing. We have explained, in summary, above why the issues at paragraphs 4.1.5 and 4.1.6 were deleted by Employment Judge Clarke KC at this hearing. The full explanation is set out in the record of that hearing.

Unfair dismissal

1.1 The claimant was dismissed by the respondent from about 8 February 2024.
1.2 What was the reason or principal reason for dismissal? The respondent will say that the reason for dismissal was the claimant's capability to perform the role he was employed to perform.
1.3 If the reason was capability, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It Tribunal will usually decide, in particular, whether:
1.3.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;
1.3.2 The respondent adequately consulted the claimant;
1.3.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
1.3.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
1.3.5 Dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal

2.1 Does the claimant wish to be reinstated to their previous employment?
2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
2.4 Should the Tribunal order re-engagement? The Tribunal will consider in

particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
2.5 What should the terms of the re-engagement order be?
2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
2.6.1 What financial losses has the dismissal caused the claimant?
2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.6.3 If not, for what period of loss should the claimant be compensated?
2.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
2.6.5 If so, should the claimant's compensation be reduced? By how much?
2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
2.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
2.6.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
2.6.11 Does the statutory cap of fifty-two weeks' pay apply?
2.7 What basic award is payable to the claimant, if any?
2.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Disability

3.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about?
3.2 The Tribunal will decide:
3.2.1 Did they have a physical or mental impairment: The claimant will say that he has disability by reason of lower back pain and fibromyalgia.? R accepts that C disabled with back pain from 22.9.21. Does not accept fibromyalgia.
3.2.2 Did it have a substantial adverse effect on their ability to carry out day-to-day activities?
3.2.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
3.2.4 Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?
3.2.5 Were the effects of the impairment long-term? The Tribunal will decide:
3.2.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
3.2.5.2 if not, were they likely to recur?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the respondent treat the claimant unfavourably by:
4.1.1 Dismissing the claimant.
4.1.2 Failing to give proper consideration to information from the claimant's GP and Occupation Health reports.
4.1.3 Requiring the claimant to carry out inappropriate work namely heavy duties such as picking or packing.
4.1.4 Failing to assign the claimant to carry out light duties as he suggested.
~~4.1.5 Subjecting the claimant to abuse from work colleagues arising from his inability to carry out the full range of his duties.~~
~~4.1.6 Failing to address the claimant's complaints about abuse from colleagues when these matters were raised with the claimants' line manager/supervisor/team leader.~~
4.1.7 The respondent asked the claimant questions about his prognosis or timescale for recovery to an extent which was harassing during meeting with management such as the capability meetings or the review meetings
4.2 Did the following things arise in consequence of the claimant's disability:
4.2.1 The claimant's inability to carry out the full range of his duties including heavy duties.
4.3 Did the respondent dismiss the claimant and subject him to the unfavourable treatment above because of the claimant's inability to carry out the full range of his duties including heavy duties?
4.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
4.4.1 Achieving adequate levels of resourcing.
4.5 The Tribunal will decide in particular:
4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
4.5.2 could something less discriminatory have been done instead;
4.5.3 how should the needs of the claimant and the respondent be balanced?
4.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

5. Remedy for discrimination
5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
5.2 What financial losses has the discrimination caused the claimant?
5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
5.4 If not, for what period of loss should the claimant be compensated?
5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
5.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

5.10 If so is it just and equitable to increase or decrease any award payable to the claimant?
5.11 By what proportion, up to 25%?
5.12 Should interest be awarded? How much?

Findings of fact

29. Mindful the claimant is not legally represented, we explained during the hearing that we make findings of fact as to what we consider, on balance, happened, when the claimant's and respondent's witnesses' recollection of events differ and the facts are relevant to the complaints before the Tribunal. There are our findings.

Credibility of witnesses

30. We found the claimant engaged with the proceedings; he listened to and followed the guidance we were able to give him pursuant to the overrising objective of the Employment Tribunal, in particular rule 3(2)(a) of the Employment Tribunal Procedure Rules 2024 to ensure "that the parties are on an equal footing". It was apparent to us that the claimant genuinely believed he was badly treated. However, his recollection of events was entrenched; often he would not consider that events may not have happened as he recalled, even when the respondent's contemporaneous documents, for example notes of meetings, suggested otherwise. In this regard we found some of his evidence simply not credible. When this was the case, the claimant suggested that the documents were not accurate. There is no evidence that he raised concerns about the accuracy of documents during his employment or at any time before giving evidence at this hearing.

31. While it is evident that the claimant found the process of giving evidence stressful, for these reasons, we find that it is, unfortunately, necessary to treat the claimant's recollection of events with very considerable caution. There were many occasions when his evidence was manifestly inconsistent with the documentary evidence (for example his recollection of meetings, and in particular what he was told at the time about the suitability of alternative roles he suggested). The claimant was generally unwilling to make factual concession, however implausible his recollection when Ms Barrett directed him to the contemporaneous notes of a capability meeting, which he had signed at the time as accurate. This invariably affects our overall assessment of his evidence. In reaching this conclusion, we have borne in mind that untruthful evidence may be given to fortify a complaint. We do not consider that the claimant intended to recount an alternative version of the conversations. Moreover, it is our assessment that over the passage of time, and a very lengthy capability process, he had convinced himself that his recollections or "lived experience" was accurate. The contemporaneous documents and consistent recollections of the respondent's witness evidence suggest to us that in recounting what happened, he has mislead himself.

32. Similarly his suggestion to the Tribunal that he provided clarity and visibility about the prognosis for his back condition to the respondent during the capability meeting is simply not borne out by the contemporaneous notes of the meetings. There is a lack of medical evidence to support the treatment he suggests he is having, or has been referred for, and the timeline for this treatment.

33. For these reasons we find that significant parts of the claimant's evidence to the Tribunal was not credible.

34. We found the respondent's witnesses' evidence of the meeting in which they were involved consistent with the contemporaneous notes. The witnesses were direct in answering the questions and clear in assisting us with our understanding of what was involved for the various roles in the warehouse which the claimant suggested were suitable for him. When asked by the Tribunal, Mr Halfhide and Mr Baker provided us with a clear and detailed explanation of the role of a Co-worker and the tasks involved. They also provided comprehensive explanations as to why they had concluded certain tasks suggested by the claimant were not suitable for someone with a back condition.

