



EMPLOYMENT TRIBUNALS

Claimant: Mr J McFarlane
Respondent: Birmingham City Council
Heard at: Birmingham
On: 29, 30 September 1, 2, 3 October 12 November (Tribunal only) and 21 November 2025
Before: Employment Judge Meichen, Mr I Morrison, Mr A Moosa

Appearances

For the claimant: in person, supported by an intermediary
For the respondent: Ms Sandiford, counsel and Mr Jerrison, solicitor (21 November only)

JUDGMENT was sent to the parties on 1 December. The claimant's claim failed and it was dismissed. The claimant then asked for these written reasons. Full oral reasons were given at the end of hearing and so these written reasons are based on the reasons given orally.

The reasons are being provided in large font as requested by the claimant to make it easier for him to read them.

REASONS

Introduction

1. This is our decision in the employment tribunal case brought by Mr McFarlane against his old employer Birmingham City Council.

2. In this decision we will call Mr McFarlane the claimant and we will call Birmingham City Council the respondent.
3. We are going to try and explain this decision in a way which we hope makes it easier for the claimant to understand.
4. We have attached two things to these written reasons. The first attachment is the list of issues which the tribunal had to decide.
5. The list of issues was agreed at a previous hearing. There was a copy of the list of issues in the file of documents which the claimant and respondent both had, starting at page 71. There were some small changes to the list of issues made at a different previous hearing and with those changes both parties agreed at the start of the final hearing that the list of issues was a complete and correct list of all the issues that we had to decide.
6. The second attachment is a summary of the law which we had to apply and think about when making our decision.
7. We should perhaps mention that the summary of the law may be less easy for the claimant to understand. He may benefit from some help with reading that section. We have focused on making these reasons easier for the claimant to understand and we hope that if he reads these he should be able to understand why we reached the conclusion that we did.

8. During this tribunal hearing the claimant has been helped by an intermediary. The role of the intermediary was to ensure that the tribunal and the claimant could communicate effectively with each other. It was important that the claimant had help from the intermediary and they were very useful.
9. On one day of the hearing the intermediary could not attend as they were unwell and so we didn't have the hearing on that day. This is the main reason why it took a little longer than planned to finish the hearing.
10. We did our very best to listen to and follow all the suggestions that were made by both the claimant and the intermediary to make sure that the claimant could understand the hearing and this decision and take part in the case. We checked in with the claimant and the intermediary regularly during the hearing to see how we were doing and everybody agreed that the claimant was able to understand and take part. We know it wasn't easy for the claimant though and we think he deserves credit for bringing this case himself, with a little help from others.

Findings

11. Before we deal with the issues one by one we will explain our findings on what we think has happened.
12. The claimant was employed by the respondent as a care assistant from 1 August 1997 until 28 June

2023, when he was dismissed. The claimant worked for 30 hours a week.

13. The claimant worked in a care centre and he helped to look after adults, many of whom needed a lot of help and assistance. The people who the claimant helped to look after in the care centre were known as citizens.
14. The care centre was on two floors. The claimant worked on the first floor where the citizens were in for a short stay. There were about 50 to 60 citizens on that floor when the claimant was working there.
15. The claimant's job as a care assistant mainly involved providing personal care to the citizens. Personal care involved things like helping the citizens get dressed, brushing their teeth and washing their hair.
16. The claimant's job also involved keeping records of the care he had provided to the citizens using a computer.
17. The claimant would also help out with other jobs around the care centre.
18. The other jobs which the claimant would help out with were referred to as odd jobs and we have used that phrase in our decision. By using that phrase we are not suggesting that the other jobs were unimportant, just that they were jobs which the claimant occasionally helped out with from time to

time and they were not the main part of the claimant's role. The odd jobs which the claimant sometimes helped out with were things like: setting the table, fetching the clean laundry, tidying drawers, and emptying and filling the dishwasher.

19. It is important to say that the main part of the claimant's job was providing the personal care to citizens. This was clear from the claimant's job description and all the evidence we heard. The claimant was often referred to as a carer which showed that the main point of his job was to provide care for the citizens.
20. The claimant has a number of health conditions which can make things more difficult for him compared to other people.
21. The claimant has difficulty with his sight which is caused by glaucoma and cataracts. These two conditions make it difficult for the claimant to see things properly. The claimant needs to use a magnifying glass with a bright light so that he can see things properly.
22. The claimant also has anxiety and depression and a learning disorder.
23. In around 2020 the claimant was diagnosed with prostate cancer.
24. In this claim the claimant said that his eye conditions and the prostate cancer were disabilities.

The respondent has accepted that the claimant was disabled because of both the cancer and the eye conditions.

25. We think the respondent was right to accept that the claimant was disabled because of both the cancer and the eye conditions. The claimant was disabled because of his cancer and eye conditions.
26. We also think that it is very clear that the respondent knew that the claimant was disabled because of these conditions at all relevant times for this claim.
27. Until 2020 the claimant was doing his job as a care assistant very well. The claimant was liked by his colleagues and they valued all the hard work which he did.
28. The claimant was supported by the respondent to keep working in his job because they made a number of reasonable adjustments for him. Reasonable adjustments were things which the respondent did for the claimant or things they provided him with so that he could continue doing his job. Reasonable adjustments are a fair way of treating disabled people, like the claimant.
29. The respondent provided the claimant with things like magnifiers, a high contrast keyboard, a large screen, Zoomtech software and a screen reader.

30. The respondent also helped the claimant with transport to work and there was an arrangement in place where the claimant was given help with tasks that he might find difficult such as checking the citizens' skin and checking whether the kitchen was tidy.
31. These sort of adjustments meant that the claimant could work successfully as a care assistant up until 2020.
32. On 28 September 2020 the claimant went off sick due to prostate cancer and anxiety and depression. The claimant remained off sick until 1 August 2022 - a period of nearly 2 years.
33. It is important to say that the claimant was very ill during the nearly 2 years that he was off sick. He was having a lot of treatment and medication for his cancer and that made things even more difficult for him. There were side-effects and understandably the claimant's anxiety and depression increased and got worse.
34. During his absence the respondent held regular contact meetings with the claimant to find out how he was feeling and to support him. We were shown the notes from about 17 contact meetings which the respondent had with the claimant.
35. The claimant was also referred to occupational health on a number of occasions. We were shown

records showing that the claimant had been referred to occupational health on at least 7 occasions.

36. Occupational health were doctors and nurses who gave the respondent advice about the claimant's health and how it might affect him at work. They made suggestions about how the respondent might be able to help the claimant, for example by making more reasonable adjustments.
37. We think the respondent listened to the claimant and to occupational health. They wanted to find out about the claimant's health and how and when he might be able to return to work.
38. The respondent had the choice of starting a formal capability procedure. This is a procedure that could have ended in the claimant being dismissed if the respondent decided he was not well enough to do his job anymore. We think many employers might have started this procedure much sooner than the respondent did.
39. The respondent did not rush into a formal capability procedure. They wanted to avoid dismissing the claimant if possible. They waited a long time because they hoped that the claimant would become well enough to return to work and then to continue working successfully as a carer.
40. By around July 2022 however the respondent decided they could not wait any longer before starting

a capability procedure. We think this was a reasonable decision.

41. The claimant went to a hearing as part of a capability procedure on 19 July 2022. Josh Perry attended the meeting to represent the respondent. The claimant also attended and he was supported at the meeting by a support worker from the Royal National Institute for the Blind and also his trade union representative. At this hearing the decision was made that the claimant would return to work and then everyone would meet again at a later date to see if that had been successful.
42. The claimant returned to work on or around 1 August 2022.
43. A number of things were put in place to support the claimant and help him return to work successfully. These included a stress risk assessment and a covid risk assessment, and the following.
44. It was agreed that the claimant would start back working less hours and that he could take longer when carrying out personal care for citizens.
45. It was also agreed that the claimant would not need to do the administrative side of his job which was the recording of the care given on the computer system.
46. An important thing which was put in place to support the claimant was a buddy. This was

somebody that the claimant could work with whilst he was getting used to working again. The idea was that this would be in place for a short while and then the claimant would be able to start working on his own again.