Employment

35. It is agreed that the claimant's employment started on 6 April 2020 and that his role as Co-worker deployed to the night shift in the distribution warehouse involved many tasks requiring heavy lifting. The respondent accepts that in September 2021 the claimant told Mr Halfhide, his line manager at that time, that he had numbness and Mr Halfhide advised the claimant to see a GP, which resulted in the production of a GP fit note

36. On 22 September 2021 the claimant provided a GP fit note to his employer certifying that he may be fit for work with amended duties until 2 November 2021. The respondent referred the claimant to Occupational Health ('OH'). The GP fit note recommendation is confirmed by the OH report dated 8 October 2021 which states:

    "Mohamed is fit to remain in work.

    He exhibited restricted physical capability in relation to his current contracted role. If operationally feasible [our emphasis], it would be prudent to permit temporary light duties only, avoiding any heavy lifting for the next three months, whilst he is undergoing investigations.

    Due to the nature of the condition, it is likely that his symptoms may exacerbate in the future, although it is impossible to predict the regularity of the exacerbations."

37. We note that several times during the hearing the claimant suggested that his back condition was a result of the work he undertook for the claimant. He has not provided any evidence to support this suggestion. In any event, this is not a complaint included in the claim and therefore not a matter for consideration by this Tribunal.

38. From the contents of the GP fit note and the OH report, we find that the respondent first knew about the claimant's back condition on 22 September 2021. It is evident from the GP fit note and subsequent OH report that the respondent knew the claimant's back condition meant he could not carry out his usual duties. From its receipt of the OH report (which correspondence evidences was sent to Mr Halfhide on 13 October 2021), we find that the respondent was aware the back condition was likely to be long term. There is

no medical evidence before the Tribunal that the claimant had a separate condition of fibromyalgia.

Stage 1 capability meeting

39. By letter dated 17 October 2021 Mr Halfhide invited the claimant to a "capability meeting for ill health" at 4.30am on 21 October 2021. Mr Halfhide's suggestion in his written evidence that this was an invitation to an absence management meeting is inaccurate. It is evident from the wording of this letter that at this time the respondent had decided to commence a capability process. The notes of this meeting confirm our finding; they are headed "capability meeting notes". Mr Halfhide's opening comments accord with what he writes in the letter: "I have asked you here to this meeting to confirm your current health condition and see what measures we can put in place to support your recovery." Both are supportive.

40. That said, we find the 17 October 2021 invitation somewhat premature. The first step in the respondent's absence process (which applied to the claimant as he had just returned from sickness absence due to his back condition) is an attendance management meeting. This did take place on 21 October 2021, but it is not the meeting referred to in Mr Halfhide's letter. Prior to the 4.30am meeting the claimant attended an absent management meeting with Mr Halfhide at 2.30am. There is not written invitation to this meeting. That this was the attendance management meeting (rather than the 4.30am meeting) is confirmed by the contemporaneous note of the 2.30am meeting, in which Mr Halfhide states: "We are going to take a look at your absence history". The notes (signed by the claimant and about which he raised no concerns) evidences that at this time the claimant was not able to provide any timeline about the next stage in treatment for his back condition other than a suggestion he will stay in touch with his GP and have a blood test.

41. We find that the respondent 'jumped the gun' by issuing an invitation to the capability meeting without first having conducted an absence management meeting which, according to the policy, may result in a switch to a capability meeting, and sought to rectify this by slipping in the required meeting before the 4.30am capability meeting. In this regard the chronology is inaccurate; it was not the case that the outcome of the 4.30am meeting was the decision to switch to the capability process. By the wording of 17 October we find that decision had already been made, based on the advice in the OH report.

42. At the 4.30am meeting Mr Halfhide references the OH report ["it also states that you would benefit where operationally feasible from temporary light duties and avoid heavy lifting for the next three month suggested so you can get back to full fitness". He suggests certain tasks and there follows a discussion in which the says that "Covid wrap machine quality" are areas which are ok but that he would prefer not to pack due to a concern this would make his condition worse.

43. Mr Halfhide asks for details of any treatment and a timeline for this. The claimant refers to waiting for physiotherapy and to seeing a specialist (something he does not mention at the 2.30am meeting) but is unable to provide any timeline for this treatment or his recovery. Mr Halfhide tells the claimant that the tasks will be monitored and the claimant needs to be honest in providing feedback about the adjustments and if there are any issues the

claimant is to let Mr Halfhide know straight away. We find this meeting supportive of the claimant.

44. On 5 November 2021 Mr Halfhide sends the claimant a letter confirming the outcome of the stage 1 capability meeting. It records the OH recommendation of 3 months of light duties, a proposed rotation of "Covid checking, quality manual, box machine [for which training will be arranged] and parcel packing". Mr Halfhide records that he will check in weekly with the claimant and review progress in January. There is no evidence that that claimant disagreed with these proposals at the time.

45. We find that at this stage the claimant has not provided the respondent with any medical information to give the respondent visibility about the proposed treatment of or prognosis for his back condition.

Welfare meeting 1

46. On 24 January 2022 the claimant provides a GP fit note certifying he may be fit for work with amended duties until 23 April 2022. On 31 January 2022 the claimant attends a welfare meeting with Mr Halfhide. The claimant provides an update on his treatment; that he has spent his benefit on physio and is in a queue for more and still waiting to see a specialist, telling the Mr Halfhide it is difficult to get any information from the hospital. He does not provide the respondent with an medical evidence to support this, for example a referral letter from his GP to a specialist. At this meeting the claimant acknowledges the respondent's support, telling Mr Halfhide:

    "Work have supported me as much as they can with light duties until I get a scan I am okay doing these activities."