47. It was hoped that these steps would enable the claimant to return to work successfully, but the claimant was also warned that if that did not happen then he could be dismissed.
48. When the claimant returned to work it became clear that he was finding things much more difficult than he had before he went off sick. There had been a few changes whilst the claimant had been off and he had a new manager. This meant that things felt new to the claimant as he wasn't used to them.
49. The claimant had been through a very difficult experience with his cancer treatment. When he got back to work it's fair to say that he was really struggling to do his job. He was feeling very anxious and worried. He was still experiencing side effects from all the medication and treatment he had been having.
50. Josh Perry explained in his evidence, which we accepted, that the respondent tried to do lots of things to make things easier for the claimant, like changing his responsibilities, his working pattern, his start and finish times, where he sat and his break times. But nothing worked and the claimant continued to

struggle. He was experiencing symptoms of fatigue and this was recorded by occupational health.

51. It seemed to us that after everything he had been through and the long time he had been off from work the claimant had really lost his confidence. That was understandable. But it made it practically impossible for the claimant to do his job.
52. Every day at work was a challenge for the claimant and even with the extra things that had been put in place to try and help and even with his buddy the claimant did not find his work any easier as time went on. It caused him extra anxiety.
53. The thing which the claimant found most difficult was the most important part of his job and that was providing the personal care to the citizens. The claimant found that really challenging and it caused him a lot of anxiety.
54. The respondent tried to give the claimant more help with the personal care part of his job. It was agreed that the claimant could take even longer when carrying out personal care. The respondent gave the claimant more time to get ready to provide personal care to citizens. The claimant found it really difficult to do the personal care even when he was given lots of extra time to do it. In the end the claimant just didn't feel able to do the personal care at all, even with his buddy watching and there to help if he needed them.

55. This meant that it was the claimant's buddy who had to do the personal care work themselves, because the claimant felt he couldn't do it.
56. As we mentioned before the claimant was not doing the administrative side of his job on the computer system.
57. So, even though the claimant had returned to work he was only observing his buddy and helping out with the odd jobs from time to time.
58. Everybody met again at another hearing as part of the capability process on 13 September 2022. At that meeting it was clear that the claimant couldn't do his job because he couldn't do the personal care.
59. There had been some complaints from citizens about the fact the claimant was not able to do his job of providing personal care and so he was always just watching whilst his buddy was doing the personal care. We could understand why the citizens felt uncomfortable about that. Many personal care tasks were ones which should be carried out in private and with as few people as possible there. For example helping the citizen going to the toilet.
60. As well as supporting the claimant the respondent had to make sure they were looking after the citizens properly and that they were happy. The respondent had to think about the fact that having the claimant watching his buddy do the personal care was making the citizens uncomfortable.

61. At the meeting on 13 September 2022 the only new adjustment which was suggested was that a support worker be appointed to assist the claimant. It was recognised that a support worker would be required to accompany the claimant for all of his hours (30 per week) and that was because they would need to do all the personal care as the claimant could not do that at all. So, if this suggestion had been followed it would mean that the claimant would just be observing when the support worker did the personal care which was the main part of the claimant's job.
62. The respondent did not think that that would be a reasonable adjustment for the following reasons.
63. It would seem to citizens that the claimant was not able to do his job. We could understand why the respondent felt that would mean that the citizens might lose confidence in the claimant and in the care centre. It was a worry that came from the complaints that had been received since the claimant had started back at work.
64. It would still mean that there would be two people in the room when personal care was being carried out. So the problem would still be that some citizens would feel uncomfortable with having an extra person there while their personal care was being done. As we mentioned we could understand why the respondent felt that personal care should be carried out in private and with as few people as possible there.

65. A support worker would not be assisting the claimant to do the personal care because unfortunately the claimant could not do the personal care even with support. What the support worker would be doing was doing the claimant's job for him. That is what the claimant's buddy had ended up doing. This is not the aim behind a reasonable adjustment. The aim behind a reasonable adjustment is to make it easier for the disabled person to do their job not to get somebody else to do it for them.
66. Sometimes it can be reasonable to take some duties away from a disabled person. The problem in the claimant's case was that if personal care was taken away from the claimant's job there wouldn't be much left. There wouldn't be enough left to provide a proper job for the claimant.
67. It had already been agreed that the claimant would not do the administrative side of his job which was entering the care provided on the computer system. This was another part of the job which the claimant found difficult when he came back to work in September 2022 and it had been decided that he should not have to do it for that reason.
68. So, the claimant would only be left with the odd jobs. There were not enough odd jobs to make a job for the claimant. As we explained these were just things which the claimant occasionally helped out with from time to time. Also, if he only did odd jobs he would not really be a care assistant.

69. We agreed with the respondent that for the above reasons it would not be a reasonable adjustment to remove the responsibility for doing personal care from the claimant and give it to a support worker.
70. Because this was the only other adjustment that had been suggested the respondent decided that ill health retirement or medical redeployment should be considered as the next step. We think that was a reasonable decision in the difficult situation that the respondent was faced with.
71. Ill health retirement would mean that the claimant would be able to retire early because of his ill health and he might receive a better pension for this reason.
72. Medical redeployment meant that the claimant would be moved to a different job because his ill health meant he couldn't do his current job but he could be able to do a different one.
73. The respondent asked for more occupational health advice so that they could give their opinion on whether the claimant was suitable for medical redeployment or ill health retirement.
74. Occupational health provided their advice on 27 September 2022. They recommended that medical redeployment was suitable for the claimant. The respondent followed this recommendation. We think that was a reasonable thing to do.

75. The claimant started the medical redeployment process on 19 December 2022. The claimant was supported to try and find another job which he could do.
76. The claimant was given access to something called the priority movers platform. This was a system which was designed to help people in the medical redeployment process get another job as quickly as possible. The claimant was given the maximum of six months for this process with an additional two weeks on top.
77. The claimant was put on restricted duties. What this meant was that he no longer had to carry out personal care. The only work activities that the claimant was doing were the odd jobs. This meant that the claimant had a lot of time to spend on the medical redeployment process and trying to get another job through the priority movers platform.
78. The respondent also did a number of extra things to try and help the claimant get another job. We think the respondent recognised that the claimant might find it difficult to find another job and they did as much as they possibly could to try and help him.
79. The claimant was provided with a private office with all the computer equipment that he needed in order to help him apply for jobs.

80. The claimant was given a one-to-one support worker for several hours per day to help him apply for jobs.
81. The claimant was provided with a lot of help and support including with creating his CV, searching for jobs and putting together evidence of his skills and his training.
82. For the six months or so that he was in the redeployment process the claimant was spending 3 to 4 hours every day working on trying to find a new job with the help of his one-to-one support worker. This was the majority of the claimant's working time. He spent the rest of his time doing the odd jobs which we have mentioned.
83. Unfortunately the claimant was not successful in finding a new job.
84. There were very few jobs that the claimant was interested in and that he could realistically do.
85. During the whole time the claimant was in the redeployment process we think he only applied for two jobs.
86. The claimant attended another hearing as part of the capability procedure on 28 March 2023. The hearing on 28 March was chaired by Paul Hallam and it was Mr Hallam who decided that the claimant should be dismissed.

87. At the hearing on 28 March 2023 Mr Hallam decided that there were no further alternatives to dismissal and the claimant should be dismissed because of capability. This meant that the respondent had decided that the claimant was not able to do his job any more due to his health and there was no other job for the claimant to go into. We think this was a reasonable decision in the difficult situation that existed at the time.
88. We think we should mention one important point at this stage. The claimant had the benefit of being represented during the capability process by what we think was a very good trade union representative. She tried her very best to make an argument to the respondent to persuade them not to dismiss the claimant.
89. At the hearing on 28 March 2023 the claimant's trade union representative asked for more time for the claimant to find another job and more support to be given to the claimant to help him find another job including more hours per week to spend on the redeployment process. She also suggested that the claimant could be given a new job without having an application process.
90. What the claimant's representative did not do however was identify any job which the claimant could actually do. She could not explain the job which the claimant could be given.