Stage 2 capability meeting

47. By letter dated 18 February 2022 Mr Halfhide invites the claimant to a stage 2 capability meeting to discuss the claimant's "current ill health and any recent medical information about [his] condition. The meeting took place on 1 March 2022. The claimant signed the notes of the meeting at the time and did not raise any concerns about their contents until this hearing when Ms Barrett referred him to the notes to suggest the recollection of the meeting he has given to the Tribunal is inaccurate. We find there is no evidence to suggest the notes are anything other than an accurate record. They evidence that Mr Halfhide makes enquiries about the claimant's physio and GP appointments. The claimant does not provide any visibility nor medical documents to evidence that he is progressing treatment. He does not provide any details or documents to corroborate his statement to Mr Halfhide in January that he has been referred to a specialist.

48. At the meeting Mr Halfhide tells the claimant that he has tried to get the claimant trained on more tasks to help the light duties rotation but that when this was booked the claimant was not well and had some time off. We find that Mr Halfhide followed up on his suggested at the October capability meeting to offer the claimant some training to widen the scope of light duties. Mr Halfhide asks the claimant whether there are any tasks he thinks would help support him at this time. The claimant replies: "Wrap machine as there is no lifting and it is quite active and box machine Covid". We find that claimant's recollection to the

Tribunal of the tasks he considered appropriate differs from what he was telling the respondent at the time. For this reason, and by reference to the contemporaneous notes, we prefer Mr Halfhide's recollections their discussion about suitable tasks. A this meeting the claimant is also told that the light adjustments put in place are not permanent. Mr Halfhide and Mr Baker provided logical and detailed explanations as to why the claimant could not be placed on light duties permanently. In summary, the role of a Co-worker in a distribution centre involves many tasks requiring heavy lifting.

49. Furthermore, this was explained to the claimant at the capability meetings. We find the claimant's expectation that he could be placed on light duties indefinitely unrealistic. He was employed to do a role for which lifting was a key component. Oh recommended a 3 month period on light duties, with the caveat that this must be operationally feasible. We find it was not given the description of the role and the key element that all Co-workers need some rotation. The claimant told us there were colleagues on permanent light duties; however, he did not raise this during the capability process nor could he identify any by name to the Tribunal or present any evidence to support this assertion. We find that the respondent did not place Co-workers on a rotation of light duties permanently due to the need to ensure all Co-workers benefited from a rotation involving some light duties due to the prevalence of heavy lifting work in that role.

50. We also prefer the respondent's opinion as to which tasks were suitable for someone with a back condition; Mr Halfhide and Mr Baker gave us detailed explanations as to what was involved in the various tasks undertaken by a Co-worker. Given their roles and experience, we find they were better placed than the claimant to assess which roles were suitable for someone with a back condition and which were not. For example, when the claimant suggested to us he should have been assigned to the wrap machine, Mr Baker gave us a detailed explanation as to why this task was not suitable as the role involved replacing rolls of shrink wrap which weighed 16kg and to complete the wrapping of goods it was necessary to bend and stretch frequently to apply the labels to the pallets that have been wrapped. Even after hearing this explanation at the hearing, the claimant insisted this task was suitable for him.

<u>Welfare meeting 2</u>

51. On 5 April 2022 the claimant attended a second welfare meeting with Mr Halfhide. We have considered the notes of that meeting, which are signed by the claimant and about which he has raised no concerns until a general suggestion at the hearing they are incomplete. The claimant could not tell us what is missing. The notes record a verbatim conversations. We find the notes are accurate. Mr Halfhide asks the claimant for an update on his health. The claimant tells him he is doing physio at home, he has seen the GP he has three referrals and it is "vey complicated". However, the claimant does not provide any evidence to support his assertion he has been referred. It is simply not feasible that the claimant had three referrals when he did not provide evidence of this to the respondent. The claimant tells Mr Halfhide that he has not had any doctors appointment other than seeing the GP, but has had an x-ray on his knee (nothing wrong) and is waiting for another scan. When Mr Halfhide references that the claimant's fit note expires imminently and asks what the claimant's plans are, the claimant replies that he will speak to his GP.

52. At this meeting Mr Halfhide references the capability meeting discussion about the claimant being trained on pack parcels, auto wrap and box machine and asks why the claimant did not carry out the training. The claimant does not directly answer this question. Mr Halfhide goes on to explain why it is not possible for the claimant to have a chair to work on the wrap machine and that the box machine involves lifting of heavy pallets and is therefore not suitable for someone with a back condition. The discussion explores possible light duties with the claimant expressing a view as to which he considers suitable.

53. We find at this meeting Mr Halfhide was supportive, seeking to explore tasks suitable for the claimant, trying to find some visibility on the claimant's condition and proposing a further OH assessment. The claimant does not provide any clarity, the only medical documents he has provided to his employer are GP fit notes despite referencing various referrals. At this point the claimant has been on light duties for 6 months.

Welfare meeting 3

54. On the 17 May 2022 the claimant starts a further period of sick leave to 5 June 2022. He attends a welfare meeting with Mr Halfhide on 31 May 2022. Again he is unable to provide the respondent with any visibility on his condition or a timeline for treatment, telling Mr Halfhide: "The last time I saw the nurse was about 3 Months ago, they kept saying they would try and get me an appointment but still nothing, I plan to take a career break and travel back home to get the support and hopefully get the help I need". Mr Halfhide responds that he will pause the capability process until his return. We find in doing so, given the lack of medical evidence, Mr Halfhide's approach was extremely supportive. We find the OH referral is not pursued by the respondent at this stage due to the claimant's request for a career break.

3 month career break

55. On 1 June 2022 the claimant made a written request for a 3 month career break. We have read that request. We find the claimant makes a request to have a purposeful break to resolve his health issues by travelling to Egypt. We find this approach encouraging to the employer; it is presented as a possible solution to health issues which had been on-going for more than 8 months. On 7 June 2022 Mr Halfhide approves the request (a supportive approach) and makes the reasonable request that the claimant keep in touch with updates. The claimant returns to work on 6 September 2022.

Stage 3 capability meeting part 1

56. On 15 September 2022 the claimant attends a stage 3 capability meeting, almost a year after he first notified the respondent of his back condition. The claimant does not provide Mr Halfhide with any medical evidence from his trip to Egypt. We find that the respondent still has no visibility on the claimant's treatment or prognosis at this time. He tells Mr Halfhide that he has a scan / specialist appointment on 21 / 22 September.

57. We have seen the minutes of this meeting, which are signed by the claimant. Mr Halfhide explains to the claimant that the capability process has 4 stages, telling the claimant, in summary, the aim of the process is to be supportive but if the process cannot be concluded in a timely manner it can result in dismissal.

We find this is a necessary explanation at this stage in the process, particularly as the process has been on-going for 11 months and there is a lack of medical evidence from the claimant. When the claimant replies that he does not understand, Mr Halfhide goes on to explain that the claimant applied and was recruited for the job of a Co-worker picker in a furniture distribution company and while the company will try about support rotations where operationally feasible, the claimant's main task in his recruited role is manual handling. We find Mr Halfhide gave the claimant a clear explanation as to the supportive the employer could provide in the circumstances, an explanation which accords with the initial OH advice and the GP fit note. Mr Halfhide makes the supportive suggestion of a shift swap to days and arranges an OH referral, adjourning this stage of the capability process pending further clinical advice. We find this was a supportive measure, particularly given the length of time the process had been ongoing ad the lack of medical evidence from the claimant.

OH referrals

58. The claimant is notified of an OH appointment on 21 September 2022. He does not attend. Having seen the scan report, we accept the reason he did not attend was a scan to assess his back condition; however, the claimant does not inform the respondent of this in advance. As a result of his non attendance the claimant's MHE licence is suspended; it was not possible to assess whether he should still have the licence given his back condition if he was not at the appointment to be assessed.

59. The OH assessment is rescheduled and takes place on 7 October 2022. Wee have considered the assessment report. The clinician reports that "Mohamed demonstrated moderate physical restriction in his back and lower limbs. This is subsequent to pain, reduced movement and altered sensation which will affect his ability to perform activities at work that involve adopting prolonged postures, bending and manual handling" and concludes that:

"Considering the length of time that Mohamed has dealt with this condition, it is unlikely that it will resolve in any short space of time….At present Mohamed's prognosis is unclear as he has yet to receive any information / advice regarding the management of his condition."

60. We find that this is the most definitive advice the respondent has received that the claimant is unable to carry out many of the tasks for which he was employed in the distribution centre and that this is not likely to be possible for the foreseeable future. Furthermore, the advice confirms that, a year after the condition the claimant does not have a treatment plan and the respondent does not have any visibility on a timeline of prognosis and improvement. We find that this advice confirms Mr Halfhide's assessment that the claimant cannot return to his normal duties.

61. On 17 November 2022 the proposed move to the day shift agreed is agreed.

62. A further OH assessment of the claimant's condition takes place on 30 November 2022 OH assessment. The clinician concludes that:

"Due to severe restriction of movement due to back / neck pains, Mohamed is not suitable for FLT [fork lift truck] duties at this time.

I am unable to provide a timescale for Mohamad's recovery as this is subjective and will depend on response to any given treatment.

63. We find that over a year after the clamant notified his employer of his back condition the respondent still has no visibility on when the claimant can return to his normal duties.

Stage 3 capability meeting part 2

64. On 18 January 2023 the claimant attends the reconvened stage 3 capability meeting with Ilona Czarnuch, the claimant's line manager on the day shift. We have considered the notes of this meeting, which are signed by the claimant and about which he raised no concerns at the time. We find the Ms Czarnuch is completely transparent with the claimant as to where the respondent is at this stage in the process, given the limited medical information and the OH conclusions about likely prognosis. She explains to the claimant with clarity that: "Even other parts of the warehouse coworker role [sic] that aren't picking do require lifting or pushing such as hygiene, quality manual, KI quality or packing", telling the claimant:

    "We cannot continue with your current temporary adjustments forever as they aren't reasonable and could still be doing elements that you say causes you harm such as lifting or pushing."

65. This accords with the explanations of the role provided to the Tribunal by Mr Halfhide and Mr Baker.

66. It is in this context that Ms Czarnuch suggest that the claimant considers finding an alternative role within Ikea. He is told: "Your health comes first but if can't lift then can't do your current role – this process then about is supporting you to find something in Ikea you can do" [sic]. We find this would be a role within the distribution company, which Mr Baker explained is a separate business, not the wider Ikea organisation. At this meeting the claimant is referred to the job board, assessable through computers available for Co-worker use in the distribution centre, and told if he finds a role on there Ms Czarnuch could assist him with the application / interview process.

67. There is no evidence before us that the claimant did anything proactive in engaging with the job board and identifying a suitable alternative job. At the hearing he told us he did not understand the system. That is no excuse, We find that the claimant was directed to the computers at this hearing; had it not been clear to him he could have asked Ms Czarnuch for assistance in locating advertised roles; there is not evidence he did so. The claimant also told us he considered the role of "booking office" a suitable alternative role and this was not explored for him by his managers. He asked Ms Czarnuch why she did not explore him. Ms Czarnuch explained to us that she was happy to help and assist the claimant but this was not part of the Co-worker role, but a separate position with an application process and to apply for the booking office job there has to be an advert, which there was not at that time.

OH referral

68. On 23 May 2023 the claimant provides the respondent with a GP fit note certifying he may be fit for work with amended duties until 22 August 2023. The

respondent makes a further referral to OH. We have considered the report dated 31 July 2023. The updates the claimant provides on his health are self report; the claimant does not provide any medical evidence. The report records the duration of the claimant's back condition as "12 months or longer". We find that 22 months after the claimant informed his employer of his back condition the employer still has no visibility on treatment or prognosis.