91. We think that this shows that the sad reality of the situation was that there was no job which could be identified which the claimant could do. The very best argument that could be made on the claimant's behalf was that the respondent should wait to see if a job could be found for the claimant. But the respondent had already allowed more than six months for that to be done and there was no sign of any job that the claimant could do.
92. So, we felt that the respondent was being asked to extend the claimant's employment for no real reason. We could understand why they decided not to do that and that it was time instead to bring the claimant's employment to an end. We thought that was a reasonable decision.
93. The claimant was dismissed with notice which meant that he continued to be in work for another three months and his final day of employment was 28 June 2023.
94. During his notice period the claimant continued in the redeployment process. He still had all the extra support in that process which we have already described. Unfortunately, the claimant was still not successful in finding a new job. In fact, we don't think he actually applied for any jobs in the notice period. Again this demonstrates to us that the reality of the situation was that there was no job available which the claimant could do.

95. The claimant appealed the decision to dismiss him with help from his union representative.
96. Before the appeal hearing the respondent requested a further occupational health report to advise on whether the claimant could be given ill health retirement. As we have said ill-health retirement could be a benefit to the claimant financially because it could mean he would be entitled to a better pension.
97. Following the respondent's request the occupational health doctor met with the claimant and also considered his medical records. The occupational health doctor produced a report in which he recorded his view. The occupational health doctor's view was that he could think of no further adjustments that would enable the claimant to return to his role as a carer. The occupational health doctor also said that in his opinion the claimant was not able to do any type of job. So, in the occupational health doctor's opinion the claimant should be given ill health retirement.
98. We think the occupational health doctor's opinions that there were no further adjustments that would enable the claimant to return to his role as a carer and the claimant was not able to do any type of job were correct, and this suggests that the respondent got the decision to dismiss right.
99. The claimant did not agree to this last occupational health report being provided to the

respondent. This meant that the respondent did not know that the occupational health doctor thought the claimant was not able to do any type of job and that he should be given ill health retirement by the time of the appeal.

100. We think that the reason why the claimant did not agree to the last occupational health report being provided to the respondent is because he does not agree with the opinion of the occupational health doctor that he is not able to any job. He wants to continue working and he thinks he is able to do so.

101. We think that the claimant's wish to continue working is very understandable and he should be respected for wanting to continue working. However we also have to respect the medical opinion of the occupational health doctor. In our view the doctor's opinion really confirms that the reality was that the claimant was not well enough to do any job.

102. Anyway, as we have said the claimant did not agree to the occupational health report being provided to the respondent and so they didn't have it available to them at the time. When the appeal hearing took place on 28 June 2023 there was no change in the situation. There was no evidence that the claimant was able to do his job or any other job. The respondent decided that the claimant's appeal should not be successful and he should still be dismissed. We think that was a reasonable decision.

103. At the end of the appeal hearing on 28 June 2023 the claimant was told that his appeal had been unsuccessful. He was told that he would receive confirmation of this outcome in writing.
104. Under the respondent's procedures the claimant had a further chance to appeal his dismissal. This is known as an appeal to members. The claimant has appealed to the members. That process has taken a very long time mainly due to a delay by the respondent in providing an appeal outcome letter to the claimant. It took the respondent around a year (until June 2024) to send the outcome letter from the hearing on 28 June 2023 to the claimant. That delayed the claimant's appeal to members.
105. Recently, the respondent has seen the occupational health advice that the claimant was suitable for ill-health retirement. The members appeal panel have therefore offered to give the claimant ill health retirement with effect from his original dismissal date of 28 June 2023.
106. The claimant has not yet accepted the offer of ill health retirement.
107. In the hearing before us the claimant has explained that he still does not want to accept ill health retirement. We are not sure what is going to happen. It might be that ill-health retirement is the best option for the claimant now, but it is not up to us to say one way or another and it is the claimant's choice whether or not he accepts it.

Conclusions

108. We will now explain our decision in relation to each of the issues in the list of issues.

Time limits

109. The first issue for us to decide is whether the claim has been brought in time. There was a 3 month time limit for the claimant to start his claim. All of the claim has not been brought in time.

110. The claimant started his claim by contacting ACAS on 7 November 2023. He received an ACAS certificate on 16 November 2023. He submitted his claim form to the tribunal on 16 December 2023.

111. Anything which happened before 8 August 2023 is out of time. Importantly, this includes the claimant's dismissal which happened on 28 June 2023.

112. We do not think that the things that happened before 8 August 2023 should be treated as one act of discrimination along with the things that happened after 8 August 2023. The main reason for that is that we didn't find there was any discrimination after 8 August 2023. We explain the reasons for that below.

113. This means that the claimant's complaints about his dismissal and about things that happened before his dismissal are out of time and we can only hear them if we decide to extend time. We can't just extend

time because we want to. We have to apply some quite strict legal tests to decide whether to extend time.

114. The claimant has given a very clear explanation in his witness statement as to why he brought the claim out of time. We think the claimant's explanation is honest and true.

115. The claimant has honestly explained that he had advice from his union and they told him about his right to bring a tribunal claim and about the time limits by June 2023. However, the claimant wanted to wait until after his appeal to members.

116. The claimant did not actually wait until he received his appeal outcome letter or until after his appeal to members. Instead he submitted his claim in late 2023. It seems that the claimant was planning to wait but then when he didn't get the appeal outcome letter he just submitted his claim anyway.

117. In our view this is not a good enough reason to extend time. It means that the claimant chose to bring his claim late, even though he knew about the time limits. This is the reason why the claim was late. In our judgement the claimant acted unreasonably in choosing not to bring his claim in time

118. We have taken into account that the claimant also said in his statement that he had trouble completing the acas and tribunal forms. We accept that due to his sight the claimant may have needed help with the

forms. But the claimant only asked for help doing this on 20 September 2023. This means that in our view the claimant waited far too long, as he was told he was being dismissed in March 2023 and his dismissal happened and his appeal failed in June 2023.

119. The claimant knew he may need help with filling in forms and it was his responsibility to arrange that support much sooner than he did. So, we don't think this part of the explanation gives the claimant any good reason for not submitting his claim on time. We think the claimant acted unreasonably in not asking for help before 20 September 2023. The claimant needing help with the forms did not make it not reasonably practicable for him to present his claim in time.

120. Applying the legal test that we have to for the unfair dismissal claim we find that it was reasonably practicable for the claimant to have brought his claim in time. In other words we think that the claimant could and should have brought his claim in time.

121. The fact that the claimant had a chance of a further appeal to members did not mean it was not reasonably practicable for him to have brought his claim in time. We don't think that it was reasonable for the claimant to wait for his appeal to members.

122. It was reasonable to expect the claimant to bring his claim in time, especially since he knew about the time limits from June 2023 which would have given him the full 3 months to get things started, He should

have listened to his union representative and made his claim in time. It was his fault that the claim was late and the fault was substantial.

123. The deadline was not missed by a short period. The claimant should have contacted ACAS by 27 September 2023. Even if it had not been reasonably practicable for the claimant to meet the original deadline he then waited too long before making his claim. We would have decided that the claim was not presented within a further reasonable period.

124. Applying the legal test that we have to for the discrimination claims that happened before 8 August 2023 we find that it is not just and equitable in all the circumstances to extend time. It is again relevant that we found that the claimant chose to bring his claim late even though he knew about the time limits and we didn't think that was reasonable.

125. It is also relevant that the length of the delay was significant.

126. We accept it would be a prejudice to the claimant to say the discrimination claims are out of time but we think it would be more of a prejudice to the respondent to extend time if we don't apply the time limits which are part of the legal process that the claimant knew about.

127. The final thing which we have taken into account is whether the discrimination claims were likely to succeed anyway. We carefully considered whether

any of the claimant's complaints could succeed. We found they could not. We explain the reasons for this below. This is another reason why we think we should not extend time for the discrimination claims.