Stage 4 capability meeting part 1

69. On 20 September 2023 the claimant attends a stage 4 capability meeting with Stephen Baker, the warehouse manager (this having been rescheduled to allow the claimant to seek union representation). Mr Baker seeks to identify what has changed for the claimant since the las meeting. The claimant is still references an MRI scan and a consultant consultation scheduled for the 23rd October but is unable to provide a timeline for prognosis. Mr Baker takes the supportive step of adjourning this meeting to enable the claimant to travel to Egypt and have a consultation with a spinal specialist, noting the capability meeting will resume pending the outcome of this consultation with spinal specialist. This is confirmed in the letter sent by Mr Baker to the claimant on 20 September 2023. The letter also confirms a call scheduled for 23 October 2023 10:GMT to discuss the information the claimant receives at the consultation. This call does not take place as the claimant does not answer, he says due to issues using his phone in Egypt. If that was the case, we find, given the clear purpose of the call stated in the letter, it was incumbent on the claimant to contact Mr Baker (for example by email) with an update.

70. On 2 October 2023 the claimant provides the respondent with a GP fit note certifying that he is unfit to work until 29 October 2023 and starts a period of sick leave. Further sick notes state he is unfit to work until 26 January 2024.

OH referral

71. On 8 December 2023 the respondent makes an OH referral. This records the claimant's return to Egypt but notes he did not keep in touch as agreed and that OH is unaware as to whether the consultation / any treatment took place.

72. On 10 January 2024 Mr Baker and the claimant speak on the telephone. Mr Baker follows up with an email summarising the conversation. It records the claimant telling Mr Baker that his condition has not improved and he has a consultation with a new doctor on 7 April and that the claimant is unfit to return to the UK. While the claimant has suggested further treatment he provides no evidence to support this. We find that over 2 years after the claimant notified his employer of his back condition the respondent has limited visibility on prognosis and an employee who is not able to return to the role for which he was employed.

Stage 4 capability meeting part 2

73. The claimant returns to the UK on 6.02.24 the reconvened stage 4 capability meeting takes place on 8 February 2024. At the start of the meeting the claimant and his companion query the purpose of the letter. Mr Baker refers them to the invitation to the meeting; we are satisfied it is clear from that invitation that this is the reconvened capability stage 4 meeting. At the meeting the claimant informs Mr Baker that his next medical appointment is April. He is

not able to provide any clarity on treatment or prognosis. Mr baker comments that the claimant is on his third opinion and "we are no further along". Following a recap of the process and information provided by the claimant since September 2021, Mr Baker adjourns the meeting. On return he comments:

"I think that based on what I see and what I've seen within your case we are 2 years into a process with yourself where we have made adjustments to your working pattern, to your role where we can, we've allowed you time off…

Unfortunately this time we cannot continue because as I've already mentioned we've been through 2 years and we have no clear pic [sic]…

For that reason, I will be terminating your contact with us today".

74. The decision is confirmed to the claimant in writing the same day. It refers to the meeting and states "We discussed that you have not achieved the satisfactory improvement in your condition to allow for you to rehabilitate and perform in your substantive role of warehouse coworker." We find this accurately reflects the discussion in the stage 4 capability meeting notes signed by the claimant. At the meeting and in the letter Mr Baker confirms the claimant's right of appeal.

Appeal

75. On 14 February 2024 the claimant appeals the decision referring to a request to have an operation for his back condition in Egypt and his absence record. He also states the action to dismiss was too harsh and unjust, that the respondent failed to consider an alternative to dismissal and failed to consult OH and to consider reasonable adjustments or alternative duties.

76. The claimant attends an appeal meeting with Lynne Bate on 26 February 2024. We have considered the minutes of that meeting, which the claimant signed at the time and has not raised any concerns about. At the meeting Ms Bate reviewed the history of the capability process and explores with the claimant his treatment history. The claimant does not provide Ms Bate with any visibility on his prognosis. She addresses in turn each of the points raised in the claimant's appeal letters, giving the claimant the opportunity to explain why he considers the respondent has failed.

77. By letter dated 4 March 2024 Ms Bate dismisses the claimant's appeal, detailing by reference to each ground of appeal why she has done so. We have considered this letter. We find it accurately recounts the history of the capability process, setting out what the respondent has done in regard to each point.

78. We find from the documents to which we were referred in the hearing file that the claimant was given written notice of all meetings and informed of his right to be accompanied.

Relevant law

Unfair Dismissal – s96 Employment Rights Act 1996

79. Section 94 of the Employment Rights Act 1996 ('ERA') confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of

complaint to the Tribunal under section 111. An unfair dismissal claim can be brought by an employee (section 94) with 2 years continuous employment (section 108) who has been dismissed (section 95). This is also satisfied by the respondent admitting that it dismissed the claimant (within section 95(1)(a) ERA.

80. Section 98 of the 1996 Act deals with the fairness of dismissals. It states:

(1) In determining for the purpose of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
(a) the reason… for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it –
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do…
(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality…
(4) …where the employer has fulfilled the requirements of subsection (1), 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.

81. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason. In this claim the respondent replies on the reason of capability.

82. In closing submissions Ms Barrett referred us to the case of *S v Dundee City Council* [2014] IRLR 131 CSIH and paragraph 27, telling us Lady Smith conducted a review of the themes which emerge from the applicable case law on ill-health dismissals:[1]

'First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly,

[1] Including *East Lindsey District Council v Daubney* [1977] ICR 566, EAT and *Spencer v Paragon Wallpapers* [1977] ICR 301, EAT.

there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.'

83. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

84. The approach in *British Home Stores Ltd v Burchell* [1980] ICR 303, EAT applies equally to capability as to misconduct dismissals: "*the Tribunal [is] required to address three questions, namely whether the Respondent genuinely believed in their stated reason, whether it was a reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did*": *DB Schenker Rail (UK) Ltd v Doolan* EATS 0053/09 at §33.

85. Ms Barrett reminded us that a tribunal will ask itself whether the decision to dismiss fell within the band of reasonable responses which the employer might have adopted. The 'range of reasonable responses' test applies to both the decision to dismiss and the procedure followed: *Pinnington v City and County of Swansea* EAT 0561/03 at §67-69.[2]

86. We remind ourselves that we must not substitute its own view for that of the employer as to do so is an error of law.

<u>Discrimination arising in consequence of disability – section 15 Equality Act 2010</u>

87. Section 15 of EqA provides:

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

88. At the hearing, Ms Barrett referred us to the case of Pnaiser v NHS England [2016] IRLR 170 at paragraph 31, in which case Mrs Justice Simler summarised the proper approach to a s.15 EqA claim as follows:

> *"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

[2] Appealed to the Court of Appeal but not on this point – see *Pinnington v Swansea City and County Council* [2005] ICR 685.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required... The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant...
(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links... the causal link between the something that causes unfavourable treatment and the disability may include more than one link...
(e) ... However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(g) ...Weerasinghe ... highlights the difference between the two stages — the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.
... (i) ... it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

89. We direct ourselves that, if the two-stage test is satisfied by a claimant, the burden moves to a respondent to show that the treatment is a proportionate means of achieving a legitimate aim.

90. Determining whether the treatment is a proportionate means of achieving a given aim "requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition": per Balcombe LJ in Hampson v Department of Education and Science [1989] ICR 179, noting that in discrimination arising from disability it is the unfavourable treatment that must be justified. When considering whether the dismissal is a proportionate means of achieving a legitimate aim, the Tribunal we must conduct the balancing exercise ourself: *City of York Council v Grosset* [2018] ICR 149 at paragraph 54.

Conclusions

91. We set out below our conclusions by reference to the list of issues.

<u>Unfair dismissal</u>

92. The respondent accepts that the claimant was dismissed with 12 weeks pay by the respondent on 8 February 2024. The respondent says the reason for dismissal was the claimant's capability in that he was not longer able to do the

role for which he was employed due to his back condition. This is the reason stated in Mr Baker's dismissal letter dated 8 February 2024.

93. As the reason stated by the respondent is capability, we must consider whether the respondent act reasonably in all the circumstances, mindful of respondent's size and administrative resources, in treating capability as a sufficient reason to dismiss the claimant. First, we must determine whether the respondent genuinely believed the claimant was no longer capable of performing the role for which he was employed, a Co-worker in the respondent's distribution warehouse.

94. We have found, and it is accepted by the claimant, that the role of Co-worker involved heavy lifting. Both parties accepted that from September 2021 the claimant had a back condition that significantly limited his ability to lift. To assess the extent of the condition we have found the respondent made several referrals to OH. The referrals record that the claimant was unable to carry out his role without adjustments to light duties and that the condition meant the claimant was not suitable for a fork lift truck licence. We have found that Mr Halfhide explored the severity of the condition with the claimant at the capability and welfare meetings and was told by the claimant he was in pain and could only do tasks which did not involve lifting. The assessment of the claimant's ability to carry out his role was further explored by Ms Czarnuch and Mr Baker in subsequent capability meetings, with Mr Baker concluding in the second stage 4 meeting that the claimant was no longer able to do so. We have found this is the reason stated in the 8 February 2024 dismissal letter. Based on our findings, we conclude that the respondent genuinely believed the claimant was no longer capable of performing the role for which he was employed, a Co-worker.

95. Second, we must consider whether Mr Baker's belief when dismissing the claimant that he could not longer carry out the role of Co-worker was based on reasonable grounds. It was. We have found that from the outset of his back condition and throughout the period of the capability process the GP fit notes provided by the claimant to his employer record either that he may be fit for work with adjusted light duties or cannot attend work at all. The respondent made several referrals to OH. We have found the clinical advice in the OH reports is to avoid heavy lifting and none of the reports identity when it may be possible for the claimant to return to his usual duties. We have found that in making the decision to dismiss the claimant, as well as making his own enquiries of the claimant in 2 capability meetings and a phone call about any treatment the claimant was having, the timeline of this treatment and possible prognosis, Mr Baker had recounted the history of the capability process and the clinical advice from OH. We consider his comments in the final capability meeting are pertinent ["I think that based on what I see and what I've seen within your case we are 2 years into a process with yourself where we have made adjustments to your working pattern, to your role where we can, we've allowed you time off…Unfortunately this time we cannot continue because as I've already mentioned we've been through 2 years and we have no clear pic [sic]…]. It is apparent from these comments that Mr Baker genuinely believed he had come to the end of the road with options for the claimant and had reached this conclusion based on his own conversations with the claimant, the OH advice and what the claimant's own GP was recorded in the fit notes.

96. We have found that Mr Baker's comments in the final meeting also make it apparent that he was aware that the claimant had been on adjusted duties for over 2 years. We have found that the claimant was unable to provide Mr Baker with any visibility or medical evidence to identify when he may be able to return to the full role of Co-worker.

97. For these reasons, we conclude that Mr Baker had reasonable grounds (the GP notes, the OH referrals, Mr Halfhids's and Ms Czarnuch's meetings with the claimant, the claimant not being able to provide any information indicating when he would be able to return to his full role over almost 2 and a half years) for his belief in February that the claimant was no longer able to carry out the full role of Co-worker.

98. Next, we must decide whether the respondent adequately consulted the claimant. We conclude it did. Over almost 2 and a half years the respondent had 6 meeting with the respondent to discuss whether he was capable of carrying out the role for which he was employed, 3 welfare meeting and made several OH referrals to the assess this. At the first capability meeting an adjustment to various light duties was agreed, taking account of the claimant's suggestions and what he considered too heavy (parcel packing, a task never undertaken by the claimant once light duties were put in place). At each subsequent meeting we have found that the respondent's managers explored with the claimant how his light duties were going and his views on them. At each meeting he was asked how he was feeling. Indeed at the first welfare meeting with Mr Halfhide the claimant acknowledged that the respondent had supported him as much as it could.

99. When the managers did not agree a task was suitable given what the claimant had told them about his back condition and mindful of OH advice, they explained why not. Where parties disagreed about the suitability of a role, we have preferred the respondent's explanation as Mr Halfhide and Mr Baker provided clear and comprehensive descriptions of the tasks and intricate knowledge, for examples the weights some of the tools and accessories (for example wrap roles) used by Co-workers.