128. For the above reasons we do not extend time for the unfair dismissal claim or the discrimination complaints which happened before 8 August 2023. This means that we find that anything that happened before 8 August 2023 is out of time and those complaints fail for that reason. The complaints which fail for that reason are: unfair dismissal, the first two complaints of direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments.

129. In reaching the above decision as to which claims are out of time we have taken into account the following:

129.1 We think the respondent would reasonably have been expected to provide the appeal outcome, holiday pay and associated information within a month of the appeal hearing on 28 June 2023, so by 28 July 2023 at the latest.

129.2 The respondent decided not to provide a support worker as requested by the claimant's union representative in September 2022 and the claimant was aware of that at the time.

130. Although we reached the above decision on time limits we would like to explain our full findings in

relation to each of the complaints anyway because we think that might help the claimant better understand our decision and show that we have carefully considered his claim in any event.

Unfair dismissal

131. It was agreed that the claimant was dismissed.

132. We find that the reason for dismissal was capability. This means that the reason the respondent (Mr Hallam) had in their mind for dismissing the claimant was that the claimant was not able to do his job because of his ill-health.

133. We find that the respondent acted reasonably in dismissing the claimant for that reason. We explained in our findings our view that each of the decisions that the respondent took along the way to dismissing the claimant were fair and reasonable. We think the following things in particular show that the respondent acted in a fair and reasonable way.

134. The respondent kept in touch with the claimant during his long absence through regular contact meetings.

135. The respondent warned the claimant about the risk of dismissal, especially from July 2022 onwards.

136. From July 2022 there was a process where alternatives to dismissal were considered. These included the adjustments to the claimant's job made

in August and the redeployment process. Other possibilities like a full time support worker were discussed but not put into place. As we have already explained, we thought that was reasonable.

137. The respondent adequately consulted with the claimant. This means that the respondent told the claimant what was going on and their concerns that he might not be able to do his job. The respondent then listened to what the claimant had to say in response to their concerns. In our view there was a very good process of consultation especially because of the input from the claimant's union representative, which we felt the respondent carefully considered.

138. The respondent carried out a reasonable investigation including finding out about the true and up to date medical position. The respondent kept in touch with the claimant during his long period of absence from 2020 and so they knew what his health was like. The respondent organised a number of occupational health reports and this gave them more detail about the claimant's health. The respondent arranged for the claimant to come back to work and so they were able to observe how he was able to cope and they also listened to what the claimant told them about how he was finding things.

139. We do not think the respondent could not reasonably be expected to wait any longer before dismissing the claimant. Our view was that the respondent waited as long as they possibly could before starting a formal capability procedure and

ultimately dismissing the claimant. As we have said the respondent really did not rush into dismissal. They waited nearly 2 years for the claimant to try and get better and then explored alternatives like reasonable adjustments and redeployment for another six months or so before deciding to dismiss.

140. We found that the respondent genuinely believed that the claimant was no longer able to do his job. The claimant's long absence from 2020 and then all the difficulties he experienced when he tried to return to work in August 2020 demonstrated that.

141. We don't think that in order to act reasonably the respondent would have to place the claimant into a new job without an application process. Unfortunately the sad reality was that the claimant was not able to do any job and that is why he never got to the stage of suggesting a job that he could do. Even now there is no suggestion of a job that the claimant could have been given without an application process.

142. Nobody has suggested a job which the claimant could do because the reality was that he was not well enough to do any job. The odd jobs which the claimant could help out with in the care home were not enough to make a new job.

143. We did not identify any procedural flaws in the process which caused unfairness to the claimant.

144. The final question that we have to ask ourselves is whether dismissal was within the range of reasonable responses.

145. This means that we have to consider whether an employer could have reasonably dismissed the claimant in the circumstances that were known at the time. Taking into account in particular how long the respondent had waited and the lack of any evidence suggesting that the claimant was able to do his job or another job then we think dismissal was well within the range of reasonable responses.

146. For these reasons we find that the claim for unfair dismissal could not succeed anyway

Direct disability discrimination

147. In this claim we have to consider whether the claimant was treated less favourably than somebody without a disability. If so we have to consider whether the reason for the treatment was the claimant's disability.

148. The first complaint the claimant makes about direct disability discrimination is about a failure to promptly provide him with information after his first appeal in June 2023 in particular a written appeal outcome, his P45, details of how to appeal further and details of his holiday and pay entitlements.

149. The second complaint of direct discrimination is related to the first complaint. It is also about holiday

pay. It is about a failure to provide the claimant with the holiday pay he was owed, which the claimant says he did not receive until June 2024. So, these complaints are linked and we can deal with them together.

150. We accept that there was a delay in providing the claimant with the information in the first complaint and the holiday pay in the second complaint. These things were only provided to the claimant in June or July 2024 when they should have been provided in June or July 2023.

151. We should explain here that the tribunal heard evidence from Pauline Mugridge. Mrs Mugridge was the person who heard the claimant's appeal on 28 June 2023. In her evidence to the tribunal Mrs Mugridge accepted that there had been a long delay in her sending the claimant the appeal outcome letter. She believed that it has been sent shortly after the hearing June 2023. It was only around a year after the hearing that she realised the appeal letter had not been sent and so she sent it at that stage.

152. We understand it was the delay by Mrs Mugridge in sending the appeal outcome letter which also caused the delay in providing the claimant with his holiday pay and the other information he's complained about. The respondent was waiting for the appeal outcome before it sorted out the claimant's holiday pay and his P45 etc. Once Mrs Mugridge had realised she had not sent the appeal outcome it triggered the

respondent to sort out the other things which still needed to be done.

153. We think that the delay in sending this information to the claimant was long and the claimant was frustrated because of the delay. However to be fair to Mrs Mugridge she recognised that. She explained that she had made a mistake and she apologised to the claimant for that mistake.

154. We think Mrs Mugridge was right to apologise and we also accept her evidence that this was a mistake. Mistakes do happen and they can happen to anybody at any time. We think that this mistake could and would just as easily have been made to somebody without a disability. So, we do not think that this was less favourable treatment.

155. Also because we think that this was a genuine mistake we do not think that the reason for the treatment was disability. We did not see any evidence that the delay in sending the information and the pay to the claimant was because of disability. Instead it all arose from Mrs Mugridge's mistake in not checking that the appeal outcome letter had been sent out. It was just all down to a genuine and honest mistake. The claimant did not prove any facts from which we could conclude that disability might have been the reason for the delay.

156. The next allegation of direct disability discrimination that we have to consider is a reference which the respondent sent to a school where the

claimant had applied for a job on 2 January 2024. The reference which was sent was in the file of documents which everyone had at the hearing on page 744.

157. The reference was written by Sherrie Watkins, a HR Services Manager.

158. We did not hear evidence from Sherrie Watkins but it seems to us that it's likely that this reference was a response to a request for clarification about an earlier more detailed reference. That seems to be clear from the letter at page 731 of the bundle.

159. The situation was that the claimant was trying to get a job in the school and the school wanted some clarification about the reference the respondent had provided. In particular they wanted to know what was meant by a dismissal for capability. In this letter the respondent explained what they had meant by that.

160. In our view the information that the respondent provided in the letter was not misleading and it did not give the impression that the claimant was unreliable or that he had problems with his conduct. It was simply somebody in HR trying to explain what was meant by dismissal for capability.

161. We think the same letter would have been sent about somebody who had been dismissed for capability who did not have a disability. So there was no less favourable treatment.

162. Also the reason for this letter being sent was not disability. There was no evidence of that. It was just a genuine attempt to explain what was meant by capability dismissal in response to a query raised by the school where the claimant was trying to get a job. The claimant did not prove any facts from which we could conclude that disability might have been the reason for the letter being sent.

163. For the above reasons all three of the claimant's complaints about direct disability discrimination do not succeed.

Discrimination arising from disability

164. In this complaint we have to consider whether the respondent treated the claimant unfavourably and if so whether that was because of something caused by the claimant's disability.

165. The respondent may have a defence to the complaint if they can justify the treatment of the claimant. This involves looking at whether the treatment was a proportionate means of achieving a legitimate aim.

166. One of the three things which the claimant complains about as discrimination arising from disability is the failure to promptly provide him with information after his first appeal in June 2023 in particular a written appeal outcome, his P45, details of how to appeal further and details of his holiday and pay entitlements.

167. We have already explained what happened here – the respondent did fail to promptly provide the claimant with the information and the reason for the delay was the mistake made by Mrs Mugridge.

168. We find that the delay was unfavourable treatment.

169. The reason for the delay was not something arising in consequence of the claimant's disability. There was no evidence that the reason for the delay might have been something arising in consequence of disability. The claimant did not prove any facts from which we could conclude that this might have been the reason.

170. As we have already explained we accepted Mrs Mugridge's evidence that the reason for the delay was the mistake made by her in thinking that she had sent the appeal outcome letter when she had not. So, this treatment was not done because of something arising from the claimant's disability. It was done because of the mistake made by Mrs Mugridge.

171. For those reasons this complaint of discrimination arising from disability relating to promptly provide the claimant with information fails.

172. The other two things which the claimant relied on as discrimination arising from disability are his dismissal and the failure to uphold his appeal in June 2023.

173. We accept that the dismissal and the decision not to uphold the appeal were unfavourable treatment.

174. We also accept that the unfavourable treatment was done because of something caused by the claimant's disability namely the claimant's inability to do his job as a carer and his inability to do alternative roles. The claimant's difficulties in not being able to work were directly linked to the conditions which the respondent accepted were disabilities.

175. However we think that the respondent had a legitimate aim when dismissing the claimant and not upholding his appeal. The aim was to ensure adequate care standards were delivered to service users.

176. This aim meant that the respondent had to make sure that the people it employed were able to do their jobs and to look after the citizens properly. Unfortunately the fact was that the claimant's health prevented him from doing his job, from providing the care which the citizens needed and from being able to do any other job.

177. We think that the respondent acted proportionately in achieving this aim. The respondent waited before dismissing the claimant, it tried to put in place adjustments and it tried to explore alternative roles but nothing succeeded. By the time the respondent came to decide to dismiss the claimant and not to uphold his appeal there was nothing less

discriminatory that could have been done instead. The needs of the claimant and the respondent had been appropriately balanced.

178. This means that the respondent would succeed in its justification defence to these complaints and so they could not succeed in any event.

Failure to make reasonable adjustments

179. The last claim which the tribunal has to consider is for failure to make reasonable adjustments.

180. The first issue we have to decide is whether the respondent had a practice which puts the claimant at a disadvantage compared to a person without his disability.

181. The first practice which the claimant relies upon is that the respondent did not allow people from outside to help a carer such as the claimant.

182. We understand that this part of the claimant's complaint relates to the suggestion that was made that a support worker should be appointed to assist the claimant on a full-time basis. As we have explained the respondent decided not to do that.

183. The tribunal accepts that the respondent did have a practice of not allowing people from outside to help a carer such as the claimant. The decision the respondent made about the claimant not being allowed to have a support worker indicates that they

would make the same decision if somebody else asked for it.

184. We should explain however that we do not think that the respondent had a practice of not allowing any help from outside at all. Instead we think that they had a more specific practice of not allowing the outside help that the claimant required, which was for a full time support worker to be appointed to do all the personal care work for him.

185. The respondent accepts, and we think they were right to accept, that this practice put the claimant at a substantial disadvantage compared to somebody without his disability.

186. The substantial disadvantages were that it took the claimant a long time to perform the responsibilities of carer and he found it difficult to perform the responsibilities of carer. In fact we would go further and say that by September 2022, when the claimant's union representative argued for the appointment of a support worker to assist the claimant, it had become clear that the claimant could not do the responsibilities of carer at all. We note this is consistent with the claimant's case on discrimination arising from disability, which refers to his inability to do his job. It follows that the claimant was substantially disadvantaged by the practice of not allowing people from outside to help him in the way we have identified as that meant he could not do his job.

187. The only step which could have been taken to avoid the disadvantage was the one argued for by the claimant's union representative. That was for a support worker to be appointed on a full time basis to do all the claimant's personal care work for him. This is because by September 2022, when this adjustment was requested, it had become clear that the claimant could not do any personal care work at all. Therefore other possible adjustments like assigning citizens with lesser needs, doubling-up with a colleague or assigning a buddy would not have avoided or alleviated the disadvantage. Those sort of adjustments had already been tried and the situation had got to the point where it was now recognised by everybody, including the claimant and his own union representative, that the claimant could not do personal care work at all.

188. We find that it was not reasonable for the respondent to have taken the step of appointing a support worker on a full time basis to do all the claimant's personal care work for him.

189. The reasons why we found that the respondent decided not to do that were:

189.1 First because it would compromise citizens' privacy to have an observer present when personal care tasks such as being bathed or helped going to the toilet were taking place. As we explained the claimant could not do personal care at all and so he would just be observing whilst his support worker did that.

189.2 Second because it would give citizens the impression that the claimant was not competent and so they might lose confidence in the claimant and the respondent's service more generally.

190. We think that those reasons were very good reasons. We think it was reasonable and appropriate for the respondent to ensure the dignity and wellbeing of the citizens.

191. The other thing which led us to decide that it was not reasonable for the respondent to have take the step of appointing a support worker on a full time basis to do all the claimant's personal care work for him was that that would mean that the support worker would simply be doing the main part of the claimant's job for him. That is not in our view an appropriate reasonable adjustment. It goes against the whole purpose of reasonable adjustments which is to integrate disabled people into the workforce.

192. If the claimant was just watching somebody else do the main part of his job for him then he would not really be integrated. Over time we think there is a real risk that this situation would lead to the claimant himself being upset or embarrassed about the situation. It could end up worsening his anxiety and depression. This is because we think that the claimant would end up feeling like he was not really doing very much and he was no longer working as a carer. It seems to us that it would not be fair to anybody

including the claimant for the claimant simply to be observing whilst somebody else does his job.

193. Our reasoning as to why it would not be reasonable to expect the respondent to appoint a support worker to do the claimant's personal care work applies whether the appointment was made from a pool of agency workers or elsewhere.

194. We agree with the respondent that all reasonable steps had been taken to try and help the claimant get back to doing personal care - he had had a phased return, he had worked reduced hours and he had been provided with a buddy to ease him back in to doing personal care but the claimant was still not able to do it.

195. For those reasons we would find that the respondent did not fail to make reasonable adjustments for the claimant in relation to the practice of now allowing people from outside to help a carer such as the claimant.

196. The next allegation of failure to make reasonable adjustments is about the respondent not promptly providing the claimant with information after his first appeal in June 2023 in particular a written appeal outcome, his P45, details of how to appeal further and details of his holiday and pay entitlements.

197. We've already explained that there was a long and frustrating delay in this information being provided until around June/July 2024.

198. We've also already explained that this delay was caused by a mistake by Mrs Mugridge because she thought her appeal outcome letter had been sent and it hadn't and this had a knock on effect of delaying the other information being sent to the claimant.

199. We find that not promptly providing the written appeal outcome and other information was not a practice. A practice means something that is repeated or something that would be repeated. The delay in providing the claimant with the written appeal outcome and other information was not a practice. It was a one-off situation which was caused by a mistake made by Mrs Mugridge. It is not something that was or would be repeated and it is not a practice. So the duty to make reasonable adjustments did not arise in relation to this issue.

200. Even if we had found there was a practice in relation to this issue we did not think it put the claimant at a substantial disadvantage compared to someone without the claimant's disability. We do not accept that the failure to promptly provide the claimant with an appeal outcome and associated information made the claimant feel anxious, distressed and inferior. The claimant did not give us sufficient evidence to demonstrate that. We do accept that the delay was frustrating for the claimant. But somebody without the claimant's disability would have experienced the same feelings of frustration. It is not a disadvantage that is linked to disability. The same disadvantage

would be created regardless of whether the affected person had a disability.