100. We have found Ms Czarnuch told the claimant he could apply for available roles in the distribution centre and explained he could find a list of these using the Co-workers computer. We have found he did not explore this option. It is evidence from our findings that the claimant considered he could remain in his adjusted role indefinitely. Based on the explanations to the Tribunal provided by Mr Halfhide, Ms Czarnuch and Mr Baker about the role of a Co-worker and the need for rotation, we conclude this was not an option long term. We have also found that the claimant was told by Ms Czarnuch at the stage 3 meeting and Mr Baker at the stage 4 meeting that if he was unable to return to his full role a possible outcome of the process was his dismissal.

101. For these reasons we conclude that the respondent acting through its managers adequately consulted the claimant consistently throughout the 2 and a half year capability process.

102. The respondent also carried out a reasonable investigation including finding out about the claimant's up-to-date medical position. We have found that at each meeting the claimant had with the respondent's managers and at the OH assessment consultations he was asked about any treatment he was having

and the prognosis for his back condition. OH referrals were made to assess the claimant for a fork lift truck licence and to determine whether he could drive a MHE given his back condition. It was reasonable for the respondent to revoke the licences given the claimant's non-attendance / OH advice. At the appeal hearing Ms Bate asked the claimant for an update ion his condition; he was not able to provide any certainty or suggestion of improvement. The respondent could do no more; during the course of the process the claimant was not able to provide visibility about the timeline for recovery.

103. We do not consider that the respondent could reasonably be expected to wait longer before dismissing the claimant. The capability process started in October 2021; the claimant was dismissed in February 2024. During this time the respondent agreed to a 3 month career break for the claimant to travel to Egypt for treatment. Mr Baker paused the stage 4 capability process to allow the claimant to take a second trip to Egypt for consultation. Following neither trip was the claimant able to provide any clarity or timeline for treatment of his back condition. In the reconvened stage 4 meeting the claimant refers to a third trip to Egypt in April 2024. Give the capability process had been ongoing for 2 and a half years and following to trips to Egypt the claimant was unable to provide any viability for when he may be able to return to his full tasks as a Co-worker, we conclude there was nothing else Mr Baker could reasonably have done. In his oral evidence the claimant suggested that he should have been given 1 year's unpaid leave. We disagree. Had the claimant been able to provide some clear medical advice on a timeline for treatment, this may have been an option for the respondent. However, the claimant did not. The claimant has a business to run and it needs to have certainty. In our judgment, the respondent had been extremely patient in allowing the claimant to travel overseas. Neither trip took the situation any further forward and there is no evidence that the April trip or a further career break would do so. Furthermore, Mr Baker told us he had no recollection of such a request and there is no evidence before us that the claimant formally requested as second career break.

104. Throughout the hearing the claimant told us that he was keen to return to work. That would involve returning to the full role of Co-worker. However, his actions do not support this. The claimant was not proactive in providing medical evidence to his employer. The claimant repeatedly referenced the possibility of surgery and discussing this with his doctors. However he did not provide evidence to the respondent that he had done so or any medical opinions stating was surgery was a possibility / required. Nor is there any evidence before us that he consulted the respondent's vacancies list or applied for a role.

105. In our judgement, by February 2024 there was nothing more the respondent could have done. Taking account of the fact that the respondent is part of a large organisation we conclude that it had exercised its resources appropriately in the circumstances of an employee not providing visibility about prognosis and OH reports telling the respondent it was not possible to identify when the claimant would be able to return to his full Co-worker role and, accordingly, dismissal in February 2024 was within the range of reasonable responses. An employer is entitled to offer temporary adjustments to staff with physical restrictions that limit the tasks they can do. We have accepted Mr Baker's evidence that the majority of the work to be done in the distribution centre is heavy duty, for example picking and for this reason it is important all staff can partake in a rotation of tasks to ensure the health and wellbeing of the workforce

as a whole. Indeed, the claimant acknowledged in evidence that a Co-worker "can't do picking every day in IKEA, they do a rotation so people don't get tired".

106. The approach taken by the respondent is reasonable and accords with its capability policy which provides for temporary adjustments short of redeployment

107. The respondent acknowledged to the Tribunal that its size and resources means that it can put in place a significant package of support. We agree with the Ms Barrett's submission on this point that at the same time the respondent also has to treat all employees equitably and therefore a decision in one case must reflect a reasonable business approach across the company. We conclude that, as the claimant was unable to do any lifting due to his back condition and the lack of progress on treatment and visibility on prognosis over 2 and a half years, it was well within the range of reasonable options available to the respondent to terminate his employment. It was simply not feasible given the nature of the work, the nature of the claimant's condition and the health and safety need for all worker to rotate for the claimant to have been placed on light duties indefinitely. In our judgment, 2 and a half years is a generous time for the respondent to wait before moving to dismissal given that throughout that period it had no evidence of improvement or a prognosis timeline.

108. In doing so we have found that the respondent followed a fair process. The claimant was given advance notice of meetings, the right to be accompanied, adjournments where requested to trial different interventions (day shifts / treatment in Egypt), and the right to appeal.

Disability

109. The respondent accepts that the claimant is disabled for the purposes of section 6 EqA because of his lower back pain. The respondent asserts that it first knew about the claimant's back condition a short time before 22 September 2021 when the claimant obtained his first GP fit note relating to that condition. We agree. There is no evidence before us that the respondent was aware of this condition until it received the GP fit note.

110. The respondent does not accept that fibromyalgia was a separate condition also amounting to a disability. given the lack of medical evidence on this point, but nothing turns on fibromyalgia in distinction from the back condition. We agree. The claimant has not provided any medical evidence to the Tribunal to show he had a separate condition of fibromyalgia.

111. The respondent accepts that it dismissed the claimant on 8 February 2024 and that this is unfavourable treatment. The claimant alleges that in doing so the respondent failed to give proper consideration to information from the claimant's GP and Occupation Health reports. We disagree. We have found that the respondent; s managers took account of the GP's recommendation that the claimant required light duties and OH's advice over several assessments that:

> ""He exhibited restricted physical capability in relation to his current contracted role. If operationally feasible [our emphasis], it would be prudent

to permit temporary light duties only, avoiding any heavy lifting for the next three months, whilst he is undergoing investigations.