201. For these reasons we find that the respondent did not fail to make reasonable adjustments in relation to not promptly providing the written appeal outcome and other information.

Result

202. Because we reached the above conclusions the result is that the claimant's claim fails and it must be dismissed.

Attachment 1: the list of issues

These are the issues that the tribunal had to decide.

The issues were agreed at the preliminary hearing on 17 September 2024.

At a later preliminary hearing on 4 November 2024 the claimant decided that he did not want to rely on the allegations at 6.2.1 and 6.2.2. So we do not have to decide those issues and they have been crossed off the list of issues, ~~like this~~.

The respondent admitted that the claimant was disabled and so we do not have to decide that issue either. That issue has also been crossed off the list of issues, ~~like this~~.

At the start of the final hearing both parties confirmed that with the removal of allegations 6.2.1 and 6.2.2 and the disability issue this was a complete and correct list of all the issues that we had to decide.

1. Time limits

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

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

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

1.2.2 If not, was there conduct extending over a period?

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

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

1.2.4.1 Why were the complaints not made to the Tribunal in time?

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

1.3 Was the unfair dismissal complaint made within the time limit in the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

1.3.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1 Was the claimant dismissed?

2.2 What was the reason or principal reason for dismissal? The respondent says the reason was capability.

2.3 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 will usually decide, in particular, whether:

2.3.1 The respondent adequately warned the claimant and gave the claimant a chance to consider reasonable alternatives;

2.3.2 The respondent genuinely believed the claimant was no longer capable of performing their full duties;

2.3.3 The respondent adequately consulted the claimant;

2.3.4 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.3.5 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

2.3.6 Dismissal was within the range of reasonable responses.

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? The Tribunal will decide:~~

~~3.1.1 Did they have prostate cancer?~~

~~3.1.2 Did they have another physical or mental impairment: visual impairment?~~

~~3.1.3 Did it have a substantial adverse effect on their ability to carry out day-to-day activities?~~

~~3.1.4 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?~~

~~3.1.5 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?~~

~~3.1.6 Were the effects of the impairment long-term? The Tribunal will decide:~~

~~3.1.6.1 did they last at least 12 months, or were they likely to last at least 12 months?~~

~~3.1.6.2 if not, were they likely to recur?~~

4. Direct disability discrimination (Equality Act 2010 section 13)

4.1 Did the respondent do the following things:

4.1.1 Fail to promptly provide the claimant with

4.1.1.1 a (written) appeal outcome

4.1.1.2 his P45

4.1.1.3 details of how to appeal further

4.1.1.4 details of his holiday and pay entitlements.

4.1.2 Fail to promptly pay the claimant the holiday pay he was owed. The claimant

says he did not receive his holiday pay until June 2024.

4.1.3 Send a reference to a prospective employer on 2 January 2024, the wording of which was misleading and gave the impression that the claimant was unreliable and had problems with his conduct. (The claimant says he received a copy of the reference on 9 May 2024).

4.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant has not named anyone in particular who they say was treated better than they were.

4.3 If so, was it because of disability?

4.4 Did the respondent's treatment amount to a detriment?

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

5.1 Did the respondent treat the claimant unfavourably by:

5.1.1 Dismissing him

5.1.2 Failing to uphold his appeal

5.1.3 Failing to promptly provide him with those matters in 4.1.1 above

5.2 Did the following things arise in consequence of the claimant's disability:

5.2.1 His long-term absence

5.2.2 His inability to perform his full role.

5.2.3 His need for support

5.2.4 His inability to perform alternative roles.

5.2.5 His need for restricted duties

5.2.6 His need for adjustments

5.3 Was the unfavourable treatment because of any of those things?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says the legitimate aim was to ensure adequate care standards were delivered to service users. The Tribunal will decide in particular:

5.4.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.4.2 could something less discriminatory have been done instead;

5.4.3 how should the needs of the claimant and the respondent be balanced?

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

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

6.2 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

~~6.2.1 An expectation that the claimant perform the responsibilities of a carer in the EAB unit.~~

~~6.2.2 An expectation that employees who were at risk of dismissal due to capability go through a medical redeployment process.~~

6.2.3 The respondent did not allow people from outside to help a carer such as the claimant.

6.2.4 Not promptly providing an appeal outcome including the information at 4.1.1 above.

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that:

- 6.3.1 It took the claimant a long time to perform the responsibilities of carer.
- 6.3.2 The claimant found it difficult to perform the responsibilities of carer.
- 6.3.3 The specialist computer equipment that the claimant used because of his visual impairment slowed down the computer and made it difficult for him to do admin properly.
- 6.3.4 The claimant was not able to obtain an alternative role through the medical redeployment process.
- 6.3.5 Access to work recommended that the claimant be provided with a support worker (initially for 15 hours a week and then for 30 hours a week) to provide the claimant with assistance and support in completing his job role, but the council said they could not have people from outside helping the claimant. He was instead advised to ask for help from staff members. This meant the claimant sometimes had to wait a long time for help and sometimes they offered very little assistance. The claimant also felt anxious, embarrassed, guilty and stressed asking colleagues for help. It made him feel like he was not on the same level as them.
- 6.3.6 The failure to provide the claimant with an appeal outcome and associated information made the claimant feel anxious, distressed and inferior.

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

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

6.5.1I could have been assigned citizens with lesser needs because my disabilities meant that some care tasks took me longer to complete.

6.5.2I could have also been allowed to double-up with a colleague, which I had been allowed to do before.

6.5.3I could have been assigned a buddy or someone I could call on if I had any problems.

6.5.4I could have been allowed to use a support worker, as recommended by Access to Work.

6.5.5There was a big pool of agency workers who worked at the centre. I believe that the support worker I was awarded by Access to Work could have been one of the agency workers who worked at the centre.

6.5.6The respondent could have given me a workplace trial or non-competitive job interview to support me to find an alternative suitable role.

6.5.7Promptly providing him with an appeal outcome including the information at 4.1.1 above.

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

6.7 Did the respondent fail to take those steps?

Attachment 2: a summary of the law which the tribunal considered and applied when deciding the claimant's case

7. Time limits – unfair dismissal

7.1 The time limits in relation to a claim for unfair dismissal are in section 111 of the Employment Rights Act 1996. Subsection (2) provides: *"... an employment tribunal shall not consider a complaint ... unless it is presented to the tribunal - (a) before the end of the period of three months beginning with the effective date of termination, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably*

practicable for the complaint to be presented before the end of that period of three months."

7.2 As to what is meant by "not reasonably practicable" the most important case is Palmer v Southend Council [1984] ICR 372. In that case May LJ made it clear that the issue is pre-eminently one of fact for the employment tribunal and that whether something is "reasonably practicable" is a concept which comes somewhere between whether it is reasonable and whether it is physically capable of being done. It was suggested that it means something like "reasonably feasible". May LJ outlined various matters that may be relevant for an employment tribunal to consider. Among these are the question of what the substantial cause of the failure to present the claim within time was and also whether there was any "substantial fault" on the part of the claimant.

7.3 Lady Smith in Asda Stores Ltd v Kauser EAT 0165/07 explained the test as follows: *'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'*.

7.4 The onus of proving that presentation in time was not reasonably practicable rests on the claimant and *'That imposes a duty upon him to show precisely why it was that he did not present*

his complaint' (Porter v Bandridge Ltd 1978 ICR 943).

7.5 Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, the tribunal must then go on to decide whether the claim was presented within a further reasonable period. In University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12 the EAT explained that this does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired.

7.6 What amounts to a 'further reasonable period' is essentially a matter of fact for the employment tribunal to decide. There is no hard and fast rule about what period of delay is reasonable. In Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10 it was suggested that the question of whether the period between expiry of the time limit and the eventual presentation of a claim is reasonable requires an objective consideration of the factors causing the delay and of what period should reasonably be allowed in those circumstances for proceedings to be instituted. Crucially, this assessment must always be made

taking into account the primary time limit, the strong public interest in claims being brought promptly and the important general principle that litigation should be progressed efficiently and without delay. When deciding what would have been a reasonable time within which to present a late claim, tribunals should have regard to all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred.

8. Time limits – discrimination

8.1 The time limits in relation to the discrimination claims are in section 123 of the Equality Act 2010:

123 Time limits

(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120 may not be brought after the end of—

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) such other period as the employment tribunal thinks just and equitable.*

...

(3) For the purposes of this section—

- (a) conduct extending over a period is to be treated as done at the end of the period;*

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

8.2 If any allegation is out of time and not part of conduct extending over a period bringing it in time then we only have jurisdiction to hear it if it was brought within such other period as we think just and equitable. We should remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor. We should consider the balance of prejudice.

8.3 It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. The tribunal has a wide discretion but there is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule. These principles were clearly expressed in the case of Robertson v Bexley Community Centre 2003 IRLR 434:

“It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

8.4 There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings. However, whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal should have regard. See Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050 CA.

8.5 Relevant factors which may be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for

information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

8.6 Having referred to Keeble however the important point to bear in mind is that the Tribunal has a very broad general discretion and therefore we should assess all the factors which are relevant to whether it is just and equitable to extend time without necessarily rigidly adhering to a checklist. The factors which are almost always likely to be relevant are the length of and reasons for the delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). This was explained by Lord Justice Underhill in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

8.7 In Miller v Ministry of Justice UKEAT/0003/15 (15 March 2016, unreported), Laing J observed that there are two types of prejudice which a respondent may suffer if the limitation period is extended: firstly, the obvious prejudice of having to defend the claim which would otherwise have been defeated by a limitation period; and secondly the “forensic prejudice” caused by fading memories, loss of documents, and losing touch with witnesses. Forensic prejudice is “crucially relevant” in the

exercise of discretion and may well be decisive. However, the converse does not follow: if there is no forensic prejudice to the respondent that is not decisive in favour of an extension.

8.8 The EAT has explained the extent to which the potential merits of a proposed complaint can be taken into account when considering whether it is just and equitable to extend time, in Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132. The EAT held that the potential merits are not necessarily an irrelevant consideration even if the proposed complaint is not plainly so weak that it would fall to be struck out. However, the EAT advocated a careful approach. It said:

“It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it [the tribunal] does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.

So, the tribunal needs to consider the matter with care, identify if there are readily apparent features that point to potential weakness or obstacles, and consider whether it can safely regard them as having some bearing on the merits. If the tribunal is not in a position to do that, then it should not count an assessment of the merits as weighing against the claimant. But if it is, and even though it may not be a position to say there is no reasonable prospect of success, it may put its assessment of the merits in the scales. In such a case the appellate court will not interfere unless the tribunal's approach to assessing the merits, or to the weight attached to them, is, in the legal sense, perverse."

9. Unfair dismissal

9.1 The relevant parts of the Employment Rights Act 1996 say as follows:

94 The right

(1) *An employee has the right not to be unfairly dismissed by his employer.*

...

98 General

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

- (a) *the reason (or, if more than one, the principal 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.

9.2 It is for the respondent to show that the reason for dismissal was potentially fair. The potentially fair reasons for dismissal include capability which is the reason relied on in this case.

9.3 As with dismissals for other potentially fair reasons in a capability dismissal the tribunal must go on determine whether dismissal for such reason falls within the range of reasonable responses open to an employer. In these types of cases, the essential framework for the Tribunal to consider was set out by the EAT in Monmouthshire County Council v Harris EAT 0332/14. Her Honour Judge Eady observed: *'Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice'*.

9.4 The need to consult and the need for an employer to establish the genuine medical position is crucial. This has been emphasised since the important case of East Lindsey District Council v Daubney 1977 ICR 566. In that case Mr Justice Phillips stated: *'in one way or another steps should be taken by the employer to discover the true medical position'* prior to any dismissal. In most cases this will involve consultation with medics.

9.5 Ultimately, we must consider whether dismissal fell within the range of reasonable responses open to a reasonable employer. We

reminded ourselves that it is not for us to substitute our own view for that of the respondent.

9.6 The range of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.

9.7 As part of our decision making the tribunal will consider whether there were any procedural flaws which cause unfairness.

9.8 Guidance on that part of the exercise was given by the Court of Appeal in the case of OCS v Taylor [2006] ICR 1602, which clarified that the proper approach is for the tribunal consider the fairness of the whole of the process. The court stated that our purpose is to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage.

9.9 The Court went on further to say that the tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.

10. Direct disability discrimination

10.1 Section 13 Equality Act 2010 says that: “*a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others*”.

10.2 Section 23 Equality Act 2010 says that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

10.3 The statutory comparator must not share the claimant's protected characteristic. The status of the comparator was made clear by Lord Scott in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, when he observed: *‘[T]he comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class’*.

10.4 In Nagarajan v London Regional Transport [1999] IRLR 572, the House of Lords held that if the protected characteristic had a ‘significant influence’ on the outcome, discrimination would be made out. The crucial question in every case is, *‘why the complainant received less*

favourable treatment...Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?’.

11. Discrimination arising from disability

11.1 Section 15 Equality Act 2010 states as follows:

(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.

11.2 The unfavourable treatment must be shown by the claimant to be "because of something arising in consequence of [his] disability". The tribunal must therefore ask what the reason for the alleged treatment was. If this is not obvious then the tribunal must enquire about mental processes - conscious or subconscious - of the alleged discriminator see R (on the application of El v Governing Body of JFS and The Admissions Appeal Panel of JFS and Ors [2010] IRLR, 136, SC).

11.3 In Pnaiser v NHS England [2016] IRLR 170 the EAT set out the following guidance for section 15 claims:

- a. A tribunal must first identify whether there was unfavourable treatment and by whom.
- b. The tribunal must determine the reason for or cause of the impugned treatment. This will require an examination of the conscious or unconscious thought processes of the putative discriminator. 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 amount to an effective reason for or because of it. Motive is irrelevant.
- c. The focus of this part of the enquiry is on the reason for or cause of the impugned treatment.
- d. The tribunal must determine whether the reason or cause is something arising in consequence of the claimant's disability. The causal link between the something that causes the unfavourable treatment, and the disability may include more than one link. The more links in the chain the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

5.2 The 'because of' enquiry therefore involves two stages: firstly, A's explanation for the treatment (and conscious or unconscious reasons

for it) and secondly, whether (as a matter of fact rather than belief) the "something" was a consequence of the disability. It does not matter precisely in which order these questions are addressed.

5.3 The respondent will escape liability if it is able to objectively justify the unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and it must represent a real, and objective consideration. As to proportionality, the EHRC Code on Employment notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (4.31).

5.4 The burden of establishing the justification defence is on the respondent. In Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15 it was said, approving Mummery LJ in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, that what is required is: first, a real need on the part of the respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end. In summary, the respondent's aims must reflect a real business need; its actions must contribute to

achieving it; and this must be assessed objectively, regardless of what the respondent considered at the time. Proportionality is about considering not whether the respondent had no alternative course of action, but whether what it did was reasonably necessary to achieving the aim(s).

5.5 The application of the burden of proof to section 15 was specifically addressed in South Warwickshire NHS Foundation Trust v Lee and ors (UKEAT/0287/17/DA), a decision of Eady J:

“28. Allowing for the possibility that there will be mixed motivations for the unfavourable treatment in issue, Simler J opined: “31. ... (b) ... just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. 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. The focus of this part of the enquiry is on the reason or cause of the impugned treatment ...”