Considering the length of time that Mohamed has dealt with this condition, it is unlikely that it will resolve in any short space of time….At present Mohamed's prognosis is unclear as he has yet to receive any information / advice regarding the management of his condition."

Due to severe restriction of movement due to back / neck pains, Mohamed is not suitable for FLT [fork lift truck] duties at this time.

I am unable to provide a timescale for Mohamad's recovery as this is subjective and will depend on response to any given treatment."

112. We have found that account was taken of the to information from the claimant's GP and Occupation Health report thought the capability process as follows:

112.1. At the stage 1 capability meeting on 21.10.21, amended duties were agreed in order to meet the recommendations of C's GP fit note and the October 2021 OH report. Those recommendations continued to be followed throughout the remainder of the claimant's employment.

112.2. At the September 2022 stage 3 capability meeting on Mr Halfhide asked the claimant if he had any scans or medical reports he could share.

112.3. The October 2022 OH report recommended a move to the day shift, which subsequently happened.

112.4. The November 2022 medical assessment found that the claimant's back / neck pain meant he was not fit to drive MHE and the respondent did not reinstate his MHE licences.

112.5. The July 2023 OH report noted the claimant should avoid bending and standing for long periods and could not lift 2kgs. This was the level of restriction the respondent took into account at stage 4 of the capability process.

113. We agree with Ms Barrett's submission that the claimant has not identified any medical advice with R failed to consider or follow.

114. We have found that the claimant was not required to carry out inappropriate work namely heavy duties such as picking or packing. From receipt of the first OH report the claimant was put on light duties until the end of his employment. At all meetings his managers sought the claimant's input on suitability of tasks. When Mr Halfhide and Mr Baker considered the claimant's suggestions unsuitable for someone with a back condition (for example the wrap machine, Mr Baker explaining the weight of the role) they explained to him why. We have found that throughout the capability process the respondent followed the OH guidance it received and did so in discussion with the claimant. When the respondent did not agree that a task suggested by the claimant was suitable (i.e. a light duty) he was told why. We have preferred the Mr Halfhide and Mr Baker's assessment of what is suitable given their positions and more intricate knowledge of the processes. If the claimant was not assigned as a light duty a task he had suggested at one of the meeting it was because it was not suitable.

115. The claimant alleges that the respondent asked him questions about his prognosis or timescale for recovery to an extent which was harassing during meeting with management such as the capability meetings or the review meetings. We have found that the respondent's managers did ask the claimant questions about his prognosis or timescale for recovery at the capability and welfare meetings. This is a reasonable and supportive approach to enable an employer to have visibility as to the timeline for recovery and to understand the claimant's condition to ensure his carries out appropriate tasks interim. The minutes of these meetings, which we have accepted as an accurate record, evidence that the approach taken by the respondent's managers was courteous at all times: they made appropriate and reasonable enquiries to understand health condition given documentation he provided about it. The approach taken by the respondent was supportive at all times.

116. The respondent accepts that the claimant's inability to carry out the full range of his duties including heavy duties arose in consequence of the claimant's back condition. We agree; this is evident form the GP fit note and clinical advice provided by OH.

117. We have concluded the respondent did not require the claimant to carry out heavy duties or fail to assign him light duties. Where he was not assigned duties he suggested we have found his managers had good reason. We conclude there is no unfavourable treatment in this regard.

118. We have concluded the approach taken by the respondent's managers in all meetings was supportive and appropriate. In any event, we agree with Ms Barrett's submission that asking such questions was a proportionate means of achieving the respondent's legitimate aim to achieve adequate levels of resourcing to support colleagues suffering from health conditions to return to their full duties. We also agree that it would be impossible for managers to do this without ascertaining information about condition and prognosis, in order to understand what support would be necessary and appropriate. For the reasons we conclude the question asked by the respondent's managers were necessary and entirely appropriate. Furthermore the managers were following the capability process which requires then to ask the co-worker undergoing the process "to give their views in relation to their capabilities and when they feel they may be able to return to work". Indeed, to not ask the claimant about his health condition would be unreasonable. We conclude there is no unfavourable treatment in this regard.

119. The respondent accepts that it dismissed the claimant because of the claimant's inability to carry out the full range of his duties including heavy duties. Therefore, we must consider whether dismissal was a proportionate means of achieving the respondent's legitimate aim of achieving adequate levels of resourcing. In the circumstances in February 2024 we consider dismissal the claimant was proportionate. The claimant could not do the job for which he was employed (the full rage of duties of Co-worker and had been unable to do so for 2 and a half years. He had been given multiple opportunities to provide evidence of treatment timescale or a prognosis for recovery and had not done so despite 2 trips to Egypt which he told his employer was to seek specialist advice. We agree with Mr Baker's conclusion that after a lengthy period of consultation the respondent was no further forward in understanding when the claimant would be able to return to his full tole. During this time the claimant

had been assigned light duties, allowed a career break to seek medical advice, undergone several OH assessment, been offered and failed to attend additional training, been assessed for a fork lift truck licence and told he could apply for any vacant positions, and how to locate them, and that he would receive support should he do so. The respondent had tried everything but had not more clarity about the condition in February 2024 than it did in September 2021.

120. Balancing the needs of the claimant and the respondent we favour the respondent. The Co-worker role is predominantly a heavy lifting role. While the claimant was unable to fulfil this the respondent did not have a complete workforce. Indeed it had not for quite some time. The claimant had had several period of sick leave and a 3 month career break. When doing amended duties by the claimant's own admission to the Tribunal he sometimes required assistance from colleagues and on occasion he was necessary for him to sit down. The respondent had been patient over 2 and a half years waiting for some clarity as to when the claimant would return to his full role.

121. For these reasons it is the unanimous decision of this Employment Tribunal that:

121.1. The complaint of unfair dismissal is not well-founded and is dismissed. The claimant was fairly dismissed.

121.2. The complaint of discrimination arising from disability is not well founded and is dismissed.

Employment Judge Hutchings

14 November 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON

21/11/2025

FOR THE TRIBUNAL OFFICE