29. In determining whether the reason for the unfavourable treatment was “the something” for section 15 purposes, the ET is bound to approach the burden of proof as provided by section 136 EqA, as follows: “(2) If there are facts from which the court

could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

30. As has been made clear in the authorities (see, for example, in the guideline case of Madarassy v Nomura [2007] ICR 867 CA and also in Pnaiser itself, see paragraph 38), although it can be helpful in some cases for the ET to go through the two stages allowed by section 136 - so, determining first whether the Claimant has established a prima facie case such as to shift the burden to the Respondent, and only then going on to consider whether that burden has been discharged - it is not necessarily an error of law not to do so and in many cases moving straight to the second stage will be the appropriate course. Where an ET is satisfied that the burden has shifted for the purposes of section 136 EqA, it will be for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever because of the relevant protected characteristic (and see Igen Ltd v Wong [2005] ICR 931 CA).

...

49. Concision in an ET's Judgment can be good, but the reasoning does have to show a practical application of the relevant legal test. In the present case, it should thus be possible to see that the ET had identified the relevant decision-taker (Ms Martin), enquired into the reason why she had decided on the

unfavourable treatment (the withdrawal of the conditional offer) - determining this exercise as it would when determining the reason for conduct complained of in a direct discrimination claim - and determined - applying an objective test - whether there was a connection between the Claimant's disability and "the something" which provided the reason for the treatment in issue (see the guidance provided in Pnaiser).

50. Allowing for the shifting burden of proof, if the ET was satisfied that there were facts from which it could decide (absent any other explanation) that South Warwickshire had treated the Claimant unfavourably because of something arising in consequence of her disability, then the burden would shift so that it would be for South Warwickshire to demonstrate that its decision to withdraw the conditional offer had, in fact, nothing whatsoever to do with "the something" in issue (here, the Claimant's absence record)."

5.6 As can be seen, Eady J thus directs the Tribunal to apply the shifting burden of proof both to the question of what the reason was for the unfavourable treatment and to the question of whether that reason was objectively causally connected to the claimant's disability. If there are facts from which a Tribunal could decide what the reason was, and that there was a causal connection to the disability, then (applying the old approach from the case of Igen v Wong [2005] ICR 931 that Eady J paraphrases in [50]), the burden shifts to the respondent to prove that in

fact the treatment had “nothing whatsoever” to do with the disability.

12. Reasonable Adjustments

6.1 The duty to make reasonable adjustments is in section 20 Equality Act 2010. The relevant duty in this case is at subsection (3):

“The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

6.2 The claimant's case is that the respondent discriminated against him by failing to comply with that requirement.

6.3 It should be noted that the duty requires positive action by employers to avoid substantial disadvantage caused to disabled people. To that extent it can require an employer to treat a disabled person more favourably than others are treated (Archibald v Fife Council [2004] ICR 954). It should also be noted that *“the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce”* (O'Hanlon v HM Revenue and Customs UKEAT/0109/06).

6.4 The correct approach to reasonable adjustments complaints was set out by the EAT in Environment Agency v Rowan [2008] ICR 218:

- a. What is the provision, criterion or practice (“PCP”) relied upon?
- b. How does that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?
- c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?
- d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

6.5 In reasonable adjustment claims, the burden of proof is on the claimant to establish the existence of the provision, criterion or practice and to show that it placed them at a substantial disadvantage. If the duty to make reasonable adjustments has been engaged (and as the claimant has identified one or more potential reasonable adjustments) the burden of proof is reversed so that the respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved.

6.6 As to substantial disadvantage section 212 Equality Act 2010 defines “substantial” as meaning “more than minor or trivial”. It must also be a disadvantage which is linked to the disability. That is the purpose of the comparison required by section 20.

Simler P said in Sheikholeslami v University of Edinburgh UKEATS/0014/17/JW that:

“It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question. For this reason, also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person’s circumstances.

.... The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.”

6.7 The Tribunal is required to have regard to the Equality and Human Rights Commission’s statutory Code of Practice on Employment when considering disability discrimination claims. Paragraph 6.28 of the

Code sets out the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- 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 (such as advice through Access to Work); and
- The size and type of employer.

6.8 An important consideration is the extent to which the step will prevent the disadvantage. We must consider whether a particular adjustment would or could have removed the disadvantage: Romec Ltd v Rudham [2007] All ER(D) (206) (Jul), EAT.

6.9 In Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 the Court of Appeal said: *"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."*

6.10 Accordingly, it is unlikely to be reasonable for an employer to have to make an adjustment that involves little or no benefit to the disabled person in terms of ameliorating the disadvantage to which he or she has been subjected by the PCP. We have to consider whether on the evidence there would have been a chance of the disadvantage being alleviated. Our focus should be on whether the adjustment would, or might, be effective in removing or reducing the disadvantage that the claimant is experiencing as a result of his or her disability and not whether it would, or might, advantage the claimant generally.

13. The burden of proof in the Equality Act 2010 claims

13.1 Section 136 sets out the burden of proof provisions which apply to all the above claims under the Equality Act 2010. Section 136(2) says: *“if there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred”*. Section 136(3) then states: *“but subsection (2) does not apply if A shows that A did not contravene the provision”*.

13.2 These provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude in the absence of any other explanation that the respondent has committed an

unlawful act of discrimination. This is known as the “prima facie case”.

13.3 The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach was set out in Igen Ltd v Wong [2005] IRLR 258 and it was reaffirmed in Efobi v Royal Mail Group Limited [2019] IRLR 352.

13.4 The Supreme Court in Efobi confirmed that the burden on the claimant is: “...*that the claimant has the burden of proving, balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under section 136(2) of the 2010 Act just as under the old provisions, the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent.*”

13.5 The Supreme Court has also emphasised that it is for the Claimant to prove the prima facie case. In Hewage v Grampian Health

Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: *"The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be proved, and it is for the claimant to discharge that burden"*.

13.6 There is a well-established principle that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. This principle is most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

13.7 Before the burden can shift there must be something to suggest that the treatment was discriminatory (see B and C v A [2010] IRLR 400). Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular Bahl v The Law Society and others [2004] IRLR 799). Therefore inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status and/or incompetence is not sufficient to

infer unlawful discrimination (Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen, Madarassy).

13.8 The issue of what the ‘something more’ is and whether the burden shifts is not subject to hard and fast rules and the answer will vary depending on the nature of the case and the evidence given before the Tribunal. It is important to bear in mind that in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. The outcome at this stage of the analysis will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal (see paragraph 4 of Appendix to Judgment of Court of Appeal in Igen v Wong). Further, we should note the word “could” in s 136(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them (see paragraph 5 of Appendix to Judgment of Court of Appeal in Igen v Wong).

13.9 In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts (see paragraph 6 of Appendix to Judgment of Court of

Appeal in Igen v Wong). However, the Employment Tribunal is entitled to take into account the fact it disbelieves the employer's explanation (even though the employer's case is primarily relevant at the second stage): Birmingham City Council v Millwood [2012] EqLR 910, EAT. The tribunal may also draw inferences from the fact that there are inconsistencies in the employer's explanation: Veolia Environmental Services UK v Gumbs [2014] EqLR 364, EAT.

13.10 In Denman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA, Lord Justice Sedley made the point that 'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred. The Court of Appeal approved such an approach in Base Childrenswear Ltd v Otshudi 2020 IRLR 118, CA. It was open to the tribunal to take into account when drawing inferences a false explanation given for the treatment complained of and the fact that the explanation given had changed, even though it had been argued that this had been done so as to spare the employee's feelings. Lord Justice Underhill observed: *'Giving a wholly untruthful response when discrimination is alleged is well-recognised as the type of conduct that may indicate that the allegation is well-founded.'*

13.11 If the burden of proof shifts the last three paragraphs of the Appendix in Igen v Wong should be considered. They state:

To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.

That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge that burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully the explanations for failure to deal with questionnaire procedure and/or code of practice.

13.12 If the burden of proof shifts the need for the respondent to set out ‘cogent evidence’ explaining a non-discriminatory reason for its conduct is particularly relevant. In Bennett v Mitac Europe

Ltd 2022 IRLR 25 the EAT observed that the requirement for 'cogent evidence' does not apply a standard of proof beyond that of the balance of probabilities. Nonetheless, it is the respondent that generally is in a position to provide evidence about the reason for the claimant's treatment.

Employment Judge Meichen
Approved on 24.2.26